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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Application of DENISE M. OLSON For Review of Disciplinary Action Taken by FINRA	))))))))))	Denise Olson's Opening Brief in Support of her Application for Review

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TABLE OF CONTENTS

I. Issue Presented 1

II. Standard of Review 1

III. Factual Background 1

IV. Statement of the Case 4

V. Argument 5

A. The Guideline for Conversion Requires Fair Consideration of Numerous Mitigating Factors and All Facts and Circumstances 5

B. The Lesser Sanctions Imposed in *McCartney, Leopold*, and Other Cases Involving More Egregious Facts and Circumstances Than the Present Case Demonstrate That a Permanent Bar is Excessive, Oppressive and Punitive 7

C. The Board Failed to Give Proper Mitigating Effect to Numerous Factors 11

1. Ms. Olson's Misconduct Was of Short Duration, Did Not Involve a Pattern of Wrongdoing, and Represented an Aberrant Lapse in Judgment 11

2. Ms. Olson Fully Accepted Responsibility and Demonstrated Genuine Remorse 12

3. Ms. Olson's Voluntary Spending on Refrigerators and Other Gifts Show That She is Not Motivated by Greed, and Therefore Not a Risk to Commit Future Violations 15

4. Ms. Olson Was Terminated By Wells Fargo Prior to the FINRA Action 16

D. The Aggravating Circumstances Noted by the Board Do Not Justify a Bar, in Light of All the Facts and Circumstances Regarding Ms. Olson 16

E. Additional Facts and Circumstances Favoring Leniency 19

VI. Conclusion 20

TABLE OF AUTHORITIES

Page(s)

CASES

DBCC No. 4 v. Kwikkel-Elliott, Complaint No. C04960004,
1998 NASD Discip. LEXIS 4 (NBCC Jan. 16, 1998)....19

Dep't of Enforcement v. Foran, Complaint No. C8A990017,
2000 NASD Discip. LEXIS 8 (NAC Sept. 1, 2000)....10

Dep't of Enforcement v. Hunt, Complaint No. 2009018068701,
2012 FINRA Discip. LEXIS 62 (NAC Dec. 18, 2012)....9, 18

Dep't of Enforcement v. Kaplan, Disciplinary Proceeding No. 20070077587,
2008 FINRA Discip. LEXIS 22 (OHO June 20, 2008)....18

Dep't of Enforcement v. Leopold, Complaint No. 2007011489301,
2012 FINRA Discip. LEXIS 2 (NAC Feb. 24, 2012).... *passim*

Dep't of Enforcement v. McCartney, Complaint No. 2010023719601,
2012 FINRA Discip. LEXIS 60 (NAC Dec. 10, 2012).... *passim*

Dep't of Enforcement v. Nouchi, Complaint No. E102004083705,
2009 FINRA Discip. LEXIS 8 (NAC Aug. 7, 2009)....14

Gold v. SEC,
48 F.3d 987 (7th Cir. 1995)....1

Kent M. Houston, Exchange Act Release No. 71589,
2014 SEC LEXIS 614 (Feb. 20, 2014)....12

John M.E. Saad, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761 (May 26,
2010), *remanded*, 718 F.3d 904 (D.C. Cir. 2013).... *passim*

Otto v. SEC,
253 F.3d 960 (7th Cir. 2001)....1

PAZ Sec., Inc. v. SEC,
494 F.3d 1059 (D.C. Cir. 2007)....1

FEDERAL STATUTES

15 U.S.C. § 78s(e)(2)....1

FINRA MATERIALS

Notices to Members (FINRA NTM)/Regulatory Notices

Notice 93-32 (May 1993) 6

Notice 98-39 (May 1998) 6

Rules, *available at* www.finra.org/Industry/Regulation/FINRARules/P038095

FINRA Rule 2010 4

FINRA Rule 9349(c) 5

FINRA Sanction Guidelines, *available at* www.finra.org/sanctionguidelines .... *passim*

Denise Olson, by her undersigned counsel, hereby submits her opening brief in support of her application for review of the sanctions imposed in this matter.

I. Issue Presented

Whether the FINRA Board of Governors' imposition of a permanent bar upon Ms. Olson was excessive, oppressive, and punitive for her conduct in improperly requesting and receiving $740.10 by classifying a personal expense as a business expense, when Ms. Olson had no pattern of wrongdoing, was extremely remorseful, would never repeat the violation, was not motivated by greed, had consistently accepted responsibility without misleading either her firm's interviewer or FINRA, and had already been terminated by her employer in June 2010.

II. Standard of Review

The SEC reviews sanctions imposed by FINRA, including by the FINRA Board of Governors, de novo. *PAZ Sec., Inc. v. SEC,* 494 F.3d 1059, 1064 (D.C. Cir. 2007); *Otto v. SEC,* 253 F.3d 960, 964, 966-7 (7th Cir. 2001). Any final disciplinary sanction imposed by the Board is subject to "full and independent review by the SEC as to the facts as well as the law." *Gold v. SEC,* 48 F.3d 987, 990 (7th Cir. 1995). These sanctions must be overturned if they are excessive or oppressive. 15 U.S.C. § 78s(e)(2); *accord, Saad,* 718 F.3d 906, 910 (D.C.Cir. 2013); *PAZ Sec., Inc.,* 494 F.3d at 1059. Moreover, the sanctions must be remedial, not punitive. *FINRA Sanction Guidelines*, at 1-3, 5; *accord Saad*, 718 F.3d at 912-13.

III. Factual Background

Denise Olson entered the securities industry as a receptionist at Piper Jaffrey in 1991, after two years of college. *Transcript of Hearing of October 2, 2012 ("Tr."),* at 39-40 *(Olson).* She moved on to a variety of positions, ultimately becoming a branch manager for several years at Wells Fargo. *Tr.* at 40-42 *(Olson).* She was very grateful for the opportunity to be a branch

manager, and frequently paid out of her own pocket to buy decorative items and furniture for the office and meals for the staff. Ms. Olson used her own money to pay bonuses to the staff, and even spent approximately $2,000 for two refrigerators for the office, again out of her own funds. *Tr.* at 45-49 *(Olson); Tr.* at 93-94 *(Dahl).*

On April 2, 2010, Ms. Olson was buying iPods for her niece and nephew, and used her corporate card for the purchase. Such use of the corporate card for personal charges was permitted by her firm at that time. *Tr.* at 21*(Mirabella); Tr.* at 57-59 *(Olson); Tr.* at 92 *(Dahl).* But several weeks later, when Ms. Olson was clicking through her charges on the corporate card, she had a "fleeting thought" when she reached the iPod purchase of $740.10 that she had never been reimbursed for the refrigerators she had purchased, and made a false entry in the system that the iPod purchase was for "branch equip for cof room." *Tr.* at 56 *(Olson).* Ms. Olson wrongfully received reimbursement from Wells Fargo for the $740.10. She did not properly submit for or receive reimbursement for the refrigerators.

On June 2, 2010, Ms. Olson was questioned by a Wells Fargo employee regarding her corporate card charges. The interviewer showed her an eleven page spreadsheet that listed 143 transactions, 43 of which had been highlighted. *Tr.* at 64 *(Olson); CX-1.* The April 2 transaction was not highlighted. *CX-1,* at page 9 of 11. Ms. Olson then went through the spreadsheet with the interviewer. When they reached the April 2 charge, Ms. Olson initially said it was for branch equipment for a new conference room, because that was what appeared on the spreadsheet. But once Ms. Olson noticed the amount, she remembered that it was a personal charge for the iPods, and said so. *Tr.* at 64-65 *(Olson).* She knew that it was "not okay" that she had done this, despite having also thought about her refrigerator purchase and how the amounts might have offset. *Tr.* at 66 *(Olson).* But she still volunteered her wrongdoing.

The interviewer had not confronted Ms. Olson with any accusation, shown her any receipt, or indicated that she was suspicious of Ms. Olson's entry for this item. *Tr.* at 86 *(Olson).* The interviewer did not testify at the hearing, and there is no evidence that the interviewer knew that there was anything amiss regarding this particular $740.10 charge prior to Ms. Olson's confession. Among the many prior items that the interviewer had asked about before reaching the $740.10 charge were legitimate expenses for "computer equipment" *(CX-1,* at 2 of 11*),* "blackberry" *(CX 1,* at 4 of 11*),* and "office supplies" *(CX 1,* at 7 of 11*).* After volunteering the truth about the iPods purchase, Ms. Olson then wrote down for the interviewer the same accurate explanation that she had volunteered orally. *Tr.* at 65 *(Olson).* Ms. Olson was immediately terminated. *Id.*

This single instance of misconduct was not part of any pattern of wrongdoing by Ms. Olson. She did not improperly seek reimbursement for any other personal charges, nor was she charged by Enforcement with any such pattern of wrongdoing. Other than this violation, she has a completely unblemished twenty year record in the securities industry.

Ms. Olson continued to concede her mistake during Enforcement's subsequent investigation, the pre-hearing proceedings, and the hearing on the merits. She was and is ashamed of her misconduct, and has consistently expressed great and genuine remorse. As she said in her letter to FINRA during the investigation of this case, "I made an error in marking the transaction as a business expense; I would never put my family or myself in a situation like this again." *CX-3,* at 4. *See also Tr.* at 11 (counsel noting that Ms. Olson was crying), *Tr.* at 56-57 (Ms. Olson's testimony that she understood her conduct was wrong, that it was not "okay," and that she would never do this again); *Tr.* at 66 ("it's definitely not okay"); *Tr.* at 67 ("having intentionally misled my company by marking the expense was very wrong. And I would never,

ever jeopardize my family the way I did this day when I did this."); *Tr.* at 81 ("I made an error in judgment. If I could take it back, I would.").

Ms. Olson is a single mother whose ex-husband provides no financial support. After she was terminated by Wells Fargo, she was unemployed for nine months, depleted her 401 (k) account to pay monthly expenses for her daughter and herself, and ultimately moved in with her parents. *Tr.* at 71-72 *(Olson).* At the time of the hearing, Ms. Olson was employed as a recruiter for Ameriprise Financial, where she had no client contact. She was an exemplary employee at Ameriprise, where there were no issues regarding her honesty or her expense reimbursements. *Tr.* at 107-09 *(Fekete).* Ms. Olson's income at Ameriprise was $70,000 plus the possibility of small bonuses; prior to her termination by Wells Fargo, her annual income was approximately $200,000. *Tr.* at 43 *(Olson).*

In the present case, the hearing panel alone – not the NAC or the Board of Governors – heard Ms. Olson's testimony and had an opportunity to fully evaluate her credibility. The panel majority did not comment on the credibility of Ms. Olson's testimony, and the dissenting panelist explicitly found that Ms. Olson's testimony "was extremely credible." *Hearing Panel Decision*, at 15 *(Dissenting opinion).*

IV. <u>Statement of the Case</u>

On October 2, 2012, this case went to a hearing solely as to sanctions, as Ms. Olson had conceded her violation of FINRA Rule 2010. On January 4, 2013, by a 2-1 vote, the hearing panel found that Ms. Olson should be barred from the securities industry. The dissenting panel member concluded, based on the facts and the recent National Adjudicatory Council ("NAC")

decisions in *McCartney*[1] and *Leopold*[2], that this sanction was too severe, that merely labeling Ms. Olson's conduct as "conversion" did not make a bar appropriate, that the violation was serious but not egregious, and that the sanction should have been limited to a six month suspension and a $5,000 fine. *Decision,* at 14-17 *(Dissenting opinion).* On appeal to the NAC, two members of the NAC heard oral argument on August 27, 2013. Ms. Olson was present at that argument, and was so remorseful that she wept openly during the argument. Sometime prior to May 9, 2014, the NAC provided its proposed written decision to the FINRA Board of Governors ("Board"), pursuant to FINRA Rule 9349(c). *Board of Governors Decision ("Board Decision"),* at 2, n.3. The Board then took the unusual step of calling the case for review, rather than simply allowing the NAC to issue its draft decision. *Id.* Ms. Olson first learned that the Board had called the case for review on May 9, 2014, when the Board issued its decision. This appeal followed.

V. Argument

A. The Guideline for Conversion Requires Fair Consideration of Numerous Mitigating Factors and All Facts and Circumstances

The Board misstated important facts regarding Ms. Olson's acceptance of responsibility, over-emphasized the aggravating circumstances, and effectively ignored any and all mitigating factors because of excessive focus on the fact that the Guideline for "conversion" states that a bar is "standard" regardless of the amount converted. *See Board Decision*, at 7. The Board disregarded the prior decisions of the NAC that imposed far lesser sanctions under the much more egregious circumstances present in the *McCartney* and *Leopold* cases, stating only that

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[1] *Dep't of Enforcement v. McCartney*, Complaint No. 2010023719601, 2012 FINRA Discip. LEXIS 60 (NAC Dec. 10, 2012).

[2] *Dep't of Enforcement v. Leopold*, Complaint No. 2007011489301, 2012 FINRA Discip. LEXIS 2 (NAC Feb. 24, 2012).

every case is different. A fair consideration of the actual facts concerning Ms. Olson, both aggravating and mitigating, compels the conclusion that a bar is excessive, oppressive, and punitive, and that a lesser sanction should be imposed.

The FINRA Sanctions Guidelines are exactly that – guidelines. From the original adoption by the National Business Conduct Committee in 1993, the Guidelines were "not, however, predetermined, fixed sanctions for particular violations." *FINRA NTM 93-32*. As this original Notice regarding the Guidelines further explained, "Depending on the mitigating or aggravating factors present in individual cases, sanctions may be increased or decreased beyond the limits set forth in the *Guidelines*." *Id.* In 1998, in announcing the very revision to the Guidelines that a bar for conversion was "standard," NASD emphasized that the "recommended ranges are not absolute. In applying the Guidelines, Adjudicators must exercise judgment and discretion in determining remedial sanctions and may impose sanctions that fall outside of the recommended ranges, or impose no sanction at all, depending on the unique facts of the case." *NTM 98-39*, at 277. This emphasis on the non-binding nature of the guidelines, and the potential necessity of adjudicators' imposing sanctions outside the recommended ranges, even if that meant "no sanction at all," was listed as one of the more important features of the revisions. *Id.*, at 278. The only reference in *NTM 98-39* to the specific guideline for "conversion" was to note the adjustments in recommended fine levels for numerous forms of violations, including conversion. *Id.*, at 278-9. No mention whatsoever was made in this NTM of any brand new bright line test that dictated a permanent bar for all instances of "conversion."

The specific Guideline recommendation for "conversion" states "Bar the respondent regardless of amount converted," and "(No fine recommended, since a bar is standard.)" But the very same Guideline refers adjudicators to the "Principal Considerations in Introductory

Section." *Guidelines,* at 36. Those "Principal Considerations," expressly applicable to "all violations" *(Guidelines,* at 6*)*, require consideration of all the potentially mitigating circumstances. These include acceptance of responsibility, whether respondent engaged in a pattern of misconduct over an extended period of time, and whether the respondent attempted to conceal her misconduct, among many other potential factors. *Guidelines*, at 6-7.

These Principal Considerations also expressly state that the list of factors "is illustrative, not exhaustive; as appropriate, Adjudicators should consider case-specific factors in addition to those listed here and in the individual guidelines." *Guidelines*, at 6. The aptly named "General Principles Applicable to All Sanction Determinations" specifically provide that "Adjudicators may determine that no remedial purpose is served by imposing a sanction within the range recommended in the applicable guideline; *i.e.,* that a sanction below the recommended range, or no sanction at all, is appropriate." *Guidelines*, at 3. Indeed, the D.C. Circuit recently remanded a Commission decision in part because the Commission had failed to consider a mitigating circumstance not covered by any Guideline. *Saad,* 718 F.3d at 913-14 (failure to consider extreme personal and professional stress).

Any fair consideration of the aggravating and mitigating factors concerning Ms. Olson renders a permanent bar excessive, oppressive, punitive, and completely inappropriate for Ms. Olson.

B. The Lesser Sanctions Imposed in *McCartney, Leopold*, and Other Cases Involving More Egregious Facts and Circumstances Than the Present Case Demonstrate That a Permanent Bar is Excessive, Oppressive and Punitive

The Board dismissed any significance of the NAC's decisions in *McCartney* and *Leopold* because in those cases, Enforcement failed to specifically charge "conversion," and because of the general proposition that each case turns on its own facts. *Board Decision*, at 7. The same

aggravating and mitigating factors apply in conversion cases just as surely as in cases like *McCartney* and *Leopold*, where the conduct easily could have been labeled "conversion." As noted above, FINRA's Guidelines call for the same analysis of all the facts and circumstances. As for the proposition that each case turns on its own facts, *McCartney* and *Leopold* are nevertheless instructive in that the NAC described facts in those cases that were considerably more egregious than those concerning Ms. Olson, identified mitigating factors less compelling than those present here, and concluded that permanent bars were inappropriate. Indeed, in the present case, the Board largely found that the same types of conduct considered as mitigating in the NAC decisions should not be considered mitigating at all. If there were any additional facts or any other proper basis for the failure of the Board to apply the *McCartney* and *Leopold* analyses to the present case, this does not appear in the Board's decision. There simply is no reasonable basis to find that a bar is not excessive, oppressive or punitive for Ms. Olson when no such sanction was necessary for far worse conduct in *McCartney* and *Leopold.*

In *McCartney*, a registered representative obtained an improper $500 payment from his firm through elaborate deception of his firm; this was "conversion" by any measure, though Enforcement failed to charge it as such. *McCartney*, at *5-6 n.3. The registered representative submitted a false expense report and fabricated supporting documentation, including a falsified copy of his own $500 check, a fabricated hotel bill, and a forged verification letter, in order to obtain $500 to which he was not entitled. When his request for reimbursement was initially rejected for insufficient documentation, the representative altered his own check to make it appear that he had paid the $500 for legitimate expenses. *McCartney*, at *5-6 n.3. Yet despite these numerous acts of deception over an extended period, the registered representative was

credited with mitigating factors such as a lack of a pattern of wrongdoing and acceptance of responsibility. *McCartney*, at *14-16.

In *Leopold*, the respondent obtained an improper federal tax benefit, in effect defrauding the U.S. government and converting taxpayer funds. Leopold's elaborate and extensive deception over nearly two years in obtaining money that did not belong to him was at least as wrongful as any other form of "conversion" – yet under all the circumstances and with all the flexibility provided by the Guidelines, the NAC concluded that far less than a permanent bar was appropriate. The registered representative in Leopold again received mitigation credit for having "expressed sincere remorse," being "genuinely ashamed," and promising that his lapses in judgment would not be repeated. *Leopold*, at *21.

The Board cited a string of decisions involving much more egregious facts than the facts concerning Ms. Olson as part of its rationale for imposing a permanent bar. *Board Decision,* at 8. But Ms. Olson's facts and circumstances are far more deserving of leniency, and the fact that even a few egregious NAC decisions – largely ignored by the Board -- still resulted in less than a bar supports that same result here. In addition to the *Leopold* and *McCartney* cases, in *Dep't of Enforcement v. Hunt,* No. 2009018068701, 2012 FINRA Discip. LEXIS 62 (NAC Dec. 18, 2012) (six month suspension and $10,000 fine for falsified expense reports; bar imposed for other conduct), the respondent deceptively obtained reimbursement from his firm for nearly $2,000 in expenses he had not yet incurred – again, a clear instance of "conversion," albeit not explicitly charged or analyzed as such. Yet the NAC found that such conduct only warranted a six month suspension and a $10,000 fine.

In *Foran*[3], another case involving much worse conduct than the present case, the NAC did not impose a bar despite an express finding of "conversion." Over an eleven month period, Foran converted more than $5,000 in mutual fund trail commissions from his firm. He falsely contended that he had not tried to hide his misconduct from his firm. *Id.* at *16 n.16. He continually took actions to evade his firm's audit trail, and when questioned by a firm employee about apparent discrepancies in commission totals, he instructed the employee not to try to resolve the discrepancies and instead to simply write them off. *Id.* at *16 n.16. Foran did not admit having transferred the commissions to himself until finally being confronted by his firm, and even then claimed he was entitled to do so. *Id.* at *6-7, *20. And at the hearing, Foran frivolously claimed that he had acted in good faith, asserting that his case only involved an "internal firm dispute regarding the proper allocation of commissions." *Id.* at *20. Yet despite all these obviously aggravating factors, and the absence of any mitigating factors, the NAC imposed a two year suspension and a $35,000 fine, not a permanent bar. *Id.* at *22.

Finally, a case that has been remanded to the SEC by the D.C. Circuit, *John M.E. Saad*, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761 (May 26, 2010), *remanded*, 718 F.3d 904 (D.C. Cir. 2013), similarly involved far more egregious facts than the present case. In *Saad*, the SEC specifically stated:

> Saad lied to his employer about going on a recruiting trip, and he fabricated receipts, submitted a falsified expense report, and accepted unjustified reimbursement as a result of that lie. Saad also sought reimbursement for a cell phone he mislead his employer into believing he purchased for himself through a falsified receipt and expense report, and Saad attempted, at least initially, to recoup money he spent at an Atlanta-area hotel lounge at the same time he claimed he was in Memphis. After his employer caught and fired him, Saad further mislead investigators by telling them he sought reimbursement for a trip

[3] *Dep't of Enforcement v. Foran*, Complaint No. C8A990017, 2000 NASD Discip LEXIS 8 (NAC Sept. 1, 2000).

> that "had yet to occur" and by denying that he had purchased the cell phone for someone other than himself.

Saad, at *30. The SEC specifically emphasized the seriousness of Saad having provided false information to FINRA. *Id.* at *31 n.32. The SEC further noted that Saad gave misleading information to the Office of Insurance for the Commonwealth of Kentucky to evade that state regulatory inquiry. *Id.* at *9 n.4. And Saad repeatedly chose to conceal his misconduct as it came to light, such as when he attempted to withdraw a request and throw away a false receipt when questioned about it by his firm's office administrator. *Id.* at *8. Yet despite all these extreme facts, the D.C. Circuit still remanded the case, and directed the Commission to consider the mitigating effect of Saad's termination by his firm and the severe stress he was under. *Saad,* 718 F.3d at 913-14.

C. The Board Failed to Give Proper Mitigating Effect to Numerous Factors

1. Ms. Olson's Misconduct Was of Short Duration, Did Not Involve a Pattern of Wrongdoing, and Represented an Aberrant Lapse in Judgment

It is indisputable that Ms. Olson's misconduct was of short duration, did not involve a pattern of wrongdoing, and represented an aberrant lapse in judgment. These are mitigating circumstances under Guidelines Principal Considerations 8 and 9.[4] The Board improperly dismissed any mitigating effect, however, asserting in a footnote that since the Guideline states that a bar is standard without regard to the sum involved, "a single instance of theft provides ample justification" for a bar. *Board Decision,* at 10, n.18. On the contrary, as previously noted, the Guideline for conversion specifically calls for consideration of all mitigating circumstances, which include whether there was a pattern of wrongdoing and whether the

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[4] Principal Consideration 8 states: "Whether the respondent engaged in numerous acts and/or a pattern of misconduct." Principal Consideration 9 states: "Whether the respondent engaged in the misconduct over an extended period of time."

misconduct occurred over an extended period. Indeed, the NAC has found that this very factor justified leniency in *McCartney,* at *17 ("one-time, isolated incident" considered mitigating).

In *McCartney*, the respondent's creation of a false invoice and false verification letter, and subsequent alteration of a check when his initial reimbursement request was denied, were still viewed by the NAC as a "one-time, isolated incident" in a ten year career, and therefore a mitigating circumstance. *McCartney*, at *17. Ms. Olson did not label any other personal expenses as business expenses, nor did Enforcement charge her with any such additional misconduct. On the contrary, the evidence showed that Ms. Olson scrupulously separated out a $21.47 charge for her daughter's meal at Kabuki Restaurant on February 19, 2010 from the legitimate business charge of $89.53 at the same restaurant at the on the same date. *CX-1*, at 4; *Tr.* at 61-62. Ms. Olson's misconduct unquestionably was an isolated event that should have been considered a mitigating factor under Guidelines Principal Considerations 8 and 9.

2. Ms. Olson Fully Accepted Responsibility and Demonstrated Genuine Remorse

The Board appears to concede that acceptance of responsibility [5] can be a mitigating circumstance, but refused to give Ms. Olson any such credit because she supposedly did so only after her wrongdoing was detected by her firm, citing *Kent M. Houston,* Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *28 (Feb. 20, 2014). *Board Decision*, at 9.[6]

[5] Guidelines, at 6, Principal Consideration 2, which states: "Whether an individual . . . 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."

[6] *Houston* involved a registered representative who apparently stole hundreds of thousands of dollars from a client in multiple illicit transactions over many years, continued to deny his wrongdoing throughout the proceedings against him, and was disciplined for his refusal to even appear for testimony in the FINRA investigation. His argument that he ever had accepted responsibility, let alone prior to detection, appears to have been frivolous. *Houston*, at 7-11, 17-20, and 27-28.

The Board incorrectly stated that Ms. Olson "initially clung to the falsehood that the expense in question was a business expense. Instead of accepting responsibility, she resisted it until her lie became undeniable." *Board Decision*, at 9. But the evidence was clear that the Wells Fargo interviewer was going through a list of Ms. Olson's charges, not alleging that any particular charge was improper, nor showing any receipts or indicating any awareness that the $740.10 charge was really a personal expense. *Tr.* at 64-65, 86 *(Olson).* The interviewer showed her an eleven page spreadsheet that listed 143 transactions, 43 of which had been highlighted. *Tr.* at 64 (Olson); *CX-1*. The April 2 transaction was not highlighted. *CX-1*, at page 9 of 11. When Ms. Olson went through this lengthy spreadsheet and ultimately reached the April 2 charge, she initially said it was for branch equipment for a new conference room, because that was what appeared on the spreadsheet. But once Ms. Olson noticed the amount, she remembered that it was a personal charge for the iPods, and said so. *Tr.* at 64-65 (*Olson*). The interviewer had not confronted her with any accusation; shown her any receipt, or indicated that she was suspicious of Ms. Olson's entry for this item. *Tr.* at 86 (*Olson*). Enforcement did not call the interviewer as a witness or offer any countervailing evidence.

The evidence was that Ms. Olson volunteered what she had done, repeated it in her written statement to the Wells Fargo employee (*CX-2*, *Tr.* at 65-66 (*Olson*)), and repeated it consistently thereafter. Thus, Ms. Olson wrote in her letter to FINRA that "I made an error in marking the transaction as a business expense. I would never put my family or myself in a situation like this again." *CX-3*. As Ms. Olson testified, "having intentionally misled my company by marking the expense was very wrong. And I would never, ever jeopardize my family the way I did this day when I did this." *Tr.* at 67 (*Olson*). As her supervisor at

Ameriprise, George Fekete, corroborated, Ms. Olson has beaten herself up over her violation for years and has taken full responsibility for her misconduct. *Tr.* at 112-13 (*Fekete*).

Such heartfelt expressions of remorse and assurances that violations will not be repeated are mitigating circumstances under FINRA's Sanctions Guidelines. *McCartney*, at *14-15 n.13; *Leopold*, at *21-23. In *Leopold*, largely on the basis of the respondent's expressing sincere remorse, being genuinely ashamed, and vowing not to repeat his misconduct (at *21), the NAC reduced the sanction from a bar to a one-year suspension and a $25,000 fine, even though Leopold had engaged in "a pattern of misconduct over an extended period of time." *Leopold*, at *7-8, 18. Similarly, in *McCartney*, despite the far greater amount of deception compared to the present case, the NAC still found that McCartney recognized the seriousness of his behavior, was truly remorseful, was genuinely ashamed of his actions, and had avowed that he would not repeat his violations. *McCartney*, at *14. The NAC found these circumstances to be mitigating, and reduced the sanction to a six-month suspension and a $5,000 fine. *See also Dep't of Enforcement v. Nouchi*, Complaint No. E102004083705, 2009 FINRA Discip. LEXIS 8 (NAC Aug. 7, 2009) (expressions of "sincere remorse" were mitigating and contributed to decision to affirm only a 90 day suspension for intentional false claims for disability waivers of contingent deferred sales charges). Moreover, in *McCartney*, the respondent's acceptance of responsibility was deemed to be mitigating despite the fact that he did not admit his misconduct until "confronted by FINRA four years after the misconduct . . ." *McCartney*, at *15.

It is uncontested that Ms. Olson consistently has expressed great and genuine remorse ever since she identified her wrongdoing for Wells Fargo. She was in tears for most of the hearing of this case. *See Tr.* at 11 (counsel noting that Ms. Olson was crying). The only panel member to comment on her sincerity noted Ms. Olson was "extremely credible," "truly

remorseful," and "genuinely ashamed of her behavior." *Hearing Panel Decision*, at 15 *(Dissenting opinion).* The Board, however, stated that her assurances that she will not repeat her misconduct is "unconvincing," relying upon Ms. Olson's testimony that she was not "bothered" by her actions and did not "grasp the nature of her 'mistake'" until she had been terminated by Wells Fargo. *Board Decision*, at 9. No explanation was offered for why Ms. Olson, who was so clearly mortified and ashamed of her conduct, could be denied any mitigating effect simply because she did not feel such shame before June 2, 2010 – now more than four years ago. The full extent of the wrongfulness of her conduct is painfully apparent to her now, and has been from the moment she volunteered what she had done on June 2, 2010 and was immediately terminated.

Although Ms. Olson testified that her false description of the iPod transaction did not "bother" her until her meeting with the interviewer on June 2, 2010, she explained that she simply did not focus on it again until that date. *Tr.* at 74-75 (*Olson*). She knew it was wrong to claim an expense was for a business purpose when it was not, and said so repeatedly during her testimony. Any question as to her full comprehension of the significance of her wrongdoing, regardless of her prior generosity toward her firm, vanished over four years ago. Ms. Olson was genuinely remorseful, ashamed of her misconduct, and vowed never again to commit such a violation (*see Leopold*, at *21 (emphasizing that Leopold "expressed sincere remorse," was "genuinely ashamed," and "avows that his lapses in judgment will not be repeated); *McCartney*, at *14-16 (same)). Under all the circumstances, Ms. Olson should have been given mitigation credit for her acceptance of responsibility.

3. Ms. Olson's Voluntary Spending on Refrigerators and Other Gifts Show That She is Not Motivated By Greed, and Therefore Not a Risk to Commit Future Violations

Ms. Olson did not argue that her misconduct was excused or less wrongful simply because she had spent $2,000 on the refrigerators without seeking reimbursement, and that this was more than the $740.10 she received improperly. But this evidence is important in understanding all the facts and circumstances. Her generosity regarding the refrigerators, as well as the many other times that she paid out of her own pocket to benefit her firm, show that she is not a greedy person who is a continuing risk, as the Board posits. She is simply a good, well-meaning, generous person who made a single, aberrant, terrible mistake, and should not be permanently barred from the securities industry over that mistake. The Sanctions Guidelines are surely flexible enough to allow her credit for these facts and circumstances. See *Saad*, 718 F.3d at 913-14 (remanding Commission decision for failure to consider mitigating effect of personal and professional stress, despite absence of any Guideline labeling these factors as mitigating).

4. Ms. Olson Was Terminated By Wells Fargo Prior to the FINRA Action

Despite prior cases in which termination of employment has not been viewed as a mitigating factor, the D.C. Circuit rightly questioned this analysis in *Saad.* Ms. Olson's sudden termination on June 2, 2010 is clearly relevant to whether a permanent bar is remedial or punitive, and whether any additional deterrent effect would be achieved by barring her (as opposed to a lesser sanction), when she has already suffered the trauma of sudden termination and will so clearly never again commit any violations. Her termination should be viewed as mitigating under Principal Consideration 14.

D. The Aggravating Circumstances Noted by the Board Do Not Justify a Bar, in Light of All the Facts and Circumstances Regarding Ms. Olson

The Board gave undue weight to its view of aggravating factors. Ms. Olson does not contest that her misconduct in falsely describing the iPod transaction was intentional within the meaning of Principal Consideration 13. She admits that she "concealed" her misconduct with

this same false description, but this was the very act of misconduct, not the type of separate concealment of misconduct that appears to be the focus of Principal Consideration 10. Far from such evasion of responsibility, she cooperated with the investigations by Wells Fargo prior to detection, contrary to the Board's flawed description of the relevant facts. Finally, Ms. Olson admits that she benefited in the amount of $740.10, that this was an injury suffered by her firm, and that this fits within the aggravating factors set forth in Principal Considerations 11 and 17. But in the context of all the facts and circumstances, these aggravating factors do not justify a permanent bar.

There was no issue that Ms. Olson, in a foolish, fleeting moment, intentionally made a false entry when she entered "branch equip for cof room." That much was never in dispute; what was important was that this was not a carefully calculated plan, was completely out of character for her, and was never going to be repeated. Thus, although *Guidelines* Principal Consideration 13 regarding intentional acts is applicable, it is of far less consequence than circumstances involving careful pre-meditation and elaborate planning. And the NAC has reduced sanctions substantially even where the intentional acts at issue occurred over an extended period of time and demonstrated extensive pre-meditation. *See McCartney* and *Leopold*, *supra.*

In *McCartney*, (a case in which the NAC reduced the sanction to a six month suspension and a $5,000 fine), a registered representative submitted numerous false documents, including elaborate forgeries. He created fictitious Embassy Suites invoices and verification letters from other brokers. *McCartney*, at *2-5. McCartney obtained a template to make the bogus Embassy Suite invoices several weeks before using it. *McCartney*, at *5, 17. Moreover, when the request for reimbursement was initially rejected for insufficient documentation, he created additional false documentation. *McCartney*, at *5-6 n.3. This repeated and carefully planned deception

over an extended period was far more egregious evidence of intentional misconduct than Ms. Olson's single moment of making one false entry, and then volunteering the truth to her firm's representative.

In *Leopold*, the respondent created ten false invoices for meetings that had not occurred, generated ten fraudulent verification letters thanking himself for the imaginary seminars, and forged the signatures on seven of these letters (he left the others blank). Leopold also submitted false invoices on nine additional occasions for meetings that had occurred but for which he had not saved his receipts.[7] Both *McCartney* and *Leopold* thus involved far more extensive intentional wrongdoing that the present case, yet neither of those cases resulted in a bar from the industry.

Regarding the issue of "concealment" (Principal Consideration 10), the very entry of the false description was the only act of "concealment." There was no prolonged, elaborate subterfuge, but rather only the single act that constituted the violation itself. By contrast, *McCartney* and *Leopold* involved extensive deception over a prolonged period. Yet even under these circumstances, a bar was not imposed in either case.

Similarly, in *Dep't of Enforcement v. Hunt,* No. 2009018068701, 2012 FINRA Discip. LEXIS 62 (NAC Dec. 18, 2012) (six-month suspension and $10,000 fine for falsified expense reports; bar imposed for other conduct), the respondent submitted six false expense reports by altering the check numbers, payment amounts, and dates of the checks, misconduct that occurred over approximately a one year period. *Hunt*, at *16-17.[8]

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[7] *Leopold*, at *7-8.

[8] Cases where "concealment" has truly been an aggravating circumstance, and has contributed to imposition of severe sanctions, have generally involved attempts to mislead FINRA or firm investigators. See *Dep't of Enforcement v. Kaplan*, Disciplinary Proceeding No. 20070077587, 2008 FINRA Discip. LEXIS 22 (OHO June 20,

Regarding the final aggravating circumstance noted by the Board, Ms. Olson's misconduct did violate her firm's trust and result in financial harm of $740.10. (*Principal Considerations 11, 17*). Ms. Olson unquestionably did not have the right to receive reimbursement in this manner for the refrigerators or any of the many other purchases that she had made with her own funds for the benefit of the firm. Even though Ms. Olson's payments for the refrigerators were more than the $740.10 she wrongfully obtained, Wells Fargo did suffer a $740.10 loss. But the circumstances of Ms. Olson's generosity to the firm were essential to understanding that she was not an evil person motivated by greed. On the contrary, the evidence showed that she was a good and generous person who made a single, out of character, fleeting mistake. Under such circumstances, this aggravating factor should not have been deemed to support a severe sanction against Ms. Olson.

E. Additional Facts and Circumstances Favoring Leniency

Several additional facts and circumstances support a reduced sanction in this case, even though they have generally not been viewed as "mitigating" in and of themselves in past cases. First, Ms. Olson repaid the entire amount at issue, albeit at the request of her firm. There was no dispute that Ms. Olson had paid for over $2,000 worth of refrigerators for Wells Fargo, which the firm could and should have viewed as a sufficient set off. Wells Fargo had, after all, retained the refrigerators and fired Ms. Olson, and she no longer could submit for reimbursement through

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2008) (when audited by his firm two years later, the respondent failed to admit wrongdoing despite being specifically asked to review his expense reimbursements for personal expenses. At the hearing itself, the respondent engaged in an extensive, frivolous attempt to claim a "psychological disorder" defense); *DBCC No. 4 v. Kwikkel-Elliott*, Complaint No. C04960004, 1998 NASD Discip. LEXIS 4, at *19 (NBCC Jan.16, 1998), (respondent had lied extensively at hearing and claimed that she had done nothing wrong despite the fact that she had obtained approximately $900 in reimbursement when she had in fact only ordered and paid for items totaling $7.60); *John M.E. Saad*, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761 (May 26, 2010), *remanded*, 718 F.3d 904 (D.C. Cir. 2010) (Saad attempted to throw away a false receipt when questioned about it by his firm's office administrator (at *8), provided false information to FINRA (at *31 n.32), and gave misleading information to the Office of Insurance for the Commonwealth of Kentucky to evade that state regulatory inquiry (at *9 n.4).

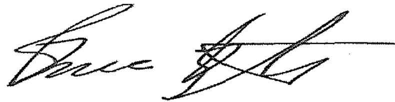
the firm's normal process. But Wells Fargo told Ms. Olson that she should pay back the $740.10 regardless, and she did so. *Tr.* at 50 (*Olson*).

Secondly, Ms. Olson's conduct caused no harm to any investor. Although the NAC generally views injury to the respondent's firm as sufficient to preclude mitigation, under the special circumstances of this case, where Ms. Olson had voluntarily paid thousands of dollars for her firm's benefit and was clearly not a greedy person, the absence of customer harm should be considered as yet another basis for a reduced sanction.

VI. Conclusion

Ms. Olson respectfully submits that if all the mitigating facts and circumstances are properly considered, she should not be barred from the securities industry, and should instead receive a sanction more consistent with *McCartney*.

Respectfully submitted,



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ADDENDUM

CASES

DBCC No. 4 v. Kwikkel-Elliott, Complaint No. C04960004, 1998 NASD Discip. LEXIS 4 (NBCC Jan. 16, 1998) 1

Dep't of Enforcement v. Foran, Complaint No. C8A990017, 2000 NASD Discip. LEXIS 8 (NAC Sept. 1, 2000) 2

Dep't of Enforcement v. Hunt, Complaint No. 2009018068701, 2012 FINRA Discip. LEXIS 62 (NAC Dec. 18, 2012) 3

Dep't of Enforcement v. Kaplan, Disciplinary Proceeding No. 20070077587, 2008 FINRA Discip. LEXIS 22 (OHO June 20, 2008) 4

Dep't of Enforcement v. Leopold, Complaint No. 2007011489301, 2012 FINRA Discip. LEXIS 2 (NAC Feb. 24, 2012) 5

Dep't of Enforcement v. McCartney, Complaint No. 2010023719601, 2012 FINRA Discip. LEXIS 60 (NAC Dec. 10, 2012) 6

Dep't of Enforcement v. Nouchi, Complaint No. E102004083705, 2009 FINRA Discip. LEXIS 8 (NAC Aug. 7, 2009) 7

Gold v. SEC, 48 F.3d 987 (7th Cir. 1995) 8

Kent M. Houston, Exchange Act Release No. 71589, 2014 SEC LEXIS 614 (Feb. 20, 2014) 9

John M.E. Saad, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761 (May 26, 2010), *remanded*, 718 F.3d 904 (D.C. Cir. 2013) 10

Otto v. SEC, 253 F.3d 960 (7th Cir. 2001) 11

PAZ Sec., Inc. v. SEC, 494 F.3d 1059 (D.C. Cir. 2007) 12

FEDERAL STATUTES

15 U.S.C. § 78s(e)(2) 13

FINRA MATERIALS

Notices to Members (FINRA NTM)/Regulatory Notices

Notice 93-32 (May 1993)....................14

Notice 98-39 (May 1998)....................15

Rules

FINRA Rule 2010....................16

FINRA Rule 9349(c)....................17

FINRA Sanction Guidelines....................18

OTHER

Board of Governors Decision....................19

Hearing Panel Decision....................20

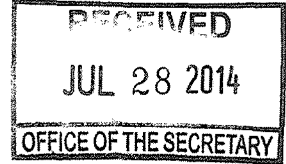
Transcript of Hearing of October 2, 2012....................21

Department of Enforcement Exhibits

CX-1, Denise Olson's Expense Report spreadsheet....................22

CX-2, Denise Olson's handwritten statement made to Corporate Security....................23

CX-3, Request for Information from Oliver Kamp and response from Denise Olson....................24



UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-15916

In the Matter of the Application of DENISE M. OLSON For Review of Disciplinary Action Taken by FINRA	))))))))))	Denise Olson's Opening Brief in Support of her Application for Review

ADDENDUM

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2012 FINRA Discip. LEXIS 62 (NAC Dec. 18, 2012) 3

Dep't of Enforcement v. Kaplan, Disciplinary Proceeding No. 20070077587,
2008 FINRA Discip. LEXIS 22 (OHO June 20, 2008) 4

Dep't of Enforcement v. Leopold, Complaint No. 2007011489301,
2012 FINRA Discip. LEXIS 2 (NAC Feb. 24, 2012) 5

Dep't of Enforcement v. McCartney, Complaint No. 2010023719601,
2012 FINRA Discip. LEXIS 60 (NAC Dec. 10, 2012) 6

Dep't of Enforcement v. Nouchi, Complaint No. E102004083705,
2009 FINRA Discip. LEXIS 8 (NAC Aug. 7, 2009) 7

Gold v. SEC,
48 F.3d 987 (7th Cir. 1995) 8

Kent M. Houston, Exchange Act Release No. 71589,
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2010), *remanded*, 718 F.3d 904 (D.C. Cir. 2013) 10

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FEDERAL STATUTES

15 U.S.C. § 78s(e)(2) 13

FINRA MATERIALS

Notices to Members (FINRA NTM)/Regulatory Notices

Notice 93-32 (May 1993) 14

Notice 98-39 (May 1998) 15

Rules

FINRA Rule 2010 16

FINRA Rule 9349(c) 17

FINRA Sanction Guidelines 18

OTHER

Board of Governors Decision 19

Hearing Panel Decision 20

Transcript of Hearing of October 2, 2012 21

Department of Enforcement Exhibits

CX-1, Denise Olson's Expense Report spreadsheet 22

CX-2, Denise Olson's handwritten statement made to Corporate Security 23

CX-3, Request for Information from Oliver Kamp and response from Denise Olson 24

1

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District Business Conduct Committee For District No. 4, Complainant, v.
Tammy S. Kwikkel-Elliott, Respondent.

Complaint No. C04960004

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE
NASD REGULATION, INC.

1998 NASD Discip. LEXIS 4

January 16, 1998

TEXT:

[*1] DECISION

Introduction

This matter was called for review by the National Business Conduct Committee ("NBCC") pursuant to NASD Procedural Rule 9310. We affirm the finding of the District Business Conduct Committee for District No. 4 ("DBCC") that Tammy S. Kwikkel-Elliott ("Kwikkel-Elliott") violated NASD Conduct Rule 2110 (formerly Article III, Section 1 of the Rules of Fair Practice) by obtaining funds from her employer under false pretenses. We order that Kwikkel-Elliott be censured, fined $ 5,000 and barred from associating with any member of the NASD in any capacity. We also uphold the imposition of costs for the DBCC hearing. n1

n1 The NBCC called this case for review to determine whether the sanctions imposed by the DBCC were appropriate in light of the conduct in question. The parties were provided notice that a hearing of this matter was scheduled for October 7, 1997. Despite receiving this notice, Kwikkel-Elliott did not attend the hearing, either in person or by telephone. The NASD regional attorney who presented this matter to the DBCC was available by telephone, but determined that no further argument was required because Kwikkel-Elliott failed to attend. Accordingly, the matter was decided on the basis of the record below and any timely filed briefs.

[*2]
Background

During all relevant times Kwikkel-Elliot was associated with member firm AAL Capital Management Corporation ("AAL") as a sales representative and was registered with the NASD as an investment company and variable contract products representative. She is not currently associated with any member firm.

Facts

In November 1993, Kwikkel-Elliott became associated with AAL as a district representative and member of its field staff. She was employed in an AAL office located in Jackson, Missouri ("Jackson Office"). Throughout most of the relevant period, the field staff at the Jackson Office was composed of Kwikkel-Elliott, another district representative, and a district manager. The Jackson Office field staff shared in paying the rent, telephone expenses, and the secretary's salary. There was also evidence that they, along with the field staff of other AAL district offices, jointly advertised and conducted seminars, and shared in these expenses.

As a district representative and member of the field staff, Kwikkel-Elliott was obligated to pay for certain sales and promotional materials from AAL, known as "cost items," for use in sales presentations. Kwikkel-Elliott received [*3] a memorandum from AAL addressed to "All Field Staff," dated May 2, 1994, entitled "Urgent Update 92." Urgent Update 92 advised the field staff immediately to cease using listed obsolete cost items. The field staff was instructed to retain all obsolete cost items until a process for obtaining credit was established.

Kwikkel-Elliott received another memorandum from AAL, dated May 31, 1994, entitled "Procedure Update 273." Attached to this mailing was a copy of AAL's "Promotional Materials Reimbursement Request Form" ("Reimbursement Request"), which provided the means for AAL field staff to seek reimbursement for obsolete cost items. Directly above the signature line, the Reimbursement Request included the following attestation: "I have completed the form to the best of my knowledge and have destroyed the materials noted on the Inventory Worksheet." AAL required those seeking reimbursement to return the Reimbursement Request by June 30, 1994.

Kwikkel-Elliott completed, signed and submitted the Reimbursement Request to AAL on June 18, 1994. Kwikkel-Elliott requested reimbursement of $ 913.60, but she ultimately received $ 879.60 on or about July 1, 1994, due to an adjustment calculated [*4] by an AAL home office employee. n2

n2 Kwikkel-Elliott received $ 840 in her payroll check from AAL on July 1, 1994. This amount represents the adjusted Reimbursement Request amount of $ 879.60, minus $ 39.60 for other supplies that she had ordered.

Thereafter, the other district representative in the Jackson Office happened across a copy of Kwikkel-Elliott's reimbursement request of $ 913.60. Believing that Kwikkel-Elliott's request was excessive for a person who had been with AAL for less than a year, this district representative made a photocopy of Kwikkel-Elliott's Reimbursement Request and forwarded it to a supervisor outside the

Jackson Office. AAL's Special Investigation Department ("Investigation Department") investigated the matter and discovered that, of the 697 Reimbursement Requests received from AAL field staff, Kwikkel-Elliott's Reimbursement Request was one of only 10 that exceeded $ 200. The Investigation Department determined that Kwikkel-Elliott actually had ordered and paid for only $ 7.60 worth [*5] of cost items deemed obsolete by Urgent Update 92 and eligible for reimbursement. The Investigation Department also confirmed that Kwikkel-Elliott received her funds pursuant to the Reimbursement Request. n3

n3 The Investigation Department also verified that AAL did not review or alter Kwikkel-Elliott's Reimbursement Request, other than to adjust it to $ 879.60 because of a miscalculation of the quantity in a unit of one of the cost items.

When an AAL supervisor confronted Kwikkel-Elliott with this information on August 3, 1994, she did not claim that she had ordered or paid for all of the cost items listed in her Reimbursement Request. Kwikkel-Elliott asserted, however, that she and the other field staff at the Jackson Office jointly may have ordered some cost items and, therefore, AAL records would not accurately reflect all of the cost items that she had ordered. She offered no proof that she had ordered or paid for $ 913.60 worth of cost items. She also stated that she simply had estimated the quantity of cost [*6] items included in her Reimbursement Request. AAL terminated Kwikkel-Elliott's employment at this meeting. n4

n4 Kwikkel-Elliott was the only AAL employee terminated for submission of an inaccurate Reimbursement Request.

Discussion

The complaint in this matter alleged, and the DBCC found, that Kwikkel-Elliott violated NASD Conduct Rule 2110 by obtaining funds from AAL under false pretenses. Rule 2110 provides that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." n5 It is well established that conduct that is not directly related to the securities industry may violate Rule 2110. See, e.g., Vail v. SEC, 101 F.3d 37, 38 (5th Cir. 1996) ("The SEC has consistently held that the NASD's 'disciplinary authority is broad enough to encompass business related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security'.")(citations omitted); In re Leonard John Ialeggio, Exchange [*7] Act Rel. 37910, at 7 (Oct. 31, 1996) (upholding NASD's finding that respondent violated Article III, Section 1 of the Rules of Fair Practice -- now Conduct Rule 2110 -- by inducing his employer to pay for country club fees and emphasizing that misconduct not directly related to the securities industry nonetheless may violate the NASD rules); In re George R. Beall, 50 S.E.C. 230, 231-32 (1990) (finding that respondent's passing of bad checks to his firm in connection with options trading in his personal account was a violation of Article III, Section 1 of the Rules of Fair Practice, now Conduct Rule 2110). n6

n5 Rule 2110 is applicable to associated persons pursuant to Rule 115(a), formerly Article I, Section 5(a), which states that "[t]hese Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."

n6 See also In re Howard B. Labow, 48 S.E.C. 134, 135 (1985) (affirming NASD finding that insurance agent violated just and equitable principles of trade by falsifying insurance application and retaining commission for policy after policy was canceled); In re Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) (finding that insurance agent's falsification of insurance applications to earn commissions violated Article III, Section 1).

[*8]
In the current case, it is undisputed that the Reimbursement Request submitted by Kwikkel-Elliott was inaccurate. She admitted that she personally did not order and pay for all of the items included in her Reimbursement Request. Nevertheless, Kwikkel-Elliott claimed that she did not act in bad faith in preparing and submitting an inaccurate Reimbursement Request. She argued that the Reimbursement Request was confusing and that she believed that it was supposed to have been submitted on behalf of the other field staff at the Jackson Office, as well as on her own behalf. Kwikkel-Elliott explained that, as a result of this misunderstanding, all of the cost items ordered by the Jackson Office field staff were included in her Reimbursement Request. She also stated that in preparing the Reimbursement Request, she did not intentionally exaggerate the number of cost items. Rather, she estimated the promotional materials in the office storage cabinets. She further asserted that once she received the reimbursement funds, she intended to divide them among all the members of the field staff at the Jackson Office. We do not find Kwikkel-Elliott's explanation of the events to be credible.

Kwikkel-Elliott's [*9] assertion that the Reimbursement Request was confusing and that she was led to believe that it should be submitted on behalf of the Jackson Office is belied by the facts. Procedure Update 273 and the attached Reimbursement Request were addressed to "All Field Staff." They were not addressed and sent to the Jackson Office or even to the district manager. In addition, Procedure Update 273 provided that the "home office will reimburse you for those materials that have a cost associated with them." (emphasis added). The Reimbursement Request instructed the field staff to "compile all materials you have that are listed on the Inventory Worksheet . . ." and "calculate the amount to be reimbursed to you. . . ." (emphasis added). Neither the manner of distribution of the correspondence, the instructions contained therein nor the method of reimbursement suggested that the Reimbursement Requests should be submitted on behalf of anyone other than an individual person. n7

n7 The Reimbursement Request also had a section where the party seeking reimbursement was supposed to check the box that represented his or her position with AAL. Kwikkel-Elliott checked the box marked "DR" for district representative. There was no box that could be checked to submit the form for the office as a whole. In addition, Kwikkel-Elliott placed her registered representative number and Social Security number on the form. She did not place the numbers of any other member of the Jackson Office field staff on the form.

[*10]
Moreover, notwithstanding her assertion that she found the Reimbursement Request confusing, Kwikkel-Elliot never sought clarification of the proper procedure to follow. She did not ask anyone from AAL, including co-workers at the Jackson Office, for assistance in filling out the Reimbursement Request, despite the fact that she executed the Reimbursement Request and submitted it to AAL on June 18, 1994, 12 days before the June 30, 1994 due date. n8 She also did not consult her co-workers for help in calculating the quantity of cost items to be included.

n8 Both "Procedure Update 273" and the Reimbursement Request provided express instructions regarding the proper department to contact with questions about the Reimbursement Request.

Even if the evidence supported Kwikkel-Elliott's claim that she thought that the Reimbursement Request was to be made on behalf of the entire office, which it does not, her "estimate" included both cost items and non-cost items. Kwikkel-Elliott testified that she merely performed a visual [*11] inspection of certain cabinets where promotional materials were kept when she made her estimate. These cabinets, however, contained both cost items and non-cost items and Kwikkel-Elliott admitted that she did not distinguish between the two, notwithstanding that only the former items were reimbursable. Thus, her "estimate" would not have been accurate in any event. n9

n9 Kwikkel-Elliott also failed to destroy the obsolete cost items, even though she attested on the Reimbursement Request that she had destroyed such materials.

Kwikkel-Elliott's claim that she planned to divide the reimbursement funds among all the members of the Jackson Office field staff is also untenable. She made no attempt to determine what portion of the cost items included in her Reimbursement Request belonged to which members of the Jackson Office. Thus, she had no means to determine how to allocate the reimbursement funds. She also never told anyone that she had submitted the Reimbursement Request on behalf of the Jackson Office.

In addition, [*12] Kwikkel-Elliott never offered any reimbursement funds to any members of the Jackson Office field staff after the funds were deposited in her account on July 1, 1994. In fact, within five days of receipt of the reimbursement funds, Kwikkel-Elliott did not have sufficient funds to share with other members of the Jackson Office field staff. She claims not to have known that the funds had been directly deposited into her credit union account. However, Urgent Update 273 advised that the reimbursement funds would be included in the payroll checks of those making requests. She was also sent a payroll document from AAL confirming that the reimbursement funds had been deposited into her account. Furthermore, if she had intended to share the funds with the

other members of the field staff, it is likely that she would have been watching for the reimbursement funds. n10

n10 We note, as well, that the Securities and Exchange Commission ("SEC") has held that a respondent's claim that the act in question resulted merely from his or her disorganization or forgetfulness provides no justification for misconduct of the type alleged in this case. See In re Ernest A. Cipriani, 51 S.E.C. 1004, 1006 n.7 (1994) ("We have held that disorganization and absentmindedness are no excuse for misappropriation.") (citing In re Stanley D. Gardenswartz, 50 S.E.C. 95 (1989)).

[*13]
Under these circumstances, we do not find Kwikkel-Elliott's version of events to be plausible. The evidence indicates that Kwikkel-Elliott did not make an inadvertent mistake, but rather that she acted in bad faith. She made no attempt to separate cost items from non-cost items, grossly exaggerated the number of cost items, submitted a Reimbursement Request under false pretenses, and received reimbursement funds of $ 879.60. Her conduct was inconsistent with high standards of commercial honor and just and equitable principles of trade. Accordingly, we find that Kwikkel-Elliott violated NASD Conduct Rule 2110.

Sanctions

The DBCC determined that Kwikkel-Elliott should be censured, suspended for 30 days from association with any member firm in any capacity, required to requalify by examination prior to reassociating with a member firm, and assessed costs of $ 1,291.90. In mitigation, the DBCC considered that Kwikkel-Elliott was under a great deal of personal and work-related stress at the time she prepared the Reimbursement Request. The DBCC also found that AAL did nothing to determine the accuracy of other Reimbursement Requests and did not terminate any other employees for submitting [*14] inaccurate Reimbursement Requests. In addition, the DBCC considered that the Reimbursement Request was a one-time program and that no one at AAL, including Kwikkel-Elliott, had any prior experience with it. Finally, the DBCC noted that Kwikkel-Elliott had no prior disciplinary history and that she offered to return the reimbursement funds at the meeting that resulted in her termination.

We find that the mitigating factors considered by the DBCC do not warrant the lenient sanctions imposed on Kwikkel-Elliott in light of the severity of her misconduct. First, Kwikkel-Elliott's conduct cannot be excused by the fact that she may have been under personal and work-related stress. See In re Leonard John Ialeggio, Exchange Act Rel. No. 37910, at 3-4 (Oct. 31, 1996) (rejecting contention that misconduct was caused, in part, by respondent's extremely busy travel schedule); In re Joel Eugene Shaw, 51 S.E.C. 1224, 1226 (1994) (holding that respondent's conduct cannot be justified by his personal and financial circumstances). Nothing in the record convinces us that the conduct in question resulted from or was exacerbated by Kwikkel-Elliott's personal or work-related circumstances. The evidence [*15] clearly supports the finding that Kwikkel-Elliott intended to obtain funds under false pretenses and there is no indication in the record before us that she would have acted differently under other circumstances.

Second, whether AAL attempted to verify the accuracy of other Reimbursement Requests and whether it terminated other employees for similar conduct has no bearing on a determination of the appropriate sanctions here. As the SEC has emphasized, "it is no defense that others in the industry may have been operating in a similarly illegal or improper manner." In re Patricia H. Smith, Exchange Act Rel. No. 35989, at 4 n.8 (June 27, 1995). See also In re Bison Securities, Inc., 51 S.E.C. 327, 330 n.10 (1993) ("[O]ne dealer's improper pricing practices cannot legitimize another's."); In re Donald T. Sheldon, 51 S.E.C. 59, 66 n.32 (1992) ("[E]ven if Sheldon had established that other firms also misused customer fully-paid securities, that would not have exonerated him."), aff'd, 45 F.3d 1515 (11th Cir. 1995). AAL discovered, inadvertently, that Kwikkel-Elliott had engaged in misconduct by filing an inaccurate Reimbursement Request. AAL then terminated Kwikkel-Elliott and notified the [*16] NASD of her conduct through a Uniform Termination Notice for Securities Industry Registration ("Form U-5"). AAL's vigilance with regard to the accuracy of other Reimbursement Requests is of little consequence.

Third, the fact that the Reimbursement Request was a one-time program with which no one had any prior experience does not provide Kwikkel-Elliott with a basis for mitigation. The forms involved in this matter were not overly complex or confusing. Moreover, Kwikkel-Elliott never sought assistance in interpreting the procedures or in filling out the forms. Under these circumstances, Kwikkel-Elliott cannot shift responsibility for her misconduct to AAL. Cf. In re Thomas C. Kocherhans, Exchange Act Rel. No. 36556, at 6 (Dec. 6, 1995) ("[W]e have repeatedly held that a respondent cannot shift his or her responsibility for compliance with an applicable requirement to a supervisor. . . ."); In re Ernest A. Cipriani, 51 S.E.C. 1004, 1007 (1994) (rejecting contention that the lack of adequate supervision justified conduct in question).

Fourth, Kwikkel-Elliott's lack of any disciplinary history offers little solace given the short time in which she had been registered with the NASD [*17] and considering the seriousness of her misconduct. At the time of the infraction, Kwikkel-Elliott had been registered with the NASD for less than a year. n11 Receiving funds under false pretenses within a year of becoming registered with the NASD does not evince an exemplary track record. Cf. In re Henry E. Vail, Exchange Act. Rel. No. 35872, at 5 (June 20, 1995) (rejecting contention that bar for misappropriation of funds was unwarranted because of no past disciplinary history), aff'd, 101 F.3d 37 (5th Cir. 1996).

n11 Kwikkel-Elliot became associated with member firm AAL in August 1993. She took the Series 6 exam on September 23, 1993, and became registered with the NASD as an investment company and variable contract products representative on September 28, 1993. The violative conduct occurred on June 18, 1994.

Finally, the DBCC viewed Kwikkel-Elliott's offer to pay back the reimbursement funds as a mitigating factor. We note, however, that Kwikkel-Elliott's offer occurred only after she was approached by AAL about [*18] her wrongdoing. There is no evidence suggesting that she would have made the offer absent such a confrontation. Under these facts, we do not find Kwikkel-Elliott's repayment offer to be a mitigating factor. See Henry E. Vail, supra, at 6 (rejecting contention that repayment of money was a mitigating factor when only done because criminal charges had been filed); Joel Eugene Shaw, supra, at 1227 ("Nor does the fact that Shaw ultimately repaid . . . the

money [to the customer] warrant permitting him to remain in the securities business. It appears that Shaw would have retained [the customer's] money if she had not discovered his conversion."). n12

n12 See also Ernest A. Cipriani, supra, at 1007-08 (holding that the fact that respondent ultimately paid back the money afforded no justification for the misconduct which, presumably, would have continued had it not been discovered); In re Raymond M. Ramos, 49 S.E.C. 868, 872 (1988) ("[T]he fact that Ramos ultimately paid the money back does not warrant permitting his return to the securities business where he poses a threat to other investors.").

[*19]
Considering the evidence as a whole, we find that there are no mitigating facts which would warrant the lenient sanctions imposed by the DBCC below. To the contrary, the facts support the finding that Kwikkel-Elliott engaged in serious misconduct. As discussed above, Kwikkel-Elliot acted in bad faith by submitting a materially false Reimbursement Request to her employer, culminating in her obtaining funds under false pretenses. Although Kwikkel-Elliott's wrongdoing in this instance did not involve securities or customer funds, the willingness to acquire a sum of money through questionable means indicates a troubling disregard for basic principles of ethics and honesty which, on another occasion, might manifest itself in a securities- or customer-related transaction. See Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) ("Although Jackson's wrongdoing in this instance did not involve securities, the NASD could justifiably conclude that on another occasion it might."). As the SEC has noted, the securities industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants." In re Bernard D. Gorniak, Exchange Act Rel. No. [*20] 35996, at 5 (July 20, 1995) (citations omitted). See also In re Mayer A. Amsel, Exchange Act Rel. No. 37092, at 11 (April 10, 1996) (noting that the securities industry is "rife with opportunities for abuse.").

In light of our duties to protect the investing public and to ensure the integrity of the market, we would be remiss in not acting decisively in cases, like the present matter, where the evidence calls into question the honesty and the veracity of a person associated with a member firm. Because we find that Kwikkel-Elliott's continued participation in the securities industry presents a risk to the public, we hold that she is barred in all capacities from associating with any member firm. See Mayer A. Amsel, supra, at 11 ("Amsel has exhibited a disturbing disregard for the standards that govern the securities industry. . . . In light of his deliberate and serious misconduct, we consider his exclusion from that business a desirable safeguard for both broker-dealers and members of the investing public."); Henry E. Vail, supra, at 6 ("Through his mishandling of these funds, Vail demonstrated a serious misunderstanding of the fiduciary obligations he subjected himself to by becoming [*21] the Club's treasurer. His actions make us doubt his commitment to the high fiduciary standards demanded by the securities industry."). n13

n13 See also In re Stanley D. Gardenswartz, 50 S.E.C. 95, 97-98 (1989) (upholding NASD's decision to increase to a bar the one-year suspension imposed on respondent by the DBCC for misappropriating funds belonging to his employer).

Accordingly, we impose a censure, a $ 5,000 fine, and a bar from associating with any NASD member firm in any capacity. We also affirm the imposition of costs of $ 1,291.90 for the DBCC hearing. n14 In light of the bar, we eliminate the requirement that Kwikkel-Elliott requalify by examination prior to reassociating with a member firm. The bar is effective immediately upon the issuance of this decision. n15

n14 In addition, we agree with the DBCC that restitution is inappropriate. AAL took no action on Kwikkel-Elliott's offer to return the reimbursement funds. AAL also has withheld all trailing and renewal commissions due to Kwikkel-Elliott.

[*22]

n15 We have considered all of the arguments of the parties. Such arguments are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days notice in writing, will summarily be revoked for non-payment.

On Behalf of the National Business Conduct Committee,

Joan C. Conley, Corporate Secretary

Distribution of the Kwikkel-Elliott decision for final review and comment before being sent to the parties:

Deborah McIlroy ____

Norman Sue, Jr. ____

(Return to Jim Wrona)

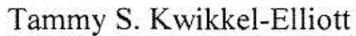
Direct: (202) 728-8381
Fax: (202) 728-8894

Joan C. Conley
Corporate Secretary

January 16, 1998

VIA FIRST CLASS/CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Tammy S. Kwikkel-Elliott



RE: Complaint No. C04960004: Tammy S. Kwikkel-Elliott

Dear Ms. Kwikkel-Elliott:

Enclosed herewith is the Decision of the National Business Conduct Committee in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. [*24] If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W., Stop 6-9
Washington, D.C. 20549

The address of NASD Regulation is:
Office of General Counsel
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley
Corporate Secretary

Enclosure

cc: Regional Attorney

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Department of Enforcement, Complainant, v. David L. Foran, Respondent.

Complaint No. C8A990017

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
NASD REGULATION, INC.

2000 NASD Discip. LEXIS 8

September 1, 2000

TEXT:

[*1]
DECISION

Where general securities and financial and operations principal misdirected mutual fund trail commissions away from member firm's "house account" to his own commission account, held that respondent converted firm funds and acted unethically and in contravention of Conduct Rule 2110; Foran suspended for two years, required to requalify, and fined $ 35,000.

This matter was appealed by David L. Foran ("Foran"). Under review is a December 3, 1999 decision of an NASD Regulation, Inc. ("NASD Regulation") Hearing Panel. We find that Foran violated Conduct Rule 2110 by converting commission funds from the house account of Bentley-Lawrence Securities, Inc. ("Bentley"), the member firm with which Foran was associated, to his own commission account. We suspend Foran for two years, require him to requalify, and fine him $ 35,000. We also affirm the Hearing Panel's imposition of $ 2,728.75 in costs.

Background

The Department of Enforcement ("Enforcement") filed the complaint in this matter after receiving an amended Form U-5 Uniform Notice of Termination ("Form U-5") on behalf of Foran from Bentley, in which Bentley disclosed that at the time of Foran's termination, Foran was [*2] under review for misdirecting house mutual fund trail commissions into his own commission account.

From December 1987 through November 1995, Foran was associated with Bentley and was registered as a general securities representative and general securities, financial and operations, and municipal securities principal. In 1995 (the period relevant to the complaint), Foran served as Bentley's executive vice president and financial and operations principal. In 1995, he also held a seven percent ownership interest in the firm and was a director of the firm. Foran is not currently registered, although he is associated in an unregistered capacity with a member firm.

This case involves Foran's directing of mutual fund trail commissions n1 from Bentley's house account to his own commission account. Throughout the course of this proceeding, Foran admitted that, between January and November 1995, he redirected more than $ 5,000 in mutual fund trail commissions from Bentley's house commission account to his own commission account. n2 Foran argued that, given the circumstances of his relationship with Bentley, this case involved nothing more than a disagreement between Bentley officers and [*3] denied that his conduct violated Conduct Rule 2110. Our review therefore is limited to a consideration of whether Foran's transfer of trail commissions from

the house account to his own account constituted a violation of Conduct Rule 2110 and whether, as the Hearing Panel found, Foran's conduct constituted conversion. n3

n1 Trail commissions are fees paid to broker-dealers by mutual fund companies to compensate the broker-dealers for providing personal service and maintenance to shareholder accounts. In re Louis Feldman, 52 S.E.C. 19 (1994). Trail commissions paid to a firm are considered firm assets. Feldman, supra. Broker-dealer firms generally apportion trail commissions to the registered representatives at the firm who have serviced the mutual fund accounts at issue.

n2 The complaint also alleged that Foran posted fictitious commissions and commissions belonging to other Bentley registered representatives to his account. The Hearing Panel found that the evidence was inconclusive as to whether any of the commissions that Foran admitted having posted to his account belonged to other firm representatives or whether any were fictitious and that, in any event, given the finding that Foran converted firm funds, it did not matter if some of those funds might have been payable to firm representatives. We affirm the Hearing Panel's findings in this regard.

[*4]

n3 The Hearing Panel found that Foran converted in excess of $ 5,000 from Bentley. The Hearing Panel did not make a finding as to the precise amount of funds that Foran converted. Bentley calculated that Foran had misappropriated $ 5,747.46, and Foran repaid this amount to the firm. Throughout the course of this proceeding, Enforcement alleged that Foran had misappropriated slightly different amounts. (The final amount that Enforcement alleged was $ 5,599.82.) All of the calculations indicated, and Foran did not dispute, that Foran redirected to his own commission account in excess of $ 5,000 in commissions. The Hearing Panel concluded that Foran had converted "more than $ 5,000" and determined that it was not necessary to make a more precise finding. We agree. Based on the record before us, we find that Foran converted in excess of $ 5,000 and, based on Foran's own admissions and the fact that he repaid the misappropriated funds, we do not find it necessary to make a more precise determination as to the exact amount that Foran converted.

Facts

In 1987, Foran met Bentley president Richard Coskey ("Coskey") when both individuals were working at another broker-dealer. Coskey [*5] founded Bentley in October 1987. In December of that year, he hired Foran as Bentley's executive vice president and financial and operations principal. Throughout Foran's tenure at Bentley, Foran was responsible for all financial, operational and back office management. He also was responsible for posting commissions, including mutual fund trail commissions, and he had one assistant who also posted commissions. n4 Although Foran initially held no ownership interest in Bentley, by 1995, he had acquired a seven percent ownership interest in the firm and at some time prior to 1995, he had invested $ 25,000 in Bentley. n5

n4 RN assisted Foran until June 1995. Thereafter, KH assisted Foran.

Each month Bentley received commission statements from mutual fund companies. The statements listed the trail commissions that would be paid to the firm that month. Foran and/or his assistant reviewed each commission statement and posted the commissions to Bentley's commission accounts in the firm's internal computer system. (Bentley maintained separate commission accounts for each registered person and one commission account for the house.) Since the firm did not reassign customer accounts when registered representatives left the firm, trail commissions for mutual fund accounts for customers whose account representatives had left Bentley were assigned to the Bentley house commission account. Commissions posted to the house account generally increased the firm's capital position.

[*6]

n5 As of 1995, Coskey held an 81 percent ownership interest in the firm; Dennis Columbus ("Columbus") held a 12 percent interest; and Foran held a seven percent interest. All three were directors of the firm, but Co-

lumbus' responsibilities were somewhat limited. Coskey and Foran were the main principals at the firm and were responsible for day-to-day management and operations.

As of January 1995, Foran received $ 3,000 per month as compensation for his service as operations manager. In addition to managing Bentley's operations, Foran also serviced his own accounts (for which he received an additional 70 percent payout on commissions) and house accounts (for which he did not receive additional compensation). Foran testified that the time demands associated with his servicing the house accounts and conducting the firm's back office operations left little time for him to service his own customers and that he ultimately lost many of his customers for this reason. Starting in January 1995, at the end of each month, Foran moved commissions from the Bentley house account to his own commission account. n6 Foran felt that, as an officer, director and part-owner of the firm, he was entitled [*7] to compensate himself for the work that he did for the house customer accounts. n7 Foran believed that this was an appropriate way to give himself the additional compensation that he felt he deserved. n8

n6 Foran did not discuss these commission transfers with Coskey or Columbus, and his assistants were unaware of his actions. Foran also did not enter specific notations on the firm's books to document the transfers.

n7 Foran did not "match up" the work that he did for the house accounts with specific trail commissions that the firm received. Foran testified that at the end of each month he simply decided how much additional compensation he felt that he deserved for all of his work that month and then transferred trail commissions from the house account to cover that amount.

n8 Foran was able to transfer commissions from the house account to his own commission account without leaving an obvious trail because the computer system that Bentley used in early 1995 did not provide for an audit trail. When an entry was deleted, it disappeared from the system. Sometime in the late Summer or early Fall of 1995, Bentley upgraded its computer system to enable the firm to maintain an audit trail. Thereafter, deleted entries no longer disappeared from the system.

[*8]

Foran did not discuss with Coskey or Columbus his decision to provide himself with additional compensation. Foran indicated that he and Coskey made independent decisions in their assigned areas of responsibility and that they did not discuss their decisions with each other. Foran also indicated that by 1995 his relationship with Coskey had become strained and that he disagreed with Coskey's handling of certain firm expenses and liabilities. Coskey testified that, had Foran asked for additional compensation, he (Coskey) would have denied the request, particularly since Bentley had come upon financial difficulties. n9

n9 In late 1994, Bentley had encountered net capital problems that resulted in Coskey's infusing additional capital of $ 30,000 into the firm. Coskey testified that he had asked Foran and Columbus also to contribute additional capital to the firm, but neither one did so.

In June or July 1995, Coskey began to suspect Foran's actions. Coskey conducted an examination of the firm's commission accounts and, when he compared them to the monthly mutual fund statements, immediately concluded that Foran had been posting house commissions to his own commission account. n10 [*9] Coskey nevertheless did not confront Foran and allowed the practice to continue until November 1995. On November 15, 1995, Coskey and Columbus confronted Foran. Foran admitted that he had transferred commissions to his own account, contended that he had been entitled to do so, agreed to repay Bentley $ 5,747.46, and immediately resigned. n11

n10 Coskey testified that he also had concluded that, in addition to house commissions, Foran had posted other representatives' commissions and fictitious commissions to his commission account. When Foran repaid Bentley the commissions at issue, however, Coskey deposited the money into the firm's account and never reimbursed the other firm representatives from whom Foran allegedly had taken commissions. In this regard, Foran testified that prior to 1995, he had established a policy at Bentley (with Coskey's tacit approval) whereby commissions of $ 2.50 or less would be credited to the house account instead of individual representatives' accounts. Subsequently, the policy was extended (again with Coskey's tacit approval) to commissions of $ 5 or less (collectively, "the Five Dollar Policy"). Foran indicated that the Five Dollar Policy was established to ease the burdensome workload of posting commissions manually. Foran also acknowledged that representatives at Bentley were unaware of this policy and that it was not strictly enforced. Like the Hearing Panel, we question the ap-

propriateness of maintaining a firm policy of which firm employees are not aware. In that Enforcement was unaware of the policy and did not reference it in the complaint, however, we make no findings with respect to the policy.

[*10]

n11 Foran indicated that before being confronted, he had planned to leave Bentley. He stated that, although he agreed to repay Bentley, he never admitted to any wrongdoing and continued to believe that his actions were justified. He also admitted that he would not have repaid Bentley if he had not been confronted by Coskey.

On November 21, 1995, the parties met to finalize the terms of Foran's resignation. Foran signed a letter of resignation dated November 21, but effective as of November 15. The parties also executed a Termination and Stock Redemption Agreement ("Termination Agreement") dated November 21, 1995, in which the parties referred to the $ 5,747.46 in commissions as a debt that Foran owed Bentley and noted that Foran had repaid the debt in full. The agreement also included restrictive covenants in which Foran agreed not to divulge the names or addresses of Bentley's clients and employees. Finally, Coskey prepared and signed a letter to Foran dated November 18, 1995 in which he indicated that Bentley would not disclose the commission issue on the Form U-5 that it intended to file on behalf of Foran, but that it reserved the right to amend the Form U-5 if it discovered [*11] any misfeasance of which it previously was not aware or if Foran failed to abide by the terms of the Termination Agreement. Foran signed the November 18 letter on November 21 to indicate that he acknowledged and agreed with it.

Coskey filed a Form U-5 on behalf of Foran on November 21. As promised in the November 18 letter, Coskey indicated in the Form U-5 that Foran's termination was voluntary and responded negatively to the question as to whether Foran was under review for wrongful taking of property when he left the firm.

After leaving Bentley, Foran became president of a start-up NASD member firm. During 1996, Foran hired several Bentley representatives. On January 27, 1997, more than 14 months after Foran left Bentley, an attorney representing Bentley and Coskey sent Foran a letter in which he alleged that Foran, by hiring Bentley representatives, had violated the restrictive covenants contained in the Termination Agreement. The letter demanded payment of $ 10,000 to cover Bentley's damages and threatened that, if Foran failed to pay, Bentley would enforce its rights under the Termination Agreement and November 18 letter agreement (regarding amending Foran's Form U-5). In [*12] a letter dated January 29, 1997, Foran's attorney denied that Foran had violated the Termination Agreement. On February 2, 1997, Coskey amended the Form U-5 that he had filed regarding Foran to indicate that, when Foran left Bentley, he had been under investigation for the wrongful taking of property and to provide details regarding Foran's taking of house commissions. n12

n12 After receiving a request for more information from the NASD, Coskey subsequently amended the Form U-5 a second time to provide more detail regarding the firm's allegations against Foran. Bentley and Coskey resolved allegations that they had filed a false Form U-5 (when they filed the initial Form U-5) through a Letter of Acceptance, Waiver and Consent ("AWC"), whereby they were censured and fined $ 5,000, jointly and severally.

Discussion

We find that, by transferring commissions from Bentley's house account to a personal commission account, Foran converted firm funds and violated Conduct Rule 2110.

Conduct Rule 2110 states in its entirety: "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Thus, the rule's language [*13] requires that two tests be met: (1) the misconduct occurred "in the conduct of" the respondent's business; and (2) the misconduct contravened high standards of commercial honor or violated just and equitable principles of trade. We find that both tests are met here. n13

n13 Rule 115 indicates that persons associated with a member shall have the same duties and obligations under the NASD's Rules as members. Thus, the ethical standards imposed on members in Rule 2110 apply equally to persons associated with members.

Foran's misconduct occurred in the conduct of his business, thereby satisfying the first prong of the test. A registered person's "business" includes his business relationship with his employer, as well as his commercial relationships with his customers. Ialeggio v. SEC, No. 98-70854 (9th Cir. May 20, 1999). Foran's actions related directly to his relationship with Bentley, his employer, and therefore occurred in the conduct of his business.

Foran's misconduct also contravened high standards of commercial honor and just and equitable principles of trade, thereby satisfying the second prong of the test. "Disciplinary hearings to require compliance with 'high standards [*14] of commercial honor and just and equitable principles of trade' are ethical proceedings; hence the concern is with ethical implications of [a respondent's] misconduct." In re Timothy L. Burkes, 51 S.E.C. 356, 360 (1993), aff'd, Burkes v. SEC, No. 93-70527 (9th Cir. July 25, 1994). We find that Foran acted unethically by obtaining additional compensation from Bentley by transferring firm assets to himself without the knowledge or consent of the firm's other shareholders, officers and directors. He converted the firm's money to his own use and benefit, and his reasons for doing so do not excuse his misconduct.

Foran's primary defense was that he acted in "good faith." He argued that, given the responsibilities regarding house accounts that he had assumed and in the absence of written firm policies regarding the posting of trail commissions, he was entitled to receive a portion of the house commissions as compensation, particularly because of his position as an officer, director and co-owner of Bentley. n14 We reject this defense and do not find that Foran acted in good faith. Foran testified that trail commissions belonging to registered persons who had left the firm would be posted [*15] to the house account, and Foran confirmed that commissions in the house account were firm assets. Indeed, both Foran and his assistants routinely posted the commissions at issue first to the house commission account before Foran subsequently redirected those commissions to his own commission account without entering any notations into the firm's books to document the transfer. n15 Foran's failure openly to post the commissions at issue to his own account in the first instance, his failure to advise Coskey of his actions, and his failure to advise his assistants of his actions support our conclusion that he did not really believe himself to be entitled to these commissions under the firm's procedures and that he did not intend for other individuals at the firm to observe his actions. n16

n14 Foran contended that he was responsible for back office operations and posting commissions and that he was not required to confer with Coskey on every management decision that he made. He suggested that his appropriation of house commissions was tantamount to a commission-related management decision that he did not have to discuss with Coskey. Foran's contention is contradicted, however, by his own admission that when he developed the Five Dollar Policy (according to which Foran credited Bentley with individual representatives' commissions equal to or less than $ 2.50 and, later, $ 5), he discussed it, albeit briefly, with Coskey and obtained his agreement.

[*16]

n15 During the months of September and October 1995, after Coskey had upgraded the computer system so as to provide for an audit trail, Foran appeared to have posted firm commissions directly into his own account, rather than posting them first to the house account. If he had continued his procedure of first posting into the house account after the revision of the computer system, he would have left an audit trail of the commission transfers. Foran's efforts in this regard to avoid leaving an audit trail provide further support for our finding that he acted in bad faith.

n16 Foran contended that he never tried to hide his conduct from Coskey or others at Bentley. The evidence belies this claim. At the outset, we note that Foran never told anyone that he was directing house commissions to his own account and, during most of 1995, he only redirected the commissions after he and his assistant had posted them to the house account. During most of 1995, the firm's computer system enabled Foran to do so without leaving an audit trail. Indeed, when Foran learned that Coskey had retained a consultant to update the system, he expressed displeasure and thereafter installed a password onto his computer (although KH continued to have access to the commission posting system on her own computer). Furthermore, KH testified that in Sep-

tember and October 1995 (after the computer system had been updated), Foran input commission information from the major mutual fund companies himself, without her assistance.

As noted above, see n. 15 supra, the record also suggests that, after the computer upgrade, Foran posted house commissions directly to his account (rather than first posting them to the house account) in order to avoid detection. Additionally, in late Summer or early Fall of 1995, when KH uncovered on two consecutive month-end dates discrepancies between the amount of commissions that the firm had received and the amount of commissions that it had credited to representatives (including Foran), she brought the discrepancies to Foran's attention. Foran instructed her to disregard the discrepancies. He indicated that resolving the discrepancies would require too much work and suggested that she "write them off." In our view, the evidence clearly indicates that Foran never intended for his actions to be transparent.

In any event, even if Foran had not endeavored to conceal his misconduct, we would still find his actions to be unethical. "Registered persons are expected to adhere to a standard higher than 'what they can get away with.'" In re Leonard John Ialeggio, 52 S.E.C. 1085, 1088 (1996), aff'd mem., Ialeggio v. SEC, No. 98-70854 (9th Cir. filed on May 20, 1999). Even if the evidence did not demonstrate that Foran affirmatively sought to conceal his actions, he admits that he did not advise Coskey, Columbus or his assistants of his plan to increase his personal compensation, even when he was directly questioned about a discrepancy.

[*17]
Furthermore, the fact that Foran was an officer and director of Bentley does not lend support to his defense. As a general matter, employees (and independent contractors) of member firms, including officers, do not have the right, absent a clear grant of authority, to transfer firm assets to themselves because they decide that they are entitled to greater compensation. n17 Foran owned only seven percent of the outstanding shares of Bentley. He was not the sole owner or even a majority shareholder of the firm. Foran admitted that he did not discuss the commission transfers with or seek approval from Coskey or Columbus, the other two officers, directors and owners of the firm. Coskey contended that Foran did not have authority to unilaterally redirect house commissions to himself, and Foran did not suggest that he affirmatively had been granted such authority in writing or had been given specific authorization to transfer commissions to his account. Indeed, the record suggests that Foran knew that if he had requested Coskey's permission, it would have been denied. In transferring commissions to himself, Foran acted solely out of self-interest and in a manner contrary to the interests [*18] of Bentley. By doing so, he violated Conduct Rule 2110. Cf. Feldman, supra (part-owner, vice president and general principal's request for bulk transfer of mutual fund accounts to another broker-dealer with whom principal was soon to become associated, without authorization of current member firm, was unethical and violated Conduct Rule 2110 (formerly known as Article III, Section 1 of NASD Rules of Fair Practice)); In re Philip S. Wilson, 48 S.E.C. 511 (1986) (managing partner's conversion of substantial amount of funds from an account belonging to the member firm with which he was associated violated just and equitable principles of trade); In re Michael T. McAuliffe, 48 S.E.C. 86, 87 (1985) ("Entrusted to transact business on behalf of [his] firm, [respondent] breached his fundamental duty of loyalty to his employer by benefitting himself and others at his employer's expense.").

n17 The fiduciary relationship of the corporate officer to the corporation forbids any act by which the corporate assets are wrongfully diverted from corporate purposes. Therefore, an officer drawing a corporate check payable to himself and endorsing and cashing it must account for the funds. Additionally, if an officer is owner of all but even one share of stock, the officer cannot use the corporation's assets to pay individual debts without the consent of the other shareholder. Indeed, directors and officers who misappropriate funds are liable to the corporation, even if they own substantially all of the stock of the corporation. Fletchers Cyc. Corp., §§ 1102-1103 (Perm. Ed. 1994).

[*19]
Turning to Foran's other defenses, we note that Foran sought to excuse his actions by asserting that he did not misappropriate customer funds and that no customers were harmed by his actions. Conduct Rule 2110 is not limited to securities-related conduct involving firm customers; instead, it covers all unethical business-related conduct, including misconduct that did not result in customer harm. See In re Eliezer Gurfel, Exchange Act Rel. No. 41229 (Mar. 30, 1999) (registered representative of member firm who forged name of firm president on commission checks payable to the firm and converted the proceeds to his own use violated Rule 2110), aff'd, No. 99-1199 (D.C. Cir. Mar. 7, 2000); In re James A. Goetz, Exchange Act Rel. No. 39796 (Mar. 25, 1998) (respondent who improperly obtained a donation for his daughter's private school tuition from his member firm's matching gifts program by misrepresenting that he had contributed personal funds violated Rule 2110); In re Leonard J. Ialeggio, 52 S.E.C. 1085 (1996) (associated person who

improperly obtained reimbursement for country club initiation fees from his employer firm violated Rule 2110), aff'd mem., Ialeggio v. SEC, (9th Cir. filed [*20] on May 20, 1999); In re Timothy L. Burkes, 51 S.E.C. 356 (1993) (representative who persuaded back-office employee to credit him for commissions to which he was not entitled violated Rule 2110), aff'd mem., 29 F.3d 630 (9th Cir. July 24, 1994).

Foran also argued that this matter is nothing more than an internal firm dispute regarding the proper allocation of commissions and that the Hearing Panel erred in treating it as a theft. In support of this argument, he noted that the initial Form U-5 that Coskey had filed did not disclose this incident. We reject this argument. The fact that the initial Form U-5 did not mention Foran's conversion of firm funds does not mean that the conversion did not occur. See Gurfel, supra (fact that Form U-5 reflecting Gurfel's termination from a member firm did not disclose Gurfel's commission of forgery rejected as evidence that the forgery did not occur in light of other record evidence). Foran left Bentley when Coskey confronted him and accused him of stealing firm commissions. Foran admitted that he repaid the commissions only because Coskey confronted him and that he otherwise would not have done so. The concept of an "internal dispute" suggests [*21] that Coskey was aware of Foran's actions and that Foran openly transferred the commissions. To the contrary, Foran made an effort to conceal his actions from Coskey, and he left the firm when his misconduct was exposed. These actions are not consistent with the actions of a person engaged in an internal dispute over the allocation of commissions. Furthermore, regardless of whether this incident may be categorized as an internal dispute, for the reasons stated above, we find that Foran acted unethically and in bad faith and that his conduct violated Rule 2110.

Foran's covert appropriation and conversion to his own use of Bentley's commissions "reflect directly on [his] ability both to comply with regulatory requirements fundamental to the securities business and to fulfill his fiduciary responsibilities in handling other people's money . . . . This business-related misconduct is actionable under NASD Rules as unethical conduct." Goetz, supra at 6-7. In sum, we find that Foran converted funds that belonged to Bentley, that he sought to conceal his misconduct, and that he acted in bad faith, in violation of Conduct Rule 2110.

Sanctions. The Hearing Panel barred Foran and fined him [*22] $ 35,000 (due and payable only if and when Foran seeks readmission into the securities industry). Based on the unique facts and circumstances of this case, we reduce the bar to a two-year suspension from associating with any member firm in any capacity, impose a requirement to requalify by examination before acting in any capacity requiring registration, and impose a $ 35,000 fine, due and payable upon issuance of this decision. We also affirm the Hearing Panel's imposition of $ 2,728.75 in costs. n18

n18 The monetary sanction is consistent with the applicable guideline in the NASD Sanction Guidelines ("Guidelines"). See Guidelines (1998 ed.) at 34 (Conversion or Improper Use of Funds or Securities). The two-year suspension is below the range recommended in the Guidelines. Although we find Foran's misconduct to be egregious, based on the unique circumstances of this case, we also find that a two-year suspension and requirement to requalify, accompanied by a significant fine (calculated as recommended by the Guidelines as five times the amount converted plus $ 10,000), are of sufficient moment so as to prevent the recurrence of similar misconduct by Foran or others.

Foran contended that the Hearing Panel erred in referring to the applicable guideline because one of the two rules and the interpretive release referenced in the guideline address misuse of customer funds or securities. We do not agree. The guideline itself does not indicate that its use must be restricted to conversion or misuse of customer funds. While one of the two rules and the interpretive release referenced in the guideline address misuse of customer funds, the remaining rule referenced in the guideline (Conduct Rule 2110) is not limited to conduct involving customer (rather than firm) funds.

In any event, the "Overview" section of the Guidelines indicates that, for violations that are not addressed specifically in the Guidelines, adjudicators are encouraged to look to the Guidelines for analogous violations. Cf. Gurfel, supra (in case involving respondent's conversion of firm commissions, NAC and Securities and Exchange Commission ("SEC") relied on guideline for conversion or improper use).

[*23]

As the SEC has acknowledged, "the securities business presents a great many opportunities for abuse and overreaching, and depends heavily on the integrity of its participants." Burkes, supra at 360. Foran's misconduct strikes at the heart of Rule 2110--unethical behavior--and the sanctions that we impose must recognize the severity of his misconduct.

Turning first to the principal considerations listed in the Guidelines, we note that Foran did not accept responsibility for his actions or attempt to repay the firm until he was confronted by Coskey. Indeed, Foran admitted that he would not have returned the commissions if Coskey had not requested that he do so. Once confronted, Foran immediately admitted his actions, repaid the firm, and cooperated with Enforcement staff's investigation of the matter. His misconduct, however, persisted over the course of nearly one year, and he attempted to conceal his actions or, at a minimum, he did not act openly. His actions resulted in a loss of capital to the firm (which he restored by repaying the funds that he converted) and financial gain to himself. n19

n19 Foran also cited as a mitigating factor that his misconduct did not result in customer harm. We do not find this to be mitigating. See Gurfel, supra (repayment of commissions and fact that no customer funds were involved rejected as mitigating factors); Ialeggio, supra (fact that firm rather than customer funds were misused is rejected as mitigating factor). Additionally, Foran cited as mitigating the fact that Bentley had no policies or guidelines that addressed reassigning commissions. We reject this as mitigating. While it may be true that the firm had not developed written policies to address commission assignments, Foran's conduct still was unethical. Even without guidance from the firm, he should have known that he could not simply take whatever money that he wanted from Bentley under the guise that he was responsible for commission payments. Cf. Ialeggio, supra (standard of conduct in the securities industry must be higher than whatever registered person "can get away with").

[*24]

Accordingly, Foran is suspended for two years from associating with any member firm in any capacity, required to requalify before acting in any capacity requiring qualification, and fined $ 35,000. We also affirm the Hearing Panel's imposition of $ 2,728.75 in costs. n20

n20 We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Senior Vice President and Corporate Secretary

3

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Department of Enforcement, Complainant, vs. Harry W. **Hunt,** Respondent.

Complaint No. 2009018068701

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

2012 FINRA Discip. LEXIS 62

December 18, 2012

TEXT:
[*1]

DECISION

Respondent used the name, address, and social security number of a customer to make the customer a guarantor of a student loan without the customer's knowledge or authorization. Respondent also submitted false expense reports to his firm. For these violations, the Hearing Panel barred the respondent in all capacities. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Dale A. Glanzman, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Matthew T. Boos, Esq.

Decision

Pursuant to FINRA Rule 9311, Harry W. **Hunt ("Hunt"**) appeals an October 17, 2011 Hearing Panel decision. In that decision, the Hearing Panel found that **Hunt** violated FINRA Rule 2010 by using the name, address and social security number of a customer to make the customer a guarantor of a loan without the customer's knowledge or authorization. The Hearing Panel also found that **Hunt** violated FINRA Rule 2010 and NASD Rule 2110 by submitting false expense reports between February 2008 and March 2009. n1 For these violations, the Hearing Panel barred **Hunt** from associating in any capacity with [*2] any FINRA member.

n1 The conduct rules that apply are those that existed at the time of the conduct at issue. FINRA Rule 2010 and NASD Rule 2110, however, contain identical language.

The facts of this case are undisputed and based on stipulations made by the parties. The parties also do not dispute **Hunt's** liability for the alleged misconduct. Consequently, this decision focuses on the appropriate sanction for **Hunt's** violations. The Hearing Panel barred **Hunt** in all capacities for his misconduct, and after reviewing the record, we find that a bar is appropriate.

I. Background

Hunt entered the securities industry in March 1983. **Hunt** joined Wachovia Securities, LLC ("Wachovia Securities" or "the Firm") in April 2002 as a general securities representative. On April 20, 2009, Wachovia Securities terminated **Hunt.** The Uniform Termination Notice for Securities Industry Registration ("Form U5") disclosed that **Hunt** had used a customer's name and confidential information in an attempt to obtain a student loan. **Hunt** is currently [*3] registered with another FINRA member firm as a general securities representative.

II. Procedural History

On August 3, 2010, FINRA's Department of Enforcement ("Enforcement") filed a three-cause complaint alleging that **Hunt:** (1) used the name, address, and social security number of a customer to make the customer a guarantor of a student loan for **Hunt's** daughter, without the customer's knowledge or authorization, in violation of FINRA Rule 2010; (2) falsified a photocopy of **Hunt's** daughter's driver's license in connection with the loan application, in violation of FINRA Rule 2010; and (3) submitted false expense reports to his firm, in violation of FINRA Rule 2010 and NASD Rule 2110. In a decision issued on October 17, 2011, the Hearing Panel found **Hunt** liable for the first and third causes alleged in the complaint. n2 The Hearing Panel barred **Hunt** in all capacities for these violations. **Hunt** appealed the Hearing Panel's decision.

n2 The Hearing Panel dismissed the second cause of the complaint, finding that **Hunt's** alteration of the photocopy of his daughter's license was not "business related." This finding was not appealed by Enforcement. We therefore do not consider this cause of action on appeal.

[*4]
III. Facts

A. Unauthorized Loan Application

In 2009, **Hunt's** daughter was applying to college. At the same time, **Hunt** was experiencing significant financial difficulties, and he did not have the resources available to fully fund his daughter's education. Consequently, it became necessary for her to apply for a $ 10,000 short-term student loan through Sallie Mae. n3

n3 Sallie Mae is a public corporation whose operations include originating, servicing, and collecting on student loans.

In the initial Sallie Mae loan application, **Hunt** offered himself as a guarantor of the loan. Sallie Mae rejected the application due to **Hunt's** poor financial situation. In two subsequent applications, **Hunt** listed his wife and his father as the guarantor of the loan. Sallie Mae rejected each of these applications as well.

In yet another application, **Hunt** listed DL, a customer and close personal friend, as the guarantor of the loan. n4 In order to do so, **Hunt** provided Sallie Mae with DL's name, address, gross monthly income, monthly [*5] mortgage payment, and social security number. **Hunt** testified that he already knew all of this information, except for DL's social security number, which **Hunt** obtained from Wachovia Securities' customer files. **Hunt** failed to inform DL or seek DL's consent to use DL's information on the application. n5 In fact, DL was unaware of the application, and did not know **Hunt** had offered DL as a guarantor for the loan.

n4 The Sallie Mae application was a one-page application accompanied by a promissory note. The application required the electronic "signatures" of both the borrower and the cosigner. **Hunt** submitted the application

online, and to complete the application, **Hunt** typed the borrower's (**Hunt**) and cosigner's (DL) names on signature lines in the application before submitting it to Sallie Mae.

The promissory note had notices with express language warning that: (1) the cosigner would have to pay up to the full amount of the debt if the borrower did not pay; (2) the lender could collect the debt from the cosigner without trying to collect from the borrower, using collection methods such as lawsuits and wage garnishment; and (3) if the borrower ever defaulted, the default could become part of the cosigner's credit record.

[*6]

n5 **Hunt** testified that he did not ask DL to be a guarantor for the loan because he was afraid that DL would not agree to do so.

In furtherance of his effort to secure a loan for his daughter's education, **Hunt** utilized a post office box as a mailing address. In the Sallie Mae application that identified DL as the guarantor, **Hunt** also identified the post office box as the residential address for his daughter. n6 **Hunt** used this post office box to ensure that any correspondence relating to the loan application would only be available to him.

n6 In connection with the loan application where **Hunt** listed himself as the guarantor of the loan, Sallie Mae requested documentation verifying his daughter's residential address. In order to ensure that the requested documentation was consistent with the loan application, **Hunt** altered a photocopy of his daughter's license, changing her residential address to the post office box address. This conduct formed the basis of cause two of the complaint, which was dismissed. *See supra* Note 2.

[*7]

In early April 2009, while **Hunt** was on a family vacation, Sallie Mae contacted DL regarding his guarantee of the student loan. n7 DL disavowed his role as a guarantor and notified Wachovia Securities of **Hunt's** improper conduct. Sallie Mae denied the application and Wachovia Securities terminated **Hunt** after he returned from his vacation. As a consequence of his termination, **Hunt** lost the opportunity to collect upcoming deferred compensation and a retention bonus from the Firm. n8

n7 **Hunt** testified that he planned to confess his scheme to DL once he returned from his vacation.
n8 **Hunt** contends that the bonus and deferred compensation totaled more than $ 300,000.

B. Falsified Expense Reports

Wachovia Securities reimbursed its brokers for certain business-related expenses, such as meals with customers, printing bills and telephone expenses incurred in the course of the broker's employment. Wachovia Securities' reimbursement policy required each employee to incur and pay the expense prior to submission of a claim [*8] for reimbursement. The parties have stipulated that between February 2008 and March 2009, **Hunt** submitted six false claims for reimbursement totaling $ 1,869.47 to Wachovia Securities. For these six claims, **Hunt** sought reimbursement from the Firm before he actually paid for the expenses. In these six instances, **Hunt** submitted as evidence of payment, checks that he photocopied and altered to give the false appearance of having been paid to the vendor and cleared by the vendor's bank. **Hunt** did not fabricate any of the expenses listed in the reports, thus **Hunt** only sought reimbursement for real costs that he had incurred, but had not yet paid.

IV. Discussion

A. Unauthorized Loan Application

FINRA Rule 2010 (formerly NASD Rule 2110) requires a registered person to: (1) observe high standards of commercial honor and just and equitable principles of trade; (2) in the conduct of that person's business. n9 "Rule 2110

applies to [associated persons] through [NASD Rule 115] (now FINRA Rule 0140), which provides that persons associated with a member have the same duties and obligations as a member." *Dante J. DiFrancesco, Exchange Act Rel. No. 66113, 2012 SEC LEXIS 54,* [*9] at *2 n.2 (Jan. 6, 2012). "It is well-established that [FINRA's] disciplinary authority under [FINRA Rule 2010] 'is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security.'" *Daniel D. Manoff, 55 S.E.C. 1155, 1162 (2002)* (citation omitted). Moreover, FINRA Rule 2010 "serve[s] as an industry backstop for the representation, inherent in the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession." *DiFrancesco, 2012 SEC LEXIS 54,* at *17 (citation omitted).

n9 We discuss the rules in effect when the conduct occurred. FINRA Rule 2010 applies to **Hunt's** misuse of DL's personal information. The violation occurred after December 14, 2008, the effective date of FINRA's first group of consolidated rules, which included FINRA Rule 2010. *See FINRA Regulatory Notice 08-57, 2008 FINRA LEXIS 50,* at *32-33 (October 2008).

[*10]

Here, **Hunt** misused DL's social security number and income information and attempted to bind DL to guarantee a $ 10,000 student loan for **Hunt's** daughter without DL's knowledge or consent. Under these undisputed facts, there is no doubt that **Hunt** acted unethically and did not deal with DL fairly or in accordance with the standards of the industry. There is also no doubt that **Hunt's** activities arose "in the conduct of his business," as required by FINRA Rule 2010. **Hunt** used confidential information from Wachovia Securities' customer file to complete the student loan application. **Hunt** was only able to engage in such misconduct through his business relationship with Wachovia Securities and his commercial relationship with DL. *Cf. DiFrancesco, 2012 SEC LEXIS 54,* at *17 n.18 (finding that respondent's action in taking and downloading confidential nonpublic information relating to approximately 36,000 customers was business-related as it involved both his business relationship with his firm and his commercial relationship with his customers). Consequently, we find that **Hunt** violated FINRA Rule 2010, as alleged in cause one of the complaint.

B. Falsified Expense [*11] Reports

Hunt admits that from February 2008 to March 2009, he intentionally falsified checks, submitted false expense reports and accepted hundreds of dollars in reimbursements before they were due to him. In doing so, **Hunt** violated NASD Rule 2110 and FINRA Rule 2010 as alleged in cause three. *See Dep't of Enforcement v. Taylor*, Complaint No. C8A050027, 2007 NASD Discip. LEXIS 11, at *22-23 (NASD NAC Feb. 27, 2007) (finding that falsifying documents is a violation of Rule 2110).

V. Sanctions

The Hearing Panel found that **Hunt's** misconduct was egregious, and barred **Hunt** from association with any member firm in any capacity for: (1) using a customer's social security number and other personal information to secure a student loan for his daughter without the customer's authorization, in violation of FINRA Rule 2010; and (2) falsifying expense reports, in violation of NASD Rule 2110 and FINRA Rule 2010. n10 We agree, with respect to cause one, that **Hunt's** conduct was egregious, and that a bar is an appropriate sanction to protect the investing public. n11 We find with respect to cause three, that **Hunt's** conduct was serious but not egregious, and that an appropriate sanction for [*12] this violation is a six-month suspension and $ 10,000 fine.

n10 The Hearing Panel aggregated the sanctions for **Hunt's** violations of FINRA Rule 2010 and NASD Rule 2110 under causes one and three. *See Dep't of Enforcement v. Fox & Co. Invs., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NASD NAC Feb. 24, 2005) (stating that "where multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve NASD's remedial goals.") (citation omitted), *aff'd, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822* (Oct. 28, 2005). We find that aggregation of sanctions is inappropriate here because although each of **Hunt's** violations relate to his financial problems, his misconduct stems from two sets of distinct, deliberate acts.

n11 *See Geoffrey Ortiz, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401,* at *29-30 (Aug. 22, 2008) (stating that a "bar also serves the goal of general deterrence by alerting others who may be in a position to forge or cause the forgery of account documents, or submit forged documents to their employers, that forgery is treated as serious misconduct and receives severe sanctions.").

[*13]

A. Unauthorized Loan Application

We have considered the FINRA Sanction Guidelines ("Guidelines") in determining the appropriate sanction for **Hunt's** submission of the falsified loan application. n12 The Guidelines governing sanctions for forgery and/or falsification of documents recommend a fine of $ 5,000 to $ 100,000 and a suspension for up to two years where mitigating factors exist, or a bar in egregious cases. n13 The Guidelines further set forth two specific considerations for such violations: (1) the nature of the document(s) forged or falsified; and (2) whether the respondent had a good faith, but mistaken, belief of express or implied authority. n14 We find that both considerations serve to aggravate **Hunt's** misconduct.

n12 *FINRA Sanction Guidelines* (2011), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter "*Guidelines*"].
n13 *Id.* at 37.
n14 *Id.*

First, the Sallie Mae loan application was an important document. Indeed, the application [*14] was critically important because it contained highly confidential information, including DL's social security number, and also reflected that DL was obligated to guarantee a $ 10,000 loan. Second, **Hunt** admitted that he did not have a good-faith belief that he had authority to falsify the Sallie Mae application because he believed all along that DL would not agree to co-sign for the loan.

We next consider the Principal Considerations in Determining Sanctions. n15 Upon consideration, we find that there are several additional aggravating factors associated with **Hunt's** improper use of DL's confidential information. First, **Hunt's** misconduct was intentional--his misdeeds were premeditated acts designed to address his "cash flow" problems. n16 **Hunt's** misconduct also provided him with the potential for monetary gain in the form of a $ 10,000 loan to pay for his daughter's education. n17

n15 *Id.* at 6-7.
n16 *Id.* at 7 (Principal Consideration No. 13) (adjudicators should consider whether the respondent's misconduct was intentional).
n17 *Id.* (Principal Consideration No. 17) (adjudicators should consider whether the respondent's misconduct resulted in the potential for monetary or other gain).

[*15]

Taking all these factors into account, we find that **Hunt's** improper use of DL's confidential information was egregious, and that a bar is an appropriate sanction for this misconduct.

B. Falsified Expense Reports

We have considered the Guidelines in determining the appropriate sanction for **Hunt's** submission of false expense reports. The Guidelines governing sanctions for forgery and/or falsification of documents recommend a fine of $ 5,000 to $ 100,000 and a suspension for up to two years where mitigating factors exist, or a bar in egregious cases. n18 The Guidelines further set forth two specific considerations for such violations: (1) the nature of the document(s) forged or falsified; and (2) whether the respondent had a good faith, but mistaken, belief of express or implied authority. n19 We find that both considerations serve to aggravate **Hunt's** misconduct.

n18 *Id.* at 37.
n19 *Id.*

First, the expense reports were important because they are business records that employers and regulators (like the IRS) [*16] rely on to judge the legitimacy of business expenses. Moreover, **Hunt's** willingness to falsify the reports is an important reflection of his lack of trustworthiness. *Cf. Dep't of Enforcement v. Leopold, Complaint No. 2007011489301, 2012 FINRA Discip. LEXIS 2,* at *17 (FINRA NAC Feb. 24, 2012) (finding that the respondent's willingness to falsify hotel invoices and verification letters were "an important reflection on [the respondent's] veracity and integrity."). Second, **Hunt** knew that he did not have authority to falsify the expense reports to obtain payments for expenses from Wachovia Securities before he actually paid these expenses. This was evidenced by the fact that **Hunt** provided altered checks to his firm to conceal the fact that he had not paid the expenses prior to seeking reimbursement.

We next consider the Principal Considerations in Determining Sanctions. n20 Upon consideration, we find that there are several additional aggravating factors associated with **Hunt's** falsification of his expense reports. First, we find that **Hunt's** misconduct was intentional. n21 We also find that **Hunt** attempted to deceive his firm. n22 For example, **Hunt's** efforts [*17] to create the appearance that his altered checks had been paid and cleared required: (1) altering checks that had previously cleared; (2) changing the dates of the checks; (3) changing the check numbers; and (4) changing the amounts of the checks. These efforts all show how far **Hunt** was willing to go to deceive Wachovia Securities. **Hunt's** pattern of using altered documents to receive reimbursement from the Firm prior to paying his expenses on six occasions over the course of roughly a year also is aggravating. n23 In addition, we find it aggravating that **Hunt's** misconduct provided him with the potential for monetary gain in the form of actual reimbursements from the Firm before he was entitled to such reimbursement. n24 However, we note that unlike other disciplinary actions involving the falsification of expense reports, **Hunt** did not seek reimbursement for fake expenses. He only sought to speed up the period that he had to wait for reimbursement.

n20 *Guidelines*, at 6-7.
n21 *Id. at 7* (Principal Consideration No. 13) (adjudicators should consider whether the respondent's misconduct was intentional).
[*18]

n22 *Id. at 6* (Principal Consideration No. 10) (adjudicators should consider whether the respondent concealed his or her misconduct from the member firm which he or she was associated).
n23 *Id.* (Principal Consideration Nos. 8 and 9) (adjudicators should consider whether the respondent: (1) engaged in numerous acts or a pattern of misconduct; and (2) engaged in the misconduct over an extended period of time).
n24 *Id. at 7* (Principal Consideration No. 17) (adjudicators should consider whether the respondent's misconduct resulted in the potential for monetary or other gain).

Based on the forgoing, we find that **Hunt's** falsification of the six expense reports was serious, but not egregious. As such, a bar for this misconduct is inappropriate. Instead, we find that an appropriate sanction for this violation is a six-month suspension and a $ 10,000 fine.

C. There Are No Mitigating Factors the Militate Against a Bar for **Hunt's** Improper Use of His Customer's Personal Information

In determining sanctions, we have also considered [*19] the potentially mitigating factors in the record, and we find that there are no mitigating factors that militate against imposing a bar for **Hunt's** misuse of DL's confidential information. n25 **Hunt** makes several unpersuasive arguments in favor of mitigation, which we address below.

n25 **Hunt** argues that a bar is excessive because there are several examples of persons who have not been barred for similar or worse misconduct. The Commission, however, has stated that "[i]t is well-established . . . that the appropriateness of a sanction 'depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action taken in other proceedings.'" *John M.E. Saad, Exchange Act Rel. No. 62178, 2010 SEC LEXIS 1761,* at *21-22 (May 26, 2010) (citations omitted), *appeal docketed,* No. 10-1195 (D.C. Cir. July 22, 2010).

First, **Hunt** argues that his lack of disciplinary history should be mitigating. This notion is misguided. The Commission has "repeatedly [*20] stated that a 'lack of disciplinary history is not a mitigating factor for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional.'" *Howard Braff, Exchange Act Rel. No. 66467, 2012 SEC LEXIS 620,* at *25 (Feb. 24, 2012) (citations omitted); *see also Mark F. Mizenko, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655,* at *17 (Oct. 13, 2005) (rejecting argument that a lack of a disciplinary history was mitigating when the respondent's misconduct involved multiple deceptive acts). n26

n26 Similarly, we reject **Hunt's** argument that we should consider it mitigating that he is not a recidivist. *See Guidelines,* at 2 (General Principles Applicable to All Sanction Determinations). It is not mitigating that **Hunt** is not a repeat offender when he is required to comply with FINRA's rules.

Second, **Hunt** argues that it is mitigating that he "did not provide inaccurate or misleading [*21] testimony . . . and stipulated to the facts" surrounding his misconduct. This argument also fails because **Hunt** only acknowledged his misconduct after the Firm discovered it and intervened. *See Mizenko, 2005 SEC LEXIS 2655,* at *17 (stating that the respondent's acknowledgement of his misconduct "carries little weight because it came only after he was confronted by his employer with his wrongdoing."). n27

n27 We also reject **Hunt's** argument that we should consider it mitigating that he has already been harmed by losing the retention bonus and deferred compensation he was expecting to receive from Wachovia Securities. This is because the harm was the result of **Hunt's** misconduct. *See Jason A. Craig, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844,* at *27 (Dec. 22, 2008) (holding that in determining sanctions, the Commission does not "consider mitigating the economic disadvantages [the respondent] alleges he suffered because they are a result of his misconduct.").

Likewise, we reject **Hunt's** argument that it is mitigating that Wachovia Securities terminated him prior to FINRA detecting his misconduct. The Firm's termination of **Hunt** was contemporaneous with its submission of a Form U5 alerting FINRA about **Hunt's** misconduct. *See Saad, 2010 SEC LEXIS 1761,* at *27-34 (affirming bar imposed by FINRA despite respondent's claims, among others, that FINRA failed to consider it mitigating that his firm terminated him prior to FINRA's detection of his misconduct).

[*22]

Third, **Hunt** asserts that it is mitigating that despite his acts of deception involving the loan application, "there was no realistic possibility" that DL would have actually been obliged to guarantee the loan. **Hunt's** argument is misplaced. **Hunt** created the appearance that DL was subject to a $ 10,000 obligation without DL's knowledge or authorization, which was harmful on its own. Moreover, the fact that Sallie Mae uncovered **Hunt's** unauthorized use of DL as a guarantor and therefore DL was never actually subject to this obligation does not mitigate any sanction we might impose for **Hunt's** misconduct. *Cf. Dep't of Enforcement v. Bullock, Complaint No. 2005003437102, 2011 FINRA Discip. LEXIS 14,* at *63 (FINRA NAC May 6, 2011) (stating that "[e]ven though the record before us does not demonstrate that [the respondent's] misconduct harmed the investing public, the fact that [the respondent's misconduct] potentially could have resulted in harm or in any way threatened the firm or its customers suggests that lack of customer harm should not be considered mitigating."). Similarly, we also do not find it mitigating that **Hunt** thought he would be more than able

[*23] to repay the loan after receiving his anticipated $ 300,000 in bonus money and deferred compensation. **Hunt** would have still created the appearance that DL was subject to a significant obligation in the interim.

Next, **Hunt** argues that it is mitigating that he: (1) was forthcoming and cooperative throughout this proceeding and FINRA's investigation; (2) expressed remorse, and (3) did not harm any customers as a result of his misconduct. None of these arguments for mitigation persuade us not to impose a bar in light of the egregiousness of **Hunt's** misconduct. *See Mizenko, 2005 SEC LEXIS 2655,* at *18 (affirming a bar in a forgery case and stating that "[t]he record indicates that [the respondent] cooperated with the . . . investigation, expressed contrition, and harmed no customers . . . [but] [t]hese factors, although relevant to the determination of what sanctions are appropriate, do not counterbalance the egregiousness of [the respondent's] conduct."); *see also Braff, 2012 SEC LEXIS 620,* at *26 (stating that "[t]he absence of . . . customer harm is not mitigating, 'as our public interest analysis 'focus[es] . . . on the welfare [*24] of investors generally.'") (citations omitted); *Phillippe N. Keyes, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631,* at *23 (Nov. 8, 2006) (rejecting respondent's argument for a lesser sanction because he cooperated with NASD in its investigation of his conduct and he testified truthfully). Moreover, **Hunt's** actions created potential customer harm, because he filed an application that created the appearance that DL had a $ 10,000 obligation. We do not find it mitigating that his scheme to cause such harm was not successful.

Finally, **Hunt** claims that it is mitigating that he accepted responsibility for his actions at all times as evidenced in part by his assertion that he planned to inform DL of his misconduct after he returned from his family vacation. The record shows, however, that the Firm and DL discovered **Hunt's** misconduct before he returned from vacation and could own up to his wrongdoing. Thus, **Hunt** did not acknowledge his wrongdoing to Wachovia Securities prior to the Firm detecting his misconduct. n28 In fact, it was only after DL contacted the Firm to disclose the improper loan application, and the Firm confronted **Hunt,** that he acknowledged [*25] his misconduct. After reviewing the record, we find that there are significant aggravating factors and a lack of mitigating factors that justify a bar for **Hunt's** egregious and improper use of DL's confidential information. n29

n28 *Guidelines*, at 6 (Principal Consideration No. 2) (adjudicators should consider whether an individual accepted responsibility for and acknowledged the misconduct to his or her employer prior to detection and intervention by the firm).

n29 Although we affirm the Hearing Panel's sanction of a bar, we do not agree with each aspect of the Hearing Panel's sanctions analysis. Specifically, the Hearing Panel cited Principal Consideration No. 14, and without further elaboration, found it aggravating that "at no time did **Hunt** attempt to remedy his misconduct." Principal Consideration No. 14 asks adjudicators to consider "[w]hether the member firm with which an individual respondent is/was associated disciplined [the respondent] for the misconduct at issue prior to regulatory detection." We fail to comprehend the connection between the Hearing Panel's finding that **Hunt** did not "remedy" his misconduct and its finding of aggravation in connection with Principal Consideration No. 14. Consequently, we give no weight to this finding by the Hearing Panel in our sanctions determination.

Similarly, the Hearing Panel, without explanation, concluded that it was aggravating that **Hunt** "left for vacation without informing DL or Sallie Mae about the unauthorized application." In this vacuum, we find that the fact that **Hunt** went on vacation without disclosing his misconduct is of no consequence, and we do not consider this an aggravating factor.

[*26]
VI. Conclusion

For violating FINRA Rule 2010 by using a customer's confidential information to apply for a student loan without the customer's knowledge or consent, we bar **Hunt** in all capacities. n30 For violating NASD Rule 2110 and FINRA Rule 2010 by falsifying expense reports we suspend **Hunt** for six months and fine him $ 10,000. However, in light of the bar for **Hunt's** Rule 2010 violation, we do not impose this suspension and fine. Finally, we also order **Hunt** to pay hearing costs of $ 2,027.15 and appeal costs of $ 1,512.08. n31

n30 The bar is effective as of the issuance of this decision.
n31 We have considered and reject without discussion all other arguments advanced by the parties.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President and Corporate Secretary

4

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DEPARTMENT OF ENFORCEMENT, Complainant, v. MATTHEW S. KAPLAN (CRD No. 2714169), Respondent.

Disciplinary Proceeding No. 20070077587

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

2008 FINRA Discip. LEXIS 22

June 20, 2008

TEXT:
[*1]

Hearing Officer -- AWH

HEARING PANEL DECISION

Respondent is barred from associating with any FINRA member in any capacity for (1) conversion of firm funds, in violation of NASD Conduct Rule 2110, and (2) falsifying expense reports, causing the firm to have false books and records, in violation of NASD Conduct Rules 3110 and 2110 and SEC Rule 17a-3. Respondent is also assessed costs.

Appearances:

Robin W. Sardegna, Esq., and Jeffrey S. Evans, Esq., for the Department of Enforcement. Matthew S. Kaplan, *pro se*.

DECISION

I. Background

On June 27, 2007, the Department of Enforcement filed the original three-cause complaint against Respondent Matthew Kaplan, alleging (1) conversion and misuse of firm funds for personal expenses; (2) giving something of value in excess of $ 100 to a representative of his client in relation to his business; and (3) falsifying expense reports, thereby causing the firm to have false books and records. By Order dated October 31, 2007, Enforcement's Motion to Amend the Complaint was

granted, allowing Enforcement to omit the Second Cause of the Complaint which had been pled in the alternative. On November 6, 2007, Respondent filed [*2] an Answer to the Amended Complaint, admitting a number of the factual allegations, and asserting as an affirmative defense, *inter alia*, that his alleged conduct was a direct result of psychological disorders and was not committed with the intent to convert and/or misappropriate firm funds. On March 11 and 12, 2008, a hearing was held in New York, New York, before an Extended Hearing Panel composed of the Hearing Officer, a current member of the District 9 Committee, and a former member of the District 11 Committee. The parties filed post-hearing submissions on April 28, 2008.

II. The Violations

The material facts of the violations are not in dispute, as evidenced by Respondent's Answer, the Stipulations filed by the parties, and the documents that have been admitted into evidence without objection. n1

n1 References to the Department of Enforcement's exhibits are designated C-; Respondent's exhibits, as Tr. ; factual stipulations, as Stip ; and the transcript of the hearing, as Tr. .

[*3]

Matthew Kaplan first entered the securities industry after his graduation from college in 1995. As pertinent to the Complaint, he was employed as a research salesman for the institutional trading desk at Lazard Freres & Co. LLC, n/k/a Lazard Capital Markets LLC ("Lazard") from December 1, 1997, through December 9, 2005, when he was terminated by Lazard. Kaplan then held, and currently holds, Series 7 and 63 licenses. As a research salesman, Kaplan was issued a corporate American Express credit card to pay for business travel and entertainment expenses he incurred while entertaining clients of Lazard for whom he was responsible for servicing and conducting business. Lazard maintained a business expense reporting system that enabled Kaplan to submit business-related charges on the corporate credit card for payment by the firm. n2 Between October 2001 and June 2003, Kaplan used his firm American Express charge card on the following four occasions to pay for an escort service he patronized called Exotica 2000:

n2 Stip. PP 1-6; C-1, p. 4; C-17, p. 9.

[*4]

1. October 1, 2001

On October 1, 2001, Kaplan used the firm American Express card to pay for his personal use of an escort service. Although he was alone with the escort when he utilized the services provided, he falsified the Lazard expense report to conceal the true nature of the escort service charges that appeared under the name "Ce Soir of New York." Kaplan claimed that the charges were for clients' tickets to a Broadway show and a rock concert, which would have been appropriate business ex-

penses. He believed that an expense reviewer would assume that "Ce Soir of New York" was a ticket broker. Lazard paid the charges, which totaled $ 3,700. n3

n3 Tr. 85-92; C-2, pp. 5, 9, 13; Stip. PP 7, 8, 21.

2. June 13, 2002

Kaplan again used the escort service on June 13, 2002, charging the expense on the firm American Express card. The charge was a personal expense with no business purpose. However, on the expense report that he submitted to Lazard, he claimed that the $ 3,300 Ce Soir charge was for Bruce Springsteen [*5] concert tickets given to three traders who were employed by one of his clients. Lazard paid the expense. n4

n4 Tr. 100-04; C-3, pp. 1, 3, 5, 7; Stip. PP 9, 10, 21.

3. August 17, 2002

Kaplan used the escort service for a third time on August 17, 2002. The charge was a personal, non-business expense. However, on the expense report he submitted to Lazard, he claimed that the $ 5,000 charge from Ce Soir was for U. S. Open tickets for himself, his wife, and clients. Lazard paid the expense. n5

n5 Tr. 106-11; C-4, pp. 1, 3, 5; Stip. PP 11, 12, 21.

4. June 18, 2003

On June 18, 2003, Kaplan had dinner and drinks with MP, a friend who also was a portfolio manager for one of Kaplan's clients at Lazard. They discussed MP's marital difficulties, and Kaplan suggested using an escort service as a solution to MP's problems. Kaplan agreed to pay for the [*6] service, although MP did not know that Kaplan intended to pay for it with his Lazard charge card. Kaplan made the arrangements for the escort service and then met MP at a hotel where they availed themselves of the services offered by Exotica/Ce Soir. Although the charge was personal and not an appropriate business expense, Kaplan claimed that the $ 4,950 Ce Soir charge was for concert tickets for MP to see Bruce Springsteen at Giants Stadium. Lazard paid the charge. n6

n6 Tr. 113-18; Stip. PP 13, 14, 21.

During the relevant time period, Lazard permitted the use of the firm American Express card for personal expenses, provided that the individual declared the expense to be personal and eventually reimbursed the firm pursuant to the procedure it put in place for that purpose. Kaplan used that procedure at least once, in January 2002, when he reimbursed Lazard $ 1,623.00 for November 2001 expenses described in his expense report as personal. He also charged a number of other personal expenses during the 2001-2003 time [*7] period, running up a balance of between $ 2,000 to $ 4,000. n7

n7 Tr. 75-80; 100, 126-27; C-2, pp. 3, 5, 6. Although the reimbursement check in the amount of $ 1,623 appears to be dated January 7, 2001, the check was actually written in January 2002 to reimburse expenses incurred in November 2001. Tr. 139-43. The memo line on the check is blank, and the Lazard journal entry shows only that the check was reimbursement for unspecified personal charges.

At some time in early 2005, Lazard employees, including Kaplan, were instructed to review their expense reports for personal expenses that had been submitted as business expenses. Kaplan did not identify the four escort expenses as personal. In December 2005, after his conduct had been discovered, he offered to reimburse Lazard for the escort service charges. He actually reimbursed Lazard, by check dated May 12, 2006, for the $ 16,950 he charged for the personal use of the escort service on the four occasions described above. n8

n8 Tr. 105-06, 126-28; C-14; Stip. P 22.

[*8]

III. Evidence Concerning Psychological Disorders

In May 2006, Kaplan's former attorney referred him to clinical psychologist Dr. Barry Rosenfeld for an evaluation of Kaplan's psychological functioning. Dr. Rosenfeld diagnosed Kaplan as having a chronic, generalized anxiety disorder, in addition to a transient depressive disorder that arose after Kaplan had been terminated by Lazard. He described the anxiety disorder as mild -- a general sense of nervousness and insecurity -- and not disabling. He found no personality disorder. Dr. Rosenfeld concluded that Kaplan's use of the escort service stemmed from stresses and insecurity that arose out of his relationship with his wife. He also concluded that Kaplan's falsification of the expense reports was motivated by his desire to hide his indiscretions from his wife who oversaw their finances and would have detected the charges if he had paid with his own credit card or withdrawn cash. Dr. Rosenfeld explained that Kaplan's falsification of the expense reports was "something he thought he could do and get away with." n9 Dr. Rosenfeld did not testify, nor did his report state, that Kaplan's falsification of his expense reports was a result [*9] of any mental disorder, disease, or defect.

n9 Tr. 222-24, 226, 231, 247-49, 254-55, 273; R-1.

The Department of Enforcement retained the services of forensic psychiatrist Dr. Jeffrey S. Janofsky to assess Kaplan's mental state at the time he submitted the false expense reports, to assess his mental state at the time Dr. Janofsky interviewed him for a psychiatric evaluation in January 2008, and to comment on Dr. Rosenfeld's report. Dr. Janofsky concluded that there is no data to support a conclusion that Kaplan was suffering from any mental disorder during the time he submitted the false expense reports; and that, while he was suffering from mild symptoms of depression and anxiety at the time of the January 2008 interview, those symptoms were not of sufficient severity to make a mental illness diagnosis. n10 Dr. Janofsky's report concluded as follows:

> Mr. Kaplan weighed the risk of identifying the expenses he incurred as personal on his Lazard expense reports (repaying Lazard and having his wife question the expenses) [*10] against the risk of Lazard discovering the true nature of his American Express charges. After completing a risk: benefit analysis, Mr. Kaplan simply determined that the risk to his marital relationship outweighed the risk that Lazard would discover his expense reports were false.
>
> Mr. Kaplan was fully in control of his thinking and behaviors at all times when he falsely filled out his expense reports. He simply did not expect to be caught, as he routinely used his Lazard provided American Express card to charge up to $ 25,000.00 per month of legitimate entertainment expenses. There is no data that Mr. Kaplan was suffering from depression, anxiety or any other psychological symptoms around the times he filled out his false expense reports. n11

n10 Tr. 303, 306-07; C-23.
n11 C-23, p. 31. *See also* Tr. 318-21.

Dr. Janofsky noted that Dr. Rosenfeld did not attempt to collect any collateral data, such as Kaplan's current and former treatment records or personnel records. He opined that, even if he were to [*11] assume that all of Dr. Rosenfeld's diagnostic hypotheses were correct, none of them explains how or why any psychological factors affected Kaplan's ability to submit truthful expense reports. n12 Dr. Janofsky's report states:

> . . . Dr. Rosenfeld does not explain how Mr. Kaplan's anger, hostility, anxiety or any other psychological factors affected his ability to submit truthful expense reports. There is no evidence that if such psychological factors existed, they reached a clinically significant level of severity. Dr. Rosenfeld's report provides no support for the premise that at the time of the expense account falsifications, Mr. Kaplan lacked the capacity to

know or appreciate the wrongfulness of his actions or lacked capacity to behave in an appropriate fashion. n13

n12 Tr. 322-27.
n13 C-23, p. 33.

IV. Conclusions of Law

Conversion is the wrongful exercise of dominion over the personal property of another. n14 Kaplan admitted that he used firm funds for personal expenses and falsely claimed that [*12] the funds were used for appropriate business expenses. By so doing, he intended the firm to pay those personal expenses, without having to reimburse the firm as required by its procedures. Accordingly, he converted firm funds, in violation of NASD Conduct Rule 2110, when he charged personal expenses to the firm credit card and falsely claimed the expenses to be appropriate business expenses. n15 Even where the conversion is not in connection with a securities transaction, it "constitute[s] unethical business-related conduct and calls into question [a respondent's] ability to fulfill his fiduciary duties in handling other people's money." n16

n14 *Dep't. of Enforcement v. Paratore, 2008 FINRA Discip. LEXIS 1,* *10 (NAC Mar. 7, 2008) (citing Restatement (Second) of Torts § 222A(1) (1965)). *See also* FINRA SANCTION GUIDELINES, at 38 n.2 (Conversion is "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it.").
n15 *See, e.g., Dep't of Enforcement v. Zulick*, 2001 NASD Discip. LEXIS 22, *30 (OHO Feb. 27, 2001) (charging personal expenses to firm credit card to pay personal expenses constituted conversion, in violation of NASD Rule 2110).
[*13]

n16 *Daniel D. Manoff, Exchange Act Release No. 46,708, 2002 SEC LEXIS 2684* (Oct. 23, 2002) (unauthorized use of co-worker's credit card numbers).

NASD Rule 3110 requires member firms to keep books and records as prescribed by SEC Rule 17a-3. Section 17(a) of the Exchange Act and Rule 17a-3 thereunder require members to make and keep current "[l]edgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts." Because Kaplan intentionally submitted false expense reports, disguising his personal expenses as legitimate business expenses, he caused his firm to violate SEC Rule 17a-3 and NASD Rules 3110 and 2110. n17

n17 Violations of federal securities laws and other NASD Conduct Rules also violate NASD Conduct Rule 2110. *Dep't of Enforcement v. Shvarts*, 2000 NASD Discip. LEXIS 6, ** 12-13 (NAC June 2, 2000). NASD General Provision 0115(a) applies the obligations of member firms to individuals associated with those firms.

[*14]
V. Sanctions

According to the FINRA Sanction Guidelines, a bar is standard for conversion, regardless of the amount converted. n18 For egregious recordkeeping violations, a bar may also be the appropriate sanction. n19 Here, the two violations are intertwined, and there are no material mitigating factors that warrant sanctions less than bars in all capacities. The Principal Considerations in Determining Sanctions also support the conclusion that bars are the appropriate sanctions in this case. n20

n18 FINRA SANCTION GUIDELINES at 38.
n19 *Id.* at 30.
n20 *Id.* at 6-7.

Principal Consideration No. 2 is whether the respondent accepted responsibility for and acknowledged the misconduct to his employer or a regulator prior to detection and intervention by the firm or a regulator. Kaplan did not. Notwithstanding the opportunity to admit his misconduct when the firm asked its employees specifically to identify any personal expenses that had been claimed as business expenses, he failed to identify any [*15] of the four personal expenses he had charged.

Principal Consideration No. 4 is whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct. Kaplan did not. He did not attempt to repay Lazard until December 1995, after the firm had discovered his misconduct and confronted him with it. He finally reimbursed Lazard for the $ 16,950 in personal expenses in May 2006, almost three years after the last time he charged Ce Soir expenses to the firm, and after he had received a *Wells* notice from the Department of Enforcement, notifying him that it intended to bring a disciplinary action against him. n21

n21 C-13, C-14.

Principal Consideration No's. 8 and 9 are whether the respondent engaged in numerous acts and/or a pattern of misconduct, over an extended period of time. Kaplan did. He committed four separate acts of conversion over a period of 20 months.

Principal Consideration No. 10 is whether the respondent attempted to conceal [*16] his misconduct or to lull into inactivity, mislead, or deceive the member firm with which he was associated. Kaplan did. He filed the false expense reports precisely to conceal the personal nature of the escort service charges, and he thought he could get away with doing so.

Principal Consideration No. 13 is whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence. Kaplan's misconduct was admittedly intentional.

Finally, Principal Consideration No. 17 is whether the respondent's misconduct resulted in the potential for his monetary or other gain. Kaplan's misconduct resulted in his actual gain of the $ 16,950 his firm paid for his personal expenses.

Because there is some authority for consideration of extreme emotional distress as a mitigating factor, the Extended Hearing Panel has considered the expert evidence offered by both Kaplan and Enforcement. n22 However, the Extended Hearing Panel does not find that the evidence supports a finding that Kaplan's misconduct resulted from or was exacerbated by any emotional distress or psychological disorder. n23

n22 *See, e.g., District Bus. Conduct Comm.v. Klein*, No. C02940041, 1995 NASD Discip. LEXIS 229, at * 13 (NBCC June 20, 1995) (extreme emotional distress considered, but not found sufficient to reduce sanction to less than a bar for conversion). *See also Joel Eugene Shaw, Exchange Act Release No. 34,509, 1994 SEC LEXIS 2493* (Aug. 10, 1994).

[*17]

n23 *See District Bus. Conduct Comm. v. Kwikkel-Elliott*, 1998 NASD Discip. LEXIS 4, at * 14 (Jan. 16, 1998) (no indication that misconduct resulted from or was exacerbated by personal or work-related stress).

Although Dr. Rosenfeld explained how stresses and insecurity arising out of Kaplan's relationship with his wife impacted Kaplan's decision to use the escort service, that issue is not material to the Complaint in this case. The relevant issue is the falsification of the expense reports. As to that issue, neither Dr. Rosenfeld nor Dr. Janofsky found that Kaplan's falsification of expense reports resulted from any mental disorder, disease, or defect. Both experts agreed that Kaplan merely thought he could successfully hide his indiscretions from his wife and elude detection by Lazard if he falsified the nature of the expenses. The Extended Hearing Panel finds persuasive Dr. Janofsky's testimony that Kaplan rationally engaged in a risk/benefit analysis to determine his course of conduct.

The Extended Hearing Panel also concludes that Kaplan did not falsify his expense reports merely to hide [*18] his conduct from his wife. Kaplan could have used his own checking account to reimburse Lazard for unspecified personal expenses, as he had done in the past. In addition, with the exception of the June 13, 2003 use of the escort service, which was a spur of the moment decision, he could have arranged for a cash advance to pay the charges. Finally, he could have requested that Lazard deduct his tab of personal expenses from his yearly six-figure bonus that he was earn-

ing. n24 Falsification of the expense reports was the only method by which he could avoid ultimate payment of those expenses.

n24 With a base salary of $ 100,000, Kaplan's total compensation in 2001 was $ 600,000; in 2002, $ 650,000; and in 2003, $ 565,000. Tr. 123-24.

VI. Conclusion

Matthew S. Kaplan is barred from associating with any FINRA member in any capacity for conversion of firm funds, in violation of NASD Conduct Rule 2110, and falsifying expense reports, causing the firm to maintain false records, in violation of Section 17(a) of the Exchange [*19] Act, Rule 17a-3 thereunder, and NASD Rules 2110 and 3110. n25 He is also assessed costs in the total amount of $ 3,884.66, consisting of a $ 750 administrative fee and a $ 3,234.66 transcript fee. If this decision becomes FINRA's final disciplinary action, the bars shall become effective immediately.

n25 The Extended Hearing Panel has considered and rejects without discussion all other arguments of the parties.

SO ORDERED.

Alan W. Heifetz

Hearing Officer

For the Extended Hearing Panel

 5

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Department of Enforcement, Complainant, v. Ryan A. Leopold, New Orleans, LA, Respondent.

Complaint No. 2007011489301

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

2012 FINRA Discip. LEXIS 2

February 24, 2012

TEXT:
[*1]

DECISION

Respondent falsified hotel invoices and verification letters. Held, findings affirmed, in part, and sanctions modified.

Appearances

For the Complainant: Laura Leigh Blackston, Esq. and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Meredith A. Cunningham, Esq.

Decision

Ryan A. Leopold ("Leopold") and FINRA's Department of Enforcement ("Enforcement") each appeal a May 21, 2010 Hearing Panel decision pursuant to FINRA Rule 9311. The Hearing Panel found that Leopold fabricated hotel invoices and broker-dealer verification letters, in violation of NASD Rule 2110, and barred him. n1 Leopold appeals the Hearing Panel's sanction determination.

n1 The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

The Hearing Panel also concluded that Enforcement failed to prove that Leopold's falsification of hotel invoices and verification letters caused his employer member firm's books [*2] and records to be inaccurate and in violation of Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Rule 17a-3, and NASD Rule 3110 ("books and records rules"), which Enforcement alleged was a violation of NASD Rule 2110. Enforcement appeals this finding. After an independent review of the record, we affirm, in part, the Hearing Panel's findings and modify the sanctions it imposed.

I. Background

Enforcement initiated this action on March 30, 2009, with a complaint alleging two causes of action. The first cause alleges that Leopold violated NASD Rule 2110 by falsifying hotel invoices and verification letters. The second cause of action alleges that by submitting these fictitious hotel invoices and verification letters to his employer, PLANCO Financial Services, LLC ("PLANCO"), Leopold violated NASD Rule 2110 by causing his employer member firm to be in violation of the books and records rules. Leopold admitted his falsification of documents prior to the hearing. On January 11, 2010, Leopold and Enforcement entered into joint stipulations in which Leopold stipulated, among other things, that he created ten hotel invoices for meetings that did not occur [*3] and forged verification letters from registered representatives of broker-dealers in support of those fictitious meetings. The parties also stipulated that Leopold did not convert PLANCO funds or property.

During the pre-hearing conference on February 17, 2010, the Hearing Officer stated that the hearing would address sanctions alone because Leopold's admissions established liability on both counts. When counsel for Leopold noted that Leopold had not admitted liability as to the books and records cause of action, the Hearing Officer stated that Enforcement did not need to present evidence on that cause because Leopold's submission of false documents "per se" caused PLANCO to be violation of its books and records obligations.

At the commencement of the hearing on February 25, 2010, the Hearing Officer reiterated that the hearing would be limited to a determination of sanctions. Based on the Hearing Officer's representations, Enforcement did not call any witnesses to testify. Leopold testified on his own behalf and called as a witness his current supervisor at Lincoln Financial Services ("Lincoln Financial"), Tad Fifer ("Fifer"). Fifer is a divisional sales manager at Lincoln Financial, [*4] covering the southwest region for Lincoln Financial's Choice Plus Annuity line, and oversees approximately 12 wholesalers in the region. Fifer testified that Leopold was forthright with Lincoln Financial about his falsification of documents while at PLANCO and subsequent termination. Fifer also stated that due to his prior disciplinary history at PLANCO, Lincoln Financial created a heightened supervision program focused on Leopold's expense reporting. The heightened supervision plan requires that all of Leopold's reimbursement requests be submitted weekly along with the original receipts, which Fifer reviews before approving any expenses. He also travels with Leopold on a quarterly basis to meetings with retail firms and reviews with Leopold both Lincoln Financial's policies and procedures and those of the firms at which he makes presentations.

Notwithstanding the Hearing Officer's statements that the false submissions "per se" caused PLANCO to violate the books and records rules, the Hearing Panel found that Enforcement failed to present any evidence about how PLANCO recorded or accounted for Leopold's expenses in its books and records and thus dismissed cause two of the complaint. [*5] The Hearing Panel, amid a split decision, barred Leopold for his violation of NASD Rule 2110 under the first cause of action. Both parties have appealed. Leopold appeals on the grounds that the bar is inappropriately punitive under the circumstances of the case. Enforcement appeals the Hearing Panel's dismissal of the books and records cause of action as contrary to the rulings made by the Hearing Officer during the pre-hearing conference as well as at the hearing itself.

II. Facts

The parties have stipulated as to liability under cause one (falsification of documents) and the underlying facts are not in dispute.

A. Leopold's Employment History

Leopold entered the securities industry in January 2005, as an investment company and variable contracts products limited representative at PLANCO. Leopold is currently employed by Lincoln Financial as a variable annuity wholesaler.

B. Leopold's Employment at PLANCO

Beginning in late 2004, Leopold was employed as a regional marketing director, or wholesaler, for PLANCO, a subsidiary of The Hartford Financial Services Group, Inc. ("Hartford Group"). n2 One of his job responsibilities was to make seminar presentations to the registered [*6] representatives of other broker-dealers who would, in turn, sell variable annuity products issued by the Hartford Group or one of its subsidiaries. Leopold personally paid for the expenses associated with these seminars and received reimbursement from PLANCO based on a percentage of the total product sales generated by his presentations. PLANCO did not reimburse its wholesalers, including Leopold, beyond a certain set amount; however, for certain additional allowable expenses, the firm paid the wholesaler an equivalent amount of gross commissions without the deduction of income tax. During Leopold's tenure at PLANCO, he was pro-

vided an annual business expense account of approximately $ 50,000 that he, like many of the wholesalers, regularly exceeded. PLANCO required its wholesalers to produce receipts for their seminars and related expenses as well as a verification letter from each broker-dealer whose representatives attended the seminars.

n2 A "wholesaler" markets a product to broker-dealers in an effort to persuade those broker-dealers to sell the offering to their customers. A wholesaler typically does not engage in retail sales of an offering.

[*7]

C. Leopold Generated False Invoices and Verification Letters

From July 28, 2005, through June 7, 2007, Leopold admittedly used the template of an Embassy Suites hotel invoice to create ten invoices for meetings that did not occur and submitted those invoices to PLANCO for reimbursement. The template for the creation of these hotel invoices was found on Leopold's company-issued computer's hard drive. n3

n3 Early in his employment at PLANCO, Leopold began working with a veteran wholesaler, with whom he traveled and who acted as a mentor for Leopold. This veteran wholesaler was the individual who introduced Leopold to the practice of reducing a wholesaler's tax liability by taking advantage of PLANCO's reimbursement system and provided Leopold with the computer template on which he created his fictitious invoices. This association merits mention only because it is discussed in the record and joint stipulations and is not mitigating.

In connection with these created invoices, Leopold generated fictitious verification [*8] letters from the registered representatives of broker-dealers purportedly thanking Leopold for conducting the seminars. Leopold forged registered representatives' signatures to seven of the verification letters, leaving the other three letters unsigned. Leopold did not have authorization from the clients to draft these letters or to sign on their behalf.

On nine other occasions, Leopold admittedly submitted invoices to PLANCO that he created for meetings that occurred, but for which he did not maintain original receipts. Leopold approximated the amounts contained in these invoices and submitted these invoices to PLANCO, without informing the firm that he generated these invoices himself and only approximated the amounts. At the times Leopold engaged in the admitted misconduct, he had exceeded the $ 50,000 expense limit provided by PLANCO, therefore these invoices and verification letters did not result in payments by PLANCO to Leopold. Rather, Leopold did this to reduce his tax liability. The total amount of the false hotel invoices submitted by Leopold was $ 7,760.38, resulting in a reduction of his tax liability by approximately $ 720. n4

n4 Leopold has filed amended tax returns for 2006 and paid an additional $ 720 in taxes.

[*9]

D. Leopold's Termination from PLANCO

During PLANCO's 2007 routine review of Leopold's expenses, its auditors identified an unusual pattern of activity and referred the matter to the Hartford Group's internal audit department. After the audit, the Hartford Group questioned Leopold, and he admitted that he falsified the hotel invoices and verification letters. In November of 2007, PLANCO terminated Leopold's employment and disclosed the reasons for the termination on his Form U5. Subsequent to this termination in December of 2007, FINRA initiated its own investigation.

E. Leopold's Association with Lincoln Financial

Leopold joined Lincoln Financial in June of 2008, after being recruited by Fifer. Fifer was the only other witness to testify at the hearing besides Leopold. Lincoln Financial was aware of the circumstances of Leopold's termination from PLANCO prior to hiring Leopold, and pursuant to *NASD Notice to Member 97-19*, 1997 NASD LEXIS 23 (Apr. 1997)

placed Leopold under heightened supervision. Leopold remains under heightened supervision at Lincoln Financial and has had no disciplinary problems since joining the firm.

III. Discussion

Our role as an appellate body is to [*10] conduct a de novo review of cases appealed from Hearing Panel decisions to determine whether, in each instance, Enforcement has proven its allegations by a preponderance of the evidence and whether the sanctions imposed are appropriate. *Dep't of Enforcement v. Sathianathan*, Complaint No. C9B030076, 2006 NASD Discip. LEXIS 3, at *51 (NASD NAC Feb. 21, 2006), *aff'd, Exchange Act Rel. No. 54722, 2006 SEC LEXIS 2572* (Nov. 8, 2006), *aff'd, 304 Fed. App'x 883 (D.C. Cir. 2008).* If we find that "the totality of the evidence suggests an equally or more compelling inference than [Enforcement's] allegation," we can reverse or modify a Hearing Panel's findings. *Dep't of Enforcement v. Reynolds*, Complaint No. CAF990018, 2001 NASD Discip. LEXIS 17, at *54 (NASD NAC June 25, 2001) (citing *SEC v. Moran, 922 F. Supp. 867, 892 (S.D.N.Y. 1996)).*

For the reasons discussed below, we affirm the Hearing Panel's findings that Leopold falsified hotel invoices and registered representative verification letters based on the joint stipulations agreed to by the parties. We vacate the Hearing Panel's dismissal [*11] of the second cause of the complaint. We find that the Hearing Panel precluded Enforcement from presenting its case and then proceeded inappropriately to dismiss the cause of action based on Enforcement's failure to sustain its burden of proof.

A. Leopold's Falsification of Documents

There is no dispute that Leopold created fictitious hotel invoices and forged the signatures of registered representatives on false verification letters for the purpose of reducing his tax liability, in violation of NASD Rule 2110. "Falsifying documents is a prime example of misconduct that adversely reflects on a person's ability to comply with regulatory requirements and has been held to be a practice inconsistent with just and equitable principles of trade." *Dep't of Enforcement v. Taylor*, No. C8A050027, 2007 NASD Discip. LEXIS 11, at *22-23 (NASD NAC Feb. 27, 2007).

Leopold used an Embassy Suites invoice template, provided by another PLANCO employee, to generate invoices for meetings that did not occur, or for which he did not maintain actual receipts, and he submitted these invoices to PLANCO as expenses. Leopold also created false verification letters to accompany the forged hotel invoices, purportedly [*12] thanking Leopold for holding meetings that never occurred. Leopold stipulated that on seven occasions, he signed the registered representatives' signatures to the verification letters without their authorization. Based on Leopold's admissions, the Hearing Panel correctly found him to be in violation of NASD Rule 2110.

B. Books and Records Violations

Enforcement appealed the Hearing Panel's decision with respect to its finding that Enforcement failed to prove that Leopold's falsification of hotel invoices and verification letters caused his employer's books and records to be inaccurate and not in compliance with Exchange Act Section 17(a), Exchange Rule 17a-3, and NASD Rules 3110 and 2110. Enforcement maintains that the Hearing Panel erred in its findings based on the Hearing Officer's statements on the record during the pendency of this matter. We agree with Enforcement and vacate the Hearing Panel's dismissal under cause two.

Our review of the Hearing Panel's decision permits us to make independent findings and cure any errors that may exist in the Hearing Panel's decision. *See Kevin M. Glodek, Exchange Act Rel. No. 60937, 2009 SEC LEXIS 3936,* at *19 [*13] (Nov. 4, 2009) (stating that the NAC's review is de novo, and the NAC has the authority to make an independent finding), *aff'd, No. 09-5325, 2011 U.S. App. LEXIS 6178* (2d Cir. Mar. 25, 2011); *Dep't of Enforcement v. Erenstein*, Complaint No. C9B040080, 2006 NASD Discip. LEXIS 31, at * 10 (NASD NAC Dec. 18, 2006) (holding that the NAC's de novo review of the Hearing Panel's decision "cures any drafting deficiencies or errors that may exist in the Hearing Panel's decision"), *aff'd, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596,* (Nov. 8, 2007), *aff'd, 2008 U.S. App. LEXIS 19746* (11th Cir. Sep. 16, 2008). The Hearing Officer's statements on the record during the pre-hearing conferences and at the hearing itself completely contradicted the final rulings made by the Hearing Panel in the decision. The Hearing Officer's statements prejudiced Enforcement by prohibiting it from presenting its case in chief, and prejudiced Leopold by denying him the opportunity to defend against those allegations. We therefore vacate the Hearing Panel's findings under cause two.

Although we vacate the Hearing Panel's [*14] dismissal under cause two, we do not adopt Enforcement's position that Leopold's admissions contained in the joint stipulations and the documents presented at the hearing are sufficient to find that he caused his member employer firm's books and records to be in violation of SEC and NASD rules. Enforce-

ment had the burden of proving, by a preponderance of the evidence, each violation charged in the complaint. *See Dep't of Enforcement v. Reynolds*, 2001 NASD Discip. LEXIS 17 at *54-55 (NAC June 25, 2001). Leopold in turn was entitled to an opportunity to respond to Enforcement's presentation of evidence and offer a defense. Due to the Hearing Officer's rulings, each side was prohibited from proffering evidence to support, or defend against, the books and records allegations. In light of this, and based on the record that we have before us, we are unable to make a reasoned and supported determination that Leopold either did or did not violate NASD Rule 2110 in count two. Moreover, as discussed in greater detail in the sanctions discussion below, while we have determined that the Hearing Panel erred in dismissing the books and records cause of action, we decline to remand the matter [*15] for further consideration. Our analysis of Leopold's falsification leads us to conclude that even if we were to find that he caused his firm to violate the books and records rules, any sanction imposed for said violation would not be materially different from the suspension we impose for the falsification of documents, because both violations resulted from identical conduct.

IV. Sanctions

The FINRA Sanction Guidelines ("Guidelines") for forgery or falsification of records recommend a fine of $ 5,000 to $ 100,000 and a suspension for up to two years in cases where mitigating factors exist, and a bar in egregious cases. n5 In determining appropriate sanctions, we also are guided by the "General Principles Applicable to All Sanction Determinations" and the "Principal Considerations in Determining Sanctions" included in the Guidelines. n6

n5 *FINRA Sanction Guidelines*, at 37 (2011), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf. [hereinafter *Guidelines*].

n6 *Id.* at 2-6.

[*16]

Based on its findings that Leopold generated falsified hotel invoices and related verification letters, the Hearing Panel found his violation egregious and barred Leopold from associating with any firm in any capacity. n7 The record does not support this sanction. Rather, we find that the existence of mitigating factors renders this a serious case and therefore reduce the sanctions. We instead fine Leopold $ 25,000 and suspend him from associating with any FINRA member in any capacity for one year.

n7 One of the three Hearing Panelists dissented as to the sanctions imposed. The dissenting Panelist believed that mitigating factors existed which should have resulted in a sanction lower than a bar. Specifically, the dissenting Panelist found that Leopold's youth and inexperience led him to follow the guidance given by a more experienced wholesaler with respect to expense reimbursement procedures. The Panelist also noted that Leopold does not recommend investments to public customers and that no customers were harmed by Leopold's misconduct. Unlike the majority of the Hearing Panel, the dissenting Panelist found the testimony of Leopold's current supervisor, Fifer, compelling and, like the full Hearing Panel, found Leopold sincerely remorseful. This Panelist would have imposed a six- to nine-month suspension.

[*17]

In serving as the single appellate body for FINRA's disciplinary appeals, we bring a national perspective to the task of assessing sanctions in an attempt to promote consistency in the imposition of remedial sanctions. Our review of the sanctions imposed by a hearing panel is de novo. *See First Heritage Inv. Co., 51 S.E.C. 953, 960 (1994).* When conducting our de novo review, we can assign our own weight to the relevant--and often countervailing--factors in a case. We do so here.

The Guidelines for falsification of records provide two considerations in determining the appropriate sanctions: (1) the nature of the documents falsified; and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority to falsify the records. Both considerations serve to aggravate Leopold's misconduct. n8 First, the documents falsified were hotel invoices and verification letters. While not related to clients, prospective clients, or client

accounts, these documents are an important reflection on Leopold's veracity and integrity. Second, Leopold admitted that he did not have a good-faith belief that it was appropriate to falsify the hotel [*18] invoices and verification letters. We find that these two factors lend themselves to an aggravation of Leopold's sanctions.

n8 *Id.* at 37.

We also find that Leopold engaged in a pattern of misconduct over an extended period of time. n9 From July 28, 2005 through June 7, 2007, Leopold admittedly used a template of a hotel invoice to create ten invoices for meetings that did not occur and submitted those invoices to PLANCO for reimbursement. During this same time period, in conjunction with the falsified hotel invoices, Leopold generated fictitious verification letters. This extended pattern of behavior also serves to aggravate Leopold's misconduct.

n9 *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

We overrule the majority of the Hearing Panel with respect to the presence of mitigating factors and find that it disregarded [*19] mitigating factors with respect to sanctions. We weigh these mitigating factors against the aggravating factors discussed above and conclude that Leopold's misconduct was serious. n10

n10 We expect the written submissions filed by all parties in all matters to be well grounded in fact and free from scandalous and impertinent matters. We hold all parties to an exacting standard and expect them to comply with the letter and spirit of these requirements. We find that Enforcement's appellate briefs and other submissions missed the mark in certain respects. For example, Enforcement's appellate briefs characterized Leopold's misconduct as fraud, notwithstanding that Enforcement neither alleged nor proved that Leopold engaged in fraudulent conduct. Nevertheless, we did not consider these arguments in our deliberations. We have relied instead on our careful review of the record in resolving this case.

When conducting our de novo review, we normally give deference to the Hearing Panel as the fact finder on the matter of witness [*20] credibility, based on its having had the opportunity to observe the witness's demeanor. n11 We note that the Hearing Panel credited certain aspects of Leopold's testimony, most importantly stating that it "was persuaded that Leopold is remorseful for his conduct." n12 *See Dep't of Enforcement v. Nouchi, Complaint No. E102004083705, 2009 FINRA Discip. LEXIS 8,* at *11 (FINRA NAC Aug. 7, 2009) (concluding that a sanction should fall within the lower end of the relevant Guidelines where the respondent expressed "sincere remorse").

n11 *Eliezer Gurfel, 54 S.E.C. 56 (1999), aff'd, 205 F.3d 400 (D.C. Cir. 2000); Dep't of Enforcement v. Frankfort,* Complaint No. CO2040032, 2007 NASD Discip. LEXIS 16, at *24-25 (NASD NAC May 24, 2007); *Dep't of Enforcement v. DaCruz,* Complaint No. C3A040001, 2007 NASD Discip. LEXIS 1, at *23-24 (NASD NAC Jan. 3, 2007).
n12 The Hearing Panel believed Leopold's remorse did not outweigh his dishonesty.

[*21]

On the other hand, the Hearing Panel is silent as to any credibility determinations it may have made regarding the other aspects of Leopold's testimony. In the absence of any countervailing testimony or evidence, we credit the entirety of his testimony. Leopold testified that he recognized the severity of his misbehavior, expressed sincere remorse, and accepted responsibility for his actions. He acknowledges that a serious sanction is warranted for his misconduct, is genuinely ashamed of his behavior, and avows that his lapses in judgment will not be repeated. *See Dep't of Enforcement v.*

Charles V Cuozzo, Jr., Complaint No. C9B050011, 2007 NASD Discip. LEXIS 12, at *35-36 (NASD NAC Feb. 27, 2007) (several factors that militate against a finding that the respondent's misconduct was egregious include that respondent did not attempt to conceal his false dating of documents from investigators; expressly acknowledged that his conduct may have harmed firm customers; accepted responsibility for his misconduct; and expressed remorse and offered sincere apologies for his actions throughout these proceedings).

Leopold admitted his misconduct from the outset, first to the Hartford Group [*22] and then to FINRA. After Leopold was approached by investigators at the Hartford Group, he admitted to the falsification of the documents, provided detailed testimony both to the Hartford Group and to FINRA investigators, accepted responsibility for his misconduct, was remorseful, and willingly accepted heightened supervision at Ohio National and Lincoln Financial. n13 We find that Leopold testified consistently throughout the course of the underlying investigations and at the hearing.

n13 Enforcement did not call any witnesses from PLANCO to rebut Leopold's argument that he was forthcoming and cooperative, but Enforcement nonetheless argued that if the Hartford Group's auditors had testified, they would have said that Leopold was not initially forthcoming. The record does not support Enforcement's argument, and we have disregarded it.

We have also considered that several serious aggravating factors are notably absent from an examination of Leopold's misconduct. While the lack of aggravating factors are not mitigating [*23] under the Guidelines, their absence in this instance, when examined in consort with the genuinely mitigating factors discussed above, militates against a bar. There was no customer loss or harm sustained due to Leopold's misconduct. Leopold's falsification of hotel invoices and verification letters did not result in any financial loss for PLANCO. Enforcement even stipulated that it does not contend that Leopold converted PLANCO's funds or property. The absence of these factors colors our evaluation and further supports a reduction of Leopold's sanctions.

Based on the presence of both aggravating and mitigating factors, and our assigning of moderate weight to mitigating factors, we have determined that Leopold's conduct was serious and warrants a downward departure from a bar. We find that Leopold breached his duty as an associated person to act ethically and in a manner that comports with high standards of commercial honor and just and equitable principles of trade. We also find that Leopold failed to use sound judgment by knowingly falsifying hotel invoices and verification letters. Leopold, however, appears to understand fully the magnitude of his failings and is genuinely remorseful. [*24] Based on the foregoing, we fine Leopold $ 25,000 and suspend him for one year. n14 We find that these sanctions will best serve to remedy the violation and deter others who may consider engaging in such activity. n15

n14 We also view favorably Lincoln Financial's heightened supervision of Leopold during the pendency of this matter and the firm's willingness to continue such supervision into the future.
n15 FINRA sanctions may be remedial, but must not be punitive. *McCarthy v. SEC, 406 F.3d 179, 188-89 (2d Cir. 2005); Guidelines*, at 2. A remedial sanction is designed to correct the harm done by respondent's wrongdoing and to protect the trading public from any future wrongdoing the respondent is likely to commit. *McCarthy, 406 F.3d at 188.* In addition to remediation, deterrence may also be relied upon as an additional rationale for the imposition of sanctions. *Id.*

While we have determined that the Hearing Panel erred in dismissing the books [*25] and records cause of action, we decline to remand back to the Hearing Panel for further consideration. Assuming we were to able to find, based on the record before us, that Leopold violated NASD Rule 2110 by causing his firm to be in violation of the books and records rules, it would not change our sanction determination. Leopold's violations stem from a single source, which is his falsification of hotel invoices and verification letters. These violations are based on identical conduct, uniform in nature, and do not pose any distinct or differing public policy concerns. *See generally Michael Frederick Siegel, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459,* at *46 (Oct. 6, 2008), *aff'd in relevant part, 592 F.3d 147, 157-158 (D.C. Cir. 2010).* Because the second cause of action is derivative of the first, and both causes are the result of identical

conduct, we need not remand the books and records cause of action to the Hearing Panel for further consideration. We believe that the appropriate sanction is the one-year suspension and fine imposed for Leopold's falsification of records

V. Conclusion

Leopold falsified [*26] hotel invoices and verification letters in violation of NASD Rule 2110. n16 For this violation, we fine Leopold $ 25,000, suspend him in all capacities for one year, and affirm costs of $ 1,403.60. n17

n16 We have considered and reject without discussion all other arguments advanced by the parties.
n17 Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President and Corporate Secretary

6

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Department of Enforcement, Complainant, vs. Chad A. McCartney, Respondent.

Complaint No. 2010023719601

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

2012 FINRA Discip. LEXIS 60

December 10, 2012

TEXT:
[*1]

DECISION

Registered representative falsified an expense report and supporting documentation to obtain a $ 500 reimbursement to which he was not entitled. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Thomas M. Huber, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Richard A. Levan, Esq.

Decision

Pursuant to FINRA Rule 9311, Chad A. McCartney ("McCartney") appeals a FINRA Hearing Panel's September 15, 2011 decision barring McCartney for falsifying an expense report and supporting documentation to obtain a $ 500 reimbursement to which he was not entitled. The Hearing Panel found that McCartney's misconduct violated NASD Rule 2110. n1 After a thorough review of the record, we affirm the Hearing Panel's findings and modify the sanctions imposed.

n1 The conduct rules that apply in this case are those that existed when the conduct at issue occurred in 2006.

I. Background

McCartney entered the securities industry [*2] in September 2000 as an investment company products/variable contracts representative associated with Hartford Life Distributors, LLC, formerly Planco Financial Services, LLC ("Hartford Life"). McCartney voluntarily left Hartford Life in December 2009 and joined another member firm as an investment company products/variable contracts representative. In February 2011, he voluntarily terminated his association with his member firm. He is not currently associated with a FINRA member firm. The conduct that is the subject matter of this action occurred in April 2006, during McCartney's association with Hartford Life.

II. Procedural History

In December 2010, FINRA's Department of Enforcement ("Enforcement") filed a two-cause complaint. Cause one alleged that McCartney violated NASD Rule 2110 by submitting a false expense report and fabricated supporting documentation to Hartford Life that resulted in a $ 500 reimbursement payment to McCartney to which he was not entitled. Cause two alleged that McCartney violated NASD Rule 2110 by creating and submitting falsified supporting documentation (a falsified copy of his own $ 500 check, a fabricated hotel bill, and a forged verification [*3] letter from a registered representative with another firm) to support the false expense report referenced in cause one. FINRA discovered McCartney's reimbursement request in the course of investigating other fabricated reimbursement requests at Hartford Life several years after McCartney left the firm.

In a September 2011 decision, the Hearing Panel found that McCartney violated NASD Rule 2110 as alleged and barred McCartney from associating with any member firm in any capacity. This appeal followed.

III. Facts

McCartney does not dispute the underlying facts and admitted the allegations of the complaint in his amended answer. The pertinent facts are as follows.

McCartney joined Hartford Life in 2000 as a "wholesaler" of variable annuity products issued by Hartford Life or its affiliates. n2 As a wholesaler, McCartney conducted seminar presentations for registered representatives at broker-dealers not affiliated with Hartford Life to encourage the representatives to sell Hartford Life variable annuities.

n2 A "wholesaler" markets products to other broker-dealers in an effort to persuade those broker-dealers to sell the products to their retail clients. Typically, wholesalers such as McCartney do not engage in retail sales of offerings, although they may occasionally make presentations to other broker-dealers' clients.

[*4]

McCartney was an independent contractor with Hartford Life. He earned commissions based on sales that resulted from his presentations and did not receive any salary or other remuneration from Hartford Life. Hartford Life did not provide McCartney with an expense account to cover the costs associated with these seminars. Rather, McCartney personally paid for all expenses associated with the seminars. Hartford Life reimbursed McCartney for documented expenses, generally up to $ 500 per seminar. To receive reimbursement, Hartford Life required that McCartney produce actual receipts for all expenses, including receipts from seminar venues, and letters from broker-dealers whose representatives attended the seminars verifying McCartney's presentation ("verification letters").

During 2006, RM was a financial advisor at member firm WS, one of McCartney's highest producing clients, and McCartney had known RM since 2000. RM solicited McCartney to donate money to his son's private school. McCartney agreed to the donation and, on April 4, 2006, wrote a check drawn on his personal account to the school for $ 500. The school deposited the check into its donation account at WS on April 12, 2006. [*5]

During this time, Hartford Life's reimbursement policy had been the subject of discussion and criticism at the wholesalers' division meeting. During the meeting, SL, another wholesaler at Hartford Life, told McCartney and others that he had been submitting false expense reports to circumvent Hartford Life's strict reimbursement policy. He advised them that he used an invoice template bearing the logo for Embassy Suites Hotels, and he provided them with an electronic copy of the Embassy Suites template and WS letterhead.

McCartney thereafter used the Embassy Suites template to fabricate an invoice to obtain reimbursement of his $ 500 donation. McCartney created a false invoice addressed to RM, dated April 3, 2006, which listed an April 3, 2006 room rental, food, and tax charge of $ 725.87. To accompany the false invoice, McCartney created a letter on WS letterhead that SL provided purportedly verifying that on April 3, McCartney held a seminar for 27 people at a cost to McCartney of $ 500. McCartney forged RM's signature on the letter. McCartney also altered his personal check payable to the school. McCartney changed the payee to WS and deleted the school's account number. McCartney [*6] submitted a copy of the altered check and the other falsified documents to an expense processor at Hartford Life, who then prepared an expense report and submitted it to the firm on McCartney's behalf. n3

n3 Initially, McCartney submitted just the falsified hotel invoice and verification letter to the expense processor, but the reimbursement request was rejected for insufficient documentation. In response, McCartney altered the check that he had given to the school to change the payee name to WS and submitted it as proof that he paid for a seminar.

McCartney received a $ 500 reimbursement from Hartford Life. McCartney testified that he realizes that his actions were wrong and violated FINRA rules. He acknowledged that he deserves a sanction for his actions. He stated that he did not feel that he could refuse RM's request for a donation because RM was such a good customer to him and Hartford Life. He also stated that, at the time, he was overcome with business expenses, and he made a "stupid" mistake when he sought [*7] to obtain reimbursement for the school donation. McCartney stated that he deeply regrets his actions and has not repeated them.

IV. Discussion

The Hearing Panel found that McCartney violated NASD Rule 2110 by submitting a false expense report and accompanying falsified documentation to Hartford Life, resulting in a $ 500 payment to McCartney to which he was not entitled. We affirm these findings.

NASD Rule 2110 is an ethical rule. n4 It requires members and associated persons to observe high standards of commercial honor and just and equitable principles of trade. In the absence of the violation of another securities law or rule, conduct may violate Rule 2110 if it is unethical or committed in bad faith. *See Kirlin Sec., Inc., Exchange Act Rel. No. 61135, 2009 SEC LEXIS 4168,* at *65 (Dec. 10, 2009). FINRA's authority to pursue disciplinary action for violations of Rule 2110 is sufficiently broad to encompass any unethical business-related misconduct, regardless of whether it involves a security. *See John M. Saad, Exchange Act Rel. No. 62178, 2010 SEC LEXIS 1761,* at *14-15 (May 26, 2010) (finding that registered representative [*8] who submitted false expense reimbursement requests and accompanying documentation violated Rule 2110), *appeal filed*, No. 10-1195 (D.C. Cir. July 23, 2010); *Daniel D. Manoff, 55 S.E.C. 1155, 1162 (2002)* (finding that registered representative who used a co-worker's credit card without authorization violated Rule 2110); *James A. Goetz, 53 S.E.C. 472, 475 (1998)* (finding that registered person's misuse of member firm's matching gift program to obtain private school tuition credit violated Rule 2110); *Keith Perkins, 54 S.E.C. 989, 993 (2000)* (finding that registered person's submission of false reimbursement requests for seminar expenses that he did not incur violated Rule 2110), *aff'd, 31 F. App'x 562* (Mar. 11, 2002). The test to determine whether conduct violates Rule 2110 is whether the misconduct "reflects on the associated person's ability to comply with the regulatory requirements of the securities business." *Manoff, 55 S.E.C. at 1162.*

n4 Effective December 15, 2008, FINRA Rule 2010 superseded NASD Rule 2110. The language of the rule remains unchanged. *See SR-FINRA-2008-028, Exchange Act Rel. No. 58643, 2008 SEC LEXIS 2279* (Sept. 25, 2008).

[*9]

McCartney does not dispute that he intentionally prepared and submitted to Hartford Life a false expense report and, to support the false report, a fabricated receipt, a fabricated verification letter, and a falsified check, for which he received monetary reimbursement of $ 500 to which he was not entitled. We find that McCartney acted unethically and his conduct reflects negatively on his ability to comply with regulatory requirements. McCartney thus violated Rule 2110, as alleged in causes one and two.

V. Sanctions

The Hearing Panel barred McCartney in all capacities. We modify that sanction.

Our review of the sanctions imposed by the Hearing Panel is de novo, and we must assign our own weight to the relevant, and often countervailing, factors in each case. *Dep't of Enforcement v. Leopold, Complaint No. 2007011489301, 2012 FINRA Discip. LEXIS 2,* at *17 (FINRA NAC Feb. 24, 2012). We do not concur with the Hear-

ing Panel's conclusion that several aggravating and no mitigating factors exist and, for the reasons outlined below, we find that McCartney's violation of Rule 2110 was serious, but not egregious. "The relevancy and characterization of [an [*10] aggravating or mitigating] factor depends on the facts and circumstances of a case and the type of violation." n5 Balancing the factors present in this case, we find that lesser sanctions would be appropriately remedial. n6 We therefore eliminate the bar and impose a six-month suspension in all capacities and $ 5,000 fine. n7

n5 *FINRA Sanction Guidelines,* at 6 (2012), http://www/finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf (hereafter "Guidelines").

n6 We are guided by our recent action in *Dep't of Enforcement v. Leopold*, which is a similar case. In *Leopold*, we upheld the Hearing Panel's findings that Leopold fabricated in excess of 20 hotel invoices and broker-dealer verification letters under similar circumstances as McCartney. The *Leopold* Hearing Panel barred Leopold. On appeal, we reduced Leopold's bar to a $ 25,000 fine and a one-year suspension. We found that Leopold demonstrated remorse, recognized the significance of his misconduct, accepted responsibility for his actions, acknowledged that a serious sanction was in order, and vowed that similar misconduct would not recur. We also noted that Leopold admitted his misconduct from the outset to his firm's investigators and to FINRA's examiners, and that his testimony was consistent throughout the course of the proceeding. In Leopold, we balanced these factors with the absence of aggravating factors, such as harm to customers and significant loss to the firm, and determined that Leopold's misconduct was serious, but not so egregious as to warrant a bar. In light of the *Leopold* decision and to "promote consistency in the imposition of remedial sanctions," we reach a similar conclusion here. *Leopold, 2012 FINRA Discip. LEXIS 2,* at *17.

[*11]

n7 The complaint contains two causes of action, both of which allege a Rule 2110 violation based on a single course of action (McCartney's falsification of a hotel receipt, verification letter, and check and his signing the name of another person to obtain a $ 500 reimbursement). Because the misconduct alleged in causes one and two is identical, we have determined to impose a single sanction for both causes of action. *See Guidelines*, at 4.

We first turn to the Guidelines applicable to conversion or the improper use of funds, which recommend a fine of $ 2,500 to $ 50,000 for the improper use of funds. n8 The Guidelines also recommend a bar for all cases involving conversion. n9 For cases involving improper use of funds, the Guidelines state "consider a bar" and that, where mitigation exists, consider suspending respondent for six months to two years. The Guidelines for forgery and falsification of records recommend a fine of $ 5,000 to $ 100,000. They also recommend that the adjudicator consider a bar in egregious cases and, if mitigating factors exist, a suspension of up to two years. n10

n8 *Guidelines*, at 36.

[*12]

n9 The complaint alleged that McCartney violated NASD Rule 2110 by submitting a false expense report, fabricating and falsifying supporting documentation, forging another representative's name on the supporting documentation, and accepting reimbursement of $ 500 to which he was not entitled. The complaint did not specifically allege that McCartney violated Rule 2110 by converting firm funds. McCartney argues that he was denied a fair process because the complaint did not allege conversion, but the Hearing Panel nonetheless found conversion for purposes of sanctions. McCartney argues that, by finding conversion when it was neither alleged in the complaint nor argued by Enforcement, the Hearing Panel improperly subjected him to a more significant sanction without providing him with the opportunity to defend against the allegation of conversion.

The Hearing Panel's decision stated that, although the Guidelines provide that a bar is standard for conversion, the Hearing Panel did not "confine its analysis to a finding that McCartney converted $ 500 from Hartford

Life." The Hearing Panel indicated that it also considered the lack of mitigating factors and existence of aggravating factors. Furthermore, although the Hearing Panel implied that it considered McCartney's actions to constitute conversion, it also applied the Guidelines for forgery and/or falsification of records to its sanctions determination.

The complaint did not allege conversion, and we therefore do not find that McCartney "converted" firm funds and have not imposed sanctions based on such a finding. *See Saad, 2010 SEC LEXIS 1761,* at *16-18 (rejecting similar notice argument where sole cause of complaint was labeled conversion but FINRA imposed sanctions on a basis other than conversion). Section 15A(h)(1) of the Securities Exchange Act of 1934 ensures fairness in FINRA proceedings by requiring that FINRA bring specific charges, provide notice of such charges, provide an opportunity to defend against the charges, and keep a record of the proceedings. *15 U.S.C. § 78o-3*(h)(1). We find that McCartney was adequately aware of the issues in controversy and had a full opportunity to defend himself.

[*13]

n10 *Guidelines*, at 37.

The Guidelines for forgery and falsification of records provide two considerations for determining the appropriate sanctions: (1) the nature of the documents falsified; and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority to falsify the records. n11 Neither of these considerations serves to mitigate McCartney's misconduct. The documents at issue are a hotel invoice, a verification letter, and a check. While not related to clients, prospective clients, or client accounts, McCartney's willingness to falsify these documents reflects negatively on his veracity and integrity. Additionally, McCartney never contended that he had a good-faith belief that it was appropriate to falsify the hotel invoice, verification letter, and check and to submit a false expense report. In fact, he has always admitted that his actions were wrong. We find that these two factors do not mitigate McCartney's actions.

n11 *Id.*

[*14]

Turning next to the principal considerations generally applicable to all sanctions determinations, we concur with the Hearing Panel's conclusion that McCartney's lack of disciplinary history should not mitigate the sanctions imposed. n12

n12 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 1); *see also Manoff, 55 S.E.C. at 1165-66 n.15* (holding that a respondent should not be rewarded because he may have previously acted appropriately as a registered person).

We credit McCartney's testimony that he recognized the seriousness of his behavior, was truly remorseful, and accepted the consequences of his actions. n13 He acknowledges that a serious sanction is warranted for his misconduct, is genuinely ashamed of his behavior, and avows that his lapses in judgment will not be repeated. *See Perkins, 54 S.E.C. at 994* (finding respondent's recognition that his submission of false expense reimbursement requests was inherently dishonest to be mitigating); [*15] *Leopold, 2012 FINRA Discip. LEXIS 2,* at *20-22 (holding that respondent's expression of remorse, recognition of the severity of his misbehavior, acceptance of responsibility, and vow that lapses in judgment will not be repeated support reducing the sanction from a bar); *Dep't of Enforcement v. Nouchi, Complaint No. E102004083705, 2009 FINRA Discip. LEXIS 8,* at *11 (FINRA NAC Aug. 7, 2009) (concluding that a sanction should fall within the lower end of the relevant Guidelines range where, among other factors, the respondent expressed "sincere remorse"). We also note that McCartney admitted his misconduct from the outset. McCartney left Hartford Life before the firm discovered his actions. When confronted by FINRA four years after the misconduct occurred, McCartney did not deny his actions and offered an explanation to the best of his memory as to what occurred. McCartney did not attempt to conceal his misconduct or cast blame on others. n14

n13 In response to being asked how he felt about what he did, McCartney stated: "I obviously know what I did was wrong. I'm not the type of individual that's deceitful, that lies. This was - I mean, I feel terrible. This keeps me up all the time . . . so I know what I did was wrong and I feel terrible about it, but it's not something I do on a regular basis. It's a one-time incident." The Hearing Panel was silent as to credibility determinations it may have made regarding McCartney's testimony. We credit the entirety of McCartney's testimony, which is consistent with our understanding of the events and not challenged by countervailing testimony or evidence. McCartney testified that he recognized the severity of his misbehavior, expressed sincere remorse, and accepted responsibility for his actions, and findings to the contrary are not supported by the record. *See Dep't of Enforcement v. Masceri*, Complaint No. C8A040079, 2006 NASD Discip. LEXIS 29, at *42 n.26 (NASD NAC Dec. 18, 2006) ("We note that, on de novo review, we owe 'no special deference' to [H]earing [P]anel 'inferences and conclusions that do not hinge upon findings of credibility.'") (citation omitted).

[*16]

n14 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 10).

We further find that McCartney testified consistently throughout the course of the underlying investigations and at the hearing. *See Dep't of Enforcement v. Cuozzo,* Complaint No. C9B050011, 2007 NASD Discip. LEXIS 12, at *35-36 (NASD NAC Feb. 27, 2007) (holding that factors that militate against finding respondent's misconduct to be egregious include that respondent did not attempt to conceal his false dating of documents from investigators; expressly acknowledged that his conduct may have harmed firm customers; accepted responsibility for his misconduct; and expressed remorse and offered sincere apologies for his actions throughout these proceedings); *Dep't of Enforcement v. Foran*, Complaint No. C8A990017, 2000 NASD Discip. LEXIS 8, at *22-23 (NASD NAC Sept. 1, 2000) (reducing Hearing Panel bar where, when confronted, respondent immediately admitted that he had converted firm funds, repaid the firm the amount he converted, and cooperated with investigators and regulators). n15

n15 McCartney's attorney argued that a sanction of less than a bar is appropriate. In support of this argument, he noted that the amount at issue ($ 500) was relatively minor for a company as large as Hartford Life, that McCartney did not act out of a desire for personal gain, but rather to be made whole for a donation that he made in furtherance of an important business relationship, and that there was no customer loss or harm sustained due to McCartney's misconduct. The Hearing Panel viewed these arguments as McCartney's effort to trivialize the significance of his misconduct. We disagree. We view these arguments as McCartney's efforts to place his misconduct into context for purposes of sanctions. We find that McCartney's testimony as a whole expressed an understanding of the significance of his rule violations and his willingness to accept responsibility for his actions. McCartney was entitled to defend himself, and we do not find that his efforts in this regard discount his whole-hearted admissions of misconduct and acceptance of responsibility.

[*17]

The Hearing Panel flatly rejected McCartney's contention that his violative conduct should be viewed as a single moment of very poor judgment. The Hearing Panel based its conclusions on what it found to be the premeditated and deliberate nature of his "ongoing deceit." The Hearing Panel was swayed by the following facts: McCartney possessed the Embassy Suites template several weeks before using it, he engaged in a multi-step process to facilitate his falsified reimbursement request, and he doctored his own check when Hartford Life requested proof of payment. While we agree that none of these factors mitigate the seriousness of McCartney's actions, we do not agree with the Hearing Panel that these facts disprove that his actions constitute one lapse in an otherwise unblemished career. First, McCartney worked in the securities industry for more than 10 years without incident (other than this matter). Second, McCartney did not engage in numerous acts of misconduct, a pattern of misconduct, or misconduct that extended over a lengthy period of time, and since 2006, he has not repeated his misconduct. n16 We find that McCartney's misconduct appears to be a one-time, isolated incident. [*18] *But see Dep't of Enforcement v. Saad, Complaint No. 2006006705601, 2009*

FINRA Discip. LEXIS 29, at *22-24 (FINRA NAC Oct. 6, 2009) (finding that misconduct was premeditated and ongoing where respondent covered up his misconduct for nearly a year, and he fabricated an elaborate lie regarding a two-day business trip that never occurred, lied to obtain reimbursement for an acquaintance's purchase of a cell phone, misled his office staff as to his whereabouts for two days, manufactured numerous false receipts, misled a state examiner and FINRA examiner, and hedged his answers in a FINRA on-the-record interview), *aff'd, 2010 SEC LEXIS 1761; Dep't of Enforcement v. Manoff,* Complaint No. C9A990007, 2001 NASD Discip. LEXIS 4, at *33-34 (NASD NAC Apr. 26, 2001) (finding misconduct egregious where respondent exploited a junior employee, actively concealed his misconduct during the firm's and regulator's investigations, provided conflicting accounts of events, and failed to show remorse or admit wrongdoing), *aff'd, 55 S.E.C. 1155 (2002).*

n16 *Id.* (Principal Considerations in Determining Sanctions, Nos. 8, 9).

[*19]

Based on the presence of both aggravating and mitigating factors, and our balancing of these factors, we have determined that McCartney's misconduct was serious, but not egregious, and warrants a sanction of less than a bar. We find that McCartney breached his duty as an associated person to act ethically and in a manner that comports with high standards of commercial honor and just and equitable principles of trade. We also find that McCartney failed to use sound judgment by knowingly falsifying a hotel invoice, verification letter, and check, and signing another registered representative's name to the letter. McCartney, however, appears to understand fully the magnitude of his failings and is genuinely remorseful. Based on the foregoing, we suspend McCartney for six months in all capacities and fine him $ 5,000. We find that these sanctions are tailored to address McCartney's misconduct. n17

n17 FINRA sanctions may be remedial, but must not be punitive. *McCarthy v. SEC, 406 F.3d 179, 188-89 (2d Cir. 2005); Guidelines,* at 2. A remedial sanction is designed to correct the harm done by respondent's wrongdoing and to protect the trading public from any future wrongdoing the respondent is likely to commit. *McCarthy, 406 F.3d at 188.* In addition to remediation, deterrence may also be relied upon as an additional rationale for the imposition of sanctions. *Id.*

[*20]

VI. Conclusion

We affirm the Hearing Panel's findings that McCartney violated NASD Rule 2110 by fabricating a hotel receipt and verification letter, falsifying a check, and submitting these documents to Hartford Life for a $ 500 reimbursement to which he was not entitled. We also find, based on the aggravating and mitigating factors, that McCartney's misconduct is serious. We suspend McCartney for six months in all capacities and fine him $ 5,000. We affirm the Hearing Panel's imposition of $ 1,599.65 in costs. n18

n18 Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

We have considered and reject without discussion all other arguments advanced by the parties.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President and Corporate Secretary

7

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Department of Enforcement, Complainant, vs. Lisa Ann Tomiko **Nouchi,** Respondent.

Complaint No. E102004083705

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

2009 FINRA Discip. LEXIS 8

August 7, 2009

TEXT:
[*1]

DECISION

Respondent improperly obtained contingent deferred sales charge waivers for customers selling Class B mutual fund shares by falsely claiming that those customers were disabled, in violation of NASD Rules 3110 and 2110. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Cynthia A. Kittle, Esq., and Soo H. Im, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Gregory J. Sherwin, Esq.

Decision

Pursuant to NASD Rule 9311, Lisa Ann Tomiko **Nouchi ("Nouchi")** appeals a February 7, 2008 Hearing Panel decision. n1 In that decision, the Hearing Panel found that **Nouchi** misrepresented that certain customers of hers were disabled in order to obtain waivers of contingent deferred sales charges ("CDSCs") for these customers. n2 The Hearing Panel found that **Nouchi's** misrepresentations caused her firm to maintain inaccurate books and records, in violation of NASD Rule 3110. The Hearing Panel also found that **Nouchi's** conduct failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of NASD Rule 2110. n3 The Hearing Panel imposed a 90-day suspension and [*2] $ 10,000 fine upon **Nouchi** for her violations. **Nouchi** does not challenge the Hearing Panel's findings that she violated Rules 3110 and 2110. n4 Our review therefore focuses on whether the sanctions the Hearing Panel imposed for these violations were appropriate.

n1 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 the NASD Rule 9000 Series, as it existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

n2 A CDSC is "a sales charge that mutual fund companies impose on investors who sell or redeem their Class B or C mutual fund shares within a certain [holding] period after purchase." *Dep't of Enforcement v. John C. Correro, Complaint No. E102004083702, 2008 FINRA Discip. LEXIS 29,* at *1 n.1 (FINRA NAC Aug. 12, 2008).

[*3]

n3 A violation of an SEC or FINRA rule also constitutes a violation of Rule 2110. *See Steven J. Gluckman, 54 S.E.C. 175, 185 (1999).*

n4 NASD Rule 0115 makes all FINRA rules, including Rules 3110 and 2110, applicable to both FINRA members and all persons associated with FINRA members.

After reviewing the record, we affirm both the findings and sanctions the Hearing Panel imposed.

I. Background

Nouchi first became registered with FINRA as a general securities representative in July 1992. During the time relevant to our decision, **Nouchi** was associated with UBS PaineWebber, Inc. ("UBS"). On May 10, 2004, UBS filed a Uniform Termination for Securities Industry Registration ("Form U5"), stating that **Nouchi** had been terminated for "miscoding mutual fund order tickets." **Nouchi** is currently associated with another FINRA member as a general securities representative.

II. Procedural History

On December 18, 2006, FINRA's Department of Enforcement ("Enforcement") filed a one-cause complaint against **Nouchi** alleging that she falsely represented that 15 customers [*4] were disabled in order to obtain CDSC waivers for these customers. The complaint further alleged that she caused her firm's books and records to contain false and misleading information as a result of her misrepresentations. On January 12, 2007, **Nouchi** filed an answer to the complaint and requested a hearing.

The Hearing Panel conducted a hearing on October 24, 2007. In a decision issued on February 7, 2008, the Hearing Panel found **Nouchi** liable for the violations alleged in the complaint. The Hearing Panel imposed a 90-day suspension and $ 10,000 fine for her misconduct. **Nouchi** appealed the Hearing Panel's decision, but only requested a review of the sanctions imposed.

III. Facts

The material facts in this case are undisputed. **Nouchi** admits that from March 14, 2003, through September 15, 2003, she obtained CDSC waivers for 15 non-disabled clients by falsely representing on UBS's electronic order entry system that the clients were disabled. These waivers were associated with 21 mutual fund redemptions and totaled approximately $ 4,986.72.

FINRA discovered **Nouchi's** misconduct following a 2003 examination of UBS. FINRA's 2003 examination showed that there were a significant number [*5] of requests for CDSC waivers by UBS brokers claiming to represent disabled clients. As a result, FINRA staff asked UBS to identify brokers who had placed five or more requests for disability waivers during a period from March through December 2003. UBS identified **Nouchi** and about 40 brokers in response to FINRA's request.

Nouchi participated in an on-the-record interview with FINRA investigators on April 6, 2005. At this interview, **Nouchi** confirmed that she improperly obtained disability waivers for non-disabled clients in some cases where either the client was upset with the fund's performance or the client needed money and was within 6-12 months of the holding period expiring. **Nouchi** testified that she learned about the practice of waiving CDSCs based on a client's disability from "talking around the water cooler" with other UBS employees. **Nouchi** further testified that she was "just thinking about the client" when she sought the CDSC waivers.

IV. Discussion

NASD Rule 2110 requires FINRA members, in conducting their business, to "observe high standards of commercial honor and just and equitable principles of trade." NASD Rule 3110(a) requires FINRA member firms to "make and

[*6] preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws," including Exchange Act Rule 17a-3. n5

n5 Exchange Act Rule 17a-3 requires member firms to make and keep "[a] memorandum of each brokerage order, and of any other instruction, given or received from the purchase or sale of securities." 17 C.F.R. §240.17a-3(a)(6)(i).

The Commission has found that entering inaccurate information in a member firm's books and records violates both Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade and Rule 3110's requirement to keep accurate books and records. *Fox & Co. Inv., Inc., Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822,* at *30-32 (Oct. 28, 2005).

Here, it is undisputed that **Nouchi** entered inaccurate information into UBS's books and records. **Nouchi** did this by submitting false information into UBS's electronic order system to obtain CDSC disability waivers for customers [*7] who were not eligible for such waivers. We previously have concluded that virtually identical conduct violates Rules 3110 and 2110. *See Correro, 2008 FINRA Discip. LEXIS 29,* at * 14-17 (finding that another UBS employee who entered false information into the firm's electronic order entry system in order to obtain CDSC disability waivers violated Rules 3110 and 2110). Moreover, **Nouchi** does not dispute that her actions violated Rules 3110 and 2110. Consequently, we affirm the Hearing Panel's findings that **Nouchi** violated these rules by falsely obtaining CDSC disability waivers for non-disabled customers.

V. Sanctions

The Hearing Panel fined **Nouchi** $ 10,000 and suspended her for 90 days in all capacities. We have considered the FINRA Sanction Guidelines ("Guidelines") n6 in determining the appropriate sanction for **Nouchi's** violations, as well as the potentially mitigating factors raised by **Nouchi** on appeal. We find that the sanctions imposed by the Hearing Panel for **Nouchi's** violations are appropriately remedial.

n6 *FINRA Sanction Guidelines* (2007), http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

[*8]

As an initial matter, we conclude that we should apply the Guidelines for falsification of records to determine sanctions for **Nouchi's** misconduct. Here, **Nouchi** did not accidentally enter false information into UBS's order entry system. Instead, she deliberately entered the information to allow her clients to avoid CDSC fees. We previously have found that the falsification of records Guidelines are applicable to such deliberate acts involving the false entry of disability waivers, and we apply them here as well. n7

n7 *Compare Correro, 2008 FINRA Discip. LEXIS 29,* at * 17 (applying falsification of records guidelines in case where respondent deliberately entered CDSC disability waivers into his firm's order entry system to benefit his customers), *with Carl Martin Trevisan, Complaint No. E9B2003026301, 2008 FINRA Discip. LEXIS 12,* at *31 n.14 (FINRA NAC Apr. 30, 2008) (concluding that where respondent's actions were negligent, and not intentional, it is more appropriate to determine sanctions using the Guidelines for recordkeeping violations rather than the Guidelines for falsification of records).

[*9]

For falsification of records, the Guidelines recommend the imposition of a fine of $ 5,000 to $ 100,000 and a suspension in any or all capacities for a period of up to two years when mitigation is present. n8 The Guidelines recommend a bar in egregious cases. n9 The Guidelines for falsification of records also provide that in determining the appro-

priate sanction, adjudicators should consider: (1) the nature of the documents forged or falsified, and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority. n10

n8 *Guidelines*, at 39 (2007).
n9 *Id.*
n10 *Id.*

We find the nature of the customer order information that **Nouchi** falsified to be an aggravating factor in this case. It is essential for registered representatives to provide their firms with accurate information. *See Charles E. Kautz, 52 S.E.C. 730, 734 (1996)* (stating that "[t]he entry of accurate information on official Firm records is a predicate to the NASD's regulatory [*10] oversight of its members [and] [i]t is critical that associated persons, as well as firms, comply with this basic requirement"). By miscoding order tickets, **Nouchi** deliberately ignored this fundamental responsibility. It also is aggravating that **Nouchi** had no good faith belief that her falsification of the order tickets was authorized by UBS. Indeed, **Nouchi** consistently has admitted throughout the proceedings that she knew her conduct was improper, and there is no evidence that she had any belief that she had authority to miscode the order tickets. In addition, we find it aggravating that **Nouchi's** misconduct lasted for a period of approximately six months. n11

n11 *Id.* at 6-7 (Principal Considerations in Determining Sanctions, No. 9).

There are, however, several factors that when considered together lead us to conclude that the sanctions for **Nouchi's** violations should fall within the lower range of the Guidelines. First, it appears that **Nouchi's** violations were motivated in part by her desire to assist her clients, [*11] some of whom needed money immediately, but could not redeem the mutual funds at issue without incurring a penalty. n12 Second, Second, **Nouchi** consistently accepted responsibility for her actions. n13 Third, we have considered the fact that **Nouchi's** 21 violative transactions generated less than $ 5,000 in CDSC waivers. n14 Finally, the Hearing Panel found **Nouchi's** expression of sincere remorse to be mitigating, and we do not disturb this finding. n15

n12 *See Correro, 2008 FINRA Discip. LEXIS 29,* at *18 (finding it mitigating that respondent entered false disability waivers to benefit customers, where at least two of the customers had recently lost their employment).
n13 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2).
n14 *Id* at 7. (Principal Considerations in Determining Sanctions, No. 18).
n15 The Hearing Panel evaluated **Nouchi's** testimony and found that her expressions of remorse were credible. We find nothing in the record that would lead us to overturn the Hearing Panel's finding. *See Dane S. Faber, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277,* at *17-18 (Feb. 10, 2004).

[*12]

In its discussion of sanctions, the Hearing Panel also considered the fact that **Nouchi** fully cooperated with FINRA's investigation. We note, however, that the Guidelines recognize as generally mitigating a respondent's *substantial assistance* to FINRA in its investigation of misconduct. *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12) (emphasis added). In this case, **Nouchi** provided forthcoming testimony as she was obligated to do under FINRA's rules. We do not consider this alone to be a mitigating factor under the Guidelines. *See Philippe N. Keyes, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631,* at *23 (Nov. 8, 2006) (emphasizing that a person registered with FINRA agrees to abide by its rules, which are "unequivocal with respect to the obligation to cooperate").

Nouchi argues that it is mitigating that she did not benefit personally from the violations. n16 **Nouchi's** argument is misplaced. The Guidelines direct adjudicators to consider "[w]hether the respondent's misconduct resulted in the *potential* . . . for monetary gain" in determining sanctions. n17 **Nouchi's** claim that she did not realize any profit from [*13] her misconduct is therefore irrelevant, and we previously have rejected such a claim as a mitigating factor. *See Mark F.*

Mizenko, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NASD NAC Dec. 21, 2004) (overturning Hearing Panel's finding that respondent's failure to benefit personally from misconduct was a mitigating factor). n18

n16 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17).
n17 *Id.* (emphasis added).
n18 **Nouchi** also claims that we should consider it mitigating that she was terminated by UBS for her misconduct. The sanctions we impose, however, are independent of whether a member firm decides to fire an employee. *See Dep't of Enforcement v. Prout*, Complaint No. C01990014, 2000 NASD Discip. LEXIS 18, at *11 (NASD NAC Dec. 18, 2000) (stating that "[a]s a general matter, we give no weight to the fact that a respondent was terminated by a firm when determining the appropriate sanction in a disciplinary case").

Nouchi also asserts that in imposing [*14] a 90-day suspension, the Hearing Panel failed to consider the harm that such a suspension will do to her elderly customer base. **Nouchi's** assertion has no merit. The Commission has previously rejected similar arguments by respondents who cite customer hardship as a reason to find that a sanction was excessive. *See Hans N. Beerbaum, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971,* at *20 (May 9, 2007) (rejecting respondent's argument that bar imposed was excessive where respondent claimed FINRA did not consider the impact of the bar on his clients). We therefore reject **Nouchi's** claim that the 90-day suspension is excessive.

We find that **Nouchi's** misconduct was serious and merits a significant sanction. We therefore impose a sanction for her misconduct consisting of a 90-day suspension and $ 10,000 fine. n19 We note that the Hearing Panel imposed an identical sanction after concluding that "a fine that is substantially larger than the amount of [CDSC waivers would] offset a long suspension that it might otherwise impose." In our sanctions determination, however, we explicitly reject this reasoning and any inference from the Hearing Panel decision that a [*15] respondent should be able to pay a fine: (1) as a substitute for a suspension, or (2) to reduce the length of a suspension that would otherwise be imposed for a violation of FINRA rules.

n19 We do not award any restitution here because FINRA's policy is to provide restitution to injured customers whenever possible, not to injured member firms. *See e.g., Correro, 2008 FINRA Discip. LEXIS 29,* at *22 n.10.

VI. Conclusion

We find that **Nouchi** violated Rules 3110 and 2110 because she obtained CDSC waivers by falsely claiming that 15 of her customers were disabled. n20 Accordingly, we impose a sanction consisting of a 90-day suspension and a $ 10,000 fine. n21 We also affirm the Hearing Panel's order directing **Nouchi** to pay hearing costs in the amount of $ 1,622.25, and we impose $ 1,557.80 in appeal costs.

n20 We have considered and reject without discussion all other arguments advanced by the parties.
[*16]

n21 Pursuant to FINRA Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President and Corporate Secretary

8

ALAN H. GOLD, Petitioner, v. SECURITIES AND EXCHANGE COMMISSION, Respondent.

No. 94-1915

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

48 F.3d 987; *1995 U.S. App. LEXIS 2888*; *Fed. Sec. L. Rep. (CCH) P98,614*

October 6, 1994, Argued
February 15, 1995, Decided

SUBSEQUENT HISTORY: [**1] As Amended March 2, 1995.

PRIOR HISTORY: Petition for Review of an Order of the Securities and Exchange Commission. No. 3-7982.

COUNSEL: For ALAN H. GOLD, Petitioner: Dana A. Parisi, Neal H. Levin, LEVIN & ASSOCIATES, Chicago, IL.

For SECURITIES AND EXCHANGE COMMISSION, Respondent: Eric Summergrad, Brian F. McNally, Jonathan G. Katz, Angel Lang, SECURITIES & EXCHANGE COMMISSION, Washington, DC. Simon Swidler, NEW YORK STOCK EXCHANGE, INCORPORATED, New York, NY.

JUDGES: Before COFFEY, MANION, and KANNE, Circuit Judges.

OPINION BY: COFFEY

OPINION

[*988] COFFEY, *Circuit Judge*. Petitioner Alan H. Gold seeks judicial review of an order of the Securities and Exchange Commission ("SEC") affirming disciplinary action taken against him by the New York Stock Exchange ("NYSE"). The issue raised in this appeal is whether Gold, who was formerly associated with a member firm of the NYSE, [1] had a *Fifth Amendment* due process right to actual notice, rather than constructive notice, that the NYSE was investigating his trading practices and thus retaining jurisdiction over him following his termination from the member firm. We affirm.

1 The NYSE designates as "member firms" those firms listed on its membership rolls which agree to participate in its regulatory procedures. All other firms are designated as "non-member firms."

I. FACTUAL BACKGROUND

From August 1986 through June 1988, Gold was employed as a registered associate with Prudential-Bache [**2] Securities, Inc., a member firm of the NYSE. In June 1988, Prudential-Bache discharged Gold for suspected violations of NYSE rules. In August 1988, Prudential-Bache filed notice of Gold's termination with the Central Registration Depository ("CRD"), [2] the repository of current registration data used by the NYSE and its member firms. [3] The notice of termination listed two customer complaints as the reason for Gold's discharge. Specifically, in January 1988, Gold's customers Goeffrey and Katherine Pinkus filed a demand for arbitration with the American Arbitration Association against Gold alleging unauthorized trading, failure to follow orders, and mishandling of their account. In July 1988, Gold's customer Susan Kirschner sent a letter of complaint to Prudential-Bache alleging improper conduct and breach of fiduciary duty by Gold. From June 1988 through August 1988, Gold was employed by another NYSE member firm, Blunt Ellis & Loewi. The NYSE, through the CRD, received notice of Gold's termination from Blunt Ellis & Loewi in September 1988. After leaving Blunt Ellis & [*989] Loewi, Gold was not associated with any NYSE member firm.

2 The CRD is a national registration system operated by the National Association of Securities Dealers, Inc., under an agreement with the North American Securities Administrators Asso-

ciation. The CRD is the main repository for current registrant data, including the names and addresses of current and former member firm employees. Receipt of updated information by the CRD is deemed receipt by the NYSE.

[**3]

3 Each member firm of the NYSE must file with the CRD a Form U-5, Uniform Termination Notice for Securities Industry Registration, for each employee who terminates employment, either voluntarily or involuntarily. Any person wishing to register as an associate of a NYSE member firm must file a Form U-4, Uniform Application for Securities Industry Registration or Transfer.

Shortly thereafter, the NYSE initiated an investigation into Gold's trading activities during his employment with Prudential-Bache from August 1986 through June 1988. In February 1989, the NYSE obtained Gold's last known address from the CRD as being located on Lake Shore Drive in Chicago, Illinois, and forwarded a letter to Gold by certified mail advising him that he was the subject of a NYSE investigation. The letter stated: This letter is to give you notice under Exchange Rule 477 (copy enclosed), that the Exchange is investigating the possibility that while you were employed by [Prudential-Bache] you may have engaged in unsuitable, unauthorized and excessive options trading and made misrepresentations in connection with the [**4] account of [redacted] and engaged in unauthorized trading and failed to follow the customer's orders in connection with the account of [redacted] The letter directed Gold to submit a detailed written explanation of his trading in these two accounts to the NYSE's Division of Enforcement. The NYSE sent a duplicate copy of this letter to Gold at the same address via first class mail. In early March 1989, both letters were returned to the NYSE undelivered and stamped "moved, left no address" and "unable to forward." The NYSE inquired at the Chicago Post Office whether Gold had filed a change of address form. The Post Office confirmed that Gold had moved from the Lake Shore Drive address and had left no forwarding address. Upon receiving this notice from the Post Office, the NYSE suspended its investigation. In April 1990, the NYSE again asked the CRD for Gold's current address, and was advised by the CRD that it had recently received a change of address notice from Gold. The CRD's updated records listed Gold's current address in Skokie, Illinois and noted that he was again employed in the securities industry, this time with a NYSE nonmember firm. On May 1, 1990, [**5] the NYSE notified Gold by letter at the Skokie, Illinois address that it was resuming its investigation into his trading activities during the period of his employment with Prudential-Bache. Attached to this letter was a copy of the February 1989 letter notifying Gold of the investigation.

In August 1991, after completing its investigation, the NYSE's Division of Enforcement formally charged Gold with violating five NYSE rules. Gold did not contest two of the charges against him, but denied the remaining three charges and challenged the jurisdiction of the NYSE, asserting that its Division of Enforcement had failed to serve adequate and timely notice on Gold under NYSE Rule 477, which required the service of written notice of the NYSE's investigation within one year following the NYSE's receipt of written notice of Gold's termination. [4] A unanimous NYSE Hearing Panel rejected Gold's jurisdictional argument and found him responsible for the rules violations he admitted: (1) effecting an option transaction in a customer's account before that account was approved for options trading, in violation of [*990] NYSE Rule 721(a), and (2) agreeing to share losses in a customer's account, in violation [**6] of NYSE Rule 352(c). [5] The panel censured Gold and imposed a one-month suspension of his trading privileges. [6]

4 Rule 477 provides: If, prior to termination, or during the period of one year immediately following the receipt by the Exchange of written notice of the termination, of a person's [association with a member firm], the Exchange serves (as provided in paragraph (d) of Rule 476) written notice on such person that it is making inquiry into, or serves a Charge Memorandum on such person with respect to, any matter or matters occurring prior to the termination of such person's [association with a member firm] . . . the Exchange may thereafter require such person to comply with any requests of the Exchange to appear, testify, submit books, records, papers, or tangible objects, respond to written requests and attend hearings . . . . Service must be provided in accordance with Rule 476, which specifically permits constructive notice rather than actual notice: Service [of the notice] shall be deemed effective by personal service . . . or by leaving same either at the respondent's last known office address during business hours or respondent's last place of residence as reflected in Exchange records, or upon mailing same to the respondent at the aforesaid office address or place of residence. Rule 477 permits the NYSE to retain jurisdiction over a former employee of a member firm until the NYSE completes its investigation into the matters identified in the notice or Charge Memorandum, determines the penalty, if any, to be imposed, and carries out any penalty imposed.

[**7]

5 The Hearing Panel exonerated Gold of the remaining three charges, which included (1) recommending options transactions to a customer without a reasonable basis for believing that customer could evaluate or bear the risks of the transaction; (2) engaging in conduct inconsistent with just and equitable principles of trade by, without understanding an options strategy, recommending that strategy to a customer and causing trades to be executed based on that strategy; and (3) failing to comply with NYSE requests to return attested transcripts.

6 Gold was barred from "membership, allied membership, approved person status and from employment or association in any capacity with any member or member organization" for a period of one month. Disciplinary actions taken by the NYSE have far-reaching consequences. Notice of a person's censure and any membership suspension is released to the news media, distributed to member firms, and listed by the CRD. Any disciplinary sanction becomes part of a person's permanent record. A sanctioned individual must report the NYSE's action to all future employers within the securities industry. Members of the public, including prospective customers, have access to information on the NYSE's disciplinary actions through the Exchange itself, the CRD, state regulatory agencies, as well as a toll-free telephone number operated by the National Association of Securities Dealers, Inc.

[**8] Gold appealed the panel's order to the NYSE's Board of Directors, which affirmed the panel's decision without comment. Gold subsequently appealed to the SEC, which, after conducting a *de novo* review, upheld the NYSE's findings and disciplinary action. The SEC concluded that the NYSE's mailing of notice of its investigation to Gold's last known residence address within one year of his termination from a NYSE member firm was sufficient to retain jurisdiction over him.

II. DISCUSSION

The SEC is the federal agency charged with the regulation of the securities industry, and, because the SEC lacks the resources to police the entire industry, it relies on industry members to promote compliance with the securities laws and regulations and to pursue enforcement actions. *Schellenbach v. Securities and Exchange Commission, 989 F.2d 907, 909 (7th Cir. 1993)*; *Mister Discount Stockbrokers, Inc. v. Securities and Exchange Commission, 768 F.2d 875, 876 (7th Cir. 1985)*. The NYSE is a national securities exchange registered with the SEC under Section 6 of the Securities and Exchange Act of 1934, *15 U.S.C. § 78f*. [**9] As a registered exchange, the NYSE is responsible for enforcing compliance with the federal securities laws, including the associated rules and regulations, as well as its own rules. *15 U.S.C. §§ 78f(b)(1), 78s(g)*. The NYSE must "provide a fair procedure for the disciplining of members and persons associated with members . . . ." *15 U.S.C. § 78f(b)(7)*. The NYSE's disciplinary process empowers the Division of Enforcement to file charges of NYSE rules violations, conduct hearings, make findings, and impose penalties. The NYSE's Board of Directors reviews orders of the Division of Enforcement and any final disciplinary sanction imposed by the Board of Directors is subject to de novo review by the § *15 U.S.C. §§ 78s(d)(2), 78s(e)(1)*. This court does not directly review the actions of the NYSE since the NYSE's disciplinary orders are subject to a full and independent review by the SEC as to the facts as well as the law. *Shultz v. Securities and Exchange Commission, 614 F.2d 561, 568 (7th Cir. 1980)*. Accordingly, our consideration of alleged errors in [**10] NYSE proceedings is limited; we will reverse an SEC order because of errors committed by the NYSE " 'only if and to the extent that [the NYSE's errors] infected the Commission's action by leading to error on its part.' " *Id.* (quoting *R.H. Johnson & Co. v. Securities and Exchange Commission, 198 F.2d 690, 695* (2d Cir.), *cert. denied, 344 U.S. 855, 97 L. Ed. 664, 73 S. Ct. 94 (1952))*. Our review of the proceedings before the SEC is not so limited; this court may overturn an SEC sanctions order if it is unwarranted in law or without justification in fact. *Nowicki v. United States, 536 F.2d 1171, 1178 (7th Cir. 1976)*; *Hateley v. Securities and Exchange Commission, 8 F.3d 653, 655 (9th Cir. 1993)*.

Gold argues that he had a *Fifth Amendment* due process right to actual notice, rather [*991] than constructive notice, that the NYSE was exercising jurisdiction over him to investigate his conduct while employed by a member firm. Gold concedes that the NYSE followed its own rules in providing notice of its investigation, but he asserts that the constructive notice allowed by Rule 477 [7] is constitutionally inadequate because [**11] it authorizes the NYSE to exercise jurisdiction over a former employee of a member firm, not only to investigate unlawful conduct, but to adjudicate legal rights. We disagree.

7 Rule 477 authorizes the NYSE to retain jurisdiction over a member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization by mailing notice to that person's last known office or residence address.

As a preliminary matter, we are faced with the question of whether the NYSE, a private organization regulated by the federal government, is a governmental actor

whose jurisdictional rules and enforcement actions are subject to due process analysis. Gold's due process argument presumes that the NYSE, when it acts to enforce its own rules and regulations as well as the federal securities laws, should be regarded as an agent of the SEC bound by constitutional due process requirements. The SEC avoids this question by arguing that no due process violation occurred in this case.

[**12] This court has expressed doubt about the proposition that the comprehensive regulation of securities exchanges by the federal government would turn those exchanges into government actors. In *Bernstein v. Lind-Waldock & Co., 738 F.2d 179 (7th Cir. 1984)*, we said: The argument for treating a securities or commodity exchange as an arm of the federal government is that federal law imposes on the exchange a duty of policing its members that makes the exchange in effect a law-enforcement agent of the government. . . . But as Judge Friendly pointed out in [*United States v. Solomon, 509 F.2d 863, 869 (2d Cir. 1975)*], the agency analogy is upside down. The exchange is the principal rather than the agent; the purpose of the federal law is to strengthen the power and responsibility of the exchange in performing a policing function that preexisted federal regulation.

738 F.2d at 186 (dicta). Heavy governmental regulation, by itself, does not make a private organization into a government actor, for "that would bring under the *Fifth Amendment* much of the private sector, ranging from hospitals to railroads." *Id.*

Gold's assertion that the NYSE's disciplinary [**13] actions against him were state actions subject to due process scrutiny was largely undeveloped in both Gold's written briefs and oral argument. As noted above, the SEC limited its argument to the alleged due process violation and did not discuss the government action question at all. Because neither party to this dispute presented this question squarely to the court, we consider it waived on appeal. *See Luddington v. Indiana Bell Telephone Co., 966 F.2d 225, 230 (7th Cir. 1992), cert. denied, 128 L. Ed. 2d 362, 114 S. Ct. 1641 (1994)* (declining to consider undeveloped issues on appeal). Accordingly, we confine our analysis to a determination of whether the SEC provided "a fair procedure" for disciplining Gold pursuant to *15 U.S.C. § 78f(b)(7)*. This statutory fairness requirement is closely related to the fairness requirements derived from the *Fifth Amendment's Due Process Clause*. We have therefore assessed the fairness of the NYSE's jurisdictional rules and enforcement action against Gold by relying on traditional due process principles.

Due process does not require notice, either actual or constructive, of [**14] an administrative investigation into possible violations of the securities laws. [8] *See Securities and Exchange Commission v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984)* ("the Due Process Clause . . . is [not] offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him. The Due Process Clause is not [*992] implicated under such circumstances because an administrative investigation adjudicates no legal rights . . . ."). When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Hannah v. Larche, 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960). [**15] The Supreme Court has noted with approval SEC rules which provide that "parties to adjudicative proceedings shall be given detailed notice of the matters to be determined," but make such notice "specifically inapplicable to investigations" in order to "prevent the sterilization of investigations by burdening them with trial-like procedures." *Id. at 446-47*. Thus, we are of the opinion that due process does not require the NYSE to provide a former employee (as defined in footnote 7) of a member firm with actual notice of its investigation into that former employee's conduct.

8 We note that Gold has not challenged the NYSE's authority to *investigate* his activities by providing constructive notice; his challenge focuses on the NYSE's authority to *adjudicate* his legal rights.

Our inquiry does not end here. The NYSE's constructive notice to Gold did not simply serve to notify him of the investigation. The constructive notice allowed the NYSE to retain jurisdiction [**16] over Gold to investigate, and later adjudicate, his alleged violations of NYSE rules. Of particular significance is the fact that the NYSE did not *establish* jurisdiction over Gold without his consent. By registering as an associate with a member firm of the NYSE, Gold consented to submit to the jurisdiction of the NYSE and agreed to abide by all its rules and regulations. Gold signed a Form U-4, Uniform Application for Securities Industry Registration or Transfer, which stated:

I hereby apply for registration with the organizations and states indicated in Item 10 as may be amended from time to time and, in consideration of such organizations and states reserving and considering my application, *I submit myself to the jurisdiction of such states and or-*

ganizations and hereby certify that I agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and *I agree to comply with, be subject to and abide by all such requirements and all rulings, orders, directives* [**17] *and decisions of, and penalties, prohibitions and limitations imposed by such states and organizations*, subject to right of appeal as provided by law; and I agree that any decision of such states and organizations as to the results of any examination(s) that I may be required to pass will be accepted by me as final. (Emphasis added.) Gold never contested the validity of this agreement.

Registered brokers and associates are presumed as a matter of law to have knowledge of the published rules of the securities exchange. *Carter v. Securities and Exchange Commission, 726 F.2d 472, 474 (9th Cir. 1984) (per curiam); see also Sloan v. New York Stock Exchange, Inc., 489 F.2d 1, 3 (2d Cir. 1973)* ("when appellants became members of the [NYSE] they consented, quite knowingly and intelligently to [its] disciplinary procedures . . . ."). NYSE Rule 476 authorizes the NYSE to discipline its member firms and their employees. Rule 477 permits the NYSE to retain jurisdiction over an individual who is no longer associated with a member firm. The NYSE may retain jurisdiction over a former member firm employee only if, within one year after the NYSE [**18] receives notice of the employee's termination of employment with the member firm for any reason, the NYSE commences an investigation and serves notice, either actual or constructive, on that former employee that it is investigating matters which occurred while he or she was associated with a member of the NYSE. As explained in the SEC's opinion affirming the disciplinary action taken against Gold by the NYSE, "this mechanism [constructive notice] enables the NYSE to prevent the employee from escaping the [*993] consequences of his misconduct by leaving the member firm."

Gold acknowledged the NYSE's authority to retain its jurisdiction over him beyond his employment with a member firm (*see supra* n.4) when he registered as an associate with a member firm and voluntarily subjected himself to the NYSE's rules. As a registered associate, Gold was presumed as a matter of law to have knowledge of all of the NYSE's rules, including the rule that it could retain jurisdiction over him by mailing a letter to his last known business or residence address within one year of his termination from a member firm. The CRD's records reflect that Gold was no longer employed by a NYSE member firm as of September [**19] 1988. The NYSE commenced its investigation of Gold's trading practices in late 1988. The NYSE mailed notice of its investigation of Gold's trading activities to his last known residence address in February 1989, within a year of his termination from a member firm. The NYSE suspended its investigation of Gold until it was able to locate him in April 1990, when the NYSE received his updated address from the CRD. Gold received actual notice of the NYSE's resumed investigation in May 1990, and he received actual notice of the charges against him in August 1991, when the NYSE's Division of Enforcement served him with a Charge Memorandum. He participated in a full evidentiary hearing before a NYSE Hearing Panel at which he was represented by counsel. The Hearing Panel dismissed the three charges Gold denied. *See supra* n.5.

We hold that the NYSE's retention of jurisdiction to investigate and later adjudicate Gold's alleged rules violations through constructive notice was proper and constitutionally adequate. " 'Traditional notions of fair play and substantial justice' " are not offended where an individual has consented to an administrative agency's exercise of continued jurisdiction through [**20] the service of constructive notice. *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* (quoting *Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940))*. Due process requires no more.

III. CONCLUSION

The SEC's order affirming disciplinary action taken against Gold by the NYSE is

AFFIRMED.

9

In the Matter of the Application of KENT M. HOUSTON, Carlsbad, California 92009;
For Review of Disciplinary Action Taken by FINRA

Admin. Proc. File No. 3-14175r

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934 Release No. 71589

2014 SEC LEXIS 614

February 20, 2014

ACTION:
[*1] ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

COUNSEL: Kent M. Houston, pro se.

Alan Lawhead, Carla Carloni, and Megan Rauch for FINRA.

TEXT: OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Sanctions Imposed by Registered Securities Association on Remand

On remand, registered securities association modified the sanctions imposed on a former general securities representative of a member firm for violating association rules for (i) engaging in outside business activities without providing his member firm with written notice; (ii) failing to appear for an on-the-record interview with association staff; and (iii) engaging in conduct inconsistent with just and equitable principals of trade. *Held*, association's modification of sanctions *sustained.*

Appeal filed: March 22, 2013

Last brief received: June 26, 2013

I.

Kent M. Houston, formerly a general securities representative with First Wall Street Corp. ("First Wall Street" or "the Firm"), a former NASD member firm, has appealed a decision by FINRA's National Adjudicatory Council ("NAC") reconsidering and modifying sanctions. n1 On December 20, 2011, n2 we sustained the [*2] NAC's findings of fact and findings that Houston violated (i) NASD Rules 3030 and 2110 by engaging in outside business activity without providing written notice to his member firm, and (ii) NASD Rules 8210 and 2110 by failing to appear for an on-the-record interview ("OTR") with NASD staff. n3 But we also vacated the sanction imposed and remanded the proceeding to the NAC for a sanctions redetermination. n4

n1 On July 26, 2007, the Commission approved a proposed rule change filed by the National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA") in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *Order Granting Proposed Rule Change Relating to Restated Certificate of Incorporation of NASD*, Exchange Act Release No. 56146, *2007 SEC LEXIS*

1641 (July 26, 2007). Because this disciplinary proceeding was instituted before that date, we continue to use the designation NASD.

[*3]

n2 *Kent M. Houston*, Exchange Act Release No. 66014, *2011 SEC LEXIS 4491* (Dec. 20, 2011) (the "December 20, 2011 Opinion").

n3 Following the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. 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 the consolidated rules took effect, NASD rules apply. *See John B. Busacca, III*, Exchange Act Release No. 63312, *2010 SEC LEXIS 3787,* at *2 n.2 (Nov. 12, 2010), *petition denied*, *449 F. App'x 886 (11th Cir. 2011).*

n4 *Houston, 2011 SEC LEXIS 4491,* at *27.

We found that the sanction imposed--a bar for violating Rules 8210 and 2110 n5--was based on an NAC determination that Houston's failure to appear for the OTR constituted a complete [*4] failure to respond to NASD's Rule 8210 request. This determination, we found, did not take into account that Houston had responded, apparently to NASD's satisfaction, to two other Rule 8210 requests, and at least partially to a third Rule 8210 request. n6 We stated that "because Houston did respond in some manner to NASD's request, any sanction imposed, whether a bar or otherwise, should analyze factors other than the presumptive unfitness indicated by a failure to respond in any manner." n7

n5 In light of the bar imposed for violating Rules 8210 and 2110, the NAC assessed but initially declined to impose sanctions for Houston's failure to disclose his outside business activity in violation of Rules 3030 and 2110.

n6 *Houston, 2011 SEC LEXIS 4491,* at *24-25. All of the Rule 8210 requests at issue "were part of the same investigation by NASD." *Id.* at *25.

n7 *Id.*

On remand, the NAC suspended Houston for two years and fined him $ 25,000 for his failure to provide OTR testimony [*5] in violation of Rules 8210 and 2110. The NAC also imposed a consecutive one-year suspension and an additional $ 50,000 fine for Houston's failure to provide notice to the Firm of his outside business activity in violation of Rules 3030 and 2110. We base our findings on an independent review of the record, and sustain the sanctions imposed.

II.

A. Findings of fact and violations of NASD Rules.

We presume familiarity with our prior findings. n8 As noted, we sustained the NAC's findings of fact and findings that Houston violated (i) Rules 3030 and 2110 by engaging in outside business activity without providing the required notice to First Wall Street, n9 and (ii) Rules 8210 and 2110 by refusing to attend the OTR. n10

n8 *Id.*

n9 NASD Rule 3030 prohibits a person associated with a member from being employed by, or accepting compensation from, "any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member."

NASD Rule 2110 requires adherence to "high standards of commercial honor and just and equitable principles of trade." Rule 2110 is violated by any conduct that violates another NASD rule. *See, e.g., Wanda P. Sears*, Exchange Act Release No. 58075, *2008 SEC LEXIS 1521,* at *19 n.28 (July 1, 2008).

[*6]

n10 NASD Rule 8210(a)(1) provides that NASD may require a person associated with a member "to provide information orally, in writing, or electronically . . . and to testify at a location specified by NASD staff."

To summarize those findings, Houston failed to give First Wall Street prompt written notice that he was appointed on April 24, 2001, to serve with his great aunt, Veta M. Boyd, as co-trustee of a trust established in 1971 for the benefit of Mrs. Boyd and her late husband. n11 Houston also failed to give First Wall Street prompt written notice when he was appointed as the trust's sole trustee in June 2005. These failures were in contravention not only of Rule 3030 but also First Wall Street's periodic requests from 2002 through 2005 that Houston disclose any outside business activities.

n11 Boyd's husband, Walter L. Boyd, died in 1986. The trust was established in 1971 to pay the trust's net income to the Boyds on a monthly basis.

[*7]

Indeed, Houston did not disclose his trustee activities when he signed First Wall Street's "Independent Contractor Agreement" in 2002 and 2003 despite the fact that the agreement (i) stated that Houston was to notify the Firm of such activities, and (ii) appended an "Outside Business Activity Notification Form." n12 Houston then misrepresented on another First Wall Street form in 2004 that he had not "conducted any outside business activities during the past year." n13

n12 The agreement expressly mentioned acting as a trustee as an example of an outside business activity. Houston did not complete the appended form in 2002 or 2003.

n13 This form was entitled "Outside Business Activities Statement," and was separate from the form appended to the Firm's "Independent Contractor Agreement."

Houston continued with his deception in 2005. He did not disclose his trustee activities after receiving a Firm memorandum on August 29, 2005, stating that registered representatives and staff should contact the compliance [*8] 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 firm in the form of commissions and is not included on your form U4 as an approved outside business activity." n14 Houston then again misrepresented on another First Wall Street form in October 2005 that he had not "accepted any appointment as trustee . . . over any client including my immediate family during the past year." n15

n14 Houston misrepresented on his Forms U4 (Uniform Application for Securities Industry Registration or Transfer) dated July 29, 2005, and October 20, 2005, that he was not engaged in an outside business activity.

n15 This form was attached to a second Firm memorandum dated September 8, 2005 reminding registered representatives that they are required to request approval for acting as a trustee.

An NASD examination in December 2005 led to the discovery of Houston's outside business activity. During that [*9] examination, First Wall Street's chief compliance officer learned that Houston had check-writing authority on an account that Houston had opened for the trust at the Firm in 2001 (the "Boyd Trust Account"). n16 The Firm subsequently learned that Houston had become sole trustee of the Boyd trust and that Houston had written numerous checks on the Boyd Trust Account, some of which were payable to Houston's home equity line of credit account at Countrywide Bank. The Firm opened a formal investigation into Houston's trustee activities, and terminated Houston after he failed to cooperate. n17

n16 The account application listed Houston and Mrs. Boyd as co-successor trustees and Houston as the account representative. Houston was able to write checks on the account without Mrs. Boyd's signature.

n17 As discussed in detail in the December 20, 2011 Opinion, Houston provided some but not all of the information and documents requested by the Firm before refusing to cooperate. And some of the information he provided was false.

[*10]

It turned out that Houston had written checks on the Boyd Trust Account to pay himself over $ 355,000 in compensation from 2003 through January 2006. n18 Houston paid himself $ 41,600 in 2003, $ 167,000 in 2004, $ 119,000 in 2005, and $ 27,500 in January 2006. n19

n18 The trust agreement authorized compensation for the trustee. Some of the checks were made payable to Houston and others to Houston's Countrywide account.

n19 Mrs. Boyd also wrote approximately $ 99,000 worth of checks to Houston from the Boyd Trust Account in 2001 and 2002. Houston also received commissions for transactions in the Boyd Trust Account.

After his termination, NASD began investigating Houston's possible misconduct at First Wall Street. NASD sent two Rule 8210 requests to Houston in June and August 2006, which Houston appears to have complied with to NASD's satisfaction. NASD sent a third Rule 8210 request to Houston in September 2006, to which Houston only partially responded. To obtain a complete response, NASD sent follow-up [*11] letters to Houston in October and November 2006 repeating the request from September. Houston again failed to provide a complete response.

On September 7, 2007, NASD sent Houston a letter requesting that he appear for an OTR. After obtaining NASD's agreement to twice reschedule the OTR, Houston sent NASD a letter stating that he had "nothing further to add and [would] not be attending the (OTR)." The FINRA disciplinary action followed.

III.

Pursuant to Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find, "having due regard for the public interest and the protection of investors," that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition. n20 As part of this review, we must consider any aggravating or mitigating factors n21 and whether the sanctions imposed by FINRA are remedial in nature and not punitive. n22

n20 *15 U.S.C. § 78s(e)(2)*. Houston does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

n21 *See Saad v. SEC, 718 F.3d 904, 906 (D.C. Cir. 2013); PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007).*

[*12]

n22 *See Paz Sec., 494 F.3d at 1065* ("The purpose of the order [must be] remedial, not penal.") (quoting *Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940)).*

Although the Commission is not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). n23 We acknowledge that the Sanction Guidelines "do not prescribe fixed sanctions for particular violations" and "are not intended to be absolute." n24

n23 *John Joseph Plunkett*, Exchange Act Release No. 69766, *2013 SEC LEXIS 1699,* at *42 (June 14, 2013). FINRA revised its Sanction Guidelines in 2011, but the NAC on remand applied the prior version of the Sanction Guidelines (cited hereinafter as the "2007 Sanction Guidelines"). The NAC noted that, in the usual proceeding, it applies the revised version of the Sanction Guidelines, which "are effective as of the date of publication, and apply to all disciplinary matters, including pending matters." FINRA Sanction Guidelines at 8 (2011). But the NAC applied the 2007 Sanction Guidelines on remand because it was "in effect at the time [it] issued its initial decision in December 2010 (and during Houston's appeal to the Commission)."

[*13]

n24 2007 Sanction Guidelines at 1.

A. The sanctions imposed for violating Rules 8210 and 2110 were neither excessive nor oppressive.

The Sanction Guidelines state that a bar is standard "[i]f the individual did not respond [to Rule 8210 requests] in any manner." n25 But where mitigation exists, the Sanction Guidelines provide that an adjudicator should "consider suspending the individual in any or all capacities for up to two years." n26 The Sanction Guidelines also recommend a fine of $ 10,000 to $ 25,000 for "[f]ailure to [r]espond [c]ompletely." n27

n25 *Id.* at 35. The 2011 revisions to the Sanction Guidelines provide that a bar is standard where an individual has provided a partial but incomplete response to a Rule 8210 request "unless the person can demonstrate that the information provided substantially complied with all aspects of the request." FINRA Sanction Guidelines at 33 (2011).

n26 2007 Sanction Guidelines at 35. The Sanction Guidelines include a list of non-exhaustive aggravating and mitigating factors. *See id.* at 6-7.

[*14]

n27 *See id.* at 35. A higher range of $ 25,000 to $ 50,000 is recommended for "[f]ailure to [r]espond" in any manner. *Id.* And a lower range of $ 2,500 to $ 25,000 is recommended for "[f]ailure to [r]espond [i]n a [t]imely [m]anner." *Id.*

The Sanction Guidelines also identify two "principal considerations" for determining sanctions where an individual has failed to respond to Rule 8210 requests. They are (i) the "[n]ature of the information requested"; and (ii) "[w]hether the requested information has been provided and, if so, . . . the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response." n28 The NAC's decision to suspend Houston for two years and fine him $ 25,000 for his failure to provide OTR testimony in violation of Rules 8210 and 2110 is supported by application of these considerations.

n28 *Id.*

First, the [*15] OTR that Houston refused to attend was important. It concerned the nature and scope of Houston's outside business activity. As we previously have stated, prompt notice to firms of an associated person's outside business activity permits the firm to object to the outside activity at a meaningful time and exercise any appropriate supervision. n29

n29 *Sears, 2008 SEC LEXIS 1521,* at *26-27; *see also* Order Approving Proposed Rule Change Relating to Outside Business Activities of Associated Persons of Member Firms, Exchange Act Release No. 26178, *1988 SEC LEXIS 2032,* at *1 (Oct. 13, 1988) (approving NASD's enactment of Rule 3030 to address the securities industry's growing concern about preventing harm to the investing public or a firm's entanglement in legal difficulties based on an associated person's unmonitored outside business activities); Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons, Exchange Act Release No. 26063, *1988 SEC LEXIS 1841,* at *2-3 (Sept. 6, 1988).

[*16]

Houston argues that information concerning his outside business activity was unimportant by the time of the OTR because he had admitted to NASD that he had violated Rule 3030. But an associated person may not "second guess"

NASD's requests for information, or "take it upon [himself] to determine whether information is material to an NASD investigation of [his] conduct." n30 And "Rule 8210(a) has no requirement that NASD explain its reasons for making the information request or justify its relevance." n31

n30 *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, *2009 SEC LEXIS 215,* at *21, *26 (Jan. 30, 2009) (citation omitted); *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, *2007 SEC LEXIS 2598,* at *18-19 (Nov. 8, 2007) ("As we have often noted, recipients of requests under Rule 8210 must promptly respond to the requests or explain why they cannot. They may not refuse such requests on the grounds of relevance or otherwise set conditions on their compliance, and NASD is not required to justify its information requests in order to obtain compliance from members and their associated persons.").

[*17]

n31 *CMG Institutional Trading, 2009 SEC LEXIS 215,* at *26; *Morton Bruce Erenstein*, Exchange Act Release No. 56768, *2007 SEC LEXIS 2596,* at *13 (Nov. 8, 2007), *aff'd, 316 F. App'x 865 (11th Cir. 2008).*

Moreover, Houston misunderstands the purpose of the OTR. Information concerning Houston's outside business activity was important not only because it concerned Houston's Rule 3030 violation but also because it concerned whether Houston defrauded and misappropriated funds from the Boyd trust. Houston's refusal to attend the OTR, therefore, impeded NASD's investigation into potentially serious misconduct against a customer of his firm.

Second, despite NASD's repeated requests and granting of accommodations to Houston, NASD was still unable to obtain Houston's attendance at the OTR. Houston responded to NASD's initial letter scheduling the OTR by stating that he would attend only if NASD provided him with (i) the "[w]ording of the 2110 violation in question"; (ii) "[s]entencing guidelines on violation [*18] 2110 & 3030"; and (iii) "[r]ecent broker history of sentences handed down and accepted by" respondents for violating Rules 3030 and 2110. NASD repeated its request in a subsequent letter, warning Houston that he could not impose conditions on his testimony and that failure to appear and testify at the OTR would be "grounds for formal disciplinary action." n32 But NASD also accommodated Houston by directing him to the location on NASD's website for the text of Rule 2110, the Sanction Guidelines, synopses of settled disciplinary actions, and hearing panel and NAC decisions. NASD then twice postponed the OTR to accommodate Houston before finally receiving a letter from him stating that he had "nothing further to add and [would] not be attending the (OTR)."

n32 *See* note 30.

Moreover, while Houston responded to NASD's initial three Rule 8210 requests for information and documents, his responses to those requests were untimely and his response to the third request was incomplete. n33 In fact, NASD sent Houston [*19] two follow-up letters demanding that he fully comply with its third Rule 8210 request, but he still failed to produce all the documents requested. These included copies of checks written from Houston's Countrywide account, n34 documents substantiating payments Houston claimed were for Mrs. Boyd's care, and Houston's tax returns for 2003 through 2005. n35

n33 The record belies Houston's contention that he provided all information and documents requested in a timely manner. Houston's responses to NASD's initial three Rule 8210 requests were each approximately two weeks late, and he never fully responded to the third request.

n34 Houston claimed that Countrywide does "not send checks."

n35 Houston questioned NASD's "legal authority" for requesting his tax returns.

Houston contends that the severity of his Rule 8210 violation is mitigated by the fact that he misunderstood the purpose of the OTR. Houston claims that he thought the OTR "was provided to [him] if [he] wanted to fight the [outside business [*20] activity] issue," and that he did not attend because he "admitted [his] guilt" and "asked to move on to an

equitable settlement." Houston blames NASD for his purported misunderstanding because it did not explain that the OTR "was for further questioning" despite knowing that Houston "did not have legal counsel." n36

n36 Houston claims that NASD neglected to explain the purpose of the OTR so that it could charge him with violating Rule 8210, and that NASD told him he "didn't need legal counsel as . . . [he] was pleading guilty to the outside business activity charge." Neither claim is supported by the record.

Houston's contention has no merit. NASD's letter to Houston scheduling the OTR stated clearly that the OTR was an "on-the-record interview" pursuant to Rule 8210, and that Houston was "obligated to appear." n37 NASD's letter neither stated nor implied that the OTR was a hearing or that a determination had been made to charge Houston with Rule violations. Moreover, Houston was responsible for understanding [*21] his obligations as a securities professional, including those under Rule 8210. n38

n37 In a subsequent letter, NASD reiterated that the OTR was an "on-the-record interview" and that NASD was authorized pursuant to Rule 8210 to require Houston "to provide information and to testify at a location specified by the Staff." The letter reminded Houston that he was "obligated to appear" and that "failure to appear and testify truthfully, alone, is grounds for formal disciplinary action."

n38 *See Hans N. Beerbaum*, Exchange Act Release No. 55731, *2007 SEC LEXIS 971,* at *19 & n.22 (May 9, 2007) ("We have repeatedly held that members and their associated persons cannot shift their burden of compliance to the NASD.") (internal quotation omitted); *Kirk A. Knapp*, Exchange Act Release No. 30391, *1992 SEC LEXIS 430,* at *11 n.15 (Feb. 21, 1992) (Respondent "cannot shift his responsibility for compliance with regulatory requirements to . . . NASD.").

[*22]

Finally, the sanctions are remedial and not punitive. We have stressed the importance of Rule 8210 in connection with NASD's "obligation to police the activities of its members and associated persons." n39 "Without subpoena power, NASD must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate." n40 Failure to respond to Rule 8210 requests "impedes NASD's ability to detect misconduct that threatens investors and markets." n41 It is therefore "critically important to the self-regulatory system that members and associated persons cooperate with NASD investigations." n42 Houston's misconduct was therefore serious, and the sanctions imposed will protect the public by encouraging Houston (upon the lifting of his suspension) as well as others to respond to Rule 8210 requests completely and in a timely manner. n43

n39 *CMG Institutional Trading, 2009 SEC LEXIS 215,* at *15 (quoting *Paz Sec. Inc.*, Exchange Act Release No. 57656, *2008 SEC LEXIS 820,* at *12 (Apr. 11, 2008), *petition denied, 566 F.3d 1172 (D.C. Cir. 2009)).*

[*23]

n40 *Id.* at 15.

n41 *Howard Brett Berger*, Exchange Act Release No. 58950, *2008 SEC LEXIS 3141,* at *13-14 (Nov. 14, 2008), *petition denied, 347 F. App'x 692 (2d Cir. 2009); see also Joseph Patrick Hannan*, Exchange Act Release No. 40438, *1998 SEC LEXIS 1955,* at *9 (Sept. 14, 1998) ("We have repeatedly stressed the importance of cooperation in NASD investigations . . . . Failures to comply [with Rule 8210 requests] are serious violations because they subvert the NASD's ability to carry out its regulatory responsibilities.").

n42 *Erenstein, 316 F. App'x at 871.*

n43 *See Siegel v. SEC, 592 F.3d 147, 158 (D.C. Cir. 2010)* (noting that deterrence may be considered as part of the overall remedial inquiry in determining sanctions).

B. The sanctions imposed for violating Rules 3030 and 2110 were neither excessive nor oppressive.

The Sanction Guidelines state that a suspension of up to one year for [*24] violating Rule 3030 should be considered "[w]hen the outside business activities involve aggravating conduct." n44 The Sanction Guidelines also recommend a fine of $ 2,500 to $ 50,000. n45

n44 2007 Sanction Guidelines at 14. The Sanction Guidelines recommend a 30-day suspension "[w]hen the outside business activities do not involve aggravating conduct." *Id.* And the Sanction Guidelines recommend a bar or suspension longer than one year "[i]n egregious cases, including those involving a substantial volume of activity or significant injury to customers of the firm." *Id.*

n45 *Id.*

The Sanction Guidelines further identify five "principal considerations" for determining sanctions for violating Rule 3030. They are (i) "[w]hether the outside activity involved customers of the firm"; (ii) "[w]hether outside activity resulted directly or indirectly in injury to customers of the firm and, if so, the nature and extent of the injury"; (iii) the "duration of the outside activity, the number of customers, [*25] and the dollar volume of sales"; (iv) "[w]hether 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"; n46 and (v) "[w]hether the respondent misled his or her employer member firm about the existence of the outside activity or otherwise concealed the activity from the firm." n47

n46 This proceeding does not involve the marketing and sale of First Wall Street products or services, and therefore the fourth principal consideration is not applicable here.

n47 2007 Sanction Guidelines at 14. The Sanction Guidelines also list as principal considerations in determining sanctions for all violations, among other factors, "[w]hether the respondent engaged in the misconduct over an extended period of time," "[w]hether the respondent's misconduct resulted in the potential for respondent's monetary or other gain," and "[w]hether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, [or] deceive . . . the member firm with which he or she is/was associated". *Id.* at 6-7.

[*26]

The NAC's decision to impose an additional and consecutive one-year suspension and $ 50,000 fine for Houston's failure to provide prompt written notice of his outside business activity to the Firm in violation of Rules 3030 and 2110 is supported by application of the above considerations. n48 Indeed, Houston's misconduct involved four significant principal considerations: firm customer, duration, substantial monetary gain, and concealment. n49 Houston's outside business activity not only involved a First Wall Street customer, the Boyd trust, but also extended over a long period of time (2001 through 2005). Houston's outside business activity resulted in substantial gain of over $ 450,000 for Houston, including approximately $ 355,000 in checks that Houston wrote to himself or his home equity line of credit from the Boyd Trust Account. And Houston repeatedly misled First Wall Street about his trustee activities. As discussed above, Houston misrepresented on one form that he sent the Firm in 2004 that he had not "conducted any outside business activities during the past year," and he misrepresented on another form that he sent the Firm in 2005 that he had not "accepted any appointment [*27] as trustee . . . over any client including my immediate family during the past year." n50

n48 It should be noted with respect to the second principal consideration that, while NASD was investigating whether Houston's trustee activities resulted in injury to the Boyd trust through the misappropriation of its funds, Houston's refusal to attend the OTR impeded NASD's investigation into this issue. We therefore make no finding with respect to whether there was or was not customer harm. For similar reasons discussed below, we also reject Houston's contention that a lack of investor injury warrants lesser sanctions.

n49 *See* 2007 Sanction Guidelines at 6-7, 14.

n50 This pattern of deception, and Houston's additional failure to report his trustee activities in response to repeated requests from the Firm, disprove Houston's contention that there was no aggravating conduct here and that he merely failed to "correctly sign[]" certain documents.

We find no mitigating factors here. Houston contends that, [*28] before the commencement of this proceeding, he admitted culpability to NASD for violating Rules 3030 and 2110. Houston further contends that he accepts responsibility for his actions and will not commit future violations. But acceptance of responsibility is mitigating only when it occurs "prior to detection and intervention by the firm . . . or a regulator." n51 Moreover, Houston's assurances are unconvincing because of his attempts to shift blame for his misconduct. For instance, Houston asserts that he never would have violated Rule 3030 if the Firm's "compliance officer had caught [his] mistake [in signing an incorrect business activity form] and sent it back to [him] for correction."

n51 2007 Sanction Guidelines at 6.

Houston further claims that the Firm "knew of [his] trustee activities" because the file he set up for the Boyd Trust Account in 2001 included a "legal document of [his] appointment as [c]o-[t]rustee," and because his name was on the Boyd Trust Account checks which were "shown [*29] on [the Boyd trust's] monthly statement for [the] compliance examination." n52 Regardless of whether the Boyd Trust Account file or the Boyd trust's monthly statement indicated that Houston was serving as a trustee, Houston remained responsible as an associated person to provide prompt notice of his outside business activity "in the form required by" the Firm. n53 Houston cannot shift his responsibility for compliance with Rule 3030 to a supervisor, compliance officer, or anyone else at the Firm. n54 Houston's attempt to do so demonstrates a fundamental misunderstanding of his responsibilities as a securities professional.

n52 Houston also claims that First Wall Street knew of his trustee activities because (i) it was the Firm's idea that he receive compensation for his services as a trustee because he "could not receive trading commissions"; (ii) he sent First Wall Street a document appointing him as sole trustee in late 2005; and (iii) the Firm's compliance department had him under special supervision "[a]s a trustee on [the Boyd Trust] account, as broker of record and with [First Wall Street] as dealer of record," and that he "had monthly meetings with compliance concerning any and all activities of Boyd's account." These claims are not supported by the record.
[*30]

n53 NASD Rule 3030. Moreover, as discussed above, Houston not only failed to provide notice of his trustee activities on the forms provided by First Wall Street, he also falsely claimed on certain of those forms that he had no such activities.

n54 *See Scott Epstein*, Exchange Act Release No. 59328, *2009 SEC LEXIS 217,* at *73 (Jan. 30, 2009) ("We have held repeatedly that a respondent cannot shift his or her responsibility for compliance with an applicable requirement to a supervisor.") (citation and internal quotation omitted), *aff'd, 416 F. App'x 142 (3d Cir. 2010).*

C. Houston's remaining contentions lack merit.

We reject Houston's remaining contentions. Houston contends that his lack of disciplinary history should be considered mitigating. FINRA has repeatedly held that a lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional. We find FINRA's application of its [*31] Sanctions Guidelines reasonable and have consistently affirmed FINRA's choice in so holding. n55

n55 *Philippe N. Keyes*, Exchange Act Release No. 54723, *2006 SEC LEXIS 2631,* at*23 (Nov. 8, 2006). *But cf. Matthew J. Collins v. SEC, 736 F.3d 521, 526 (D.C. Cir. 2013)* (noting, in the context of an appeal from an administrative proceeding, that disciplinary history is properly considered a mitigating factor); *Robert L. Burns*, Advisers Act Release No. 3260, *2011 WL 3407859,* at *11 (Aug. 5, 2011) (considering petitioner's clean disciplinary history as a mitigating factor in an appeal from an administrative law judge's initial decision).

Houston contends that he "provided seven years of substantial assistance in this investigation" by meeting his "obligation to provide [h]onest and [t]ruthful information requested of [him] in a timely manner without regulatory [*32] pressure." In addition to the fact that this contention is contradicted by the record as set forth above, associated persons

do not provide substantial assistance by fulfilling their obligations to cooperate with NASD investigations. n56 There is also no indication in the record that Houston otherwise provided substantial assistance to NASD.

n56 *Keyes, 2006 SEC LEXIS 2631,* at*24 (Respondent's "cooperation in the [NASD] investigation was consistent with the responsibilities he agreed to when he became an associated person and does not constitute substantial assistance.").

Houston contends that he should receive credit because he wanted to settle this proceeding and that NASD "never negotiated in good faith." But NASD had no obligation to settle this proceeding on Houston's terms, and settlement negotiations are irrelevant to the sanctions determination. n57 Moreover, the record does not contain any evidence that NASD acted in bad faith.

n57 *See Richard A Neaton*, Exchange Act Release No. 65598, *2011 SEC LEXIS 3719,* at *36 (Oct. 20, 2011) ("We have previously held that [settlement] negotiations are not relevant to our determination of sanctions in a contested proceeding."); *Clyde J. Bruff*, Exchange Act Release No. 40583, *1998 SEC LEXIS 2266,* at *14 (Oct. 21, 1998) ("The NASD is not obligated to accept [a settlement] offer once made."), *petition denied*, *198 F.3d 253 (9th Cir. 1999).*

[*33]

Houston contends that the sanctions imposed by the NAC should have been in line with lesser sanctions that have been imposed in proceedings settled by NASD. n58 But "[w]e have repeatedly observed that comparisons to sanctions in settled cases are inappropriate" because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement "such as the avoidance of time-and-manpower-consuming adversary proceedings." n59 Moreover, the appropriate sanction in any case "depends on the particular facts and circumstances presented." n60 "Litigated cases typically present a fuller, more developed record of facts and circumstances for purposes of assessing appropriate sanctions than do settled matters." n61

n58 Houston specifically refers to the sanction imposed upon settlement by Letter of Acceptance, Waiver and Consent in FINRA Case Nos. 2012033265101, 2010247409 01, 2011029832701, and 2012031636001.

n59 *Michael C. Pattison, CPA*, Exchange Act Release No. 67900, *2012 SEC LEXIS 2973,* at *47 (Sept. 20, 2012); *Castle Sec. Corp.*, Exchange Act Release No. 52580, *2005 SEC LEXIS 2628,* at *18 n.24 (Oct. 11, 2005) (same).

[*34]

n60 *Pattison, 2012 SEC LEXIS 2973,* at *49; *see also Dennis S. Kaminski*, Exchange Act Release No. 65347, *2011 SEC LEXIS 3225,* at *41 (Sept. 16, 2011) ("[W]e consistently have held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases."); *Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. 182, 187 (1973)* (holding that "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases"); *Geiger v. SEC, 363 F.3d 481, 488 (D.C. Cir. 2004)* (holding that, because the "Commission is not obligated to make its sanctions uniform," court would not compare sanction imposed in case to those imposed in previous cases).

n61 *Pattison, 2012 SEC LEXIS 2973,* at *49.

Houston contends that lesser sanctions [*35] are warranted because his conduct did not result in injury to investors. But the OTR that NASD requested pursuant to Rule 8210 concerned whether the Boyd trust, an investor and First Wall Street customer, was harmed by Houston's trustee activities. It was Houston's refusal to attend the OTR that impeded NASD's ability to determine whether there was any harm to the Boyd trust. n62

n62 *Paz Sec., 2008 SEC LEXIS 820,* at *17-20 (finding lack of evidence of customer harm not to be mitigating where "NASD was prevented from determining whether Applicants engaged in . . . potentially harmful conduct . . . because Applicants did not answer its information requests").

Houston contends that the suspensions imposed should be vacated because he has suffered enough as a result of this proceeding. Houston asserts that the two plus years in which he has not been "able to practice [his] trade is enough to prevent the recurrence of misconduct." But any collateral consequence that Houston may have suffered as [*36] a result of his misconduct or from the disciplinary proceeding that followed, such as the impact on his reputation, career, or finances, is not a mitigating factor. n63

n63 *See, e.g., Jason A. Craig*, Exchange Act Release No. 59137, *2008 SEC LEXIS 2844,* at *27 (Dec. 22, 2008) ("We also do not consider mitigating the economic disadvantages [respondent] alleges he suffered because they are a result of his misconduct."); *Ramiro Jose Sugranes*, Exchange Act Release No. 35311, *1995 SEC LEXIS 234,* at *4 (Feb. 1, 1995) ("[A]ny difficulty [Respondent] has encountered in securing employment is a direct consequence of his own misconduct, rather than a reason for reducing his suspension.").

Houston further contends that the consequences to his career from this proceeding have been exacerbated because NASD, despite knowing that Houston did not have legal counsel, did not inform him [*37] that our prior decision vacating the sanctions imposed and remanding the proceeding for a sanctions redetermination meant that he was no longer prohibited from associating with a member firm. As a result, Houston contends, he "sat out another full year believing [he] was still suspended." n64 But Houston's misunderstanding is not reasonable considering that the order accompanying our prior decision stated clearly "that the sanction imposed by [NASD] on Kent M. Houston in this proceeding . . . is, vacated." n65 Moreover, NASD had no obligation to explain our prior decision to Houston or otherwise provide him with legal advice.

n64 Houston claims that NASD's inaction was "[d]eliberate[] and [i]ntentional[]," and that it knew he believed he was still suspended. This claim is not supported by the record.

n65 *Houston, 2011 SEC LEXIS 4491,* at *30.

Finally, for the first time in this proceeding, Houston contends that he is unable to pay the fines imposed. But Houston has failed to carry [*38] his burden of proving inability to pay because he did not provide any supporting evidence for this contention. n66 Moreover, Houston did not show below that his financial hardship has resulted from a subsequent change in circumstances. n67

n66 *See Castle Sec., 2005 SEC LEXIS 2628,* at *19 (finding that respondent did not meet its "burden of demonstrating an inability to pay" because respondent did not introduce documentation concerning the deterioration in its financial situation); *Michael H. Novick*, Exchange Act Release No. 37503, *1996 SEC LEXIS 1994,* at *6 (July 31, 1996) (noting that respondent "bears the burden of demonstrating an inability to pay the fine" in an NASD proceeding); 2007 Sanction Guidelines at 5 ("The burden is on the respondent to raise the issue of inability to pay and to provide evidence thereof.").

n67 2007 Sanction Guidelines at 5 ("If a respondent does not raise the issue of inability to pay during the initial consideration of a matter before 'trial-level' Adjudicators, Adjudicators considering the matter on appeal generally will presume the issue of inability to pay to have been waived (unless the inability to pay is alleged to have resulted from a subsequent change in circumstances).").

[*39]

Accordingly, for the foregoing reasons, we find that the sanctions imposed on Houston are neither excessive nor oppressive within the meaning of Exchange Act Section 19(e).

An appropriate order will issue. n68

n68 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER and STEIN); Commissioner PIWOWAR not participating.

On the basis of the Commission's opinion issued this day, it is

ORDERED that the sanctions imposed by FINRA on Kent M. Houston be, and they hereby are, sustained.

By the Commission.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCriminal Law & ProcedureGuilty PleasGeneral OverviewSecurities LawSelf-Regulating EntitiesNational Association of Securities Dealers

02/21/2014

In the Matter of the Application of JOHN M.E. SAAD, Law Office of Gregory Bartko, LLC, c/o Gregory Bartko, Esq., 3475 Lenox Road, Suite 400, Atlanta, GA 30326; For Review of Disciplinary Action Taken by FINRA

Admin. Proc. File No. 3-13678

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934 Release No. 62178

2010 SEC LEXIS 1761

May 26, 2010

ACTION:
[*1] ORDER SUSTAINING DISCIPLINARY ACTION

COUNSEL: Gregory Bartko, Esq., for John M.E. Saad.

Marc Menchel, Gary Dernelle, and Carla Carloni, for the Financial Industry Regulation Authority, Inc.

TEXT: OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Misappropriation

Registered securities association found that registered representative, while associated with member firm, intentionally filed a false reimbursement claim and misappropriated member firm's funds. *Held*, association's findings of violations and sanctions are *sustained.*

Appeal filed: November 4, 2009

Last brief received: February 17, 2010

I.

John M.E. Saad, formerly a registered representative associated with Homer, Townsend & Kent ("HTK"), a FINRA member firm, appeals from FINRA disciplinary action. n1 FINRA found that Saad misappropriated funds of HTK's parent company, member firm Penn Mutual Life Insurance Co. ("Penn Mutual"), in violation of NASD Rule 2110 by accepting reimbursement based on Saad's submission of false expense reimbursement requests and receipts. FINRA barred Saad in all capacities and assessed costs. n2 We base our findings on an independent review of the record. [*2]

n1 On July 26, 2007, we approved a proposed rule change filed by National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and certain member-regulation, enforcement, and arbitration functions of the New York Stock Exchange ("NYSE"). *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), *91 SEC Docket 517.* Although the investigation into Saad's misconduct was initiated before the consolidation, the complaint was filed afterwards. For simplicity's sake, we refer only to FINRA.

n2 NASD Rule 2110 requires that members "observe high standards of commercial honor and just and equitable principles of trade."

As part of the effort to consolidate and reorganize NASD's and NYSE's rules into one FINRA rulebook, NASD Rule 2110 (which was otherwise unchanged) was codified as FINRA Rule 2010, effective December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the conduct at issue occurred before NASD Rule 2110 was codified as FINRA Rule 2010, we will continue to refer to NASD Rule 2110. NASD Rule 2110 is applicable to Saad through NASD General Rule 115 (now FINRA Rule 140), which provides that persons associated with a member have the same duties and obligations as a member. *See generally Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135 (Dec. 10, 2009), *97 SEC Docket 23299, 23300 n.4* (describing NASD Rules 2110 and 140 with respect to the rule consolidation).

[*3]

II.

The parties do not dispute the underlying facts in this matter. In the summer of 2006, Saad served as Penn Mutual's regional director in Atlanta, Georgia, and was registered with Penn Mutual's broker-dealer affiliate, HTK, as an investment company products and variable contracts limited representative, general securities representative, and general securities principal. Saad testified at his disciplinary hearing that his chief duties were recruiting insurance agents to sell Penn Mutual's insurance products as independent contractors and helping existing Penn Mutual independent contractors build their business.

Saad's career at Penn Mutual started promisingly. He was a large producer, traveled extensively on recruiting trips, and earned various production awards. By the end of 2005, however, Saad's production declined, to the point he "had almost halted travel for a period of time." By June 2006, Saad received a production warning from Penn Mutual. During his disciplinary hearing, Saad blamed his drop in productivity on an illness of one of his year-old twin sons, although he acknowledged that he neither told his employer about his son's health problems nor requested time off [*4] as a result.

A. Saad's Fabricated Receipts and False Expense Report

Saad testified that, the month after receiving the production warning, he had "a really good recruiting opportunity" in Memphis, Tennessee, scheduled for Monday, July 10, 2006. Saad testified that he intended to travel to Memphis the day before the meeting. On the way to the airport, however, he learned the meeting had been canceled. Upon learning of the canceled meeting, Saad "panicked because my travel was down dramatically." Saad testified that he instead checked into an Atlanta-area hotel for two nights: Sunday, July 9 and Monday, July 10. Saad explained that he did not go into the office during this time "[b]ecause I had told me [sic] staff that I was going to be in Memphis. I was concerned with the fact that when that appointment cancelled, that if I had gone to the office, that it would have been evident that I hadn't done any travel."

Two weeks later, Saad flew to Penn Mutual's home office, where, Saad testified, "they formally told me, essentially, that it was a 60-day production warning." He explained, "Essentially, I was told that production had fallen, and they needed to see results."

A week after [*5] this production warning, Saad submitted his July expense report for processing. Typically, Saad paid office expenses and overhead directly out of an office account into which Penn Mutual wired $ 6,300 at the beginning of each month. However, for expenses Saad incurred personally, including travel, Saad would submit a month-end expense report, along with receipts, to the office administrator, who would then submit the materials to Penn Mutual. Once approved, Saad would transfer the approved amount out of the office account into his personal account or use that money to pay his credit card bill directly.

By the time Saad submitted his July expense report, he "felt total pressure . . . to show that this recruiting trip [to Memphis] had occurred." He added, "I had to show that I was somewhere because the only way that the home office could verify my travel or work ethic or whatever was being questioned was on my expense reports." Saad submitted an expense report that included a receipt of $ 478 for a round-trip airline itinerary, showing travel from Atlanta to Memphis on July 9, 2006 and returning on July 11, 2006. Saad also included a hotel receipt of $ 274.44 that showed a two-night [*6] stay in a Memphis-area hotel for July 9 though July 11, 2006. These receipts, of course, were fakes. Saad admitted that he fabricated them by copying information and company logos from the Internet.

Unrelated to the claimed Memphis trip, Saad also submitted a $ 392.19 receipt for the purchase of a cell phone, dated July 14, 2006. The section on the receipt indicating the name of the cell phone recipient was blacked out, and a handwritten note on the receipt stated: "new cell phone, old Treo broke." Saad acknowledged writing the note on the receipt, but could not recall whether he had blacked out the recipient's name (although, he acknowledged during his investigative "on-the-record" testimony, "I'm assuming I probably did").

Regardless of whether he blacked out the name, Saad admitted he had not purchased the cell phone to replace his phone. He instead purchased the phone for Magdaline Moser, an insurance agent affiliated with Aflac, Inc.'s Atlanta office. Saad testified that he hoped to recruit Moser to sell Penn Mutual products and that, in exchange for the cell phone, Moser would introduce him to other prospects in Aflac's Atlanta office.

Saad stated that he had never before purchased [*7] a cell phone for someone he was recruiting, but claimed "I had the right to expense items that I felt necessary to help them with their production." He also claimed that he had purchased other equipment, such as laptops, for people he was recruiting and "thought that a cell phone is something that could have helped with [Moser's] production." When asked why -- if the expense was legitimate, as he claimed -- he altered the receipt instead of just submitting it at face value, Saad responded, "if I put down that I spent a cell phone [sic] for a new rep, then, you know, I just wanted -- you know, I was under the pressure of the situation that I just said, you know, I'm just going to put it down as my own, but I should have put it down as exactly the way it should have been put down and expensed it that way." The Hearing Panel, "having observed Respondent's demeanor while testifying," did not find credible Saad's claim that his purchase of a cell phone for Moser "was consistent with previously approved business equipment." Moreover, Saad stated during his on-the-record testimony that his purchase of a cell phone for Moser "probably wouldn't have been" an approved expense.

B. Discovery [*8] of Saad's Falsified Expense Report

The falsehoods in Saad's expense report might have gone unnoticed, except Saad also submitted an authentic, unaltered receipt for four drinks purchased on Sunday evening, July 9, at an Atlanta hotel lounge. The office administrator questioned Saad about the drink receipt, noting it showed Saad was in Atlanta -- not Memphis -- on the evening of July 9. Saad withdrew the receipt and threw it away, because, he explained, "if she [the office administrator] knew that I was in Atlanta, then it wouldn't help my production."

The office administrator retrieved the receipt from the trash. She submitted it, along with her concerns, to Penn Mutual's home office, writing that Saad's receipts for Memphis were part of a "BOGUS TRIP." When Penn Mutual approached Saad about his claimed expenses, Saad admitted he had not gone to Memphis. He offered to reimburse Penn Mutual, but Penn Mutual declined reimbursement and terminated him. n3

n3 HTK also terminated Saad, effective September 16, 2006. Saad testified at his disciplinary hearing that he was then associated with National Life Insurance Company, but not registered to sell securities.

[*9]

C. FINRA Investigation

Approximately two months after Saad was terminated, FINRA asked Saad to provide information about his discharge by HTK and whether he improperly submitted expense reports for expenses not actually incurred, and, if so, why. n4 Saad responded that, "[a]fter an extensive audit, it was determined that on my July 2006 expense report a charge of under $ 750 for a business trip that had yet to occur was posted." He added, "I must stress that I was given authority to manage expenses for more than $ 75,000 annually over the past 5 1/2 years (over $ 350,000). It is an under $ 750 business expense from one (1) expense report that Penn Mutual has found to be 'improperly submitted' after an extensive audit."

n4 The Office of Insurance for the Commonwealth of Kentucky ("Kentucky Office of Insurance") also asked Saad to provide a detailed response to "a complaint involving your actions as an agent." Saad answered that, "[a]fter an extensive audit, [Penn Mutual] determined that on my July 2006 expense report a charge of under $ 750 for a business trip that had yet to occur was posted." Saad added, "I asked [Penn Mutual] if I could repay the isolated expense deemed 'improperly submitted' but they declined to accept my offer. They in turn decided to terminate my employment." The Kentucky Office of Insurance informed Saad approximately six weeks later that, "[a]t this time, there is insufficient evidence to support administrative action against you."

[*10]

Approximately six months later, in April 2007, a FINRA examiner telephoned Saad to ask again about his termination. According to a FINRA file memorandum about that conversation, Saad acknowledged "HTK's issue with the airfare and hotel expense is valid," but claimed that he did not know Moser and that he did not know why HTK was questioning his cell phone expense. Saad, however, later admitted buying the cell phone for Moser during his on-the-record testimony.

In July 2007, FINRA informed Saad that it would bring a disciplinary proceeding against him for "submitting false expense reports to Penn Mutual, the parent company of [HTK], and receiving reimbursement to which you were not entitled, in violation of NASD Conduct Rule 2110." FINRA wrote that, if Saad wished to settle the matter, he could sign an enclosed Letter of Acceptance, Waiver and Consent, pursuant to which Saad would "consent to the imposition of a bar from the securities industry."

Saad declined FINRA's offer, and FINRA filed a complaint against Saad in September 2007. The complaint contained one cause of action: "Conversion of Funds" in violation of NASD Rule 2110. The specific allegations were that "Saad submitted [*11] false expense reports and receipts to Penn Mutual . . . resulting in payments to Saad of $ 1,144.63 to which he was not entitled," including the false airline, hotel, and cell phone expenses. The complaint concluded, "Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110."

D. FINRA Hearing and Appeal

A FINRA hearing panel (the "Hearing Panel") held a disciplinary hearing on April 16, 2008. Saad admitted to falsifying receipts, submitting a falsified expense report, and, as a result, receiving $ 1,144.63 in reimbursement. Saad explained that he had purchased the cell phone "for an individual that I was recruiting, and I felt I had the latitude to make that call." He added, "with regard to the Memphis trip, I feel that I was basically not where I should have been, but at the same time was here working for good reason under the pressure that I was under felt that, unfortunately, I had to do that."

Before Saad testified, FINRA presented testimony from the examiner who conducted the investigation into Saad's conduct. The examiner testified, in part, that there was "no question whatsoever" that Saad initially denied knowing Moser. When [*12] Saad was also asked during his hearing about whether he had denied knowing Moser, he responded, "I don't recall making that comment. At that time, if I -- if it was a situation I was being questioned, I had no idea -- you know, all these questions, I mean, they could have been asked, I just don't remember any at that time." Saad urged the Hearing Panel "to give me some consideration with my family and my career on the line, that you could look at this situation where it wasn't necessarily that funds were converted, but a situation where it was more of an accounting misnomer that occurred."

In a decision dated August 19, 2008, the Hearing Panel found Saad had "deliberately decided to deceive his employer in two separate reimbursement transactions, once with the false travel expenses and again with the cell phone." The panel concluded that Saad "converted Penn Mutual's funds, in violation of NASD Conduct Rule 2110, when he obtained reimbursement for fictitious expenses," and assessed costs and imposed a bar in all capacities, noting that "[a]ccording to the *FINRA Sanction Guidelines*, a bar is standard for conversion regardless of the amount converted."

Saad appealed to FINRA's National [*13] Adjudicatory Council ("NAC"), which affirmed the Hearing Panel's findings of violations and sanctions. The NAC found "that Saad's deceitful conduct was premeditated and egregious." The NAC also noted that, unlike the Hearing Panel, "[w]e have not based our sanctions on a finding that Saad converted Penn Mutual's funds. Instead, we base our decision on the fact that no mitigating factors exist." This appeal followed.

III.

NASD Rule 2110 requires associated persons to "observe high standards of commercial honor and just and equitable principles of trade." As we have held, "conduct that reflects negatively on an applicant's ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade." n5 FINRA's disciplinary authority under NASD Rule 2110 is also "broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security." n6

n5 *Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), *93 SEC Docket 8977, 8986; see also Vail v. SEC, 101 F.3d 37, 39 (5th Cir. 1996)* (per curiam) (affirming Commission's finding that representative violated just and equitable principles of trade by misappropriating funds belonging to a political club while serving as that organization's treasurer), *aff'g, 52 S.E.C. 339, 342 (1995)* (holding that "Vail commingled his and the Club's funds for the sake of his own personal convenience" and, in doing so, "make[s] us doubt his commitment to the high fiduciary standards demanded by the securities industry"); *Daniel D. Manoff, 55 S.E.C. 1155, 1162 (2002)* ("Conduct Rule 2110 applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money.").

[*14]

n6 *Vail, 101 F.3d at 39; see also Manoff, 55 S.E.C. at 1162* (noting that application of Rule 2110 to business-related conduct not involving a security "is well-established"); *Thomas E. Jackson, 45 S.E.C. 771, 772 (1975)* ("Although [applicant's] wrongdoing in this instance did not involve securities, the NASD could justifiably conclude that on another occasion it might.").

Here, Saad admits he intentionally falsified receipts, submitted a fraudulent expense report, and accepted $ 1,144.63 in unentitled reimbursement. Saad's submission of the falsified expense report, and resulting financial benefit, reflects negatively on both Saad's ability to comply with regulatory requirements and his ability to handle other people's money. The entry of accurate information in firm records is a foundation for FINRA's regulatory oversight of its members, and "[i]t is critical that associated persons, as well as firms, comply with this basic requirement." n7 We thus find Saad's conduct to be inconsistent with just and equitable [*15] principles of trade and that, as a result, Saad violated NASD Rule 2110. n8

n7 *Charles E. Kautz, 52 S.E.C. 730, 734 (1996)* (stating that "regardless of his Firm's policy or knowledge . . . it is a violation of NASD Rules to enter false information on official Firm records"); *see also Ortiz, 93 SEC Docket at 8986-87* (finding that representative violated NASD Rule 2110 by submitting false information to his employer, a member firm).

n8 *See, e.g., Manoff, 55 S.E.C. at 1161* (finding that representative's unauthorized use of co-worker/customer's credit card numbers violated just and equitable principles of trade); *James A. Goetz, 53 S.E.C. 472, 477-78 (1998)* (finding that representative violated just and equitable principles of trade by misleading his member firm into believing he had contributed $ 1,600 in personal funds to a private school to procure a matching gift in that amount for the school).

[*16]

IV.

Saad does not dispute any relevant facts and expressly admits "that his actions violated NASD Rule 2110." He nevertheless challenges the proceeding because, he claims, FINRA "failed to give him clear notice of the specific charge alleged." Saad claims FINRA violated his due process rights by labeling the sole cause of action in its complaint as "Conversion," but subsequently sanctioning him on a basis other than conversion. He claims he was "rendered incapable of preparing an appropriate defense," and he analogizes FINRA's "actions [as] tantamount to a Judge deciding to convict a defendant of bank fraud when the defendant was only charged with and provided a defense against money laundering." We disagree.

"'As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, notice is sufficient.'" n9 Here, FINRA specified in its complaint that Saad had violated Rule 2110 by submitting false expense reports and receipts to Penn Mutual and receiving, as a result, $ 1,144.63 in unentitled reimbursement. Saad, who was represented by counsel since at least the time FINRA issued its complaint, had a full opportunity to defend [*17] himself against these factual allegations, which he admitted. n10 FINRA staff also notified Saad before filing the complaint that they believed a bar was an appropriate sanction for his conduct. n11 Saad cites to no argument or evidence that his supposed lack of notice prevented him from introducing. n12 We thus conclude Saad was adequately aware of the issues in controversy and the potential sanctions involved. n13

n9 *Janet Gurley Katz*, Exchange Act Rel. No. 61449 (Feb. 1, 2010), SEC Docket , (quoting *Steven E. Muth*, Exchange Act Rel. No. 52551 (Oct. 3, 2005), *86 SEC Docket 1217, 1233 n.40), appeal filed*, No. 10-1068 (D.C. Cir. Mar. 26, 2010); *see also Aloha Airlines, Inc. v. Civil Aeronautics Bd., 598 F.2d 250, 262 (D.C. Cir. 1979)* (noting that, in administrative proceedings, "[i]t is sufficient if the respondent 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation") (quoting *NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 350 (1938)); Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), *97 SEC Docket 22027, 22036* (noting that self-regulatory organizations, such as FINRA, generally "are not state actors and thus are not subject to the Constitution's due process requirements"), *appeal filed*, No. 09-5325 (2d Cir. Dec. 28, 2009).

[*18]

n10 *See William C. Piontek, 57 S.E.C. 79, 90-91 (2003)* (finding that respondent who "understood the issue[s]" and "'was afforded full opportunity' to litigate" them had sufficient notice of the charges against him (quotations and citations omitted)); *Jonathan Feins, 54 S.E.C. 366, 378 (1999)* ("Administrative due process is satisfied where the party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding.").

n11 FINRA's position was also consistent with the range of sanctions recommended by the FINRA Sanction Guidelines. *See infra* notes 25-27 and accompanying text.

n12 Saad claims "[t]he initial charge of Conversion of Funds put [him] in the unenviable position of starting at the worst sanction and trying to justify a lesser sanction," and he spends a substantial portion of his appeal arguing that his conduct did not amount to conversion. We need not address those issues. The NAC did not find that Saad's misconduct amounted to conversion, and we review only the NAC's decision on appeal. *See Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), *89 SEC Docket 792, 800 n.17* ("[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review.").

[*19]

n13 In his initial Application for Review to the Commission, Saad asserted that FINRA's introduction of the drink receipt was part of an overall bias "obstruct[ing] Mr. Saad's right to a fair and impartial hearing." Although the drink receipt was included in the parties' joint exhibit, Saad argued that FINRA's tactics, including introduction of the drink receipt, was evidence that, "[f]rom the onset, this was clearly a trial of adultery and not an administrative proceeding of securities violation(s) or the protection of the public." Saad also argued in his Application for Review that FINRA had misled him about his need for an attorney during his on-the-record interview with FINRA's enforcement staff. The FINRA examiner who interviewed Saad, however, denied that she ever advised Saad that he did not need an attorney, and the letter summoning Saad to appear for the on-the-record interview (along with the accompanying addendum) included several statements advising Saad that he could be represented by counsel.

Saad did not mention these two arguments in his Opening Brief to the Commission, and in his Reply Brief, he stated, "though he still believes in those arguments, he understands he waived those arguments." After conducting our *de novo* review of the record, we find that these two arguments concerning bias and Saad's on-the-record testimony provide no basis for overturning FINRA's decision.

[*20]

V.

Saad further challenges the sanction imposed as excessive. Exchange Act Section 19(e)(2) directs us to sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive, oppressive, or impose an unnecessary or inappropriate burden on competition. n14 Saad contends that his actions here warranted a "much less severe sanction" and asserts that, in barring him, FINRA placed him

"in the same category of risk to the public as those individuals who actually misused or converted customer funds, some of whom were not even barred." Saad supports his claims by pointing to what he asserts are (i) inconsistencies between FINRA's sanction determination here and those made in other FINRA disciplinary proceedings; (ii) a misapplication of relevant FINRA sanction guidelines; and (iii) mitigating circumstances. We discuss each in turn.

n14 *15 U.S.C. § 78s(e)(2)*. Saad does not allege, and the record does not show, that FINRA's action imposed an undue burden on competition.

[*21]

A. Prior Disciplinary Proceedings

Saad cites nearly fifty FINRA disciplinary actions (the majority of which are settlements) he believes "illustrates the unconscionable result reached in this case." n15 Saad notes, for example, that FINRA agreed to impose a two-year suspension on another representative who allegedly submitted inaccurate travel and expense reports and, as a result, obtained approximately $ 600 from his member firm. n16 Saad asks why, if FINRA was willing to settle for a two-year suspension in that case, his offer to settle for a similar sanction "was not acceptable in his case." n17

n15 The sanctions imposed in these actions ranged from as short as ten days to as long as a bar.

n16 *Gary Steven Swiman*, FINRA Case No. 2008012094801 (2009) (accepting settlement of a two-year suspension).

n17 Saad states in his brief that he submitted an offer of settlement to FINRA on December 27, 2007 "that provided for three months of suspension, a $ 5,000 fine, and restitution."

It is well established, [*22] however, that the appropriateness of a sanction "depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action taken in other proceedings." n18 "This is especially true with regard to settled cases, where, as we have frequently pointed out, pragmatic factors may result in lesser sanctions." n19

n18 *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), *93 SEC Docket 5122, 5134* (citing *Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973)* ("The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.")), *petition denied, 566 F.3d 1172 (D.C. Cir. 2009); see also Geiger v. SEC, 363 F.3d 481, 488 (D.C. Cir. 2004)* ("The Commission is not obligated to make its sanctions uniform, so we will not compare this sanction to those imposed in previous cases."); *Hiller v. SEC, 429 F.2d 856, 858 (2d Cir. 1970)* ("[W]e cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding.").

[*23]

n19 *Anthony A. Adonnino, 56 S.E.C. 1273, 1295 (2003), aff'd, 111 Fed. Appx. 46 (2d Cir. 2004); see also Gary Kornman*, Exchange Act Rel. No. 59403 (Feb. 19, 2009), *95 SEC Docket 14246, 14260-61* (affirming bar and rejecting applicant's comparison to an allegedly similar, settled matter that involved a lesser sanction), *aff'd, 592 F.3d 173 (D.C. Cir. 2010).*

B. Application of Sanction Guidelines

Saad next asserts that FINRA misapplied its own Sanction Guidelines when it relied on the Sanction Guideline for "conversion or improper use of funds." Saad claims his "actions, though admittedly wrong, constituted falsification of records and do not constitute conversion or improper use of funds." He argues FINRA instead should have consulted the guideline for "falsification of records."

Saad, however, did more than just falsify an expense report. He also misappropriated employer funds, and FINRA may consider all the facts and circumstances [*24] surrounding the misconduct at issue when deciding to impose a bar. n20 Saad alleges that the guideline for improper use applies only to misconduct involving the misuse of "customer funds" -- which his misconduct did not involve. However, the guideline for "improper use of funds" is not so limited. n21 While the guideline cites NASD Rule 2330 (which prohibits members from making "improper use of a customer's funds or securities") as one of the rules violations to which the guideline applies, the guideline also states that it applies to violations of NASD Rule 2110, the rule at issue here. Moreover, the guidelines make clear they "are not intended to be absolute" and, "[f]or violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations." n22 The sanction guidelines, in other words, "merely provide a 'starting point' in the determination of remedial sanctions." n23

n20 *Cf. Katz,* SEC Docket at (finding NYSE had not erred when it based its imposition of a bar, in part, on conduct not charged in the complaint); *J. Stephen Stout, 54 S.E.C. 888, 915 n.64* (Oct. 4, 2000) (finding respondent's ongoing involvement in an arbitration scheme to be relevant when deciding to affirm a bar because his conduct "pose[d] a high risk of future securities law violations"); *Joseph J. Barbato, 53 S.E.C. 1259, 1282 (1999)* (finding respondent's contact of Division witnesses to be relevant when deciding to affirm a bar because respondent's conduct suggested he may commit future violations).

[*25]

n21 Saad's only authority for his interpretation of the guideline for "improper use" is a case from the United States Court of Appeals for the Ninth Circuit, *Carter v. SEC*, which Saad claims "describ[es] the NASD Conduct Rule 'Improper Use of Funds' as misuse of customer funds not rising to conversion." *726 F.2d 472 (9th Cir. 1983). Carter*, however, does not involve, or even mention, NASD Rule 2330, "misuse of funds," or "conversion." *See Carter, 726 F.2d at 473-74.*

n22 FINRA Sanction Guidelines 1 (2007 ed.), *available at* http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf.

n23 *Hattier, Sanford & Reynoir, 53 S.E.C. 426, 433 n.17 (1998)* (affirming fine in excess of guideline's recommended range), *aff'd, 163 F.3d 1356 (5th Cir. 1998); see also Peter C. Bucchieri, 52 S.E.C. 800, 806 (1996)* ("NASD's guidelines are not meant to prescribe fixed penalties but merely to provide a 'starting point' in the determination of remedial sanctions.").

[*26]

FINRA reasonably determined here that the guideline for improper use was the most analogous, and we have affirmed sanctions that relied on that guideline in similar circumstances. n24 Furthermore, FINRA's decision to impose a bar is consistent with either guideline. The guideline for improper use, which FINRA used, recommends a bar unless "the improper use resulted from respondent's misunderstanding of his or her customer's intended use of the funds or securities, or other mitigation exists." n25 The guideline for falsification of records recommends a bar in "egregious" cases and a lesser sanction only in cases "where mitigating factors exist." n26 Here, FINRA found Saad's conduct to be "egregious" and "that no mitigating factors exist." FINRA's decision to impose a bar was thus consistent with the guideline for either conversion or falsification of records. n27

n24 *See Manoff, 55 S.E.C. at 1165-66 & n.16* (noting that "[b]ecause there was no specific NASD Sanction guideline that applied to the unauthorized use of credit cards, the NASD relied on the guideline for 'Conversion or Improper Use'"); *Eliezer Gurfel, 54 S.E.C. 56, 63 n.15 (1999)* (affirming bar for forging signature on firm's commission checks and depositing funds in personal bank account that fell within the range of both the Sanction Guideline for "conversion or improper use" and "forgery and/or falsification of records"), *petition denied, 205 F.3d 400 (D.C. Cir. 2000).*

[*27]

n25 Sanction Guidelines, at 38.

n26 Sanction Guidelines, at 39.

n27 "Although the Commission is not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2)." *CMG Institutional Trading, LLC*, Exchange Act. Rel. No. 59325 (Jan. 30, 2009), *95 SEC Docket 13802, 13814 n.38.*

C. Mitigating Factors

Saad finally contends that "the record supports that indisputable mitigating factors exist pursuant to the Guidelines which neither FINRA nor the NAC chose to address." In particular, Saad argues that his misconduct was an "aberrant" lapse in judgment and that, "[w]hile he is not looking for a reward for doing what he should have been doing, it is important to note that he engaged in this conduct during an extremely short period of his career while he was under severe stress with a hospitalized infant and a stressful job environment." He claims FINRA also failed to consider that HTK had fired him before FINRA detected his misconduct and that his misconduct did not [*28] involve customers or large amounts of money. n28

n28 *See* Sanction Guidelines, at 7 (stating that a FINRA adjudicator should consider, among other things, (i) whether the member firm disciplined the respondent for the misconduct at issue prior to regulatory detection, (ii) the "number, size and character of the transactions at issue," and (iii) "the level of sophistication of the injured or affected customer").

FINRA, however, devotes several pages of its opinion to rejecting Saad's various mitigation claims. FINRA expressly rejected the notion that "Saad's misconduct is essentially a one-time lapse in judgment." FINRA detailed Saad's decision "to allow his staff and Penn Mutual to believe he traveled to Memphis" and his continued willingness to be "less than fully truthful during the initial phases of FINRA's and other regulators' investigations of this matter." As FINRA observed, Saad also "had many opportunities to reverse his initial lapse in judgment." But, "[r]ather than expose himself, he chose to compound [*29] his lies with an ongoing and intentional charade in support of which he fabricated documents." FINRA also noted that an otherwise clean disciplinary history was not mitigating n29 and that, "[a]lthough Saad's wrongdoing in this instance did not involve customer funds or securities, Saad's willingness to lie to Penn Mutual and HTK and obtain funds to which he was not entitled indicates a troubling disregard for fundamental ethical principles which, on other occasions, may manifest itself in a customer-related or securities-related transaction." n30

n29 *See, e.g., Manoff, 55 S.E.C. at 1165-66* (rejecting claim that lack of disciplinary record justifies conduct).

n30 *See, e.g., Gurfel, 54 S.E.C. at 58, 64* (affirming bar where former registered representative converted firm's commission checks to his own use); *Leonard J. Ialeggio, 53 S.E.C. 601, 605 (1998)* ("[T]hat Ialeggio abused only his employer's trust is not mitigative."), *aff'd, 185 F.3d 867 (9th Cir. 1999)* (Table); *Mayer A. Amsel, 52 S.E.C. 761, 768 (1996)* (affirming bar despite the fact that "no customer suffered as a result of any of his actions"); *Ronald H. V. Justiss, 52 S.E.C 746, 750 (1996)* (finding bar to be warranted because, although applicant's misconduct "did not involve direct harm to customers, it flouts the ethical standards to which members of this industry must adhere").

[*30]

* * *

Saad engaged in highly troubling conduct that raises serious doubts about his fitness to work in the securities industry, "a business that is rife with opportunities for abuse." n31 Saad lied to his employer about going on a recruiting trip, and he fabricated receipts, submitted a falsified expense report, and accepted unjustified reimbursement as a result of that lie. Saad also sought reimbursement for a cell phone he misled his employer into believing he purchased for himself through a falsified receipt and expense report, and Saad attempted, at least initially, to recoup money he spent at an Atlanta-area hotel lounge at the same time he claimed he was in Memphis. After his employer caught and fired him, Saad further misled investigators by telling them he sought reimbursement for a trip that "had yet to occur" and by denying that he had purchased the cell phone for someone other than himself. n32 As FINRA summarized, "Saad's ac-

tions reveal a willingness to construct false documents and then lie about them that suggests that his continued participation in the securities industry poses an unwarranted risk to the investing public." n33

n31 *Amsel, 52 S.E.C. at 768* (affirming bar where applicant "exhibited a disturbing disregard for the standards that govern the securities industry").

[*31]

n32 Saad attempts to explain some of his statements to investigators by arguing that, "[i]n the initial investigation, Saad was not represented by a lawyer, was very concerned about the repercussions of his statements and he cannot be faulted for being cautious with his statements." At best, however, these excuses explain Saad's failure to remember certain details when FINRA first interviewed him. They do not explain Saad's misleading claims about whether he sought reimbursement for an upcoming trip or his outright lie about buying the cell phone for himself. "Providing false information in any form, be it data submitted to the clearing process, or forms or testimony to a self-regulatory organization, is an especially serious matter." *Hal S. Herman, 55 S.E.C. 395, 405 (2000)* (affirming bar and noting that representative's submission of false information "emphas[izes] the appropriateness of the sanction imposed here").

n33 *See, e.g., Ortiz, 93 SEC Docket at 8989-90* (affirming bar where representative attempted to conceal misconduct by supplying false information during an investigation); *Gregory W. Gray, Jr.*, Exchange Act Rel. No. 60361 (July 22, 2009), *96 SEC Docket 19038, 19053* (affirming imposition of sanctions by considering aggravating factors, including that applicant sought to conceal his conduct); *Fox & Co. Invs.*, Exchange Act Rel. No. 52697 (Oct. 28, 2005), *86 SEC Docket 1895, 1912-13* (finding imposition of a bar to be neither excessive or oppressive where applicants, among other things, concealed their conduct); *Robin Bruce McNabb, 54 S.E.C. 917, 928-29 (2000)* (sustaining bar where applicant attempted to conceal his misconduct), *aff'd, 298 F.3d 1126 (9th Cir. 2002).*

[*32]

Imposition of a bar is not intended to punish Saad, but "to protect the public interest from future harm at his hands." n34 Saad's behavior, including accepting reimbursement based on false receipts and efforts to conceal his misconduct, provides no assurance he will not repeat his violations. A bar will prevent Saad from putting customers at risk and will serve as a deterrent to others in the securities industry who might engage in similar misconduct. n35

n34 *Conrad P. Seghers*, Investment Advisers Act Rel. No. 2656 (Sept. 26, 2007) *91 SEC Docket 2293, 2307* (quoting *Leo Glassman, 46 S.E.C. 209, 212 (1975))* (affirming bar despite respondent's suggestion that the Commission should consider "the financial circumstances and hardship suffered by Seghers and his family" by noting, in part, "that the sanctions that we impose are not intended to punish"), *petition denied, 548 F.3d 129 (D.C. Cir. 2008); see also William Louis Morgan, 51 S.E.C. 622, 629-30 (1993)* (affirming bar despite applicant's claim "that because of the bar he and his family are suffering undue hardship").

[*33]

n35 *See McCarthy v. SEC, 406 F.3d 179, 190 (2d Cir. 2005)* (noting that deterrent value is a relevant factor in deciding sanctions); *see also, e.g., Manoff, 55 S.E.C. at 1165-66* (affirming bar for using another's credit card numbers to effect unauthorized transactions); *Herman, 55 S.E.C. at 405* (affirming bar and noting that "[p]roviding false information in any form . . . emphas[izes] the appropriateness of the sanction imposed here"); *Gurfel, 54 S.E.C. at 63-64* (affirming bar for misappropriating firm's insurance commissions).

For these reasons, we find that FINRA's decision to bar Saad is neither excessive nor oppressive and that the sanction serves a remedial rather than punitive purpose.

An appropriate order will issue. n36

n36 We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

[*34]

By the Commission (Commissioners CASEY, WALTER, AGUILAR and PAREDES); Chairman SCHAPIRO not participating.

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by the Financial Industry Regulation Authority, Inc. against John M.E. Saad be, and hereby is, sustained.

By the Commission.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawCriminal OffensesMoney LaunderingConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewSecurities LawSelf-Regulating EntitiesNational Association of Securities Dealers

06/03/2010

JOHN M.E. SAAD, PETITIONER v. SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

No. 10-1195

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

718 F.3d 904; 405 U.S. App. D.C. 254; 2013 U.S. App. LEXIS 11691; Fed. Sec. L. Rep. (CCH) P97,525

January 9, 2013, Argued
June 11, 2013, Decided

PRIOR HISTORY: [***1]
On Petition for Review of an Order of the Securities & Exchange Commission.

COUNSEL: Steven N. Berk argued the cause for petitioner. With him on the briefs was Matthew J. Bonness. Michael S. Gulland entered an appearance.

Christopher Paik, Special Counsel, Securities and Exchange Commission, argued the cause for respondent. With him on the brief were Michael A. Conley, Deputy General Counsel, and John W. Avery, Deputy Solicitor.

JUDGES: Before: HENDERSON and ROGERS, Circuit Judges, and EDWARDS, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge EDWARDS.

OPINION BY: EDWARDS

OPINION

[*906] [**256] EDWARDS, *Senior Circuit Judge*: This case involves a disciplinary action brought against John M.E. Saad by the Financial Industry Regulatory Authority, Inc. ("FINRA"), which is the successor to the National Association of Securities Dealers ("NASD"). From January 2000 to October 2006, Saad was a regional director in the Atlanta, Georgia, office of Penn Mutual Life Insurance Company ("Penn Mutual"). He was also registered with Penn Mutual's broker-dealer affiliate, Hornor, Townsend & Kent, Inc. ("HTK"), which is a FINRA-member firm. In September 2007, FINRA filed a complaint with its Office of Hearing Officers charging that, [***2] in July 2006, Saad had violated FINRA rules by submitting false expense reports for reimbursement for nonexistent business travel and for a fraudulently purchased cellular telephone. After a hearing, the Hearing Panel found that Saad had violated NASD Conduct Rule 2110 and sanctioned him with a permanent bar against his association with a member firm in any capacity. This sanction was affirmed by FINRA's National Adjudicatory Counsel ("NAC") and by the U.S. Securities and Exchange Commission ("SEC" or "Commission").

In his petition for review to this court, Saad does not contest his culpability, but instead argues only that the SEC abused its discretion in upholding the lifetime bar. In reviewing a disciplinary sanction imposed by FINRA, the SEC must determine whether, with "due regard for the public interest and the protection of investors," that sanction "is excessive or oppressive." *15 U.S.C. § 78s(e)(2)*. As part of that review, the SEC must carefully consider whether there are any aggravating or mitigating factors that are relevant to the agency's determination of an appropriate sanction. *See PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1065, 377 U.S. App. D.C. 413 (D.C. Cir. 2007)* ("PAZ I"). This review is particularly [***3] important when the respondent faces a lifetime bar, which is "the securities industry equivalent of capital punishment." *Id.*

Saad has consistently advanced a number of mitigating factors that he claims should militate against a lifetime bar. The SEC addressed several of these factors [*907] [**257] and chose not to credit them. However, the agency plainly ignored two important considerations: (1) the extreme personal and professional stress that Saad was under at the time of his transgressions; and (2) the fact that Saad's misconduct resulted in his termi-

nation *before* FINRA initiated disciplinary proceedings. The latter consideration is particularly significant because it is specifically listed in FINRA's Sanction Guidelines as a potential mitigating factor. SANCTION GUIDELINES 7 (2011) *available at* http://www.finra.org. In light of this record, we agree with Saad that the SEC abused its discretion in failing to adequately address all of the potentially mitigating factors that the agency should have considered when it determined the appropriate sanction. We take no position on the proper outcome of this case. That is for the SEC to consider in the first instance, after it has assessed all potentially [***4] mitigating factors that might militate against a lifetime bar. We therefore remand to the SEC for further consideration of its sanction in light of this opinion.

I. Background

A. Regulatory Overview

FINRA is an association of securities broker-dealers registered with the Commission pursuant to Section 15A(a) of the Securities Exchange Act of 1934. *15 U.S.C. § 78o-3(a)*. It is a self-regulatory organization empowered to adopt rules governing the conduct of its members and of persons associated with its members, such as Saad. FINRA enforces compliance with the Securities Exchange Act, SEC regulations, and FINRA's own rules. *See id. § 78o-3(b)(2)*. FINRA does so by bringing disciplinary proceedings to adjudicate violations, which are subject to review by the Commission. FINRA brought such a proceeding against Saad based on his conduct in 2006 and 2007.

During 2006 and much of 2007, Saad's activities as a securities dealer were subject to regulation by the NASD. However, by the time Saad's disciplinary proceeding was formally initiated in September 2007, the SEC had approved the consolidation of NASD with certain functions of the New York Stock Exchange to create a new self-regulatory organization: [***5] FINRA. Thus, while Saad's misconduct occurred prior to the creation of FINRA, FINRA's Department of Enforcement with the FINRA Office of Hearing Officers initiated proceedings against Saad.

Generally, the references to NASD and FINRA are interchangeable throughout this opinion. The charge against Saad was for a violation of NASD Conduct Rule 2110, which requires that members "observe high standards of commercial honor and just and equitable principles of trade." *See John M.E. Saad, S.E.C. Release No. 62178, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *4 (May 26, 2010)*. NASD Conduct Rule 2110 is comparable to the current, superseding FINRA Conduct Rule 2010. *See* NASD TO FINRA CONVERSION CHART SPREADSHEET, *available at* http://www.finra.org. In sanctioning Saad, FINRA and the SEC applied the FINRA Sanction Guidelines, as opposed to the predecessor NASD Sanction Guidelines. *See Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *4.*

B. Facts

The facts in this case are undisputed. Br. of Pet'r at 17. At the relevant time, Saad was employed by Penn Mutual and registered with its broker-dealer affiliate HTK, a FINRA-member firm. Saad was registered as an investment company products and variable contracts limited representative, a general securities [***6] representative, and a general securities principal.

[*908] [**258] This case centers on Saad's submission of several false expense claims to his employer and Saad's subsequent attempts to conceal his misconduct. In July 2006, when a scheduled business trip from his home base in Atlanta to Memphis, Tennessee, was cancelled, instead of staying home, Saad checked into an Atlanta hotel for two days. He later submitted to his employer a false expense report claiming expenses for air travel to Memphis and a two-day hotel stay in that city. Saad forged an airline travel receipt and a Memphis hotel receipt and attached those receipts to his expense report. Saad also submitted another false expense claim, unrelated to the fictional Memphis trip. He claimed an expense for the replacement of his business cellular telephone when in fact he had not replaced his own telephone but rather had purchased a telephone for an insurance agent who was employed at another firm. Saad testified at the disciplinary hearing that his employer probably would not have approved his purchase of a cell phone if he had submitted an accurate expense claim. *See Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *2.*

At his disciplinary hearing, Saad also explained [***7] that this conduct occurred during a period when he was under a great deal of professional and personal stress. Toward the end of 2005, Saad's sales declined and he virtually halted business travel, which was considered a significant aspect of his professional responsibilities. In June 2006, Saad's superiors at Penn Mutual issued a production warning to him and admonished him to increase his sales of Penn Mutual products. During this same time period, Saad and his wife were caring for one-year old twins, one of whom had undergone surgery and was frequently hospitalized for a significant stomach disorder.

Saad's false travel expense report was discovered by the Atlanta office administrator, who noticed that Saad had attached to the report an unaltered receipt for four drinks purchased at an Atlanta hotel lounge on the same day when, according to the expense report, Saad was

supposed to be in Memphis. When the office administrator questioned him about the receipt for the drinks, Saad withdrew the receipt and threw it away. The office administrator retrieved the receipt from the trash and submitted it to Penn Mutual's home office, thus alerting Saad's employer to the falsity of the travel [***8] expense report. In September 2006, Saad was discharged by both Penn Mutual and HTK for his misdeeds.

C. Proceedings Below

Approximately two months after Saad was terminated, NASD investigators questioned him about the reasons for his discharge and his false expense reports. During this investigation, Saad repeatedly attempted to mislead NASD by providing investigators with false information. In a November 2006 email, Saad told NASD that the expenses claimed on the fabricated trip report were "for a business trip that had yet to occur," although in fact the expenses were for a trip that had been cancelled and had not been rescheduled. *Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *3*. In April 2007, Saad misrepresented to a FINRA examiner that he did not know the person for whom he had purchased a cell phone. *Id.* And in testimony delivered in May 2007, Saad contended that he could not recall whether he had purchased a plane ticket for the July 2006 trip to Memphis. *John M. Saad*, Compl. No. 2006006705601, 9 (NAC Oct. 6, 2009) ("NAC Decision"), *reprinted in* Deferred Joint Appendix ("D.A.") 206, 214.

FINRA brought a disciplinary proceeding against Saad in September 2007, alleging "Conversion of Funds" in violation [***9] of NASD Conduct Rule 2110. A disciplinary [*909] [**259] hearing before a FINRA Hearing Panel was held in April 2008. The Hearing Panel found that Saad had deliberately deceived his employer both with regard to the travel report and the cell phone purchase; that this deception constituted conversion of his employer's funds; and that this misconduct violated NASD Conduct Rule 2110. The Hearing Panel assessed costs against Saad and imposed a permanent bar against his association with a member firm in any capacity, noting that "according to the *FINRA Sanction Guidelines*, a bar is standard for conversion regardless of the amount converted." *John M.E. Saad*, Compl. No. 2006006705601, 8 (Office of Hr'g Officers Aug. 19, 2008), *reprinted in* D.A. 189, 196.

Saad appealed to the NAC, which affirmed the Hearing Panel. However, the NAC characterized Saad's actions as "misappropriation" of his employer's funds, not "conversion." The NAC found that there were no mitigating factors and that there were a number of aggravating factors, including "the intentional and ongoing nature of Saad's misconduct, Saad's efforts to deceive HTK and Penn Mutual, [and] Saad's initial instinct to conceal the extent of his actions [***10] from state and FINRA examiners." NAC Decision at 10, *reprinted in* D.A. 215. Because there is no specific sanction guideline for misappropriation, the NAC applied the guideline for conversion or improper use of funds and found that a permanent bar was an appropriate sanction.

On its review, the Commission agreed that Saad, by intentionally falsifying receipts, submitting a fraudulent expense report, and accepting reimbursement to which he was not entitled, had misappropriated his employer's funds in violation of NASD Conduct Rule 2110. The Commission found that Saad's dishonesty with his employer "reflect[ed] negatively on both Saad's ability to comply with regulatory requirements and his ability to handle other people's money." *Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *5*. The Commission also rejected Saad's claims that the sanction against him, a permanent bar, was improper because (a) there were inconsistencies between the sanction here and FINRA sanctions in other cases; (b) FINRA had employed the wrong sanction guideline; (c) there were mitigating circumstances; and (d) the sanction was unduly punitive rather than remedial in nature. Instead, the Commission found that the sanction was appropriate [***11] because it was not "excessive or oppressive." *15 U.S.C. § 78s(e)(2)*.

With regard to the contention that there were inconsistencies between the sanction here and the sanctions applied in other cases, the Commission stated that "[i]t is well established . . . that the appropriateness of a sanction depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action taken in other proceedings." *Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *6*. Likewise, the Commission declined to credit Saad's argument that FINRA applied the wrong provisions of its Sanction Guidelines, noting, *inter alia*, that the Guidelines "merely provide a starting point in the determination of remedial sanctions." *Id.*

The Commission also rejected Saad's claim that there existed circumstances sufficient to mitigate Saad's misconduct, noting that the Hearing Panel and the NAC had addressed and specifically rejected many of Saad's mitigation claims, including the claims that his misconduct was a one-time lapse in judgment, that he had an otherwise clean disciplinary history, and that his wrongdoing did not involve customer funds or securities. *See Saad,2010 SEC LEXIS 1761, 2010 WL 2111287, at *7*. With respect [***12] to the allegedly "aberrant" nature of Saad's conduct, the SEC explained that its focus was [*910] [**260] less on the short time period during which the expense reports were submitted, than on Saad's "ongoing and intentional charade in support of which he fabricated documents." *Id.* The SEC referred to the NAC

decision, which recounts Saad's conduct in submitting the expense reports in July 2006 and then repeatedly misleading investigators over the course of several months. *Id.* (citing NAC Decision at 9, *reprinted in* D.A. 214).

The SEC refused to be swayed by Saad's years of honest service because, the SEC explained, "an otherwise clean disciplinary history [is] not mitigating." *Id.* (citing *Daniel D. Manoff, S.E.C. Release No. 46708, 55 S.E.C. 1155, 2002 SEC LEXIS 2684, 2002 WL 31769236, at *5 (Oct. 23, 2002))*. The SEC also referenced the NAC's discussion of this factor, which explained that a violator "should not be rewarded because he may have previously acted appropriately as a registered person." *Id.* (citing D.A. 213).

The SEC additionally declined to credit Saad's argument that his conduct did not affect customers. The SEC relied on FINRA's conclusion that "[a]lthough Saad's wrongdoing in this instance did not involve customer funds [***13] or securities, Saad's willingness to lie . . . and obtain funds to which he was not entitled indicates a troubling disregard for fundamental ethical principles which, on other occasions, may manifest itself in a customer-related or securities-related transaction." *Id.* The SEC decision then cited cases in which the Commission rejected assertions by respondents who sought mitigation because their wrongful conduct had not directly targeted customers. *See 2002 SEC LEXIS 2684, [WL] at *7 n.30* (collecting cases).

The Commission further found that the sanction imposed had a remedial purpose that served the public interest. The Commission explained that a lifetime bar was warranted to protect customers from any future misconduct by Saad. *See 2002 SEC LEXIS 2684, [WL] at *7-8*. The Commission believed that Saad's conduct "raises serious doubts about his fitness to work in the securities industry, a business that is rife with opportunities for abuse." *2002 SEC LEXIS 2684, [WL] at *8*. His actions "reveal a willingness to construct false documents and then lie about them," all of which "suggests that his continued participation in the securities industry poses an unwarranted risk to the investing public." *Id.* The SEC also believed that his behavior, particularly [***14] his repeated efforts to conceal his misconduct, "provides no assurance he will not repeat his violations." *Id.* The Commission also briefly explained that Saad's punishment was intended "as a deterrent to others in the securities industry who might engage in similar misconduct." *Id.*

II. Analysis

A. Standard of Review

"The SEC reviews sanctions imposed by the NASD to determine whether they 'impose[] any burden on competition not necessary or appropriate' or are 'excessive or oppressive.'" *Siegel v. SEC, 592 F.3d 147, 155, 389 U.S. App. D.C. 94 (D.C. Cir. 2010)* (quoting *15 U.S.C. § 78s(e)(2)*); *see also PAZ I, 494 F.3d at 1065-66*. "This court reviews the SEC's conclusions regarding sanctions to determine whether those conclusions are arbitrary, capricious, or an abuse of discretion." *Siegel, 592 F.3d at 155*; *see also Paz Secs., Inc. v. SEC, 566 F.3d 1172, 1174, 386 U.S. App. D.C. 126 (D.C. Cir. 2009)* ("PAZ II"). "The agency's choice of remedy is peculiarly a matter for administrative competence, and we will reverse it only if the remedy chosen is unwarranted in law or is without justification in fact." *Siegel, 592 F.3d at 155*. Nevertheless, this court is bound to reverse an administrative action if the agency has "entirely failed to consider [***15] an important aspect of the problem" or has "offered an explanation for its decision that runs counter [*911] [**261] to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)*; *see also Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374-75, 118 S. Ct. 818, 139 L. Ed. 2d 797 (1998)* (discussing the importance of "reasoned decisionmaking" in the review of agency adjudications).

B. The Sanction Guidelines

Saad argues that the SEC erred when it sustained a lifetime bar from the securities industry predicated on an application of the wrong FINRA sanction guideline. FINRA's most recent Sanction Guidelines were issued in 2006 "for use by the various bodies adjudicating disciplinary decisions . . . in determining appropriate remedial sanctions." SANCTION GUIDELINES 1 (2011), *available at* http://www.finra.org. The Guidelines include specific provisions covering conversion or improper use of funds or securities and for forgery and/or falsification of records. The former contains two prongs: one for conversion, which advises adjudicators to "[b]ar the respondent regardless of amount converted," and one for improper use, which advises them to "[c]onsider a bar." [***16] *Id.* at 36. The guideline for forgery and/or falsification advises adjudicators to "consider" a bar in "egregious cases." *Id.* at 37.

Saad claims that the SEC improperly applied the guideline for conversion or improper use, rather than the guideline for forgery and/or falsification. Saad contends that the SEC's reliance on the guideline for conversion or improper use was inappropriate for two reasons. First he argues that, because the SEC found him guilty of misappropriation, the guideline's conversion prong was inapposite. Second, he argues that the guideline's improper

use prong applies only to the misuse of *customer* funds, not an employer's funds. Therefore, Saad continues, the Commission should have considered only the guideline for forgery and/or falsification, pursuant to which a lifetime bar would be inappropriate. Saad's arguments are unpersuasive.

The SEC did not err when it upheld a sanction pursuant to the guideline for conversion or improper use. The FINRA Sanction Guidelines do not purport to "prescribe fixed sanctions for particular violations." *Id.* at 1. "Rather, they provide direction for Adjudicators in imposing sanctions consistently and fairly." *Id.* The Guidelines do [***17] not enumerate sanctions for every conceivable securities-industry violation; they merely address sanctions for "some typical securities-industry violations." *Id.* The SEC's decision correctly notes that the Guidelines "are not intended to be absolute" and, "[f]or violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations." *Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *6* (quoting SANCTION GUIDELINES 1). The SEC reasonably concluded that "misappropriation is doubtless analogous to conversion." Br. of SEC at 19. Because the Guidelines do not list a particular sanction for misappropriation, it was not arbitrary and capricious for the Commission to analogize to the guideline's conversion prong in this way. This is wholly consistent with the SEC's repeatedly stated view that the Guidelines do not specify required sanctions but "merely provide a 'starting point' in the determination of remedial sanctions." *Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *6* & n.23 (quoting *Hattier, Sandford & Reynoir, S.E.C. Release No. 39543, 53 S.E.C. 426, 1998 SEC LEXIS 55, 1998 WL 7454, at *4 n.17 (Jan. 13, 1998)), aff'd, 163 F.3d 1356 (5th Cir. 1998).*

Saad is similarly unpersuasive in his assertion that the guideline's [***18] improper use prong only applies to the misuse of customer funds -- and thus would not apply to Saad's misconduct which involved claiming [*912] [**262] fraudulent reimbursements from his employer. The guideline for conversion and improper use refers to several FINRA and NASD rules, including FINRA Conduct Rule 2010 (the successor to NASD Conduct Rule 2110 at issue here). *See* SANCTION GUIDELINES 36. Saad points out that, "[w]ith the exception of FINRA Rule 2010 . . . each of the referenced rules concerns the improper use of (and potentially the conversion of) *customers'* funds or securities." Br. of Pet'r at 25. This assertion obviously does not advance Saad's position because it acknowledges that FINRA Conduct Rule 2010 is not limited to misconduct relating to customer funds. Although Saad's briefing on this point is far from clear, he seems to make a sort of *in pari materia* argument that, in light of the other rules referenced, the SEC was required to import the "customers' funds" limitation into FINRA Conduct Rule 2010. The argument is patently flawed, and Saad cites no authority to support his claim. We therefore reject it.

Even if we were to accept Saad's argument that the SEC should have applied [***19] the guideline for forgery and/or falsification, that error by itself would not require a reversal or remand. The Commission reasonably concluded that "FINRA's decision to impose a bar is consistent with either guideline." *Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *7.* Indeed, both guidelines suggest that FINRA at least consider a bar. *See* SANCTION GUIDELINES 36-37. Saad objects because the guideline for conversion or improper use "*emphasizes* a permanent bar, while the sanction guideline for Forgery and/or Falsification *emphasizes* suspension." Br. of Pet'r at 23 (emphasis added). But the fact remains -- as the SEC correctly noted -- both guidelines expressly contemplate the possibility of a lifetime bar. Given the deference that we owe to SEC sanction decisions, *see Siegel, 592 F.3d at 155*, we decline to disturb the SEC's decision on this basis.

C. The Lifetime Bar

Saad also argues that the Commission abused its discretion when it affirmed FINRA's imposition of a lifetime bar. He contends that the SEC failed to consider certain mitigating factors and to articulate a remedial rather than punitive purpose for the sanction. As a result, in Saad's view, the SEC erred by upholding a sanction that was "excessive [***20] or oppressive." *15 U.S.C. § 78s(e)(2).* The Commission responds that it considered all of the necessary factors and reasonably concluded that a lifetime bar was appropriate under the circumstances. For reasons described below, we agree with Saad that the Commission abused its discretion in failing to address several potentially mitigating factors.

Under *15 U.S.C. § 78s(e)(2)*, the Commission reviews a disciplinary sanction imposed by FINRA to determine whether, "having due regard for the public interest and the protection of investors," that sanction "is excessive or oppressive." *See also PAZ I, 494 F.3d at 1064* (SEC reviews NASD sanctions *de novo*). In our review of SEC actions, "[w]e do not limit the discretion of the Commission to choose an appropriate sanction so long as its choice meets the statutory requirements that a sanction be remedial and not 'excessive or oppressive.'" *PAZ II, 566 F.3d at 1176.* The SEC's burden is to provide a convincing explanation of its rationale in light of the governing law. As we explained in *PAZ I*:

> When evaluating whether a sanction imposed by [FINRA] is excessive or oppressive, as we have stated before, the

> Commission must do more than say, in effect, [***21] petitioners are bad and must be punished; at the least it must give some explanation addressing the nature of the violation and the mitigating factors presented in the record. The Commission [*913] [**263] must be particularly careful to address potentially mitigating factors before it affirms an order . . . barring an individual from associating with a[] . . . member firm -- the securities industry equivalent of capital punishment.

494 F.3d at 1064-65 (citations omitted).

Furthermore, the Commission may approve "expulsion not as a penalty but as a means of protecting investors . . . . The purpose of the order [must be] remedial, not penal." *Id. at 1065*. If the Commission upholds a sanction as remedial, it must explain its reasoning in so doing; "as the circumstances in a case suggesting that a sanction is excessive and inappropriately punitive become more evident, the Commission must provide a more detailed explanation linking the sanction imposed to those circumstances." *Id. at 1065-66*. That is not to say, however, that the Commission is under any obligation to explain why it found a lesser sanction inappropriate. *See Siegel, 592 F.3d at 157* ("[B]eyond mak[ing] the necessary findings regarding the [***22] protective interests to be served by expulsion, the agency need not state why a lesser sanction would be insufficient.").

After careful review of the record before us, we conclude that the case must be remanded for further consideration by the SEC. Remand is warranted because the decision of the Commission -- as well as those of the FINRA Hearing Panel and the NAC -- ignores several potentially mitigating factors asserted by Saad and supported by evidence in the record. We have previously cautioned that the SEC "must be particularly careful to address potentially mitigating factors" before affirming a permanent bar. *PAZ I, 494 F.3d at 1065*. The SEC has failed to do so in this case. In particular, Saad correctly notes that FINRA and the SEC failed to consider that "Mr. Saad's firm, HTK[,] disciplined him by terminating his employment in September of 2006, prior to regulatory detection." Br. of Pet'r at 34; *see also* Reply Br. at 12-13. Under the FINRA Sanction Guidelines, number fourteen of the "Principal Considerations in Determining Sanctions" is "[w]hether the member firm with which an individual respondent is/was associated disciplined the respondent for the same misconduct at issue [***23] prior to regulatory detection." SANCTION GUIDELINES 7. The SEC's decision acknowledges this argument: "[Saad] claims FINRA also failed to consider that HTK had fired him before FINRA detected his misconduct . . . ." *Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *7*. However, the SEC's decision says nothing more regarding this issue, nor do the decisions issued by the Hearing Panel and the NAC. When questioned about this point at oral argument, SEC counsel mistakenly argued that the termination was "irrelevant" because it occurred after the violation. *See* Oral Arg. at 19:45 - 23:40. The Guidelines say otherwise.

Similarly, the SEC's decision noted, but did not address, Saad's argument that "he was under severe stress with a hospitalized infant and a stressful job environment." *Saad, 2010 SEC LEXIS 1761, 2010 WL 2111287, at *7*. The Guidelines do not expressly mention personal stress as a mitigating factor, but they are by their own terms "illustrative, not exhaustive; as appropriate, Adjudicators should consider case-specific factors in addition to those listed." SANCTION GUIDELINES 6.

In response to Saad's argument that the SEC ignored these potentially mitigating factors, the Commission weakly responds that it "implicitly denied [***24] that they were [mitigating] when it stated that it denied all arguments that were inconsistent with the views expressed in the decision." Br. of SEC at 24. This contention is not an acceptable explanation for the SEC's failure [*914] [**264] to provide "reasoned decisionmaking" in support of a lifetime bar. *See Allentown Mack, 522 U.S. at 374-75*.

When we explained in *PAZ I* that the SEC "must be particularly careful to address potentially mitigating factors," we meant that the Commission should carefully and thoughtfully address each potentially mitigating factor supported by the record. The Commission cannot use a blanket statement to disregard potentially mitigating factors -- especially those, like an employee's termination, that are specifically enumerated in FINRA's own Sanction Guidelines. Because the SEC failed to address potentially mitigating factors with support in the record, it abused its discretion by "fail[ing] to consider an important aspect of the problem." *See State Farm, 463 U.S. at 43*. We must remand on that basis.

We take no position on the proper outcome of this case. We leave it to the Commission in the first instance to fully address *all* potentially mitigating factors that might [***25] militate against a lifetime bar.

III. Conclusion

The petition for review is granted. The case is remanded to the Commission for further consideration consistent with this opinion.

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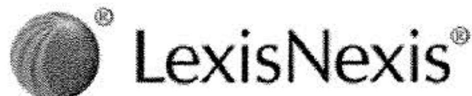

Kevin Lee Otto, Petitioner, v. Securities and Exchange Commission, Respondent.

No. 00-3897

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

253 F.3d 960; 2001 U.S. App. LEXIS 12142

April 17, 2001, Argued
June 12, 2001, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied November 13, 2001, Reported at: *2001 U.S. LEXIS 10378.*

PRIOR HISTORY: On Petition for Review of an Order of the Securities and Exchange Commission File. No. 3-9938.

DISPOSITION: AFFIRMED.

COUNSEL: For KEVIN L. OTTO, Petitioner: James A. Bolt, New Berlin, WI.

For SECURITIES AND EXCHANGE COMMISSION, Respondent: Randall W. Quinn, Susan Straus, SECURITIES & EXCHANGE COMMISSION, Office of the General Counsel, Washington, DC USA.

JUDGES: Before Fairchild, Cudahy, and Coffey, Circuit Judges.

OPINION BY: Coffey

OPINION

[*961] Coffey, *Circuit Judge.* On September 15, 2000, the Securities and Exchange Commission ("SEC" or "Commission") issued an order pursuant to the Securities Exchange Act of 1934, *15 U.S.C. § 78s(d)(1)*, affirming disciplinary action taken by the National Association of Securities Dealers, Inc. ("NASD") against Kevin Otto. Otto, a securities salesman associated with an NASD member firm at the time of the misconduct charged, seeks review of the SEC order pursuant to *15 U.S.C. § 78y(a)(1)*. We deny Otto's petition and affirm the SEC's order.

I. Factual Background

During all times relevant to the disposition of this case, Kevin Otto worked as a general securities representative for various NASD member firms including Hamilton Investments, Inc., Wellington Investment Services Corporation, and First Montauk Securities Corporation. [redacted] [1] became a client of Otto's beginning [*962] in 1988 or 1989 and followed him through his various firm transfers.

1 During the course of events that gave rise to this appeal, [redacted] changed her name to [redacted] For convenience sake, we refer to her throughout this opinion as "[redacted]."

[**2] In February 1992, Otto solicited $ 22,000 from [redacted] for an investment in the Wisconsin Business Club ("WBC"). In a letter to [redacted] Otto explained that:

> WBC is a group of people that network to bring to the table business opportunities which enable me to make some cash. These are opportunities that you and I as individuals probably wouldn't see. . . . Again as I stated on the phone this is not an investment nor is it offered by any securities company. It has nothing to do with me as a broker or my brokerage firm. This is a private thing. It is kind of fun. I think you'll like it. . . . Liquidity depends on what the funds are in.

Otto further professed that the return was reported as a Treasury Bill rate "plus a couple of percentage points." [redacted] provided Otto with the $ 22,000; unbeknownst to her, WBC did not exist.

Rather than invest the $ 22,000 into WBC as he had suggested he would, Otto instead placed the $ 22,000 partly in his personal bank account and partly in a Charles Schwab account for PowerSource Battery Corporation, an unprofitable company that he owned and

operated with a partner, Donna LeBrecht. Otto used 's funds for "personal stuff," business expenses [**3] related to the operation of PowerSource, and expenses related to the investigation of other business opportunities. Despite the illicit infusion of capital, PowerSource filed for bankruptcy protection in March of 1992.

To cover up his misuse of her funds, Otto prepared and sent to fictitious portfolio updates that falsely reflected a WBC balance. In April 1994, requested funds from her WBC account. Because he could not immediately return Smith's money, Otto stalled the repayment with more deceit, explaining in a letter that "the investment club has invested cash. May take a few weeks to find a replacement for your position. . . . Once we sell your seat, we are out unless another opens up." In May, he wrote to that her account's value was $ 28,576.24 and he had arranged for "all dividends and/or capital gains to date" to be forwarded to . Otto further explained to her that it could take a few weeks to liquidate, and suggested that she withdraw approximately $ 3,000 immediately, leaving $ 25,000 in the club to remain active, thus attempting to prolong the charade that he had invested 's money in WBC. Smith signed an authorization agreeing to leave $ 25,000 [**4] in the fictitious club, and received a personal check form Otto in the amount of $ 3,576.24 in June 1994. Initially the check was returned for insufficient funds, but later was able to deposit it.

Because of the two-month delay between her request and her receipt of the WBC funds, decided to withdraw all of the WBC funds. Still, Otto did not immediately return 's money. In a letter dated July 27, 1994, he continued to represent that WBC existed as a legitimate investment club and blamed the delay in receiving her money on the investment club.

I've not yet received our exit papers for the investment club. As your request is unusual things don't happen that fast. The group has assured me that funds will not be less than its value at the time the funds were requested. . . . This is an exclusive club with most people of professional investment background. I pushed to get us in, therefore I can't cause a lot [sic] waves. I should hope to receive our exit papers soon and subsequently the funds.

Otto finally sent a check for $ 26,346 (the fictitious balance of Smith's WBC account) on October 22, 1994, approximately [*963] six months after her initial request [**5] to withdraw her funds.

In October 1994, sent to Otto's then-employer, First Montauk Securities Corporation, copies of records and letters Otto had sent her regarding her WBC account. Nearly thirty months later, on March 14, 1997, NASD filed a complaint against Otto, charging him with violating Conduct Rule 2110, which requires members to "observe high standards of commercial honor and just and equitable principles of trade." At a subsequent hearing before the NASD Regional District Business Conduct Committee ("DBCC"), Otto admitted that WBC did not exist as anything other than an "insignia." Otto claimed, however, that had authorized him to use the funds as he did. According to Otto, faced marital difficulties and wanted to use WBC in order to hide the money from her then-husband. Otto further claimed that the only reason made a complaint against Otto was because of the request of her father, also one of Otto's clients, who was upset with Otto's handling of his account. 's complaint was admitted into evidence at the hearings, but she did not testify. On August 7, 1998, the DBCC found that Otto violated Conduct Rule 2110 and imposed a penalty composed of [**6] a censure, a permanent bar from associating with any NASD member, a fine of $ 110,000, and an assessment of costs in the amount of $ 3,110.75.

Otto appealed the DBCC's decision to the National Adjudicatory Counsel ("NAC") for NASD. At the hearing before the NAC, Otto again admitted that WBC never existed and that he used s funds for his business and personal expenses. Again did not testify. The NAC found that "Otto's misuse of 's] funds was inexcusable. His misconduct, coupled with his total refusal to acknowledge that he had misused his client's funds by using her money for his own personal and business benefit, makes him a danger to the investing public." Further, in its decision, the NAC explained that even though the guidelines did not recommend a bar for Otto's conduct, it considered a bar "essential based on the egregious nature of Otto's conduct." In support, it noted three aggravating factors: 1) the series of lies and deception beginning with his solicitation of 's funds and continuing throughout her attempts to withdraw her funds; 2) his failure to accept responsibility for his misuse of s funds; and 3) his attempt to lay blame on others, specifically [**7] upon herself with his theory that she attempted to use WBC to hide the money in a marital dispute. Accordingly, on June 28, 1999, the NAC affirmed the censure and bar, but reduced the fine to $ 35,000 because it concluded that the DBCC used a "conversion" sentencing guideline rather than an "improper use of funds" guideline.

Otto appealed the decision of the NAC to the SEC, which reviewed his case *de novo*. On September 15, 2000, the SEC sustained the censure, bar, $ 35,000 fine, and costs. The SEC found that Otto "deceived his client with a network of lies." The SEC pointed out that, by his own admission, the investment club into which Otto told he had placed her funds did not exist. The SEC

further found that when [redacted] sought to get her money back, Otto repeatedly delayed returning her money and continued the fiction of the investment club, failing to tell [redacted] that he used her money for his own benefit. The SEC found that Otto's admittedly false statements to [redacted] demonstrated "deception of a client about the use of money [that] is unethical and reprehensible." In addition, the SEC rejected Otto's procedural objections, finding that the NASD proceedings were fair, [**8] noting that Otto admitted "all of the facts necessary to determine his guilt." Finally the SEC [*964] held that the sanctions imposed by the NASD were not excessive or oppressive, concluding that Otto's conduct "demonstrates a serious misunderstanding of the obligations he owes to a customer as a registered representative." Otto now appeals.

II. Issues

Otto raises two issues in his appeal. First, he contends that the NASD proceedings violated his due process rights because hearsay evidence was admitted and relied upon, because he did not have the opportunity to cross-examine [redacted], and because the length of time that passed between the misconduct and the hearings deprived Otto of the opportunity to present witnesses on his behalf who had died during the delay. Second, Otto argues that the SEC abused its discretion in sustaining the NASD sanctions that exceeded the recommended sanctions under the NASD guidelines.

III. Analysis

The SEC is the federal agency charged with the regulation of the securities industry, but because the SEC lacks the resources to police the entire securities industry, it relies on participants in the markets to govern themselves. *See Gold v. SEC, 48 F.3d 987, 990 (7th Cir. 1995)*; [**9] *Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875, 876 (7th Cir. 1985)*. The NASD is a registered association of securities broker-dealers registered with the SEC pursuant to *15 U.S.C. § 78o-3(a)* and empowered to enforce association members' compliance with federal securities laws, Commission regulations, and the association's own rules and regulations by imposing appropriate sanctions. When enforcing members' compliance with applicable rules and regulations, the NASD must provide "a fair procedure for the disciplining of members and persons associated with members . . . ." *15 U.S.C. § 78o-3(b)(8)*; *Mister Discount Stockbrokers, Inc., 768 F.2d at 876*.

The disciplinary process established by the NASD provides that the NASD Regional District Business Conduct Committee has original jurisdiction of all complaints regarding member violations and may conduct hearings, make findings and impose penalties. *Id.* In turn the final actions taken by the District Committee are subject to review by the NASD Board of Governors. Any final disciplinary sanctions imposed by the Board of Governors is subject to "full and independent [**10] review by the SEC as to the facts as well as the law." *Gold, 48 F.3d at 990*; *15 U.S.C. § 78s(d)(2)*. Because the SEC conducts *de novo* review of the NASD's sanctions, this court's consideration of alleged errors in the NASD proceedings is limited. We will "consider errors in [the NASD] proceedings 'only if and to the extent that they infected the Commission's action by leading to error on its part.'" *Schellenbach v. SEC, 989 F.2d 907, 909 (7th Cir. 1993)*; *accord Gold, 48 F.3d at 990*; *Mister Discount Stockbrokers, Inc., 768 F.2d at 877*.

Our review of the proceedings before the SEC is not so limited. *Gold, 48 F.3d at 990*. This court may overturn an SEC sanctions order if it is unwarranted in law or without justification in fact. *Id.* (citing *Nowicki v. United States, 536 F.2d 1171, 1178 (7th Cir. 1976)*). Nevertheless, our review of the SEC's findings of fact is highly deferential. Indeed, the SEC's findings of fact are conclusive if supported by substantial evidence. *Schellenbach, 989 F.2d at 909*. Further, we will reverse the Commission decisions concerning sanctions only [**11] if this court finds that the SEC abused its discretion. *Id.*; *Mister Discount Stockbrokers, Inc., 768 F.2d at 879*. With this limited scope of review in mind, we turn to Otto's arguments.

[*965] *A. Fairness of NASD Proceedings*

Otto initially argues that the NASD proceedings violated his due process rights urging three separate grounds: 1) the NASD admitted into the record [redacted]s unsworn hearsay statements; 2) the NASD did not provide him with an opportunity to cross-examine [redacted]; 3) a six-year delay between the time of the misconduct and the date of the hearing prejudiced him because he could not call favorable witnesses who had died. None of Otto's arguments has merit.

We note at the outset that Constitutional standards do not apply unless the NASD is a state actor. *See R.J. O'Brien & Assoc., Inc. v. Pipkin, 64 F.3d 257, 262 (7th Cir. 1995)*. The fact that the NASD is subject to "extensive and detailed" governmental regulation does not necessarily convert that organization's actions into those of the state. *See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974)*. Indeed, although we have not expressly [**12] ruled on the question of whether the NASD is a state actor, we have previously expressed doubt about "the proposition that the comprehensive regulation of securities exchanges by the federal government would turn those exchanges into government actors." *Gold, 48 F.3d at 991* (suggesting that the New York Stock Exchange was not a state

actor, but declining to rule on the merits of that issue because petitioner had waived the argument on appeal). In addition, several of our Sister Circuits have reached the conclusion that the NASD is not a state actor. *See, e.g., Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999)* (noting that the NASD is a private corporation that receives no federal or state funding; that its creation was not mandated by statute; and that the government has no voice in the selection of its members); *First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 699 n.5 (3d Cir. 1979)*. In any event we need not decide the issue of whether the NASD is a state actor in this case because Otto admitted all of the facts necessary to establish his guilt, which dooms his due process arguments.

At his hearing before the NASD [**13] Board of Governors, Otto admitted, among other things, that WBC was fictional, that Smith was the only investor, and that he used ███'s funds for his "personal stuff." Further, when ███ requested to withdraw her WBC funds in April 1994, Otto continued his deception and delayed returning her money. First, he explained to her that it could take a few weeks to find a replacement and urged her to instead remain in the club. Later, Otto sent her a letter blaming the non-existent club for the delay in the return of her money. Ultimately, he continued his deception long enough to retain her money for six months after she initially requested it.

Despite his admissions, Otto nonetheless presses the argument that he somehow was prejudiced by ███'s absence at his hearings. The premise of Otto's argument is that if he were allowed to cross-examine ███h [2] she would have confirmed his explanation that she used WBC to hide assets from her husband and that she had given him permission to use the funds for his personal and business expenses. Otto's argument, however, is nothing more than pure fancy. First, there [*966] was no evidence that ███ had any prejudice against Otto that might have undermined [**14] the credibility of her complaint. Second, the *facts* of her complaint were not contradicted by any direct testimony, and instead were largely *corroborated* by Otto's own admissions. Moreover, ███'s former husband did testify at the hearing and expressly rejected Otto's assertion that the parties were contemplating divorce or separation during the time ███ had invested in WBC. Finally, Otto's letters to ███ reveal the utter incredibility of his assertion that ███ was using WBC to hide assets from her husband--for if ███ had been aware that WBC did not exist (as Otto suggests she was) then what need was there to persist in blaming the delay in the return of her funds on the non-existent club? Otto's argument has no foundation in fact. Furthermore, even if it did, it is well established that hearsay evidence is admissible in administrative proceedings, if it is deemed relevant and material. *Keller v. Sullivan, 928 F.2d 227, 230 (7th Cir. 1991)* (citing *Richardson v. Perales, 402 U.S. 389, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971)*). In addition to its relevance, ███'s complaint was supported by several indicia of reliability--most notably the corroboration [**15] from Otto's admissions.

> 2 In an attempt to secure Smith's presence, Otto's attorney sent to her a "subpoena." The document bears the indicia of the NASD (despite the fact that neither the NASD nor Otto himself had subpoena power) and "commands" her to appear with documents, falsely threatening her with punishment for contempt if she failed to comply. Otto's attempt to badger and even intimidate ███ into testifying only further undermines his claims and further suggests that he did not "observe high standards of commercial honor."

Otto also suggests that the delay in holding the hearing violated his due process rights because several witnesses, who would have testified that they participated in the WBC, died before the hearing was held. This claim is equally fanciful as Otto's claim that his due process rights were violated by his inability to cross-examine ███. The testimony of these witnesses would have largely been irrelevant. Otto admitted that he used ███s money for his business and personal expenses [**16] and whether other people had invested in the fictitious club he created is of no moment. Further, Otto admitted at the hearing that, besides himself, ███ was the only investor in WBC, thus directly contradicting the testimony he suggests he would have presented.

Given Otto's admissions coupled with the incriminating documentation he sent throughout her investment, Otto's claims that the proceedings were unfair and violated his due process rights must fail. Rule 2110 required Otto to "observe high standards of commercial honor and just and equitable principles of trade." Nothing in the record even remotely suggests that an error in the NASD proceedings infected the SEC's review. Consequently, our review is limited only to consideration of whether the SEC abused its discretion in holding that Otto violated Conduct Rule 2110. It did not. Otto's admissions and letters to ███ more than amply provide a basis to conclude that Otto did not "observe high standards of commercial honor and just and equitable principles of trade."

B. Severity of Sanctions

Otto next argues that the sanctions imposed exceeded the recommended sanctions under the NASD's guidelines, and thus, were improperly [**17] imposed. Otto also suggests that the NASD and SEC did not weigh all of the factors referenced on the NASD's sanction guide-

lines in reaching their determinations that the sanctions imposed were warranted. The NASD outlines eight factors relevant to imposing sanctions: 1) prior or other similar misconduct; 2) attempts to conceal conversion, misappropriation, or misuse; 3) forgery of documentation or customer's signature; 4) duration of the period the securities or funds were converted; 5) essentially stealing versus mistaken belief of authority to use; 6) value of converted, misappropriated or misused funds or securities (loss to customer); 7) prompt and voluntary restitution, clear evidence that the funds or securities were returned to the customer; [*967] 8) other aggravating or mitigating factors. The sanction guidelines, however, are not rigid and mechanical and serve only as a starting point for determining the proper disciplinary action. *In the Matter of Steven D. Goodman, 2001 SEC LEXIS 144*, 2001 WL 62607 (S.E.C.) at *5 (Jan. 26, 2001).

Otto coming led ████'s funds with his own for the sake of his own personal convenience and deprived her of the opportunity to invest those funds in a legitimate [**18] investment. Further, he concealed this use of funds from ████ Although he did ultimately return the funds, he put her funds at risk for more than two years. When ████ asked Otto to return her money, he continued to lie to her, attempted to convince her to leave her money invested in the fictitious WBC account, and only returned her money after six months. Given the ongoing deception in the face of a request for the return of her funds and Otto's refusal to accept responsibility for his misuse of ████'s funds, we agree with the SEC's decision to approve the NASD's imposition of sanctions.

The SEC's order is AFFIRMED.

PAZ SECURITIES, INC. AND JOSEPH MIZRACHI, PETITIONERS v. SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

No. 05-1467

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

494 F.3d 1059; *377 U.S. App. D.C. 413*; *2007 U.S. App. LEXIS 17412*; *Fed. Sec. L. Rep. (CCH) P94,437*

November 16, 2006, Argued
July 20, 2007, Decided

SUBSEQUENT HISTORY: Appeal after remand at, Review denied by *Paz Secs., Inc. v. SEC, 2009 U.S. App. LEXIS 11500 (D.C. Cir., May 29, 2009)*

PRIOR HISTORY: [***1]

On Petition for Review of an Order of the Securities and Exchange Commission.

COUNSEL: David Clarke, Jr. argued the cause for petitioners. With him on the briefs was Deborah R. Meshulam.

Michael A. Conley, Senior Special Counsel, argued the cause for respondent. With him on the brief were Brian G. Cartwright, General Counsel, Jacob H. Stillman, Solicitor, and Susan K. Straus, Attorney.

JUDGES: Before: GINSBURG, Chief Judge, and ROGERS and KAVANAUGH, Circuit Judges. Opinion for the Court by Chief Judge GINSBURG.

OPINION BY: GINSBURG

OPINION

[*1061] [**415] GINSBURG, *Chief Judge:*

PAZ Securities, Inc. and its president, Joseph Mizrachi, petition for review of an order of the Securities and Exchange Commission sustaining the decision of the National Association of Securities Dealers to expel PAZ from membership and to bar Mizrachi from ever associating with any NASD member firm as sanctions for Mizrachi's failure to respond to the NASD's repeated requests for information from and about PAZ. We hold the Commission abused its discretion in two ways: (1) it failed to address certain mitigating factors raised by the petitioners, specifically, that their failure to respond had no potential either to injure the investing public or to benefit themselves [***2] monetarily nor did the information requested relate to conduct potentially injurious to the public or beneficial to themselves; and (2) it did not identify any remedial -- as opposed to punitive -- purpose for the sanctions it approved. Accordingly, we grant the petition and remand this matter for the Commission to consider anew whether the sanctions are excessive or oppressive in light of the factors raised in mitigation and to consider for the first time whether the sanctions serve a remedial purpose, as required by *§ 19(e)(2)* of the Securities Exchange Act of 1934, *15 U.S.C. § 78s(e)(2)*.

I. Background

Joseph Mizrachi was the president of PAZ Securities, Inc., which was a member of the NASD, a "self-regulatory organization" registered with the Commission as a "national securities association" under *Section 15A* of the Securities Exchange Act of 1934, *15 U.S.C. § 78o-3*. The NASD adopts rules to regulate the conduct of its members, *§ 15A(b)(3)-(7)*, and may enforce those rules by imposing disciplinary sanctions upon member firms and persons associated with them, *§ 15A(b)(8)-(9)*.

In February 2003 the NASD began a routine on-site examination of PAZ and reviewed materials provided by Joseph [***3] Mizrachi's brother, Simon Mizrachi, in his capacity as vice president of the firm. Joseph Mizrachi claims he was unavailable at that time to respond to the NASD because he was experiencing mental distress

caused by marital difficulties and was traveling abroad. Unable to obtain through Simon Mizrachi everything it sought from PAZ, the NASD asked Joseph Mizrachi and PAZ to provide additional written information. Specifically, the NASD sent three letters to the petitioners asking whether PAZ had implemented a continuing education program; what investment banking or securities business the firm had engaged in since February 2001; what specific duties PAZ had assigned to, and what compensation PAZ had paid to, certain individuals during the period 2000-2002; whether PAZ had revised its written supervisory procedures as requested (apparently by the NASD); why the NASD had not received the firm's 2001 audit on time; and whether PAZ had a written expense sharing agreement with a company operated by Simon Mizrachi that shared office space with PAZ.

The NASD sent the first letter on May 6, 2003 by overnight courier to Joseph Mizrachi at the address listed for PAZ in the NASD's Central Registration [***4] Depository (CRD). On May 20, 2003 the NASD sent a second letter by express courier to the same address requesting the same information. On July 23, 2003 it sent a third letter by first class and certified mail to the address listed in the CRD for each petitioner. The return receipts show that one "C.J. Mizrachi" signed for the letter sent to PAZ's registered address, but the return receipt card sent to Joseph Mizrachi's home address bears an illegible signature. Joseph Mizrachi asserted before the Commission that he is not C.J. Mizrachi, [*1062] [**416] and C.J. Mizrachi is not further identified in the record.

The petitioners do not contest that the NASD's efforts to notify them comply with NASD Procedural Rule 9134, which provides the NASD may send documents by first class mail, certified mail, or courier to the address listed in the CRD. Under NASD Procedural Rule 8210(d), a member of the NASD or person to whom a request for information is directed is deemed to have received that request when it is sent to the last known business address of the member firm or the last known residential address of a person associated with the firm, as reflected in the CRD. Therefore, the petitioners had constructive, [***5] if not actual notice of the three letters requesting information from PAZ.

On August 14, 2003 the NASD Department of Enforcement filed with the NASD Office of Hearing Officers a complaint alleging the petitioners had failed to respond to a request for information, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210. The Department of Enforcement simultaneously sent by first class and certified mail a Notice of Complaint, with the complaint attached, to the addresses listed in the CRD for PAZ and for Joseph Mizrachi. The Department repeated this drill on September 12, 2003. Though the record is unclear whether Joseph Mizrachi received either of the Notices, he admitted that Simon Mizrachi told him about the complaint, apparently no later than October 2003.

In September 2003 Simon Mizrachi hired Douglas Westendorf, Esq. to represent the petitioners before the NASD. Pursuant to a motion Westendorf filed on September 26, the NASD gave the petitioners until October 20 to answer the complaint. The petitioners, however, still failed to answer the complaint, and on October 28 the NASD Hearing Officer found them in default. In November the Department of Enforcement moved for [***6] entry of a default decision and served the motion upon the petitioners and Westendorf. On December 31 the NASD Hearing Officer entered a default decision against the petitioners, expelling PAZ from membership in the NASD and barring Joseph Mizrachi from ever associating with any NASD member firm, the "standard" sanctions -- absent mitigating circumstances -- recommended in the NASD Sanction Guidelines (at 35).

On January 23, 2004 the petitioners belatedly responded to the NASD's request for information and moved to vacate the default decision. In that motion, Joseph Mizrachi explained that from January to August 2003 he had been traveling abroad to visit family and to deal with emotional distress, for which he had received counseling; from August 2003 to January 2004 he claimed he had been traveling extensively for business. Joseph Mizrachi claimed he and PAZ had relied upon Westendorf to represent them and attributed their failure to respond to the negligence of the attorney. The NASD Hearing Officer denied the motion to vacate the default decision because the petitioners had presented no evidence that their failure to respond was attributable to negligence by Westendorf and therefore [***7] failed to show good cause to vacate the default decision.

The petitioners appealed to the NASD's National Adjudicatory Council (NAC), arguing the sanctions imposed by the Hearing Officer were unduly severe and should be reduced upon the basis of three mitigating factors: (1) the petitioners' misplaced reliance upon counsel to respond to the complaint; (2) the unintentional nature of their failure to respond; and (3) the nature of the information requested, which did not involve any potential monetary gain to either of them. The NAC affirmed the default decision, the sanctions, and the Hearing [*1063] [**417] Officer's refusal to vacate the default decision. It found the petitioners' failure to respond to the NASD's requests for information were not mitigated by the enumerated factors because Joseph Mizrachi had at least constructive notice of the repeated requests for information and the petitioners' failure to respond was "tantamount to stonewalling and a willful refusal to comply," which had "undermined" the NASD's ability to fulfil its regulatory responsibilities. The NAC

did not respond to the petitioners' contention that their failure to respond was mitigated because the information requested [***8] did not relate to any potential monetary gain to them, except to say, "We have considered and rejected without discussion all other arguments of the parties."

Before the Commission, the petitioners argued the sanctions should be reduced because their failure to respond to the NASD's information requests (1) was unintentional (Principal Consideration No. 13, NASD Sanction Guidelines at 7); (2) did not injure the investing public (Principal Consideration No. 10, NASD Sanction Guidelines at 6), nor did the information requested relate to injurious conduct (violation-specific Principal Consideration No. 1, NASD Sanction Guidelines at 35); (3) did not stand to benefit them monetarily (Principal Consideration No. 17, NASD Sanction Guidelines at 7), nor did the information requested relate to conduct of benefit to them (violation-specific Principal Consideration No. 1, NASD Sanction Guidelines at 35); and (4) was attributable to their reliance upon counsel to respond to the complaint (Principal Consideration No. 7, NASD Sanction Guidelines at 6). The Commission first determined that Joseph Mizrachi actually knew about the requests for information by September 2003 but neither contacted the [***9] NASD nor delegated that task to another, which undermined the petitioners' claim that their failure to respond was unintentional. Next, the Commission rejected the petitioners' contention that they reasonably relied upon counsel because Joseph Mizrachi apparently neither followed up with Westendorf about filing an answer to the complaint nor asked anyone to keep him updated on the matter. Finally, in response to the petitioners' suggestion that the nature of the information requested mitigated their failure to respond, the Commission said the "NASD's requests were not as limited as [the petitioners] contend"; they concerned generally "the nature of PAZ's investment banking and securities activities [and, more specifically,] the duties and responsibilities of certain individuals, and whether the firm had a written agreement regarding shared expenses." Moreover, "Even if the requests had been limited" member firms and persons associated with them "cannot second-guess NASD's requests" because the "NASD has a right to request information and require cooperation." The Commission emphasized the "importance of complying with NASD's information requests" because "[w]hen members and associated [***10] persons delay their responses to requests for information, they impede the ability of NASD to conduct its investigations." Because the petitioners had received the standard sanction under the NASD Guidelines for failure to respond to a request for information, and because the Commission found that failure was unmitigated, the Commission held the sanctions were neither excessive nor oppressive.

II. Analysis

The petitioners argue the Commission abused its discretion by affirming sanctions grossly disproportionate to their conduct without considering certain mitigating factors and without articulating a remedial rather than a punitive purpose for the sanctions. Specifically, they contend the [*1064] [**418] Commission did not evaluate whether their failure to respond to the NASD's requests for information was mitigated because (1) it did not result in any injury to the investing public (Principal Consideration No. 11, NASD Sanction Guidelines at 6), (2) it did not have the potential to benefit either of them monetarily (Principal Consideration No. 17, NASD Sanction Guidelines at 7), and (3) the information requested related to conduct neither potentially injurious to the investing public nor potentially [***11] beneficial to themselves (violation-specific Principal Consideration No. 1, NASD Sanction Guidelines at 35).

The Commission responds that it may review a sanction only to determine whether it is excessive or oppressive and may not determine de novo whether it is otherwise appropriate. *See Krull v. SEC, 248 F.3d 907, 911 (9th Cir. 2001)* ("Although the Commission reviews the record de novo, its review of the sanction is narrower -- the sanction may be modified or canceled only if it is 'excessive or oppressive'"). The Commission emphasizes that the NASD Sanction Guidelines, which absent mitigating circumstances call for the expulsion of a member firm and the lifetime bar of an associated person for failure to respond to a request for information, show the sanctions imposed are not "grossly disproportionate." The Commission also asserts it considered each of the mitigating factors raised before it, and it may not now be faulted for failing to consider mitigating factors the petitioners did not raise before it.

Pursuant to *§ 19(e)* of the Securities Exchange Act of 1934*, the Commission is to review de novo a disciplinary sanction imposed by the NASD upon a member firm or a person associated [***12] therewith to determine whether the sanction "imposes any burden on competition not necessary or appropriate" to further the purposes of the Act, or is "excessive or oppressive." *See Otto v. SEC, 253 F.3d 960, 964, 966-67 (7th Cir. 2001)* ("the SEC conducts de novo review of the NASD's sanctions"). When evaluating whether a sanction imposed by the NASD is excessive or oppressive, as we have stated before, "the Commission must do more than say, in effect, petitioners are bad and must be punished," *Blinder, Robinson & Co., v. SEC, 267 U.S. App. D.C. 96, 837 F.2d 1099, 1113 (D.C. Cir. 1988)*; at the least it must give "[s]ome explanation [*1065] [**419] addressing the nature of the violation and the mitigating factors presented in the record." *McCarthy v. SEC, 406 F.3d*

179, 189-90 (2d Cir. 2005) (reviewing Commission decision affirming sanctions imposed by New York Stock Exchange, a self-regulatory organization). The Commission must be particularly careful to address potentially mitigating factors before it affirms an order expelling a member from the NASD or barring an individual from associating with an NASD member firm -- the securities industry equivalent of capital punishment. *Cf. Steadman v. SEC, 603 F.2d 1126, 1137-40 (5th Cir. 1979)* [***13] ("when the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors"), *aff'd on other grounds, 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981).*[*]

* Section 19(e), *15 U.S.C. § 78s(e)*, provides:

> (1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization ... --
>
> > (A) if the [Commission] ... finds that such member, participant, or person associated with a member has ... omitted such acts, as the self-regulatory organization has found him to have ... omitted, that such ... omissions to act, are in violation of ... the rules of the self-regulatory organization ... and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, [then the Commission,] by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or
> >
> > (B) if [the Commission] does not make any such finding it shall, by order, [***14] set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.
>
> (2) If the [Commission] ... having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, [then the Commission] may cancel, reduce, or require the remission of such sanction.

In this case the petitioners claim the Commission failed to address several mitigating factors. Insofar as the petitioners claim the Commission should have considered their previously clean disciplinary record and that they did not attempt either to mislead anyone or to conceal their present misconduct, their arguments are forfeit because the petitioners did not raise them before the Commission. *15 U.S.C. § 78y(c)(1).* Insofar as the peti-

tioners preserved other claims, however, they are on solid ground.

In the course [***15] of emphasizing in its decision the petitioners' obligation to respond to the NASD's requests for information (the "NASD has a right to request information and require cooperation from those persons it investigates"), the Commission mischaracterized the petitioners' argument, saying they "suggest[ed] that the information requests were not important because they focused on PAZ's supervisory procedures." In fact, their argument was not that the information sought was unimportant but rather that their failure to respond to the NASD (1) was of no potential monetary benefit to them and (2) did not result in any injury to the investing public, and that (3) the information requested did not relate to injurious conduct or conduct of potential monetary benefit to them.

In addition, pursuant to *Section 19* of the Act, the Commission was obliged -- but failed -- to review the sanction imposed by the NASD with "due regard for the public interest and the protection of investors." *15 U.S.C. § 78s(e)(2)*. As the Second Circuit explained in *Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940)*, that provision "authorizes [the Commission to order] expulsion not as a penalty but as a means of protecting investors [***16] .... The purpose of the order is remedial, not penal."* If the Commission upholds the sanctions as remedial, then it must explain why; furthermore, "as the circumstances in a case suggesting that a sanction is excessive and inappropriately punitive become more evident, the Commission must provide a more detailed explanation linking [*1066] [**420] the sanction imposed to those circumstances if it wishes to uphold the sanction." *McCarthy, 406 F.3d at 190*; *see also Occidental Petrol. Corp. v. SEC, 277 U.S. App. D.C. 112, 873 F.2d 325, 338 (D.C. Cir. 1989)* ("in order to allow for meaningful judicial review, the agency must produce an administrative record that delineates the path by which it reached its decision"). We do not suggest the Commission must make an on-the-record finding that a sanction is remedial, but it must explain why imposing the most severe, and therefore apparently punitive sanction is, in fact, remedial, particularly in light of the mitigating factors brought to its attention.

> * When *Wright* was decided, *Section 19* authorized the Commission itself "for the protection of investors ... to expel from a national securities exchange any member or officer thereof" for certain violations of the statute or of the rules [***17] and regulations thereunder. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 19(a)(3), 48 Stat. 881, 898-99 (codified at *15 U.S.C. § 78s(a)(3) (1940)*). Although the statute now calls for the sanction to be imposed in the first instance by a self-regulatory organization, subject to review by the Commission, that procedural change does not dilute the substantive requirement that the sanction be remedial rather than punitive. *See § 19(e)(2)*; *McCarthy, 406 F.3d at 189-91* (holding Commission abused its discretion by affirming exchange decision suspending broker from membership without determining sanction was necessary to protect investors).

The Commission did state its view that the sanctions here imposed by the NASD would "serve as a deterrent to others who may be inclined to ignore NASD's information requests," but such "general deterrence" is essentially a rationale for punishment, not for remediation. *Cf. Republic Steel Corp. v. NLRB, 311 U.S. 7, 12, 61 S. Ct. 77, 85 L. Ed. 6 (1940)* ("it is not enough to justify the [National Labor Relations] Board's requirements [of an employer] to say that they would have the effect of deterring persons from violating the [National Labor Relations] Act" because the Board's [***18] power "is remedial, not punitive"); *United States v. Bajakajian, 524 U.S. 321, 329, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)* ("Deterrence ? has traditionally been viewed as a goal of punishment"). Still, we agree with the Second Circuit that, "[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension ... it may be considered as part of the overall remedial inquiry." *McCarthy, 406 F.3d at 189*. Here, however, general deterrence was not considered as part of a larger remedial inquiry; the Commission offered no other rationale whatsoever. It simply held the sanctions were not excessive or oppressive because the NASD had a right to the requested information, the petitioners' failure to respond was not unintentional, and Joseph Mizrachi's depression was not so severe in August 2003 that he could not resume taking care of business. Nowhere did the Commission advert to any purpose other than "deterr[ing] others who may be inclined to ignore NASD's information requests." Therefore, the Commission did not adequately explain why the sanctions the NASD imposed upon the petitioners were not punitive rather than remedial.

III. Conclusion

The Commission abused its discretion by failing to address [***19] certain mitigating factors the petitioners raised before it and by affirming the severe sanctions imposed upon them by the NASD without first determining those sanctions were remedial rather than punitive. The petition for review is therefore granted and the case is remanded to the Commission for further proceedings consistent herewith.

So ordered.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

(b) Mandate to facilitate establishment of automated quotation systems

(1) In general

The Commission shall facilitate the widespread dissemination of reliable and accurate last sale and quotation information with respect to penny stocks in accordance with the findings set forth in subsection (a) of this section, with a view toward establishing, at the earliest feasible time, one or more automated quotation systems that will collect and disseminate information regarding all penny stocks.

(2) Characteristics of systems

Each such automated quotation system shall—

(A) be operated by a registered securities association or a national securities exchange in accordance with such rules as the Commission and these entities shall prescribe;

(B) collect and disseminate quotation and transaction information;

(C) except as provided in subsection (c) of this section, provide bid and ask quotations of participating brokers or dealers, or comparably accurate and reliable pricing information, which shall constitute firm bids or offers for at least such minimum numbers of shares or minimum dollar amounts as the Commission and the registered securities association or national securities exchange shall require; and

(D) provide for the reporting of the volume of penny stock transactions, including last sale reporting, when the volume reaches appropriate levels that the Commission shall specify by rule or order.

(c) Exemptive authority

The Commission may, by rule or order, grant such exemptions, in whole or in part, conditionally or unconditionally, to any penny stock or class of penny stocks from the requirements of subsection (b) of this section as the Commission determines to be consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets.

(d) Commission reporting requirements

The Commission shall, in each of the first 5 annual reports (under section 78w(b)(1) of this title) submitted more than 12 months after October 15, 1990, include a description of the status of the penny stock automated quotation system or systems required by subsection (b) of this section. Such description shall include—

(1) a review of the development, implementation, and progress of the project, including achievement of significant milestones and current project schedule; and

(2) a review of the activities of registered securities associations and national securities exchanges in the development of the system.

(June 6, 1934, ch. 404, title I, §17B, as added Pub. L. 101–429, title V, §506, Oct. 15, 1990, 104 Stat. 955.)

REFERENCES IN TEXT

Section 78w(b)(1) of this title, referred to in subsec. (d), was omitted from the Code. For further details related to reports referred to in subsec. (d), see Codification note set out under section 78w of this title.

EFFECTIVE DATE

Section effective Oct. 15, 1990, with provisions relating to civil penalties and accounting and disgorgement, see section 1(c)(1), (2) of Pub. L. 101–429, set out in an Effective Date of 1990 Amendment note under section 77g of this title.

§ 78r. Liability for misleading statements

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) Contribution

Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) Period of limitations

No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

(June 6, 1934, ch. 404, title I, §18, 48 Stat. 897; May 27, 1936, ch. 462, §5, 49 Stat. 1379.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a), was in the original "this title". See References in Text note set out under section 78a of this title.

AMENDMENTS

1936—Subsec. (a). Act May 27, 1936, inserted "or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title".

§ 78s. Registration, responsibilities, and oversight of self-regulatory organizations

(a) Registration procedures; notice of filing; other regulatory agencies

(1) The Commission shall, upon the filing of an application for registration as a national securi-

ties exchange, registered securities association, or registered clearing agency, pursuant to section 78f, 78o–3, or 78q–1 of this title, respectively, publish notice of such filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant such registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of a publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if it finds that the requirements of this chapter and the rules and regulations thereunder with respect to the applicant are satisfied. The Commission shall deny such registration if it does not make such finding.

(2) With respect to an application for registration filed by a clearing agency for which the Commission is not the appropriate regulatory agency—

(A) The Commission shall not grant registration prior to the sixtieth day after the date of publication of notice of the filing of such application unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that such clearing agency is so organized and has the capacity to be able to safeguard securities and funds in its custody or control or for which it is responsible and that the rules of such clearing agency are designed to assure the safeguarding of such securities and funds.

(B) The Commission shall institute proceedings in accordance with paragraph (1)(B) of this subsection to determine whether registration should be denied if the appropriate regulatory agency for such clearing agency notifies the Commission within sixty days of the date of publication of notice of the filing of such application of such appropriate regulatory agency's (i) determination that such clearing agency may not be so organized or have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency may not be designed to assure the safeguarding of such securities and funds and (ii) reasons for such determination.

(C) The Commission shall deny registration if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (1)(B) of this subsection of such appropriate regulatory agency's (i) determination that such clearing agency is not so organized or does not have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency are not designed to assure the safeguarding of such securities or funds and (ii) reasons for such determination.

(3) A self-regulatory organization may, upon such terms and conditions as the Commission, by rule, deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, shall cancel its registration. Upon the withdrawal of a national securities association from registration or the cancellation, suspension, or revocation of the registration of a national securities association, the registration of any association affiliated therewith shall automatically terminate.

(b) Proposed rule changes; notice; proceedings

(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, as soon as practicable after the date of the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) APPROVAL PROCESS.—

(A) APPROVAL PROCESS ESTABLISHED.—

(i) IN GENERAL.—Except as provided in clause (ii), not later than 45 days after the date of publication of a proposed rule change under paragraph (1), the Commission shall—

(I) by order, approve or disapprove the proposed rule change; or

(II) institute proceedings under subparagraph (B) to determine whether the proposed rule change should be disapproved.

(ii) EXTENSION OF TIME PERIOD.—The Commission may extend the period established under clause (i) by not more than an additional 45 days, if—

(I) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(II) the self-regulatory organization that filed the proposed rule change consents to the longer period.

(B) PROCEEDINGS.—

(i) NOTICE AND HEARING.—If the Commission does not approve or disapprove a proposed rule change under subparagraph (A), the Commission shall provide to the self-regulatory organization that filed the proposed rule change—

(I) notice of the grounds for disapproval under consideration; and

(II) opportunity for hearing, to be concluded not later than 180 days after the date of publication of notice of the filing of the proposed rule change.

(ii) ORDER OF APPROVAL OR DISAPPROVAL.—

(I) IN GENERAL.—Except as provided in subclause (II), not later than 180 days after the date of publication under paragraph (1), the Commission shall issue an order approving or disapproving the proposed rule change.

(II) EXTENSION OF TIME PERIOD.—The Commission may extend the period for issuance under clause (I) by not more than 60 days, if—

(aa) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(bb) the self-regulatory organization that filed the proposed rule change consents to the longer period.

(C) STANDARDS FOR APPROVAL AND DISAPPROVAL.—

(i) APPROVAL.—The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization.

(ii) DISAPPROVAL.—The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make a finding described in clause (i).

(iii) TIME FOR APPROVAL.—The Commission may not approve a proposed rule change earlier than 30 days after the date of publication under paragraph (1), unless the Commission finds good cause for so doing and publishes the reason for the finding.

(D) RESULT OF FAILURE TO INSTITUTE OR CONCLUDE PROCEEDINGS.—A proposed rule change shall be deemed to have been approved by the Commission, if—

(i) the Commission does not approve or disapprove the proposed rule change or begin proceedings under subparagraph (B) within the period described in subparagraph (A); or

(ii) the Commission does not issue an order approving or disapproving the proposed rule change under subparagraph (B) within the period described in subparagraph (B)(ii).

(E) PUBLICATION DATE BASED ON FEDERAL REGISTER PUBLISHING.—For purposes of this paragraph, if, after filing a proposed rule change with the Commission pursuant to paragraph (1), a self-regulatory organization publishes a notice of the filing of such proposed rule change, together with the substantive terms of such proposed rule change, on a publicly accessible website, the Commission shall thereafter send the notice to the Federal Register for publication thereof under paragraph (1) within 15 days of the date on which such website publication is made. If the Commission fails to send the notice for publication thereof within such 15 day period, then the date of publication shall be deemed to be the date on which such website publication was made.

(F) RULEMAKING.—

(i) IN GENERAL.—Not later than 180 days after July 21, 2010, after consultation with other regulatory agencies, the Commission shall promulgate rules setting forth the procedural requirements of the proceedings required under this paragraph.

(ii) NOTICE AND COMMENT NOT REQUIRED.—The rules promulgated by the Commission under clause (i) are not required to include republication of proposed rule changes or solicitation of public comment.

(3)(A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change shall take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal and State law. At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1), the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) to determine whether the proposed rule

should be approved or disapproved. Commission action pursuant to this subparagraph shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 78y of this title nor deemed to be "final agency action" for purposes of section 704 of title 5.

(4) With respect to a proposed rule change filed by a registered clearing agency for which the Commission is not the appropriate regulatory agency—

(A) The Commission shall not approve any such proposed rule change prior to the thirtieth day after the date of publication of notice of the filing whereof unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that the proposed rule change is consistent with the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(B) The Commission shall institute proceedings in accordance with paragraph (2)(B) of this subsection to determine whether any such proposed rule change should be disapproved, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of publication of notice of the filing of the proposed rule change of such appropriate regulatory agency's (i) determination that the proposed rule change may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(C) The Commission shall disapprove any such proposed rule change if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (2)(B) of this subsection of such appropriate regulatory agency's (i) determination that the proposed rule change is inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(D)(i) The Commission shall order the temporary suspension of any change in the rules of a clearing agency made by a proposed rule change that has taken effect under paragraph (3), if the appropriate regulatory agency for the clearing agency notifies the Commission not later than 30 days after the date on which the proposed rule change was filed of—

(I) the determination by the appropriate regulatory agency that the rules of such clearing agency, as so changed, may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible; and

(II) the reasons for the determination described in subclause (I).

(ii) If the Commission takes action under clause (i), the Commission shall institute proceedings under paragraph (2)(B) to determine if the proposed rule change should be approved or disapproved.

(5) The Commission shall consult with and consider the views of the Secretary of the Treasury prior to approving a proposed rule filed by a registered securities association that primarily concerns conduct related to transactions in government securities, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor. If the Secretary of the Treasury comments in writing to the Commission on a proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving the proposed rule. If the Secretary of the Treasury determines, and notifies the Commission, that such rule, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule, find that such rule is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(6) In approving rules described in paragraph (5), the Commission shall consider the sufficiency and appropriateness of then existing laws and rules applicable to government securities brokers, government securities dealers, and persons associated with government securities brokers and government securities dealers.

(7) SECURITY FUTURES PRODUCT RULE CHANGES.—

(A) FILING REQUIRED.—A self-regulatory organization that is an exchange registered with the Commission pursuant to section 78f(g) of this title or that is a national securities association registered pursuant to section 78*o*–3(k) of this title shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule change or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this paragraph collectively referred to as a "proposed rule change") that relates to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for security futures products for persons who effect transactions in security futures products, or rules effectuating such self-regulatory organization's obligation to enforce the securities laws. Such proposed rule change shall be accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, promptly publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit data, views, and arguments concerning such proposed rule change.

(B) FILING WITH CFTC.—A proposed rule change filed with the Commission pursuant to subparagraph (A) shall be filed concurrently with the Commodity Futures Trading Com-

mission. Such proposed rule change may take effect upon filing of a written certification with the Commodity Futures Trading Commission under section 7a–2(c) of title 7, upon a determination by the Commodity Futures Trading Commission that review of the proposed rule change is not necessary, or upon approval of the proposed rule change by the Commodity Futures Trading Commission.

(C) ABROGATION OF RULE CHANGES.—Any proposed rule change of a self-regulatory organization that has taken effect pursuant to subparagraph (B) may be enforced by such self-regulatory organization to the extent such rule is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal law. At any time within 60 days of the date of the filing of a written certification with the Commodity Futures Trading Commission under section 7a–2(c) of title 7, the date the Commodity Futures Trading Commission determines that review of such proposed rule change is not necessary, or the date the Commodity Futures Trading Commission approves such proposed rule change, the Commission, after consultation with the Commodity Futures Trading Commission, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1), if it appears to the Commission that such proposed rule change unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 78y of this title nor deemed to be a final agency action for purposes of section 704 of title 5.

(D) REVIEW OF RESUBMITTED ABROGATED RULES.—

(i) PROCEEDINGS.—Within 35 days of the date of publication of notice of the filing of a proposed rule change that is abrogated in accordance with subparagraph (C) and refiled in accordance with paragraph (1), or within such longer period as the Commission may designate up to 90 days after such date if the Commission finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall—

(I) by order approve such proposed rule change; or

(II) after consultation with the Commodity Futures Trading Commission, institute proceedings to determine whether the proposed rule change should be disapproved. Proceedings under subclause (II) shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within 180 days after the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings, the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

(ii) GROUNDS FOR APPROVAL.—The Commission shall approve a proposed rule change of a self-regulatory organization under this subparagraph if the Commission finds that such proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. The Commission shall disapprove such a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(8) DECIMAL PRICING.—Not later than 9 months after the date on which trading in any security futures product commences under this chapter, all self-regulatory organizations listing or trading security futures products shall file proposed rule changes necessary to implement decimal pricing of security futures products. The Commission may not require such rules to contain equal minimum increments in such decimal pricing.

(9) CONSULTATION WITH CFTC.—

(A) CONSULTATION REQUIRED.—The Commission shall consult with and consider the views of the Commodity Futures Trading Commission prior to approving or disapproving a proposed rule change filed by a national securities association registered pursuant to section 78*o*–3(a) of this title or a national securities exchange subject to the provisions of subsection (a) of this section that primarily concerns conduct related to transactions in security futures products, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(B) RESPONSES TO CFTC COMMENTS AND FINDINGS.—If the Commodity Futures Trading Commission comments in writing to the Commission on a proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving or disapproving the proposed rule. If the Commodity Futures Trading Commission determines, and notifies the Commission, that such rule, if implemented or as applied, would—

(i) adversely affect the liquidity or efficiency of the market for security futures products; or

(ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section,

the Commission shall, prior to approving or disapproving the proposed rule, find that such rule is necessary and appropriate in further-

ance of the purposes of this section notwithstanding the Commodity Futures Trading Commission's determination.

(10)[1] RULE OF CONSTRUCTION RELATING TO FILING DATE OF PROPOSED RULE CHANGES.—

(A) IN GENERAL.—For purposes of this subsection, the date of filing of a proposed rule change shall be deemed to be the date on which the Commission receives the proposed rule change.

(B) EXCEPTION.—A proposed rule change has not been received by the Commission for purposes of subparagraph (A) if, not later than 7 business days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with the rules of the Commission relating to the required form of a proposed rule change, except that if the Commission determines that the proposed rule change is unusually lengthy and is complex or raises novel regulatory issues, the Commission shall inform the self-regulatory organization of such determination not later than 7 business days after the date of receipt by the Commission and, for the purposes of subparagraph (A), a proposed rule change has not been received by the Commission, if, not later than 21 days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with the rules of the Commission relating to the required form of a proposed rule change.

(10)[1] Notwithstanding paragraph (2), the time period within which the Commission is required by order to approve a proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved is stayed pending a determination by the Commission upon the request of the Commodity Futures Trading Commission or its Chairman that the Commission issue a determination as to whether a product that is the subject of such proposed rule change is a security pursuant to section 8306 of this title.

(c) Amendment by Commission of rules of self-regulatory organizations

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4)(A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of title 5 for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this chapter.

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this chapter to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(5) With respect to rules described in subsection (b)(5) of this section, the Commission shall consult with and consider the views of the Secretary of the Treasury before abrogating, adding to, and deleting from such rules, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(d) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organiza-

[1] So in original. Two pars. (10) have been enacted.

tion, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(3) The provisions of this subsection shall apply to an exchange registered pursuant to section 78f(g) of this title or a national securities association registered pursuant to section 78*o*–3(k) of this title only to the extent that such exchange or association imposes any final disciplinary sanction for—

(A) a violation of the Federal securities laws or the rules and regulations thereunder; or

(B) a violation of a rule of such exchange or association, as to which a proposed change would be required to be filed under this section, except that, to the extent that the exchange or association rule violation relates to any account, agreement, contract, or transaction, this subsection shall apply only to the extent such violation involves a security futures product.

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) Dismissal of review proceeding

In any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by

the self-regulatory organization or member thereof.

(g) Compliance with rules and regulations

(1) Every self-regulatory organization shall comply with the provisions of this chapter, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 78q(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance—

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B) in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its members and persons associated with its members; and

(C) in the case of a registered clearing agency, with its own rules by its participants.

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

(h) Suspension or revocation of self-regulatory organization's registration; censure; other sanctions

(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this chapter, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or expel from such self-regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 78*o*(b)(4) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], this chapter, or the rules or regulations under any of such statutes;

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C) in the case of a registered clearing agency, any provision of the rules of the clearing agency.

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 78*o*(b)(6) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, or the rules or regulations under any of such statutes; or

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

(4) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to remove from

office or censure any person who is, or at the time of the alleged misconduct was, an officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated any provision of this chapter, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by any member or person associated with a member;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by any member or person associated with a member; or

(C) in the case of a registered clearing agency, with any provision of the rules of the clearing agency by any participant.

(i) Appointment of trustee

If a proceeding under subsection (h)(1) of this section results in the suspension or revocation of the registration of a clearing agency, the appropriate regulatory agency for such clearing agency may, upon notice to such clearing agency, apply to any court of competent jurisdiction specified in section 78u(d) or 78aa of this title for the appointment of a trustee. In the event of such an application, the court may, to the extent it deems necessary or appropriate, take exclusive jurisdiction of such clearing agency and the records and assets thereof, wherever located; and the court shall appoint the appropriate regulatory agency for such clearing agency or a person designated by such appropriate regulatory agency as trustee with power to take possession and continue to operate or terminate the operations of such clearing agency in an orderly manner for the protection of participants and investors, subject to such terms and conditions as the court may prescribe.

(June 6, 1934, ch. 404, title I, §19, 48 Stat. 898; Pub. L. 87–196, Sept. 5, 1961, 75 Stat. 465; Pub. L. 87–561, July 27, 1962, 76 Stat. 247; Pub. L. 90–438, July 29, 1968, 82 Stat. 453; Pub. L. 91–94, Oct. 20, 1969, 83 Stat. 141; Pub. L. 91–410, Sept. 25, 1970, 84 Stat. 862; Pub. L. 94–29, §16, June 4, 1975, 89 Stat. 146; Pub. L. 103–202, title I, §106(c), Dec. 17, 1993, 107 Stat. 2350; Pub. L. 105–353, title III, §301(b)(11), Nov. 3, 1998, 112 Stat. 3236; Pub. L. 106–554, §1(a)(5) [title II, §202(b), (c)], Dec. 21, 2000, 114 Stat. 2763, 2763A–418, 2763A–421; Pub. L. 111–203, title VII, §717(c), title IX, §§916, 929F(e), July 21, 2010, 124 Stat. 1652, 1833, 1854.)

AMENDMENT OF SECTION

Unless otherwise provided, amendment by subtitle A (§§711–754) of title VII of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see 2010 Amendment notes and Effective Date of 2010 Amendment note below.

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1), (b)(2)(C)(i), (3)(C), (7)(C), (8), (c), (d)(1), (e)(1)(A), (2), (f), (g), and (h), was in the original "this title". See References in Text note set out under section 78a of this title.

The Securities Act of 1933, referred to in subsec. (h), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, as amended, which is classified generally to subchapter I (§77a et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77a of this title and Tables.

The Investment Advisers Act of 1940, referred to in subsec. (h), is title II of act Aug. 22, 1940, ch. 686, 54 Stat. 847, as amended, which is classified generally to subchapter II (§80b–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80b–20 of this title and Tables.

The Investment Company Act of 1940, referred to in subsec. (h), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

AMENDMENTS

2010—Subsec. (b)(1). Pub. L. 111–203, §916(b)(2), substituted "as soon as practicable after the date of the filing" for "upon the filing".

Subsec. (b)(2). Pub. L. 111–203, §916(a), added par. (2) and struck out former par. (2) which related to approval of rule change or institution of proceedings regarding disapproval of such change within thirty-five days of publication of notice or within such longer period as the Commission may designate up to ninety days of such date.

Subsec. (b)(3)(A). Pub. L. 111–203, §916(c)(1), substituted "shall take effect" for "may take effect" and inserted "on any person, whether or not the person is a member of the self-regulatory organization" after "charge imposed by the self-regulatory organization".

Subsec. (b)(3)(C). Pub. L. 111–203, §916(c)(2), substituted second sentence for former second sentence which read as follows: "At any time within sixty days of the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) of this subsection, the Commission summarily may abrogate the change in the rules of the self-regulatory organization made thereby and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection and reviewed in accordance with the provisions of paragraph (2) of this subsection, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.", added third sentence, and substituted "this subparagraph" for "the preceding sentence" in last sentence.

Subsec. (b)(4)(D). Pub. L. 111–203, §916(d), amended subpar. (D) generally. Prior to amendment, subpar. (D) read as follows: "The Commission shall abrogate any change in the rules of such a clearing agency made by a proposed rule change which has taken effect pursuant to paragraph (3) of this subsection, require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection, and reviewed in accordance with the provisions of paragraph (2) of this subsection, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of filing of such proposed rule change of such appropriate regulatory agency's (i) determination that the rules of such clearing agency as so changed may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination."

Subsec. (b)(10). Pub. L. 111–203, §916(b)(1), added par. (10) relating to rule of construction relating to filing date of proposed rule changes.

Pub. L. 111–203, §717(c), added par. (10) relating to stay pending determination whether product is a security pursuant to section 8306 of this title.

Subsec. (h)(4). Pub. L. 111–203, §929F(e), in introductory provisions, substituted "any person who is, or at

the time of the alleged misconduct was, an officer or director" for "any officer or director" and "such person" for "such officer or director".

2000—Subsec. (b)(7). Pub. L. 106–554, § 1(a)(5) [title II, § 202(b)(1)], added par. (7).

Subsec. (b)(8). Pub. L. 106–554, § 1(a)(5) [title II, § 202(b)(2)], added par. (8).

Subsec. (b)(9). Pub. L. 106–554, § 1(a)(5) [title II, § 202(b)(3)], added par. (9).

Subsec. (d)(3). Pub. L. 106–554, § 1(a)(5) [title II, § 202(c)], added par. (3).

1998—Subsec. (c)(5). Pub. L. 105–353 realigned margins.

1993—Subsec. (b)(5), (6). Pub. L. 103–202, § 106(c)(1), added pars. (5) and (6).

Subsec. (c)(5). Pub. L. 103–202, § 106(c)(2), added par. (5).

1975—Pub. L. 94–29 amended section generally, substituting provisions covering the registration, responsibilities, and oversight of self-regulatory organizations by the Commission for provisions covering only the Commission's powers with respect to exchanges and securities, with a view to consolidating and expanding the Commission's oversight powers with respect to self-regulatory organizations, their members, participants, and officers, and with a view to giving the Commission identical powers over all self-regulatory organizations, including registered clearing agencies, and substantially strengthening the Commission's ability to assure that these organizations carry out their statutory responsibilities.

1970—Subsec. (e)(1). Pub. L. 91–410 substituted "December 31, 1970" for "September 1, 1970".

1969—Subsec. (e). Pub. L. 91–94 substituted "September 1, 1970" for "September 1, 1969" in par. (1), and "$945,000" for "$875,000" in par. (4).

1968—Subsec. (e). Pub. L. 90–438 added subsec. (e).

1962—Subsec. (d). Pub. L. 87–561 substituted "April 3, 1963" for "January 3, 1963" and "$950,000" for "$750,000".

1961—Subsec. (d). Pub. L. 87–196 added subsec. (d).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 916 and 929F(e) of Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Amendment by section 717(c) of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A (§§ 711–754) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see section 754 of Pub. L. 111–203, set out as a note under section 1a of Title 7, Agriculture.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 94–29 effective June 4, 1975, except for amendment of subsec. (g) by Pub. L. 94–29 which is effective 180 days after June 4, 1975, see section 31(a) of Pub. L. 94–29, set out as a note under section 78b of this title.

CONSTRUCTION OF 1993 AMENDMENT

Amendment by Pub. L. 103–202 not to be construed to govern initial issuance of any public debt obligation or to grant any authority to (or extend any authority of) the Securities and Exchange Commission, any appropriate regulatory agency, or a self-regulatory organization to prescribe any procedure, term, or condition of such initial issuance, to promulgate any rule or regulation governing such initial issuance, or to otherwise regulate in any manner such initial issuance, see section 111 of Pub. L. 103–202, set out as a note under section 78*o*–5 of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

REVIEW OF REGULATORY STRUCTURES AND PROCEDURES WITH RESPECT TO PENNY STOCKS; REPORT

Pub. L. 101–429, title V, § 510, Oct. 15, 1990, 104 Stat. 957, directed Comptroller General, in consultation with Securities and Exchange Commission, to conduct a review of rules, procedures, facilities, and oversight and enforcement activities of self-regulatory organizations under Securities Exchange Act of 1934, with respect to penny stocks (within the meaning of 15 U.S.C. 78c(a)(51)), and, within one year after Oct. 15, 1990, to submit a report on the review including a statement of findings and such recommendations as the Comptroller General considered appropriate with respect to legislative or administrative changes.

§ 78t. Liability of controlling persons and persons who aid and abet violations

(a) Joint and several liability; good faith defense

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 78u(d) of this title), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) Unlawful activity through or by means of any other person

It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.

(c) Hindering, delaying, or obstructing the making or filing of any document, report, or information

It shall be unlawful for any director or officer of, or any owner of any securities issued by, any issuer required to file any document, report, or information under this chapter or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information.

(d) Liability for trading in securities while in possession of material nonpublic information

Wherever communicating, or purchasing or selling a security while in possession of, material nonpublic information would violate, or result in liability to any purchaser or seller of the security under any provisions of this chapter, or any rule or regulation thereunder, such conduct in connection with a purchase or sale of a put, call, straddle, option, privilege or security-based swap agreement with respect to such security or with respect to a group or index of securities including such security, shall also violate and result in comparable liability to any purchaser or seller of that security under such provision, rule, or regulation.

(e) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under paragraph (1) or (3) of section

(14)

Print

93-32 NASD Publishes Sanction Guidelines To Familiarize Members With Major Violations And Penalties

SUGGESTED ROUTING
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Executive Summary

The NASD announces the publication of the *NASD Sanction Guidelines* (*Guidelines*). The *Guidelines* are being published so that members may become more familiar with some of the typical securities industry violations that occur and the disciplinary sanctions that may result.

Background

The *Guidelines* are being published and distributed so that members may become more familiar with some of the typical securities industry rule violations that occur and the disciplinary sanctions that may result. The *Guidelines* address more than 40 different types of violations.

Originally disseminated by the NASD National Business Conduct Committee (NBCC) for use by the various NASD District Business Conduct Committees and the Market Surveillance Committee, the *Guidelines* help the committees decide on appropriate remedial sanctions in NASD disciplinary proceedings. The *Guidelines* are not, however, predetermined, fixed sanctions for particular violations. Rather, they serve as a guide for the committees in an effort to achieve greater consistency, uniformity, and fairness when imposing sanctions.

Developed for the most frequent violations, the *Guidelines* include a listing of the basic considerations concerning the gravity of an offense and d ss a range of appropriate sanctions. Depending on the mitigating or aggravating factors present in individual cases, sanctions may be in..ased or decreased beyond the limits set forth in the *Guidelines*.

A significant consideration in determining appropriate sanctions for each type of violation listed in the *Guidelines* is a respondent's history of similar misconduct. This reflects the NBCC's belief that a primary objective of the NASD disciplinary process is to deter future violations by imposing progressively escalating sanctions upon repeat violators.

For more information on the *Guidelines*, call Norman Sue, Jr., Associate General Counsel, at (202) 728-8117, or Lewis E. Antone, Jr., Attorney, at (202) 728-8245. In addition to the enclosed copy of the *Guidelines*, additional copies of the *Guidelines* are available for purchase at $35 each ($10 each for employees of NASD member firms) by contacting NASD MediaSource^{SM} at (301) 590-6578 for credit card orders or by writing to: NASD, NASD MediaSource, P.O. Box 9403, Gaithersburg, MD 208989403. Please make checks payable to the National Association of Securities Dealers, Inc.

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15

NASD Notice to Members 98-39

NASD Revises Sanction Guidelines

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- ☐ Syndicate
- ☐ Systems
- ☐ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

The National Association of Securities Dealers, Inc. (NASD®) has revised the NASD Sanction Guidelines (Guidelines), which are used by the various bodies that adjudicate disciplinary matters (Adjudicators) to determine appropriate remedial sanctions. The National Business Conduct Committee (NBCC)[1] originally published the Guidelines in 1993 and periodically revised them to promote consistency and uniformity in the imposition of sanctions in disciplinary matters. The Guidelines contain an introductory section that explains the purpose of NASD disciplinary sanctions and sets forth certain generally applicable principles and considerations for determining appropriately remedial sanctions. The Guidelines also specify the range of monetary (e.g., fines and restitution orders) and non-monetary (e.g., bars, suspensions, and expulsions) sanctions generally applicable for violations at issue. The recommended ranges are not absolute. In applying the Guidelines, Adjudicators must exercise judgment and discretion in determining remedial sanctions and may impose sanctions that fall outside of the recommended ranges, or impose no sanction at all, depending on the unique facts of each case.

Questions concerning the Guidelines may be directed to Carla J. Carloni, Assistant General Counsel, NASD Regulation, Inc., at (202) 728-8019.

In addition to the copy of the Guidelines mailed with the print version of this Notice, copies of the Guidelines are available for purchase at $35 each ($10 each for employees of NASD member firms) by contacting NASD MediaSource℠ at (301) 590-6142. The Guidelines also are available on NASD Regulation's Web Site at www.nasdr.com.

Background

In 1997 the NBCC appointed a Sanction Guidelines Subcommittee (Subcommittee) to review and revise the Guidelines. The Subcommittee included representative District Business Conduct and Market Regulation Committee members, staff members from every NASD District, Market Regulation, Enforcement, and other departments of NASD Regulation℠, and current and former NBCC, National Adjudicatory Council (NAC), and NASD Board of Governors members. The Subcommittee recommended, and the NBCC approved, the attached Guidelines for publication.

The overall approach of the Guidelines is to set forth principal considerations in determining sanctions and ranges of monetary and non-monetary sanctions generally applicable to specific violations while leaving Adjudicators free to impose sanctions outside the recommended ranges in appropriate circumstances. The Guidelines include a revised introductory section, several new guidelines, and revisions to all existing guidelines.

The NASD believes that the Guidelines will enhance NASD Regulation's regulatory function by providing Adjudicators with guidance for determining appropriate remedial sanctions in disciplinary matters.

The Guidelines supersede guidelines previously published by the NASD and referenced in prior NASD Notices to Members. The Guidelines are effective as of May 15, 1998, and apply to all actions as of that date, including pending disciplinary cases.

Changes In Presentation

The presentation of the Guidelines has been revised with a view toward making the Guidelines more "user friendly." The Guidelines are

arranged according to the following 11 subject matter groupings:

- Activity Away From Associated Person's Member Firm
- Arbitration
- Distributions of Securities
- Financial and Operational Practices
- Impeding Regulatory Investigations
- Improper Use of Funds/Forgery
- Qualification and Membership
- Quality of Markets
- Reporting/Provision of Information
- Sales Practices
- Supervision

The Guidelines also include an alphabetical index that will allow users to locate any individual guideline by name.

Introductory Section

The introductory section, which now includes general principles applicable to every case and a list of principal considerations, provides users of the Guidelines with a comprehensive overview of appropriate methods for implementing the Guidelines. The revised introductory section also explains NASD Regulation's regulatory mission and the NASD's purpose in adopting the Guidelines. The NASD believes that the revised introductory section is a necessary component of the revised Guidelines and that it will prove useful to all Guidelines users.

The more important revisions and additions in the introductory section include:

- Discussion of remedial nature of disciplinary sanctions and concept of progressive discipline designed to deter future misconduct. The revised introductory section explains the intended purpose of NASD disciplinary sanctions and defines relevant disciplinary history as it applies to determining sanctions.

- Discussion of tailoring sanctions to address the specific misconduct at issue. The revised introductory section provides an illustrative list of sanctions that may be appropriate in certain instances to address specific types of misconduct and indicates that Adjudicators may find it necessary, in any given case, to impose sanctions outside the ranges recommended in the Guidelines or to impose no sanctions at all.

- Discussion of the concept of aggregation of violations. The revised introductory section delineates the factors that should be considered in determining whether to aggregate violations for purposes of instituting formal actions.

- Discussion of orders of restitution, orders of rescission, and fining away ill-gotten gains. The revised introductory section recommends that, when an identifiable customer has suffered a quantifiable loss, Adjudicators should consider ordering restitution. The introductory section also suggests that Adjudicators order that amounts not paid in restitution (because, after reasonable efforts, a customer cannot be located) be paid into the appropriate state escheat fund. The introductory section also suggests that, where appropriate, Adjudicators consider requiring orders of rescission and/or including as part of a disciplinary fine the amount of the respondent's ill-gotten gains.

- Discussion of orders of requalification. The revised introductory section now recommends that, where appropriate, Adjudicators require respondents to requalify in any or all capacities.

New Guidelines

The Guidelines include new guidelines specifically designed to address violations in the following areas:

- Confidentiality Agreements (settling with customers in exchange for customer agreements not to cooperate with regulatory authorities);

- Forms U-4 and U-5 (late filing, failing to file, filing false, misleading, or inaccurate forms or amendments);

- MSRB Rule G-36 (late filing or failing to file offering documents with the Municipal Securities Rulemaking Board);

- Regulation M Reports (late filing, failing to file, filing false or misleading reports);

- Reportable Events Under NASD Rule 3070 (late reporting, failing to report, filing false, inaccurate or misleading reports);

- Supervisory Procedures (deficient written supervisory procedures);

- Telemarketing Violations; and

- Trading Ahead of Research Reports.

Revisions To Individual Guidelines

The NBCC reviewed the Guidelines by subject matter classification in order to ensure uniformity among guidelines that address similar types of violations. This review allowed for important adjustments in recommended fine levels in the guidelines

for cheating, churning, conversion, forgery, guaranteeing a customer against loss, unauthorized trading, and others. It also allowed for adjustments in suspension recommendations for guidelines that address financial and operational violations and violations related to impeding regulatory investigations. Where appropriate, the guidelines that deal with reporting violations were expanded to address not only failures to report, but also late reporting and reporting inaccurate and/or misleading information.

Major specific changes to individual guidelines include:

- Increasing the high end of fine ranges for the guidelines on forgery, conversion, and cheating to $100,000;
- Increasing the high end of fine ranges for the guidelines on unauthorized trading and churning to $75,000;
- Introducing the concept of a daily escalator into the recommended fine amount for egregious cases of failing to honor arbitration awards;
- Expanding recommended suspensions for egregious cases of backing away from suspensions as market makers only to suspensions in any or all capacities;
- Increasing the high end of fine ranges for the guidelines on net capital violations and violations involving outside business activities to $50,000; and
- Increasing the high end of the fine range for the guideline on pricing violations to $100,000 (plus the gross amount of the excessive markups, markdowns, or excessive commissions if restitution is not ordered), and adding a recommendation to consider a suspension of up to 30 business days in non-egregious cases.

Endnote

[1] The NAC became the successor to the NBCC in January 1998. See Exchange Act Release No. 39470, December 19, 1997, 62 FR 67927 (December 30, 1997).

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76

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2010. Standards of Commercial Honor and Principles of Trade

A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

Cross References–

1122, Filing of Misleading Information as to Membership or Registration
IM-1000-3, Failure to Register Personnel
2111, Suitability
IM-2440-1, Mark-Up Policy
2342, "Breakpoint" Sales
5130, Restrictions on the Purchase and Sale of Initial Equity Public Offerings
5210, Publication of Transactions and Quotations
5220, Offers at stated Prices
5270, Front Running of Block Transactions
5320. Prohibition Against Trading Ahead of Customer Orders
IM-10100, Failure to Act Under Provisions of Code of Arbitration Procedure
IM-11110, Refusal to Abide by Rulings of the Committee

Amended by SR-FINRA-2008-028 eff. Dec. 15, 2008.
Amended by SR-NASD-2005-087 eff. Aug. 1, 2006

Selected Notices: 96-44, 08-57.

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17

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9349. National Adjudicatory Council Formal Consideration; Decision

(a) Decision of National Adjudicatory Council, Including Remand

In an appeal or review of a disciplinary proceeding governed by the Rule 9300 Series that is not withdrawn or dismissed prior to a decision on the merits, the National Adjudicatory Council, after considering all matters presented in the appeal or review and the written recommended decision of the Subcommittee or, if applicable, the Extended Proceeding Committee, may affirm, dismiss, modify or reverse the decision of the Hearing Panel or, if applicable, Extended Hearing Panel, with respect to each Respondent who has appealed or cross-appealed or is subject to a call for review. The National Adjudicatory Council may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the National Adjudicatory Council or the Review Subcommittee may remand the disciplinary proceeding with instructions. The National Adjudicatory Council shall prepare a proposed written decision pursuant to paragraph (b).

(b) Contents of Decision

The decision shall include:

(1) a statement describing the investigative or other origin of the disciplinary proceeding, if not otherwise contained in the record;

(2) the specific statutory or rule provisions that were alleged to have been violated;

(3) a statement setting forth the findings of fact with respect to any act or practice the Respondent was alleged to have committed or omitted;

(4) the conclusions as to whether the Respondent violated any provision alleged in the complaint;

(5) a statement in support of the disposition of the principal issues raised in the proceeding; and

(6) a statement describing any sanction imposed, the reasons therefor, and, pursuant to Rule 9360, the date upon which such sanction shall become effective.

(c) Issuance of Decision After Expiration of Call for Review Period

The National Adjudicatory Council shall provide its proposed written decision to the FINRA Board. The FINRA Board may call the disciplinary proceeding for review pursuant to Rule 9351. If the FINRA Board does not call the disciplinary proceeding for review, the proposed written decision of the National Adjudicatory Council shall become final, and the National Adjudicatory Council shall serve its written decision on the Parties and provide a copy to each member of FINRA with which a Respondent is associated. The decision shall constitute the final disciplinary action of FINRA for purposes of SEA Rule 19d-1(c)(1), unless the National Adjudicatory Council remands the proceeding.

Amended by SR-FINRA-2011-044 eff. Mar. 30, 2012.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-99-76 eff. Sept. 11, 2000.
Amended by SR-NASD-97-81 eff. Jan. 16, 1998.
Adopted by SR-NASD-97-28 eff. Aug. 7, 1997.

Selected Notices: 00-56, 08-57, 12-12.

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FINRA

Financial Industry Regulatory Authority

Sanction Guidelines

Table of Contents

Overview	1
General Principles Applicable to All Sanction Determinations	2
Principal Considerations in Determining Sanctions	6
Applicability	8
Technical Matters	9
I. Activity Away From Associated Person's Member Firm	12
II. Arbitration	17
III. Distributions of Securities	19
IV. Financial and Operational Practices	25
V. Impeding Regulatory Investigations	31
VI. Improper Use of Funds/Forgery	35
VII. Qualification and Membership	38
VIII. Quality of Markets	46
IX. Reporting/Provision of Information	67
X. Sales Practices	76
XI. Supervision	99
Schedule A to the FINRA Sanction Guidelines	106
Index	107

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Overview

The regulatory mission of FINRA is to protect investors and strengthen market integrity through vigorous, even-handed and cost-effective self-regulation. FINRA embraces self-regulation as the most effective means of infusing a balance of industry and non-industry expertise into the regulatory process. FINRA believes that an important facet of its regulatory function is the building of public confidence in the financial markets. As part of FINRA's regulatory mission, it must stand ready to discipline member firms and their associated persons by imposing sanctions when necessary and appropriate to protect investors, other member firms and associated persons, and to promote the public interest.

The National Adjudicatory Council (NAC), formerly the National Business Conduct Committee, has developed the *FINRA Sanction Guidelines* for use by the various bodies adjudicating disciplinary decisions, including Hearing Panels and the NAC itself (collectively, the Adjudicators), in determining appropriate remedial sanctions. FINRA has published the *FINRA Sanction Guidelines* so that members, associated persons and their counsel may become more familiar with the types of disciplinary sanctions that may be applicable to various violations. FINRA staff and respondents also may use these guidelines in crafting settlements, acknowledging the broadly recognized principle that settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle.

These guidelines do not prescribe fixed sanctions for particular violations. Rather, they provide direction for Adjudicators in imposing sanctions consistently and fairly. The guidelines recommend ranges for sanctions and suggest factors that Adjudicators may consider in determining, for each case, where within the range the sanctions should fall or whether sanctions should be above or below the recommended range. These guidelines are not intended to be absolute. Based on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall outside the ranges recommended and may consider aggravating and mitigating factors in addition to those listed in these guidelines.

These guidelines address some typical securities-industry violations. For violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations.

In order to promote consistency and uniformity in the application of these guidelines, the NAC has outlined certain **General Principles Applicable to All Sanction Determinations** that should be considered in connection with the imposition of sanctions in all cases. Also included is a list of **Principal Considerations in Determining Sanctions**, which enumerates generic factors for consideration in all cases. Also, a number of guidelines identify potential principal considerations that are specific to the described violation.

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.

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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.

3. **Adjudicators should tailor sanctions to respond to the misconduct at issue.** Sanctions in disciplinary proceedings are intended to be remedial and to prevent the recurrence of misconduct. Adjudicators therefore should impose sanctions tailored to address the misconduct involved in each particular case. Section 15A of the Securities Exchange Act of 1934 and FINRA Rule 8310 provide that FINRA may enforce compliance with its rules by: limitation or modification of a respondent's business activities, functions and operations; fine; censure; suspension (of an individual from functioning in any or all capacities, or of a firm from engaging in any or all activities or functions, for a defined period or contingent on the performance of a particular act); bar (permanent expulsion of an individual from associating with a firm in any or all capacities); expulsion (of a firm from FINRA membership and, consequently, from the securities industry); or any other fitting sanction.

   To address the misconduct effectively in any given case, Adjudicators may design sanctions other than those specified in these guidelines. For example, to achieve deterrence and remediate misconduct, Adjudicators may impose sanctions that: (a) require a respondent firm to retain a qualified independent consultant to design and/or implement procedures for improved future compliance with regulatory requirements; (b) suspend or bar a respondent firm from engaging in a particular line of business; (c) require an individual or member firm respondent, prior to conducting future business, to disclose certain information to new and/or existing clients, including disclosure of disciplinary history; (d) require a respondent firm to implement heightened supervision of certain individuals or departments in the firm; (e) require an individual or member firm respondent to obtain a FINRA staff letter stating that a proposed communication with the public is consistent with FINRA standards prior to disseminating that communication to the public; (f) limit the number of securities in which a respondent firm may make a market; (g) limit the activities of a respondent firm; or (h) require a respondent firm to institute tape recording procedures. **This list is illustrative, not exhaustive, and is included to provide examples of the types of sanctions that Adjudicators may design to address specific misconduct and to achieve deterrence. Adjudicators may craft other sanctions specifically designed to prevent the recurrence of misconduct.**

   The recommended ranges in these guidelines are not absolute. The guidelines suggest, but do not mandate, the range and types of sanctions to be applied. Depending on the facts and circumstances of a case, Adjudicators may determine that no remedial purpose is served by imposing a sanction within the range recommended in the applicable guideline; *i.e.*, that a sanction below the recommended range, or no sanction at all, is appropriate. Conversely, Adjudicators may determine that egregious misconduct requires the imposition of sanctions above or otherwise outside of a recommended range. For instance, in an egregious case, Adjudicators may consider barring an individual respondent and/or expelling a respondent member firm, regardless of whether the individual guidelines applicable to the case recommend a bar and/or expulsion or other less severe sanctions. Adjudicators must always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case. In addition, whether the sanctions are within or outside of the recommended range, Adjudicators must identify the basis for the sanctions imposed.

4. **Aggregation or "batching" of violations may be appropriate for purposes of determining sanctions in disciplinary proceedings.** The range of monetary sanctions in each case may be applied in the aggregate for similar types of violations rather than per individual violation. For example, it may be appropriate to aggregate similar violations if: (a) the violative conduct was unintentional or negligent (*i.e.*, did not involve manipulative, fraudulent or deceptive intent); (b) the conduct did not result in injury to public investors or, in cases involving injury to the public, if restitution was made; or (c) the violations resulted from a single systemic problem or cause that has been corrected.

   Depending on the facts and circumstances of a case, however, multiple violations may be treated individually such that a sanction is imposed for each violation. In addition, numerous, similar violations may warrant higher sanctions, since the existence of multiple violations may be treated as an aggravating factor.

5. **Where appropriate to remediate misconduct, Adjudicators should order restitution and/or rescission.** Restitution is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss. Adjudicators may determine that restitution is an appropriate sanction where necessary to remediate misconduct. Adjudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss proximately caused by a respondent's misconduct.[3]

   Adjudicators should calculate orders of restitution based on the actual amount of the loss sustained by a person, member firm or other party, as demonstrated by the evidence. Orders of restitution may exceed the amount of the respondent's ill-gotten gain. Restitution orders must include a description of the Adjudicator's method of calculation.

   When a member firm has compensated a customer or other party for losses caused by an individual respondent's misconduct, Adjudicators may order that the individual respondent pay restitution to the firm.

   Where appropriate, Adjudicators may order that a respondent offer rescission to an injured party.

3 Other avenues, such as arbitration, are available to injured customers as a means to redress grievances.

6. **To remediate misconduct, Adjudicators should consider a respondent's ill-gotten gain when determining an appropriate remedy.** In cases in which the record demonstrates that the respondent obtained a financial benefit[4] from his or her misconduct, where appropriate to remediate misconduct, Adjudicators may require the disgorgement of such ill-gotten gain by ordering disgorgement of some or all of the financial benefit derived, directly or indirectly.[5] In appropriate cases, Adjudicators may order that the respondent's ill-gotten gain be disgorged and that the financial benefit, directly and indirectly, derived by the respondent be used to redress harms suffered by customers. In cases in which the respondent's ill-gotten gain is ordered to be disgorged to FINRA, and FINRA collects the full amount of the disgorgement order, FINRA's routine practice is to contribute the amount collected to the FINRA Investor Education Foundation.

7. **Where appropriate, Adjudicators should require a respondent to requalify in any or all capacities.** The remedial purpose of disciplinary sanctions may be served by requiring an individual respondent to requalify by examination as a condition of continued employment in the securities industry. Such a sanction may be imposed when Adjudicators find that a respondent's actions have demonstrated a lack of knowledge or familiarity with the rules and laws governing the securities industry.

8. **When raised by a respondent, Adjudicators are required to consider ability to pay in connection with the imposition, reduction or waiver of a fine or restitution.** Adjudicators are required to consider a respondent's *bona fide* inability to pay when imposing a fine or ordering restitution. The burden is on the respondent to raise the issue of inability to pay and to provide evidence thereof.[6] If a respondent does not raise the issue of inability to pay during the initial consideration of a matter before "trial-level" Adjudicators, Adjudicators considering the matter on appeal generally will presume the issue of inability to pay to have been waived (unless the inability to pay is alleged to have resulted from a subsequent change in circumstances). Adjudicators should require respondents who raise the issue of inability to pay to document their financial status through the use of standard documents that FINRA staff can provided. Proof of inability to pay need not result in a reduction or waiver of a fine, restitution or disgorgement order, but could instead result in the imposition of an installment payment plan or another alternate payment option. In cases in which Adjudicators modify a monetary sanction based on a *bona fide* inability to pay, the written decision should so indicate. Although Adjudicators must consider a respondent's *bona fide* inability to pay when the issue is raised by a respondent, monetary sanctions imposed on member firms need not be related to or limited by the firm's required minimum net capital.

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4 "Financial benefit" includes any commissions, concessions, revenues, profits, gains, compensation, income, fees, other remuneration, or other benefits the respondent received, directly or indirectly, as a result of the misconduct.

5 Certain guidelines specifically recommend that Adjudicators consider ordering disgorgement in addition to a fine. These guidelines are singled out because they involve violations in which financial benefit occurs most frequently. These specific references should not be read to imply that it is less important or desirable to order disgorgement of ill-gotten gain in other instances. The concept of ordering disgorgement of ill-gotten gain is important and, if appropriate to remediate misconduct, may be considered in all cases whether or not the concept is specifically referenced in the applicable guideline.

6 *See In re Toney L. Reed*, Exchange Act Rel. No. 37572 (August 14, 1996), wherein the Securities and Exchange Commission directed FINRA to consider financial ability to pay when ordering restitution. In these guidelines, the NAC has explained its understanding of the Commission's directives to FINRA based on the *Reed* decision and other Commission decisions.

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.

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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.

Applicability

These guidelines supersede prior editions of the *FINRA Sanction Guidelines*, whether published in a booklet or discussed in *FINRA Regulatory Notices* (formerly *NASD Notices to Members*). These guidelines are effective as of the date of publication, and apply to all disciplinary matters, including pending matters. FINRA may, from time to time, amend these guidelines and announce the amendments in a *Regulatory Notice* or post the changes on FINRA's website *(www.finra.org)*. Additionally, the NAC may, on occasion, specifically amend a particular guideline through issuance of a disciplinary decision. Amendments accomplished through the NAC decision-making process or announced via *Regulatory Notices* or on the FINRA website should be treated like other amendments to these guidelines, even before publication of a revised edition of the *FINRA Sanction Guidelines*. Interested parties are advised to check FINRA's website carefully to ensure that they are employing the most current version of these guidelines.

Technical Matters

Calculation of days of suspension. As was the case in prior versions of the *FINRA Sanction Guidelines*, recommendations for the imposition of suspensions contained herein distinguish between suspensions for 30 or fewer days and 31 or more days. In these guidelines, the NAC recommends that a suspension of 30 or fewer days be measured in *business days*, while a suspension of 31 or more days be measured in *calendar days*.

Censures. These guidelines do not specifically recommend whether or not Adjudicators should impose censures under any of the individual sanction guidelines for particular violations. In the following two instances, however, Adjudicators generally should not impose censures: 1) in cases in which the total monetary sanction (fines, disgorgement, and restitution) is $5,000 or less and the disciplinary action (regardless of the number of violations alleged) involves the violations indicated in Schedule A to these guidelines; and 2) in cases in which an Adjudicator imposes a bar, expulsion or suspension. Adjudicators should impose censures in cases in which fines above $5,000 are reduced or eliminated due to a respondent's inability to pay or bankruptcy. Adjudicators also may impose censures in cases in which this policy would suggest no censure if the Adjudicator determines that extraordinary circumstances exist.[6]

Change in terminology; "actions" replaces "violations." Many of the guidelines recommend progressively escalating monetary sanctions for second and subsequent disciplinary "actions." The term "actions" is used to acknowledge that every violation of a rule will not necessarily rise to the level of a formal disciplinary action by FINRA, and also to reflect that, as discussed herein, multiple violations may be aggregated or "batched" into one "action" (see General Principle no. 4).

> An "action" means a Letter of Acceptance, Waiver and Consent (AWC), a settled case or a fully litigated case. FINRA Regulation staff-issued Cautionary Action Letters and staff interviews are informal actions that are not included for purposes of the *FINRA Sanction Guidelines* in the term "action."

Fines. Fines may be imposed individually as to each respondent in a case, or jointly and severally as to two or more respondents.

6 Interested parties are directed to *NASD Notice to Members 99-91* (November 1999) for additional information on FINRA's Censure Policy.

Monetary sanctions—Imposition and collection of monetary sanctions. FINRA has identified the circumstances under which Adjudicators generally will impose and FINRA generally will collect monetary sanctions. In that the overriding purpose of all disciplinary sanctions is to remedy misconduct, deter future misconduct and protect the investing public, Adjudicators may exercise their discretion in applying FINRA's policy on the imposition and collection of monetary sanctions as necessary to achieve FINRA's regulatory purposes. **The following lists of violations may not be exhaustive and these recommendations also may be appropriate for other types of cases.**[7]

- Adjudicators generally should not impose a fine if an individual is barred and there is no customer loss in cases involving the following types of misconduct:
  - failure to respond under FINRA Rule 8210;
  - exam cheating; and
  - private securities transactions (if the Adjudicator does not order disgorgement or restitution).
- Adjudicators generally should not impose a fine if an individual is barred and the Adjudicator has ordered restitution or disgorgement of ill-gotten gains as appropriate to remediate the misconduct in cases involving the following types of misconduct:
  - conversion or improper use of funds or securities;
  - forgery; and
  - sales practice and private securities transaction cases (if only one or a small number of customers are harmed).
- Adjudicators generally should impose a fine and require payment of restitution and disgorgement even if an individual is barred in all sales practice cases if:
  - the case involves widespread, significant and identifiable customer harm; or
  - the respondent has retained substantial ill-gotten gains.
- In all cases, Adjudicators may exercise their discretion and, if a bar is imposed, refrain from imposing a fine, but require proof of payment of an order of restitution when a respondent files an application for re-entry into the securities industry.[8] Adjudicators also may, in their discretion, impose a suspension and a fine, but require proof of payment of the fine when the respondent re-enters the securities industry. In this regard, Adjudicators should consider the following factors:
  - whether the respondent is suspended or otherwise not in the securities industry when the sanction is imposed; and
  - the number of customers harmed.

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7 Interested parties are directed to NASD *Notice to Members 99-86* (October 1999) for additional information on FINRA's Monetary Sanctions Policy.

8 Adjudicators have the discretion to impose post-judgment interest on restitution orders.

Monetary sanctions—payment of monetary sanctions. Respondents may be permitted to pay fines and costs through an installment payment plan. Installment payment plans generally will be limited to two years (although in extraordinary cases, installment payment plans may be extended to not more than five years). Respondents who are allowed
to utilize an installment payment plan will be required to execute promissory notes that track the installment payment plan.

Organization. These guidelines are organized into 11 subject-matter categories and arranged alphabetically by name in each category. In addition, the index lists all the guidelines alphabetically by name.

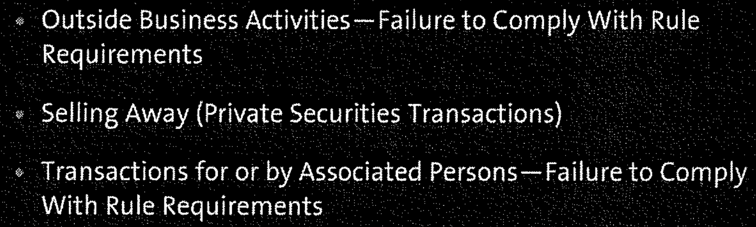
Restitution—Payment of interest. When ordering restitution, Adjudicators may consider requiring the payment of interest on the base amount. Generally, interest runs from the date(s) of the violative conduct and should be calculated at the rate established for the underpayment of federal income tax in Section 6621 of the Internal Revenue Code, 26 U.S.C. Section 6621(a)(2). If appropriate, Adjudicators may order payment to a state escheat fund of any amount that a respondent is not able to pay in restitution because he or she is unable, after reasonable and documented efforts, to locate a customer or other party to whom payment is owed.

Suspensions, bars and expulsions. These guidelines recommend suspensions that do not exceed two years. This upper limit is recommended because of the NAC's sense that, absent extraordinary circumstances, any misconduct so serious as to merit a suspension of more than two years probably should warrant a bar (of an individual) or expulsion (of a member firm) from the securities industry. Notwithstanding the NAC's recommendation in these guidelines to impose suspensions that do not exceed two years, under FINRA's rules, an Adjudicator may suspend the membership of a member or the registration of a person associated with a member for a definite period that may exceed two years or for an indefinite period with a termination contingent on the performance of a particular act.

It should be noted that an individual who is barred from associating with a member firm in any capacity generally may not re-enter the industry. Although a barred individual may seek special permission to re-enter the industry via FINRA's eligibility process, to date, the NAC has disfavored applications for re-entry.[9]

9 In Securities Exchange Act Release No. 34720 (September 26, 1994), Securities and Exchange Commission staff indicated in a letter to various self-regulatory organizations, including FINRA, that "[h]enceforth, imposition of an unqualified bar evidences the Commission's conclusion that the public interest is served by permanently excluding the barred person from the securities industry. Accordingly, absent extraordinary circumstances, a person subject to an unqualified bar will be unable to establish that it is in the public interest to permit reentry to the securities industry."

I. Activity Away From Associated Person's Member Firm



- Outside Business Activities—Failure to Comply With Rule Requirements
- Selling Away (Private Securities Transactions)
- Transactions for or by Associated Persons—Failure to Comply With Rule Requirements

Outside Business Activities—Failure to Comply With Rule Requirements

FINRA Rules 2010 and 3270

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the outside activity involved customers of the firm. 2. Whether the outside activity 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 activity, 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. 5. Whether the respondent misled his or her employer member firm about the existence of the outside activity or otherwise concealed the activity from the firm.	Fine of $2,500 to $50,000.[1]	When the outside business activities do not involve aggravating conduct, consider suspending the respondent for up to 30 business days. When the outside business activities involve aggravating conduct, consider a longer suspension of up to one year. In egregious cases, including those involving a substantial volume of activity or significant injury to customers of the firm, consider a longer suspension or a bar.

1 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Selling Away (Private Securities Transactions) *(continued)*

FINRA Rule 2010 and NASD Rule 3040

Principal Considerations in Determining Sanctions[1]	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	***Associated Person***	***Associated Person***
1. The dollar volume of sales. 2. The number of customers. 3. The length of time over which the selling away activity occurred. 4. Whether the product sold away has been found to involve a violation of federal or state securities laws or federal, state or SRO rules. 5. Whether the respondent had a proprietary or beneficial interest in, or was otherwise affiliated with, the selling enterprise or issuer and, if so, whether respondent disclosed this information to his or her customers. 6. Whether respondent attempted to create the impression that his or her employer (member firm) sanctioned the activity, for example, by using the employer's premises, facilities, name and/or goodwill for the selling away activity or by selling a product similar to the products that the employer (member firm) sells.	Fine of $5,000 to $50,000.[1]	The first step in determining sanctions is to assess the extent of the selling away, including the dollar amount of sales, the number of customers and the length of time over which the selling away occurred. Adjudicators should consider the following range of sanctions based on the dollar amount of sales: ▶ Up to $100,000 in sales: 10 business days to 3 months ▶ $100,000 to $500,000: 3 to 6 months ▶ $500,000 to $1,000,000: 6 to 12 months ▶ Over 1,000,000: 12 months to a bar Following this assessment, Adjudicators should consider other factors as described in the Principal Considerations for this Guideline and the General Principles applicable to all Guidelines. The presence of one or more mitigating or aggravating factors may either raise or lower the above-described sanctions.

1 As set forth in General Principle No. 6, Adjudicators should also order disgorgement.

Selling Away (Private Securities Transactions)

FINRA Rule 2010 and NASD Rule 3040

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*Member Firm*	*Member Firm*
7. Whether the respondent's selling away activity resulted, either directly or indirectly, in injury to the investing public and, if so, the nature and extent of the injury. 8. Whether the respondent sold away to customers of his or her employer (member firm). 9. Whether the respondent provided his or her employer firm with verbal notice of the details of the proposed transaction and, if so, the firm's verbal or written response, if any. 10. Whether the respondent sold away after being instructed by his or her firm not to sell the type of the product involved or to discontinue selling the specific product involved in the case. 11. Whether the respondent participated in the sale by referring customers or selling the product directly to customers. 12. Whether the respondent recruited other registered individuals to sell the product. 13. Whether the respondent misled his or her employer (member firm) about the existence of the selling away activity or otherwise concealed the selling away activity from the firm.	Where member firm receives written notice of a private securities transaction, but fails to provide written notice of approval, disapproval or acknowledgement, fine of $2,500 to $10,000.[2]	Where member firm receives written notice of a private securities transaction, but fails to provide written notice of approval, disapproval or acknowledgement, consider suspending responsible supervisory personnel in any or all capacities for up to two years.

2 If the allegations involve a member's failure to supervise the selling away activity, then Adjudicators should also consider the Supervision–Failure to Supervise guideline.

Transactions for or by Associated Persons—Failure to Comply With Rule Requirements

FINRA Rule 2010 and NASD Rule 3050[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	***Associated Person***	***Associated Person***
1. Whether violative transactions presented real or perceived conflicts of interest for the employer firm and/or customers. 2. Whether violative transaction(s) involved violations of the Restrictions on the Purchase and Sale of Initial Public Offerings (FINRA Rule 5130). 3. Whether the respondent provided verbal notice of the violative transactions to the employer member and/or executing member, and whether the employer member verbally acquiesced.	Fine of $1,000 to $25,000. ***Executing Member Firm*** Fine of $2,500 to $50,000.	In egregious cases, consider suspending the associated person in any or all capacities for up to two years or barring the associated person. ***Executing Member Firm*** In egregious cases, consider suspending the firm with respect to any or all activities or functions for up to two years. Also consider suspending the responsible individual at the executing firm in any or all capacities for up to two years or barring the responsible individual.

1 This guideline also is appropriate for violations of MSRB Rule G-28.

II. Arbitration

- Arbitration Award—Failure to Honor or Failure to Honor in a Timely Manner

Arbitration Award—Failure to Honor or Failure to Honor in a Timely Manner

FINRA Rules 2010 and 10330[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the respondent has paid any portion of the arbitration award. 2. Whether the respondent has made a good-faith attempt to satisfy the award in whole or in part. Consider the promptness of any such good-faith effort. 3. Whether the respondent negotiated a settlement or payment schedule with the arbitration claimant and then failed to abide by the terms of the agreement.	***Failure to Honor*** Fine of at least $5,000. In egregious cases, consider incorporating a daily escalator into the fine amount. ***Failure to Honor in a Timely Manner*** Fine of at least $2,500	***Failure to Honor*** Suspend the respondent in all capacities until the respondent satisfies the arbitration award (by payment or fully paid settlement) plus at least 30 additional business days. In egregious cases, consider a bar. ***Failure to Honor in a Timely Manner*** Suspend the respondent in all capacities for up to five business days.

1 In addition, FINRA Rule 9554 indicates that FINRA also may suspend or cancel the membership of a member or the registration of a person for failure to honor an arbitration award or settlement agreement related to an arbitration or mediation under Article V, Section 3 of the FINRA By-Laws. This guideline also is appropriate for violations of MSRB Rule G-35.

III. Distributions of Securities

- Corporate Financing Rule—Failure to Comply With Rule Requirements
- Engaging in Prohibited Municipal Securities Business
- Escrow Violations—Prohibited Representations in Contingency Offerings; Transmission or Maintenance of Customer Funds in Underwritings
- Restrictions on the Purchase and Sale of Initial Equity Public Offerings Violations
- Unregistered Securities—Sales of

Corporate Financing Rule—Failure to Comply With Rule Requirements

FINRA Rules 2010 and 5110

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section ***Failure to Comply with Filing Requirements*** ***Unfair or Unreasonable Underwriting Compensation*** 1. Percentage and dollar amount of unreasonable compensation as compared to maximum amount of underwriting compensation considered fair and reasonable (*see* FINRA Rule 5110.	***Failure to Comply with Filing Requirements*** Fine of $2,500 to $25,000. ***Unfair or Unreasonable Underwriting Compensation*** Fine of $5,000 to $50,000.[1]	***Failure to Comply with Filing Requirements*** In egregious cases, consider suspending the firm with respect to any or all activities or functions for five business days and/or suspending the responsible individual in any or all capacities for a period of 30 business days to two years. ***Unfair or Unreasonable Underwriting Compensation*** ***Individual*** Consider suspending the responsible individual in any or all capacities for a period of 30 business days to two years. In egregious cases, consider barring the responsible individual. ***Firm*** Consider suspending the firm with respect to any or all activities or functions for five business days. In egregious cases, consider suspending the firm for a longer period of time.

1 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Engaging in Prohibited Municipal Securities Business

MSRB Rule G-37[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Position in firm of person making contribution. 2. Position of official to whom the contribution was made. 3. Nature of prohibited municipal securities business in which respondent engaged. 4. Whether the respondent firm knew or should have known of contribution. 5. Relative size of the contribution.	***Firm*** Fine of $10,000 to $50,000.[2] ***Responsible Individual*** Fine of $10,000 to $50,000.[3]	In cases involving several prohibited municipal underwritings, or reckless conduct on the part of the firm, consider suspending the firm from engaging in municipal securities business with prohibited issuers for up to two years beyond the time proscribed by MSRB Rule G-37 and consider suspending the responsible individual(s) from acting as municipal principal(s) for a similar time period. In egregious cases, consider prohibiting the firm from engaging in any future business with prohibited issuers or with the involved official and barring the responsible individual(s) in any or all principal capacities.

1 MSRB Rule G-37 prohibits dealers from engaging in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by the dealer, any municipal finance professional associated with the dealer, and any political action committee controlled by the dealer or any municipal finance professional.

2 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

3 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Escrow Violations—Prohibited Representations in Contingency Offerings; Transmission or Maintenance of Customer Funds in Underwritings

FINRA Rule 2010; SEC Rule 15c2-4 and SEC Rule 10b-9

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section		
1. Amount of commissions and/or other underwriting compensation retained by the respondent. 2. Whether the respondent was affiliated with the issuer or other entity to which customer funds were released. 3. Whether subscription funds were released from escrow before the contingency occurred.		
SEC Rule 15c2-4	*SEC Rule 15c2-4*	*SEC Rule 15c2-4*
4. Extent to which the customer funds were exposed to risk or loss.	Fine of $1,000 to $10,000.	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or the responsible individual in any or all capacities for up to 30 business days.
SEC Rule 10b-9	*SEC Rule 10b-9*	*SEC Rule 10b-9*
5. Extent of failure to satisfy the contingency described in the prospectus or offering circular. 6. Whether the respondent used non-*bona fide* sales to give the false appearance that the contingency was satisfied.	Fine of $5,000 to $50,000.	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or the responsible individual in any or all capacities for up to two years. IOn appropriate cases, consider requiring a rescission offer.

Restrictions on the Purchase and Sale of Initial Equity Public Offerings Violations

FINRA Rules 2010 and 5130

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature of restricted account(s) involved. Consider whether the account is absolutely or conditionally restricted. 2. Whether the respondent has any interest in the restricted account(s). 3. Whether the case involves *bona fide* dispute regarding normal investment practice, proportion of allocation or substantiality of allocation. 4. Whether the respondent engaged in misconduct for the purpose of improperly conferring financial benefit on another person or entity.	If the respondent is the restricted buyer, a fine of $1,000 to $15,000.[1] If the respondent is the selling member firm and/or an associated person of the firm, a fine of $1,000 to $15,000.[2] If the restricted buyer is not subject to FINRA jurisdiction, "transaction profit" may be added to the fine for the selling member and/or associated person. In egregious cases or those with evidence of willful misconduct, consider a higher fine of up to three times the "transaction profit."	*Individual* Consider suspending the respondent representative (buyer or seller) in any or all capacities for up to 30 business days. In egregious cases, consider a longer suspension (of up to two years) or a bar. *Firm* Consider suspending the respondent firm with respect to any or all activities or functions for five to 10 business days. In egregious cases, consider a longer suspension (of up to two years) or an expulsion.

Unregistered Securities—Sales of

FINRA Rule 2010 and Section 5 of the Securities Act of 1933

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the respondent attempted to comply with an exemption from registration. 2. Whether the respondent sold before effective date of registration statement. 3. Share volume and dollar amount of transactions involved. 4. Whether the respondent had implemented reasonable procedures to ensure that it did not participate in an unregistered distribution. 5. Whether the respondent disregarded "red flags" suggesting the presence of unregistered distribution.	Fine of $2,500 to $50,000.[1] In egregious cases, consider a higher fine.	***Individual*** In egregious cases, consider a lengthier suspension in any or all capacities for up to two years or a bar. ***Firm*** In egregious cases, consider suspending the firm with respect to any or all activities or functions for up to 30 business days or until procedural deficiencies are remedied.

1. As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

IV. Financial and Operational Practices

- Customer Confirmations—Failure to Comply With Rule Requirements
- Customer Protection Rule—Failure to Comply With Rule Requirements
- Net Capital Violations
- Recordkeeping Violations
- Regulation T and Margin Requirements—Violations of Regulation T and/or FINRA Margin Requirements

Customer Confirmations—Failure to Comply With Rule Requirements

SEC Rule 10b-10[1] and NASD Rule 2230

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature and materiality of the inaccurate or missing information. 2. Number of affected confirmations.	***First Action*** Fine of $1,000 to $5,000. ***Second Action*** Fine of $5,000 to $10,000. ***Subsequent Actions*** Fine of $10,000 to $100,000.	***Firm*** Consider suspending the firm with respect to any or all activities or functions for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or expulsion of the firm. ***Individual*** Consider suspending the responsible party in any or all capacities for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or a bar.

1 This guideline is also appropriate for violations of MSRB Rule G-15.

Customer Protection Rule—Failure to Comply With Rule Requirements

FINRA Rule 2010 and SEC Rule 15c3-3

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Extent to which the respondent exposed customer funds to potential risk or loss.	Fine of $1,000 to $50,000. Repeated violations should carry individual fine for Financial Principal and/or responsible supervisor.	*Firm* Consider suspending the firm with respect to any or all activities or functions for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or expulsion of the firm. *Individual* Consider suspending the Financial Principal or responsible party in any or all capacities for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or a bar.

Net Capital Violations

FINRA Rule 2010 and SEC Rule 15c3-1

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the firm continued in business while knowing of deficiencies/inaccuracies or voluntarily ceased conducting business because of the deficiencies/inaccuracies. 2. Whether respondent attempted to conceal deficiencies or inaccuracies by any means, including "parking" of inventory and inflating "mark-to-market" calculations.	Fine of $1,000 to $50,000.	***Firm*** Consider suspending the firm with respect to any or all activities or functions for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or expulsion of the firm. ***Individual*** Consider suspending the Financial Principal or responsible party in any or all capacities for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or a bar.

Recordkeeping Violations

FINRA Rule 2010, NASD Rule 3110 and SEC Rules 17a-3 and 17a-4[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature and materiality of inaccurate or missing information.	Fine of $1,000 to $10,000. In egregious cases, fine of $10,000 to $100,000.	***Firm*** Consider suspending the firm with respect to any or all activities or functions for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or expulsion of the firm. ***Individual*** Consider suspending the Financial Principal or responsible party in any or all capacities for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or a bar.

1 This guideline also is appropriate for violations of MSRB Rules G-8 and G-15.

Regulation T and Margin Requirements—Violations of Regulation T and/or FINRA Margin Requirements

Regulation T; Part 220 Issued by the Board of Governors of the Federal Reserve Board; and FINRA Rules 2010 and 4210

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Extent and nature of the respondent's failure to comply.	Fine of $1,000 to $50,000. Repeated violations should carry an individual fine for the responsible individual.	***Firm*** Consider suspending the firm with respect to any or all activities or functions for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or expulsion of the firm. ***Individual*** Consider suspending the responsible individual in any or all capacities for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or a bar.

V. Impeding Regulatory Investigations

- Confidentiality Agreements—Settling With Customer in Exchange for Customer Agreement Not to Cooperate With Regulatory Authorities
- Failure to Respond, Failure to Respond Truthfully or in a Timely Manner, or Providing a Partial but Incomplete Response to Requests Made Pursuant to FINRA Rule 8210
- Settling Customer Complaints Away From the Firm

Confidentiality Agreements—Settling With Customer in Exchange for Customer Agreement Not to Cooperate With Regulatory Authorities

FINRA Rule 2010

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature of restriction contained in confidentiality clause. 2. Whether the respondent voluntarily released the customer from terms of confidentiality agreement without regulatory intervention. 3. Whether the respondent released the customer from terms of confidentiality agreement (as applied to cooperation with regulatory authorities) after regulator advised the respondent to do so.	Fine of $2,500 to $50,000.	Consider suspending the individual respondent in any or all capacities or suspending the firm (and/or responsible individual) with respect to any or all activities or functions for a period of one month to two years. In egregious cases, expel the firm (and/or bar responsible individual) or bar the individual respondent.

Failure to Respond, Failure to Respond Truthfully or in a Timely Manner, or Providing a Partial but Incomplete Response to Requests Made Pursuant to FINRA Rule 8210

FINRA Rules 2010 and 8210

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section *Failure to Respond or to Respond Truthfully* 1. Importance of the information requested as viewed from FINRA's perspective. *Providing a Partial but Incomplete Response* 1. Importance of the information requested that was not provided as viewed from FINRA's perspective, and whether the information provided was relevant and responsive to the request. 2. Number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response. 3. Whether the respondent thoroughly explains valid reason(s) for the deficiencies in the response. *Failure to Respond in a Timely Manner* 1. Importance of the information requested as viewed from FINRA's perspective. 2. Number of requests made and the degree of regulatory pressure required to obtain a response. 3. Length of time to respond.	*Failure to Respond or to Respond Truthfully* Fine of $25,000 to $50,000. *Providing a Partial but Incomplete Response* Fine of $10,000 to $50,000. *Failure to Respond in a Timely Manner* Fine of $2,500 to $25,000.	*Individual* If the individual did not respond in any manner, a bar should be standard.[1] Where the individual provided a partial but incomplete response, a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request. Where mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any or all capacities for up to two years.[2] *Firm* In an egregious case, expel the firm. If mitigation exists, consider suspending the firm with respect to any or all activities or functions for up to two years. In cases involving failure to respond in a timely manner, consider suspending the responsible individual(s) in any or all capacities and/or suspending the firm with respect to any or all activities or functions for a period of up to 30 business days.

1 When a respondent does not respond until after FINRA files a complaint, Adjudicators should apply the presumption that the failure constitutes a complete failure to respond.

2 The lack of harm to customers or benefit to a violator does not mitigate a Rule 8210 violation.

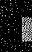
Settling Customer Complaints Away From the Firm

FINRA Rule 2010

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the respondent provided the employer with verbal notice of settlement and the employer acquiesced, or whether the respondent deceived his employer. 2. Whether the actions delayed or obviated the filing of required Forms U-4 or U-5 or NASD Rule 3070 filings.	Fine of $2,500 to $50,000.	Consider suspending the respondent in any or all capacities for up to two years. In egregious cases, consider barring respondent.

VI. Improper Use of Funds/Forgery

- Conversion or Improper Use of Funds or Securities
- Forgery and/or Falsification of Records



Conversion or Improper Use of Funds or Securities

FINRA Rules 2010 and 2150[1], and NASD Rule 2330 and IM-2330

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	***Conversion***[2] (No fine recommended, since a bar is standard.) ***Improper Use*** Fine of $2,500 to $50,000.	***Conversion*** Bar the respondent regardless of amount converted. ***Improper Use*** Consider a bar. Where the improper use resulted from the respondent's misunderstanding of his or her customer's intended use of the funds or securities, or other mitigation exists, consider suspending the respondent in any or all capacities for a period of six months to two years and thereafter until the respondent pays restitution.

1 This guideline also is appropriate for violations of MSRB Rule G-25.

2 Conversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it.

Forgery and/or Falsification of Records

FINRA Rule 2010

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature of the document(s) forged or falsified. 2. Whether the respondent had a good-faith, but mistaken, belief of express or implied authority.	Fine of $5,000 to $100,000.	In cases where mitigating factors exist, consider suspending respondent in any or all capacities for up to two years. In egregious cases, consider a bar.

VII. Qualification and Membership

- Branch Offices—Failure to Register
- Cheating, Using an Impostor, or Possessing Unauthorized Materials in Qualifications Examinations or in the Regulatory Element of Continuing Education
- Continuing Education (Firm Element)—Failure to Comply With Rule Requirements
- Continuing Education (Regulatory Element)—Failure to Comply With Rule Requirements
- Disqualified Person Associating With Firm Prior to Approval; Firm Allowing Disqualified Person to Associate Prior to Approval
- Member Agreement Violations
- Registration Violations

Branch Offices—Failure to Register

FINRA Rule 2010 and NASD IM-1000-4

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Number of branch office locations not properly registered. 2. Duration of period when branch office(s) were not properly registered. 3. The manner and scope of activities conducted in unregistered branch office(s).	Fine of $1,000 to $5,000 plus the dollar amount of registration fees that would have been assessed if the branch had been registered properly.	***Individual*** In egregious cases (including, but not limited to, those in which the firm previously has engaged in similar misconduct), consider suspending the responsible individual in any or all capacities for up to 30 business days. ***Firm*** In egregious cases (including, but not limited to, those in which the firm previously has engaged in similar misconduct), consider suspending the firm and/or the branch office at issue with respect to any or all activities or functions for up to five business days. Also require demonstrated compliance with the rule.

Cheating, Using an Impostor, or Possessing Unauthorized Materials in Qualifications Examinations or in the Regulatory Element of Continuing Education

FINRA Rule 2010[1]

Principal Considerations in Determining Sanctions[2]	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether nature of material indicated that it would not be useful for taking examination; *i.e.*, whether content of material makes it clear that respondent did not intend to cheat.	***Cheating*** ***Unauthorized Possession That Does Not Rise to the Level of Cheating*** Fine of $5,000 to $25,000.	A bar is standard. If mitigation is documented (only in cases of unauthorized possession that do not rise to the level of cheating), consider a lesser sanction, such as suspending the individual in any or all capacities for up to two years.

1 This guideline also is appropriate for violations of MSRB Rule G-3.

2 (a) The Membership and Registration Rules prohibit applicants from receiving assistance while taking an examination; (b) study outlines provided by FINRA Regulation Qualifications Department advise applicants that examinations are "closed book"; (c) examination pamphlet given to applicants advises that unauthorized materials may not be brought by the applicant into the testing center; (d) applicants taking an examination by computer must certify by prescribed keystrokes, to continue computer operation, that they will take the examination in the prescribed fashion and not receive assistance while taking the examination and, for paper examinations, applicants must sign a certification before beginning examination; and (e) proctor instructions before examinations advise applicants that unauthorized materials are not allowed during the examination.

Continuing Education (Firm Element)—Failure to Comply With Rule Requirements[1]

FINRA Rule 2010[2] and NASD Rule 1120

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the firm's misconduct effectively denied several registered persons access to participation in firm-sponsored continuing education. 2. Whether the firm has completed a training needs analysis and/or has developed written training plans aligned with the business activities of the firm.	*Individual* Fine of $1,000 to $5,000. *Firm and/or Responsible Principal* Fine of $2,500 to $20,000.	*Individual* In egregious cases, such as where there is intentional misconduct and/or repeat violations, suspend the individual in any or all capacities for 30 or more days (up to two years) or consider a bar. *Firm and/or Responsible Principal* In cases involving multiple violations or a violation of extended duration, where the firm has taken no corrective actions and appears unwilling to comply, consider suspending the firm (and/or responsible principal) with respect to any or all activities or functions for up to five business days and requiring demonstrated compliance with the requirements of NASD Rule 1120. In egregious cases, such as where the firm has not conducted a needs analysis or developed a written training plan, consider suspending the firm (and/or responsible principal) for a longer period (up to two years) or expelling the firm (and/or barring responsible principal).

1 This guideline is intended to apply to member firms that have not developed sufficient continuing education programs and/or made available to registered employees continuing education programs, and to individuals who fail to comply with the firm educational program.

2 This guideline also is appropriate for violations of MSRB Rule G-3.

Continuing Education (Regulatory Element)—Failure to Comply With Rule Requirements[1]

FINRA Rule 2010[2] and NASD Rule 1120

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature and extent of responsibilities of inactive person(s). **Violations by Individuals** 2. Whether the respondent knowingly functioned with inactive registration. **Violations by Firms** 3. Whether the firm knowingly allowed individual to function while registration was inactive.	***Individual*** Fine of $1,000 to $5,000.[3] ***Firm*** Fine of $2,500 to $20,000.[4]	***Individual*** In egregious cases, such as where there is intentional misconduct and/or repeat violations, suspend individual in any or all capacities for 30 or more days (up to two years) or consider a bar. ***Firm*** Where the firm has taken no corrective actions and appears unwilling to comply, consider suspending the firm (and/or responsible principal) with respect to any or all activities or functions for up to five business days. In egregious cases, such as those where the firm knowingly allowed a person with lapsed registration to act in a registered capacity and/or in cases with other aggravating factors, consider a longer suspension (of up to two years) of the firm (and/or responsible principal) or expulsion of the firm (and/or bar of the responsible principal).

1 This guideline is intended to apply to individuals who have not complied with the Regulatory Element and are acting in a registered capacity and to firms that have employed one or more individuals whose registration has lapsed for non-compliance with continuing education requirements and who continue to work in registered capacities.

2 This guideline also is appropriate for violations of MSRB Rule G-3.

3 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

4 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Disqualified Person Associating With Firm Prior to Approval; Firm Allowing Disqualified Person to Associate Prior to Approval

FINRA Rule 2010, NASD Rule 1031 and Article III, Section 3 of the FINRA By-Laws[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	***Firm and Supervisory Principals***	***Firm and Supervisory Principals***
1. Nature and extent of the disqualified person's activities and responsibilities. 2. Whether Form MC-400 application was pending. 3. Whether disqualification resulted from financial and/or securities misconduct.	Fine of $5,000 to $50,000.[2]	In egregious cases, consider suspending the firm with respect to any or all activities or functions for up to two years and the suspending supervisory principal in any or all capacities for up to two years or barring the supervisory principal, particularly where he or she knowingly allowed a disqualified person to become associated.
	Disqualified Person	***Disqualified Person***
	Fine of $5,000 to $50,000.[3]	In egregious cases, consider a bar.

1 This guideline also is appropriate for violations of MSRB Rule G-4.

2 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

3 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Member Agreement Violations

FINRA Rule 2010

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the respondent breached a material provision of the agreement. 2. Whether the respondent breached a provision of the agreement that contained a restriction that was particular to the firm. 3. Whether the firm had applied for, was in the process of applying for, or had been denied a waiver of a restriction at the time of the misconduct.	Fine of $2,500 to $50,000.[1]	In cases involving a serious breach of a restrictive agreement, suspend the firm with respect to any or all activities or functions and/or suspend the responsible individual in any or all capacities for up to two years. In egregious cases, consider expelling the firm and/or barring the responsible individual.

1 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Registration Violations

FINRA Rules 2010 and 1122, and NASD Rules 1000 through 1120[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
1. Whether the respondent has filed a registration application. 2. Nature and extent of the unregistered person's responsibilities.	***Firm and/or Individual*** Fine of $2,500 to $50,000[2]	***Firm*** In egregious cases, consider suspending the firm with respect to any of all activities or functions for up to 30 business days. ***Individual*** Consider suspending the individual in any or all capacities for up to six months. In egregious cases, consider a lengthier suspension (of up to two years) or bar.

1 This guideline also is appropriate for violations of MSRB Rules G-2 and G-3.

2 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

VIII. Quality of Markets

- Extended Hours Trading Risk Disclosure—Failure to Comply With Rule Requirements
- Anti-Intimidation/Coordination—Failure to Comply With Rule Requirements
- Backing Away
- Best Execution—Failure to Comply With Requirements for Best Execution
- ECN Display Rule—Failure to Comply With Rule Requirements
- Failure to Display Minimum Size in NASDAQ Securities, CQS Securities and OTC Bulletin Board™ Securities
- Limit Order Display Rule—Failure to Comply With Rule Requirements
- Limit Order Protection Rule—Failure to Comply With Rule Requirements
- Locked/Crossed Market—Failure to Comply With Rule Requirements
- Marking the Close or Open
- Options Exercise and Positions Limits—Failure to Comply With Rule Requirements
- Options Positions Reporting—Late Reporting and Failing to Report
- Order Audit Trail System (OATS)™—Late Reporting; Failing to Report; False, Inaccurate or Misleading Reporting; and Clock Synchronization Failure
- Passive Market Making Violations
- Prohibition on Transactions, Publication of Quotations or Publication of Indications of Interest During a Trading Halt
- Reports of Execution Quality and Order Routing
- Short Sale Violations
- Trade Reporting and Compliance Engine (TRACE)—Late Reporting; Failing to Report; False, Inaccurate or Incomplete Reporting
- Trade Reporting—Late Reporting; Failing to Report; False, Inaccurate or Misleading Reporting

Extended Hours Trading Risk Disclosure—Failure to Comply With Rule Requirements

FINRA Rule 2265

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the firm failed to provide customer(s) with a risk disclosure statement. 2. Whether the firm provided its customer(s) with an inadequate risk disclosure statement, or furnished the risk disclosure statement to its customer(s) in an untimely manner or a manner not designed to provide actual notice. 3. In all cases, consider the nature, quality and timing of the risk disclosure actually provided to the customer(s). 4. Whether extended-hours trading was appropriate for the affected customer(s).	Fine of $5,000 to $100,000	Consider suspending the responsible individual in any or all capacities for a period of 10 business days to one year. In egregious cases, particularly cases involving numerous customers, consider suspending for a longer period (of up to two years) or barring the responsible individual and suspending the firm with respect to any or all activities or functions for a period of up to two years.

Anti-Intimidation/Coordination—Failure to Comply With Rule Requirements

FINRA Rules 2010 and 5240

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the behavior was collusive or part of a larger manipulation. 2. Whether the behavior attempted to affect or actually affected publicly disseminated quotes or otherwise inhibited market transparency. 3. Whether the behavior attempted to or actually resulted in late or inaccurate trade reporting. 4. Whether the behavior attempted to or actually altered market prices. 5. In the case of intimidation or harassment, nature and content of the respondent's speech, communications and/or harassing behavior. 6. The general effect of the behavior on the fair and efficient operation of the securities markets. 7. Whether the behavior was repetitive or a single impulsive action.	***Intimidation/Harassment*** Fine of $5,000 to $50,000. In egregious cases, consider a fine in excess of $50,000. ***Coordination*** Fine of $10,000 to $100,000. In egregious cases, consider a fine in excess of $100,000.	***Intimidation/Harassment*** In egregious cases, suspend the individual respondent in any or all capacities and/or the member firm respondent with respect to any or all activities or functions for a period of 10 business days to two years. In egregious cases involving intimidation, consider barring the individual respondent. ***Coordination*** Suspend the individual respondent in any or all capacities and/or the member firm respondent with respect to any or all activities or functions for a period of 30 business days to two years. In egregious cases, consider expelling the member firm and/or barring the individual respondent.

Backing Away

FINRA Rules 2010 and 5220[1]

Principal Considerations in Determining Sanctions	Monetary Sanction[2]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the respondent offered contemporaneous trades or otherwise remediated the failures to execute. 2. While the respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	**First Action**[3] Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[4]	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual in any or all capacities for up to two years.

1 This guideline also is appropriate for violations of MSRB Rule G-13.

2 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

3 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

4 If the respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Best Execution—Failure to Comply With Requirements for Best Execution

FINRA Rule 2010 and NASD Rule 2320[1]

Principal Considerations in Determining Sanctions	Monetary Sanction[2]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature of the best execution violation; *i.e.*, whether the execution was at an inferior price or was untimely. 2. While the respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	***Negligent Misconduct*** **First Action**[3] Fine of $5,000 to $50,000. **Second Action** Fine of $10,000 to $100,000. **Subsequent Actions** Fine of $10,000 to $200,000.[4] ***Intentional or Reckless Misconduct*** Fine of $20,000 to $200,000. In egregious cases, consider a fine in excess of $200,000.	***Negligent Misconduct*** In egregious cases, consider suspending the responsible individual in any or all capacities and/or the firm with respect to any or all activities or functions for up to 30 business days. ***Intentional or Reckless Misconduct*** Suspend the responsible 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 may also be appropriate for violations of MSRB Rules G-18 and G-30 that do not involve a dealer's excessive profit, but do involve unfair pricing based on an inattention to market value. *See* MSRB Notice 2004-3 (Review of Dealer Pricing Responsibilities) (Jan. 26, 2004).

2 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range. Adjudicators should order restitution or increase the recommended fine amount by adding the amount of a respondent's financial benefit in all cases in which the best execution violation resulted in a quantifiable loss for the customer. In cases involving best execution violations that arose from intentional or reckless misconduct, Adjudicators may consider imposing a set fine amount per violation rather than in the aggregate.

3 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

4 If the respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

ECN Display Rule—Failure to Comply With Rule Requirements

FINRA Rule 2010 and Regulation NMS, Rule 602

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the priced order was a customer order, rather than an order entered for the account of the market maker. 2. Whether the priced customer order was executed during the period of non-compliance, while other transactions were executed in the marketplace at prices equal to or better than that priced order. 3. Evidence of significant adverse impact on market-price discovery or transparency that occurred because the order was not displayed at all, was displayed only after long delay, or was displayed in a grossly incorrect manner. 4. While respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	**First Action**[2] Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[3]	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual in any or all capacities for up to two years or expelling the firm and/or barring the responsible individual.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

3 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Failure to Display Minimum Size in NASDAQ Securities, CQS Securities and OTC Bulletin Board Securities

FINRA Rules 2010, 6170 and 6272, and SEC Rule 144A

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar, or Other Sanctions
See Principal Considerations in Introductory Section	**First Action**[2] Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[3]	In egregious cases, consider suspending the firm with respect to any or all activities or functions for up to 20 business days and/or suspending the responsible individual in any or all capacities for up to 20 business days.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

3 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Limit Order Display Rule—Failure to Comply With Rule Requirements

FINRA Rule 2010 and Regulation NMS, Rule 604

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the customer limit order was executed during the period of non-compliance and whether other transactions were executed at prices equal to or better than that customer limit order. 2. Whether the misconduct had a significant adverse impact on market-price discovery or transparency. 3. While respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	**First Action**[2] Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[3]	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual in any or all capacities for up to two years or expelling the firm and/or barring the responsible individual.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

3 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Limit Order Protection Rule—Failure to Comply With Rule Requirements

FINRA Rule 2010 and NASD IM-2110-2

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether respondent traded ahead of and/or failed to execute a customer limit order. 2. While respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	**First Action**[2] Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[3]	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual in any or all capacities for up to two years.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

3 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Locked/Crossed Market—Failure to Comply With Rule Requirements

FINRA Rules 2010, 6170 and 6272

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the locked/crossed market affected the market at a particularly sensitive time, such as at the market open, at commencement of secondary trading or on an expiration date. 2. While respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	**First Action**[2] Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[3]	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual in any or all capacities for up to two years or expelling the firm and/or barring the responsible individual.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

3 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Marking the Close or Open

FINRA Rules 2010 and 5210

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the misconduct resulted in protecting a securities position or enhancing size. 2. Whether the respondent received a benefit from the misconduct, including but not limited to increased valuation of inventory, avoidance of margin calls or affecting month-end performance. 3. Whether the activity affected the market at a particularly sensitive time, such as on an expiration date. 4. Whether the misconduct was an isolated incident involving one stock or a systemic pattern of behavior involving multiple stocks.	Fine of $25,000 to $200,000. In egregious cases, consider a fine in excess of $200,000.	***Negligent Misconduct*** Suspend the 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 the individual in any or all capacities and/or suspend firm with respect to any or all activities or functions for up to two years. In egregious cases, consider barring the individual and/or expelling the firm.

Options Exercise and Positions Limits—Failure to Comply With Rule Requirements

FINRA Rules 2010 and 2360

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	**First Action[2]** Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[3]	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual in any or all capacities for up to two years or prohibiting the firm from conducting options transactions.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

3 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Options Positions Reporting—Late Reporting and Failing to Report

FINRA Rule 2010 and 2360(b)(5)

Principal Considerations in Determining Sanctions[1]	Monetary Sanction[2]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Size of the positions not reported. 2. Whether respondent violated rule requirements during an extended period of days. (Adjudicators should treat as aggravating the fact that a respondent's failure to report or incorrect reporting occurred for more than one week. Adjudicators should treat as egregious misconduct a respondent's failure to report for several weeks.) 3. Evidence of respondent's potential for benefit or monetary gain.	***Late Reporting and Failing to Report*** **First Action[3]** Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[4] In all egregious cases, whether a first, second or subsequent action, consider a fine greater than or equal to the high end of the range for a first, second or subsequent action. Also consider imposing the fine on a "per violation" basis.	***Failure to Report*** In egregious cases, consider suspending the responsible individual in any or all capacities for up to two years. Also consider suspending the firm from conducting options transactions for up to two years or barring the firm from conducting options transactions.

1 A respondent's delegation of its reporting responsibilities to a third party who caused or contributed to respondent's violation is not an independent basis for mitigation.

2 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

3 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

4 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Order Audit Trail System (OATS)—Late Reporting; Failing to Report; False, Inaccurate or Misleading Reporting; and Clock Synchronization Failure

FINRA Rules 7400 through 7460

Principal Considerations in Determining Sanctions[2]	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature of OATS reporting violation. 2. Extent to which violative conduct affected the regulatory audit trail. 3. Whether violation occurred over an extended period of days. 4. Whether reporting violation was readily apparent from a review of FINRA's OATS website.[4] 5. While respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed, and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	***Late Reporting, Failing to Report, False, Inaccurate or Misleading Reporting*** **First Action[3]** Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[5] In all egregious cases, whether a first, second, or subsequent action, consider a fine greater than or equal to the high end of the range for a first, second, or subsequent action. ***Failure to Synchronize Clocks*** **First Action** Fine of $5,000 to $10,000. **Subsequent Actions** Fine of $10,000 to $50,000.[5]	***For All Types of Violations*** ***Firm*** **Subsequent Actions** Consider suspending the firm with respect to any or all activities or functions for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or expulsion of the firm. ***Individual*** **Subsequent Actions** Consider suspending the responsible individual in any or all capacities for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or a bar.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 A respondent's delegation of its reporting responsibilities to a third party who caused or contributed to respondent's violation is not an independent basis for mitigation.

3 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

4 In cases in which the respondent fails for more than one week to detect a failure to report that would have been apparent from a review of data on the OATS website, Adjudicators should consider the respondent's violations to be egregious.

5 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Passive Market Making Violations

FINRA Rule 2010 and Regulation M

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	**First Action[2]** Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[3]	In egregious cases, consider suspending responsible individual in any or all capacities for up to two years or barring responsible individual. Also consider suspending the firm with respect to any or all activities or functions for up to two years.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

3 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Prohibition on Transactions, Publication of Quotations or Publication of Indications of Interest During a Trading Halt

FINRA Rules 2010 and 5260[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether respondent knew of the trading halt.	Fine of $5,000 to $50,000. Adjudicators may consider ordering restitution or disgorgement in appropriate cases. In egregious cases, consider a fine in excess of $50,000.	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual in any or all capacities for up to two years or expelling the firm and/or barring the responsible individual.

1 This guideline also is appropriate for violations of MSRB Rule G-13.

Reports of Execution Quality and Order Routing

Regulation NMS, Rules 605 & 606

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section[3] 1. Whether respondent violated rule requirements during a period of months.[4] 2. While respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed, and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	**First Action[2]** Fine of $10,000 to $20,000. **Second Action** Fine of $20,000 to $50,000. **Subsequent Actions** Fine of $20,000 to $100,000.[5] In all egregious cases, whether a first, second or subsequent action, consider a fine greater than or equal to the high end of the range for a first, second or subsequent action. Also consider imposing the fine on a "per violation" basis.	

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time should be given more weight than less recent events.

3 A respondent's delegation of its reporting responsibilities to a third party who caused or contributed to respondent's violation is not an independent basis for mitigation.

4 Adjudicators should treat as aggravating the fact that a respondent's failure to report or incorrect reporting occurred for more than one month.

5 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Short Sale Violations

FINRA Rules 4560, 7230A and 7330, and Regulation SHO

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. In cases involving short interest reporting, consider the number of months during which the respondent failed to report short interest or reported short interest incorrectly.[4] 2. While respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed, and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	**First Action[2]** Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[5] In all egregious cases, whether a first, second or subsequent action, consider a fine greater than or equal to the high end of the range for a first, second or subsequent action. Also consider imposing the fine on a "per violation" basis.	If the short-selling customer is not subject to FINRA jurisdiction, in egregious cases or those with evidence of willful misconduct, consider adding the amount of the short-selling customer's "transaction profit"[3] to the fine for the executing member and/or associated person. In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible Individual in any or all capacities for up to two years or expelling the firm and/or barring the responsible individual.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

3 "Transaction profit" means the profit that the short-selling customer realized. This amount is separate and distinct from the respondent's financial benefit, as described in General Principle No. 6.

4 Adjudicators should treat as aggravating the fact that a respondent's failure to report or incorrect reporting of short interest occurred for more than one month. A respondent's delegation of its reporting responsibilities to a third party who caused or contributed to respondent's violation is not an independent basis for mitigation.

5 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

Trade Reporting and Compliance Engine (TRACE)—Late Reporting; Failing to Report; False, Inaccurate or Incomplete Reporting *(continued)*

FINRA Rules 2010 and 6730[1]

Principal Considerations in Determining Sanctions	Monetary Sanction[2]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section[3] 1. Extent to which violative conduct affected market transparency, the dissemination of trade information, or the regulatory audit trail. 2. While respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed, and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services. 3. Whether respondent violated rule requirements during an extended period of days. (Adjudicators should treat as aggravating the fact that a respondent's failure to report or incorrect reporting occurred for more than one week. Adjudicators should treat as egregious misconduct a respondent's failing to report for several weeks.) 4. Whether a reporting violation was readily apparent from a review of FINRA's TRACE website (or MSRB's website for violations of MSRB Rule G-14).[6]	***For All Types of Violations*** First Action[4] Fine of $5,000 to $10,000. Second Action **Fine of $10,000 to $50,000.** Subsequent Actions Fine of $10,000 to $100,000.[5] In all egregious cases, whether a first, second or subsequent action, consider a fine greater than or equal to the high end of the range for a first, second or subsequent action. Also consider imposing the fine on a "per violation" basis.	***For All Types of Violations*** ***Firm*** In egregious cases, consider a suspension (of up to two years) or expulsion of the firm. ***Responsible Individual*** Consider suspending the responsible individual in any or all capacities for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or a bar.

(footnotes continue on next page)

1 This guideline also is appropriate for violations of MSRB Rule G-14 AND G-17.

2 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

3 A respondent's delegation of its reporting responsibilities to a third party who caused or contributed to respondent's violation is not an independent basis for mitigation.

4 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

5 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

6 In cases in which the respondent does not detect a reporting failure or violation that would have been apparent from a routine review of data such as, for example, transaction reporting cards on FINRA's TRACE website or MSRB's website, Adjudicators should consider the respondent's violations to be egregious.

Trade Reporting—Late Reporting; Failing to Report; False, Inaccurate or Misleading Reporting

FINRA Rule 2010 and Equity Trade Reporting Rules

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature of trade reporting violation. 2. Whether violative conduct affected market-price discovery data. 3. Whether operational problems caused delayed reports. 4. Whether respondent violated rule requirements over an extended period of days. 5. While respondents are responsible for the systems that they use and the third-party vendors that they employ, the appropriate level of sanctions will depend on whether the respondent diligently chose, installed, and tested a system that nevertheless malfunctioned; the frequency and thoroughness with which the respondent ensured that the system was operating in compliance with applicable rules; and the care that the respondent exercised in undertaking all necessary steps to correct systems-related malfunctions. The same considerations apply to a respondent that has relied on a third-party vendor's products or services.	**First Action[2]** Fine of $5,000 to $10,000. **Second Action** Fine of $10,000 to $50,000. **Subsequent Actions** Fine of $10,000 to $100,000.[3] In all egregious cases, whether a first, second or subsequent action, consider a fine greater than or equal to the high end of the range for a first, second, or subsequent action.	In egregious cases, consider suspending the firm with respect to any or all activities or functions and/or suspending responsible individual in any or all capacities for up to two years. Also consider expelling the firm and/or barring the responsible individual.

1 In cases in which the violations: (1) involve a pattern or patterns of misconduct; (2) can be quantified by number or percentage; or (3) can be compared to the standard maintained by industry peers, Adjudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions. Imposition of monetary sanctions greater than those recommended in this guideline may be particularly appropriate in cases involving violations that occurred during two or more examination or review periods or violations that occurred over an extended period of time. Similarly, in cases in which the respondent acted intentionally or recklessly, and in cases in which the respondent's compliance rate is significantly lower than that of its peers, Adjudicators may impose a monetary sanction in excess of the recommended range.

2 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time should be given more weight than less recent events.

3 If respondent's second or subsequent action involves a violation that is less serious than a prior violation, includes conduct that demonstrates that respondent is improving its compliance rate, or involves mitigation that did not exist in a prior action, Adjudicators may consider imposing a fine that is less than the fine imposed in the prior action.

IX. Reporting/Provision of Information

- FOCUS Reports—Late Filing; Failing to File; Filing False or Misleading Reports
- Forms U4/U5—Late Filing of Forms or Amendments; Failing to File Forms or Amendments; Filing of False, Misleading or Inaccurate Forms or Amendments
- MSRB Rule G-36 (Timely Filing of Offering Documents With the MSRB)—Late Filing and Failing to File
- MSRB Rule G-37 Reporting—Late Filing; Failing to File; Filing False or Misleading Reports
- Regulation M Reports—Late Filing; Failing to File; False or Misleading Filing
- Reportable Events Under NASD Rule 3070—Late Reporting; Failing to Report; Filing False, Inaccurate or Misleading Reports
- Request for Automated Submission of Trading Data—Failure to Respond in a Timely and Accurate Manner

FOCUS Reports—Late Filing; Failing to File; Filing False or Misleading Reports

FINRA Rule 2010 and SEC Rule 17a-5[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Number of days late respondent filed reports. 2. Whether respondent filed late to delay reporting a recordkeeping, operational, or financial deficiency.	***Late Filing*** Fine of $1,000 to $20,000. ***Failure to File or Filing False or Misleading Reports*** Fine of $10,000 to $50,000.	***Late Filing*** In egregious cases, consider suspending the firm from all solicited retail business for up to 20 business days; also consider suspending the Financial Principal or other responsible principal in any or all capacities for up to 10 business days. ***Failure to File or Filing False or Misleading Reports*** Consider suspending the firm from all solicited retail business for up to 30 business days and thereafter until the firm corrects all deficiencies; also consider suspending the Financial Principal or other responsible principal in any or all capacities for up to two years.

1 This guideline is intended to apply to FOCUS Reports Parts I, II and IIA.

Forms U4/U5—Late Filing of Forms or Amendments; Failing to File Forms or Amendments; Filing of False, Misleading or Inaccurate Forms or Amendments *(continued)*

Article V of FINRA By-Laws and FINRA Rule 2010[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature and significance of information at issue. 2. Whether failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm. 3. Whether respondent member firm's misconduct resulted in harm to a registered person, another member firm or any other person or entity.	Late Filing of Forms or Amendments *Individual* Fine of $2,500 to $25,000. Firm and/or Responsible *Principal* Fine of $5,000 to $50,000. Failure to File or Filing False, Misleading or Inaccurate Forms or Amendments[2] *Individual* Fine of $2,500 to $50,000.	Failure to File or Filing False, Misleading or Inaccurate Forms or Amendments *Individual* Consider suspending individual in any or all capacities for five to 30 business days.

1 This guideline also is appropriate for violations of MSRB Rule G-7 and for failures to report changes in ownership or control of member firms.

2 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Forms U4/U5—Late Filing of Forms or Amendments; Failing to File Forms or Amendments; Filing of False, Misleading, or Inaccurate Forms or Amendments

Article V of FINRA By-Laws and FINRA Rule 2010

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	***Responsible Principal and/or Firm*** Fine of $5,000 to $100,000.	***Responsible Principal at the Firm*** Consider suspending responsible principal in all supervisory capacities for 10 to 30 business days. **In Egregious Cases (such as: those involving repeated failures to file, untimely filings or false, inaccurate, or misleading filings; those involving the failure to disclose or timely to disclose a statutory disqualification event or customer complaint; or where the failure to disclose or timely to disclose delayed regulatory investigation of terminations for cause):** *Individual*–Consider a longer suspension in any or all capacities (of up to two years) or a bar. *Responsible Principal at the Firm*–Consider a suspension in any or all capacities (of up to two years) of responsible principal or bar of responsible principal in all supervisory capacities. *Firm*–Suspend firm with respect to any or all activities or functions until the firm corrects the deficiency.

MSRB Rule G-36 (Timely Filing of Offering Documents With the MSRB)—Late Filing and Failing to File

MSRB Rule G-36

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*Late Filing*	*Late Filing*
1. Average number of days late. 2. Whether respondent also failed to comply with the recordkeeping requirements of MSRB Rule G-8 concerning the delivery of Official Statements and Advance Refunding Documents to the MSRB. 3. Evidence of improper mailing; *i.e.*, by means that do not provide a record of sending. 4. Extent to which violative conduct deprived the investors or other market participants of publicly available information regarding the issuer.	Fine of $5,000 to $10,000. Consider imposing a fine on a per violation basis. *Failure to File* Fine of $5,000 to $20,000. Consider imposing a fine on a per violation basis.	In egregious cases, consider suspending the firm from engaging in all municipal underwriting activities for up to 30 business days. Also consider suspending the responsible individual in any or all capacities for up to 30 business days. *Failure to File* In egregious cases, consider suspending the firm from engaging in all municipal underwriting activities for up to 30 business days. Also consider suspending the responsible individual in any or all capacities for up to 60 business days.

MSRB Rule G-37 Reporting—Late Filing; Failing to File; Filing False or Misleading Reports

MSRB Rule G-37

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the report is inaccurate, outdated or both. 2. Whether respondent is active in the municipal underwriting business and generally makes political contributions. 3. Whether respondent eventually filed report, albeit late. 4. Whether violation involved failing to report political contributions or failing to report participation in an underwriting. 5. Extent to which violative conduct deprived the investing public or other market participants of information regarding the issuer. 6. With respect to false or misleading reports, whether misconduct was intentional or reckless.	*Late Filing* Fine of \$5,000 to \$10,000. Consider imposing a fine on a per violation basis. *Failure to File* Fine of \$5,000 to \$20,000. Consider imposing a fine on a per violation basis. *Filing False or Misleading Reports* Fine of \$10,000 to \$100,000 per violation.	*Late Filing* In egregious cases, consider suspending the firm from engaging in all municipal underwriting activities for up to 30 business days. Also consider suspending the responsible individual in any or all capacities for up to 30 business days. *Failure to File* In egregious cases, consider suspending the firm from engaging in all municipal underwriting activities for up to 30 business days and thereafter until the firm files accurate reports, as required by the rules. Also consider suspending the responsible individual in any or all capacities for up to 60 business days. *Filing False or Misleading Reports* Consider suspending the firm from engaging in all municipal underwriting activities for up to two years. Also consider suspending the responsible individual in any or all capacities for up to two years or barring the individual.

Regulation M Reports—Late Filing; Failing to File; False or Misleading Filing

FINRA Rules 2010, 5110, 5190, 6275, 6470 and 6540

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Number of days that report is late. 2. Whether report contains a significant number of material inaccuracies.	***Late Filing*** **First Action**[1] Fine of $1,000 to $2,000. **Second Action** Fine of $2,000 to $5,000. **Subsequent Actions** Fine of $3,000 to $10,000. ***Failure to File, or False or Misleading Filing*** **First Action** Fine of $1,000 to $10,000. **Subsequent Actions** Fine of $10,000 to $100,000.	***Late Filing; Failure to File; False or Misleading Filing*** In egregious cases, consider suspending the responsible individual in any or all capacities for up to two years or barring the individual. Also consider suspending the firm with respect to any or all corporate financing and/or market- making activities for up to 15 days and thereafter until the firm accurately files the required reports.

1 Adjudicators should consider actions concerning violative events that occurred within the three years prior to the misconduct at issue. Events that are more recent in time, however, should be given more weight than less recent events.

Reportable Events Under NASD Rule 3070—Late Reporting; Failing to Report; Filing False, Inaccurate or Misleading Reports

FINRA Rule 2010 and NASD Rule 3070

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section		
Late Reporting 1. Number and type of incidents not reported. 2. Whether events reported in late reports established a pattern of potential misconduct.	***Late Reporting*** Fine of $5,000 to $50,000.	***Late Reporting*** In egregious cases, consider suspending the responsible principal in any or all capacities for up to two years or barring the responsible principal in all supervisory capacities.
Failure to Report or Filing False, Misleading, or Inaccurate Reports 1. Whether events not reported or reported inaccurately would have established a pattern of potential misconduct. 2. In cases involving the failure to file or inaccurate filing of a quarterly report, the number and type of incidents not reported or reported inaccurately.	***Failure to Report or Filing False, Misleading, or Inaccurate Reports***[1] Fine of $5,000 to $100,000.	***Failure to Report or Filing False, Misleading or Inaccurate Reports*** Consider suspending responsible principal in all supervisory capacities for 10 to 30 business days. In egregious cases, consider suspending the responsible principal in any or all capacities for up to two years or barring the responsible principal in all supervisory capacities. Also consider suspending the firm with respect to any or all activities or functions until the firm corrects the deficiency.

1 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Request for Automated Submission of Trading Data—Failure to Respond in a Timely and Accurate Manner

FINRA Rules 2010, 8211 and 8213[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*10 to 15 Days Late* Fine of $100 per day. *16 to 30 Days Late* Fine of $500 per day.	

1 Any automated submission submitted by a member firm more than 30 calendar days late generally is alleged to constitute a violation of Rule 8210. A firm with a history of more than four violations of Rules 8211 and 8213 may be alleged to have violated Rule 8210. The filing of incomplete or inaccurate automated submissions or the filing of manual submissions without prior exemptions may be alleged to constitute a violation of Rule 8210.

X. Sales Practices

- Churning or Excessive Trading
- Communications With the Public—Late Filing; Failing to File; Failing to Comply With Rule Standards or Use of Misleading Communications
- Customer Account Transfer Contracts—Failure to Comply With Rule Requirements
- Day-Trading Accounts—Failure to Comply With Risk Disclosure Requirements; Failure Appropriatelyto Approve an Account for Day Trading; Failure to Preserve Required Day-Trading Records
- Discretion—Exercise of Discretion Without Customer's Written Authority
- Guaranteeing a Customer Against Loss
- Institutional Sales Material—Failing to Establish and Maintain Written Procedures in Compliance With Rule Standards; Failing to Comply With Rule Standards Regarding Recordkeeping
- Misrepresentations or Material Omissions of Fact
- Penny Stock Rules—Failure to Comply With Rule Requirements
- Pricing—Excessive Markups/Markdowns and Excessive Commissions
- Research Analysts and Research Reports—Failing to Comply With Rule Requirements Regarding (1) Relationships Between Research Department and Investment Banking Department; (2) Compensation for Research Analysts; and (3) Relationships Between Research Analysts and Subject Companies
- Suitability—Unsuitable Recommendations
- Telemarketing—Failing to Comply With Time-of-Day Restrictions and Do-Not-Call Lists; Failing to Establish and Maintain Procedures to Comply With Rule 2212(a)
- Trading Ahead of Research Reports
- Unauthorized Transactions and Failures to Execute Buy and/or Sell Orders

Churning or Excessive Trading[1]

FINRA Rule 2010[2] and IM-2310-2

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	Fine of $5,000 to $75,000[3]	Suspend respondent in any or all capacities for a period of 10 business days to one year. In egregious cases, consider a longer suspension (of up to two years) or a bar.

1 This guideline also is appropriate for annuity and mutual fund-related violations, including switching.

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

3 As set forth in General Principle No. 6, Adjudicators should also order disgorgement.

Communications With the Public—Late Filing; Failing to File[1]; Failing to Comply With Rule Standards or Use of Misleading Communications[2] *(continued)*

FINRA Rules 2010 and 2220[3], and NASD Rules 2210 and 2211(d)

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section		
Failure to File	*Failure to File*	*Failure to File*
1. Whether failure to file was inadvertent. 2. Whether communications with the public were circulated widely without having been filed with the Advertising Regulation Department. 3. Whether an individual respondent failed to notify a supervisor of a communication with the public.	Fine of $1,000 to $15,000.	In egregious cases, consider imposing, for a definite period, a "pre-use" filing requirement to obtain an FINRA Regulation staff "no objection" letter on proposed communications with the public. Also consider suspending the responsible individual in any or all capacities for up to five business days.
Late Filing	*Late Filing*	*Late Filing*
1. Whether late filing was inadvertent. 2. Whether communications with the public were circulated widely before having been filed with the Advertising Regulation Department. 3. Number of days late.	Fine of $1,000 to $10,000.	In egregious cases, consider imposing, for a definite period, a "pre-use" filing requirement to obtain an FINRA Regulation staff "no objection" letter on proposed communications with the public. Also consider suspending the responsible individual in any or all capacities for up to 10 business days.

1 Failing to file includes instances in which a respondent files with FINRA Regulation staff a communication with the public in response to a notice from FINRA Regulation staff that a necessary filing had not been made.

2 This guideline is appropriate for disciplinary actions that name as respondents member firms that have violated FINRA rules or associated persons who have circumvented the firm's procedures or violated FINRA rules.

3 This guideline also is appropriate for violations of MSRB Rule G-21.

FINRA Rules 2010 and 2220, and NASD Rules 2210 and 2211(d)

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section *Failure to Comply with Rule Standards/ Misleading* 1. Whether violative communications with the public were circulated widely.	*Failure to Comply/Misleading* *Failure to Comply with Rule Standards or Inadvertent Use of Misleading Communications* Fine of $1,000 to $20,000.	*Failure to Comply/Misleading* *Failure to Comply with Rule Standards* In egregious cases, consider suspending the firm with respect to any or all activities or functions for up to one year and thereafter imposing, for a definite period, a "pre-use" filing requirement to obtain FINRA Regulation staff "no objection" letter on proposed communications with the public. Also consider suspending the responsible person in any or all capacities for up to 60 days.

Communications With the Public—Late Filing; Failing to File; Failing to Comply With Rule Standards or Use of Misleading Communications

FINRA Rules 2010 and 2220, and NASD Rules 2210 and 2211(d)

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*Intentional or Reckless Use of Misleading Communications* Fine of $10,000 to $100,000.	*Use of Misleading Communications with the Public* In cases involving inadvertent use of misleading communications, consider suspending firm with respect to any or all activities or functions for up to six months and thereafter imposing, for a definite period, a "pre-use" filing requirement to obtain a FINRA Regulation staff "no objection" letter on proposed communications with the public. In cases involving intentional or reckless use of misleading communications with the public, consider suspending the firm with respect to any or all activities or functions for up to two years.[4] Also consider suspending the responsible person in any or all capacities for up to two years. In cases involving numerous acts of intentional or reckless misconduct over an extended period of time, consider suspending the firm with respect to any or all activities or functions for up to two years, suspending the responsible person in any or all capacities for up to two years, expelling the firm, and/or barring the responsible individual.

4 If an Adjudicator is considering suspending a firm's ability to execute transactions in the securities referenced in the violative communications, the Adjudicator should consider the potential ramifications to public investors of such a suspension.

Customer Account Transfer Contracts—Failure to Comply With Rule Requirements

FINRA Rule 11870[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Consider the nature of the violation—consider the respondent's transfer pattern, the number of days late, and whether respondent was late with delivery or validation.	Fine of $1,000 to $10,000. In egregious cases, consider a higher fine of up to $50,000.	***Individual*** Consider suspending the responsible individual in any or all capacities for up to 30 business days. In egregious cases, consider a lengthier suspension of up to two years. ***Firm*** In egregious cases, consider suspending the firm with respect to any or all activities or functions for a period of up to two years.

1 This guideline also is appropriate for violations of MSRB G-26.

Day-Trading Accounts—Failure to Comply With Risk Disclosure Requirements; Failure Appropriately to Approve an Account for Day Trading; Failure to Preserve Required Day-Trading Records *(continued)*

FINRA Rules 2130 and 2270

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section		
Failure to Comply with Risk Disclosure Requirements 1. Whether the firm failed to provide customer(s) with a risk disclosure statement. 2. Whether the firm provided its customer(s) with an inadequate risk disclosure statement, or furnished the risk disclosure statement to its customer(s) in an untimely manner or a manner not designed to provide actual notice. 3. Whether the firm failed to obtain FINRA approval of an alternative disclosure statement or failed timely to seek FINRA approval. 4. In all cases, consider the nature, quality, and timing of the risk disclosure actually provided to the customer(s). 5. Whether day trading was appropriate for the affected customer(s). 6. The number of affected customers.	***Failure to Comply with Risk Disclosure Requirements*** Fine of $5,000 to $100,000.	***Failure to Comply with Risk Disclosure Requirements*** Consider suspending the responsible individual in any or all capacities for a period of 10 business days to one year. In egregious cases, particularly cases involving numerous customers, consider suspending for a longer period (of up to two years) or barring the responsible individual and suspending the firm with respect to any or all activities or functions for a period of up to two years.

Day-Trading Accounts—Failure to Comply With Risk Disclosure Requirements; Failure Appropriately to Approve an Account For Day Trading; Failure to Preserve Required Day-Trading Records *(continued)*

FINRA Rules 2130 and 2270

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section		
Failure Appropriately to Approve an Account for Day Trading 1. Whether the firm permitted the customer(s) to engage in a day-trading strategy without the approval required by the rule. 2. Whether the firm failed to conduct a meaningful review before approving the customer account(s) for a day-trading strategy. 3. Whether the firm's approval of the customer account(s) for a day-trading strategy was inappropriate based on the facts it knew or should have known. 4. The timeliness of the approval of the customer account(s) for a day-trading strategy. 5. Whether engaging in a day-trading strategy was appropriate for the affected customer(s). 6. The number of affected customers.	***Failure Appropriately to Approve an Account for Day Trading*** Fine of $5,000 to $100,000.[1]	***Failure Appropriately to Approve an Account for Day Trading*** Suspend responsible individual in any or all capacities for a period of 10 business days to one year. Consider suspending member firm with respect to any or all activities or functions for up to one year. In egregious cases, particularly cases involving numerous customers, consider suspending the responsible individual for a longer period (up to two years) or barring the individual. Also consider suspending the member firm for a longer period (of up to two years).

1 As set forth in General Principle No. 6, Adjudicators should also order disgorgement.

Day-Trading Accounts—Failure to Comply With Risk Disclosure Requirements; Failure Appropriately to Approve an Account For Day Trading; Failure to Preserve Required Day-Trading Records

FINRA Rules 2130 and 2270

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section		
Failure to Preserve Required Day-Trading Records 1. Whether the firm failed adequately to record its approval of the customer account(s) for day trading. 2. Whether the firm failed adequately to preserve the written customer agreement(s) to refrain from engaging in a day-trading strategy. 3. Whether the failure enabled problematic practices to occur and/or to escape detection.	***Failure to Preserve Required Day-Trading Records*** Fine of $1,000 to $25,000.	***Failure to Preserve Required Day-Trading Records*** In egregious cases, consider suspending the responsible individual in any or all capacities for up to 30 business days and suspending the firm in any or all activities or functions for up to 15 business days.

Discretion—Exercise of Discretion Without Customer's Written Authority

FINRA Rule 2010 and NASD Rule 2510[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether customer's grant of discretion was express or implied. 2. Whether firm's policies and/or procedures prohibited discretionary trading and/or whether the firm prohibited the respondent from exercising discretion in customer accounts.	Fine of $2,500 to $10,000.[2]	In egregious cases, consider suspending respondent in any or all capacities for 10 to 30 business days.

1 This guideline also is appropriate for violations of MSRB Rule G-19(d).

2 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Guaranteeing a Customer Against Loss

FINRA Rules 2010 and 2150[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Purpose and timing of the guarantee. 2. Whether respondent received a financial benefit from the guaranteed transactions.	Fine of $2,500 to $25,000.[2]	Consider suspending individual respondent in any or all capacities for up to 30 business days. In egregious cases, consider a longer suspension (of up to two years) or a bar. Consider suspending member firm with respect to any or all activities or functions for up to 30 business days. In egregious cases, consider a longer suspension (of up to two years) or expulsion.

1 This guideline also is appropriate for violations of MSRB Rule G-25.

2 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Institutional Sales Material—Failing to Establish and Maintain Written Procedures in Compliance With Rule Standards; Failing to Comply With Rule Standards Regarding Recordkeeping

NASD Rule 2211

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations In Introductory Section. *Failure to Establish and Maintain Written Procedures in Compliance with Rule 2211(b)* 1. Whether deficiencies enabled violations to occur and escape detection. 2. Nature, extent, and character of underlying misconduct, if any.	*Failure to Establish and Maintain Written Procedures in Compliance with Rule 2211(b)* Fine of $5,000 to $20,000.	*Failure to Establish and Maintain Written Procedures in Compliance with Rule 2211(b)* In egregious cases, consider suspending the responsible individual(s) in any or all capacities for up to one year. In egregious cases, also consider imposing a pre-use filing requirement for institutional sales material and suspending the firm with respect to any or all activities or functions for up to 30 business days or until the firm's written procedures are amended to conform to the requirements of Rule 2211(b).
Failure to Comply with Record-Keeping Requirements of Rule 2211(b) 1. Nature and materiality of inaccurate or missing information.	*Failure to Comply with Record-Keeping Requirements of Rule 2211(b)* Fine of $1,000 to $20,000. In egregious cases, consider a higher fine.	*Failure to Comply with Record-Keeping Requirements of Rule 2211(b)* In egregious cases, consider suspending the responsible individual for up to two years and consider suspending the firm in any or all activities or functions for up to 30 days.

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.

Penny Stock Rules—Failure to Comply With Rule Requirements

FINRA Rule 2010 and SEC Rules 15g-1 through 15g-9

Principal Considerations in Determining Sanctions	Monetary Sanction[1]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*Negligent Misconduct* Fine of $5,000 to $100,000.	*Negligent Misconduct* Consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual in any or all capacities for up to two years.
	Willful Misconduct Fine of the greater of $100,000 or $5,000 per violative transaction. For egregious misconduct, require firm to offer rescission of violative trades to each customer.	*Willful Misconduct* Consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual in any or all capacities for up to two years. In egregious cases, bar the responsible individual and/or expel the firm.

1 As set forth in General Principle No. 6, Adjudicators should also order disgorgement.

Pricing—Excessive Markups/Markdowns and Excessive Commissions

FINRA Rule 2010, NASD Rule 2440 and NASD IM-2440[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether respondent dominated and controlled the market in the subject security or securities. 2. Whether respondent (registered representative) had discretion as to the amount of markups, markdowns or commissions on each trade.	Fine of $5,000 to $100,000 plus (if restitution is not ordered) the gross amount of the excessive markups, markdowns, or excessive commissions. Consider suspending individual respondent in any or all capacities for up to 30 business days and requiring demonstrated corrective action with respect to the firm's markup/markdown policy or commission policy.	In egregious cases, consider suspending individual respondent in any or all capacities for up to two years or barring individual. For the firm, consider suspending with respect to any or all activities or functions for up to two years or expelling the firm.

1 This guideline also is appropriate for violations of MSRB Rule G-30.

Research Analysts and Research Reports—Failing to Comply With Rule Requirements Regarding (1) Relationships Between Research Department and Investment Banking Department; (2) Compensation for Research Analysts; and (3) Relationships Between Research Analysts and Subject Companies[1]

NASD Rules 2711(b), 2711(c), 2711(d), 2711(e), 2711(j)

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section. 1. Whether misconduct resulted from negligence or intentional/ reckless behavior. 2. Whether misconduct also resulted in publication of research reports that omitted material information or contained misleading information. 3. Whether evidence suggested systemic problems or widespread abuse in the firm.	*Negligent Misconduct* Fine of $5,000 to $100,000. *Intentional/Reckless Misconduct* Fine of $10,000 to $200,000. In egregious cases, consider a larger fine.	*Negligent Misconduct* Consider suspending the responsible individual(s) in any or all capacities for up to 30 business days. *Intentional/Reckless Misconduct* **Responsible Individual** – Suspend responsible individual(s) in any or all capacities for a period of 60 business days to two years. In egregious cases, suspend individual(s) for a longer period or bar individual(s). **Firm** – Consider suspending firm's research activities for a period of one month to two years. Consider requiring firm to retain an independent consultant to review and make recommendations regarding the adequacy of the firm's supervisory procedures regarding research activities. In cases involving violative relationships between a firm's research department and investment banking department, consider suspending the firm's investment banking activities for a period of three months to two years. In egregious cases, suspend firm in any or all activities or functions for up to two years or expel the firm.

1 For violations of Rule 2711(i) Supervisory Procedures, Adjudicators should refer to the guideline for Supervision – Failure to Supervise.

Research Analysts and Research Reports—Failing to Comply With Rule Requirements Regarding (1) Restrictions on Publishing Research Reports and Public Appearances of Research Analysts; (2) Restrictions on Personal Trading of Research Analysts; and (3) Disclosure Requirements for Research Reports and Public Appearances of Research Analysts[1]

NASD Rules 2711(f), 2711(g), 2711(h) *(continued)*

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
For All Violations ***See Principal Considerations in Introductory Section*** 1. Whether misconduct resulted from negligence or intentional/ reckless behavior. 2. Whether misconduct also resulted in publication of research reports that omitted material information or contained misleading information. 3. Whether evidence suggested systemic problems or widespread abuse in the firm.	***Failure to Comply With Restrictions on Personal Trading of Research Analysts (Rule 2711(g))*** Fine of $5,000 to $50,000.[2] In egregious cases, consider a higher fine.	***Failure to Comply With Restrictions on Personal Trading of Research Analysts (Rule 2711(g))*** Suspend individual in any or all capacities for a period of 10 business days to one year. In egregious cases, consider a longer suspension or a bar.

1 For violations of Rule 2711(i) Supervisory Procedures, Adjudicators should refer to the guideline for Supervision – Failure to Supervise.

2 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

	Failure to Comply With Restrictions on Publishing Research Reports, Restrictions on Public Appearances of Research Analysts and Disclosure Requirements for Research Reports and Public Appearances (Rule 2711 (f) and (h)) *Negligent Misconduct* Fine of $5,000 to $100,000. *Intentional/Reckless Misconduct* Fine of $10,000 to $200,000. In egregious cases, consider a larger fine.	*Failure to Comply With Restrictions on Publishing Research Reports, Restrictions on Public Appearances of Research Analysts and Disclosure Requirements for Research Reports and Public Appearances (Rule 2711 (f) and (h))* *Negligent Misconduct* **Responsible Individual** – Consider suspending responsible individual(s) in any or all capacities for up to 60 business days. *Intentional/Reckless Misconduct* **Responsible Individual** – Suspend responsible individual(s) in any or all capacities for a period of 60 business days to two years. In egregious cases, suspend individual(s) for a longer period or bar individual(s). **Firm** – Consider suspending firm's research activities for a period of one month to two years. Consider requiring firm to retain an independent consultant to review and make recommendations regarding the adequacy of the firm's supervisory procedures regarding research activities. Consider requiring firm, for a period of six months to two years, to certify monthly that a general securities principal has conducted a pre-distribution review of all research reports. In egregious cases, suspend firm in any or all activities or functions for up to two years or expel the firm.

Suitability—Unsuitable Recommendations

FINRA Rule 2010 and NASD Rule 2310[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	Fine of $2,500 to $75,000.[2]	Suspend respondent in any or all capacities for a period of 10 business days to one year. In egregious cases, consider a longer suspension (of up to two years) or a bar of an individual respondent. Also consider suspending respondent member firm with respect to any or all activities or functions for up to two years.

1 This guideline also is appropriate for violations of MSRB Rule G-19 and FINRA Rule 2114.

2 As set forth in General Principle No. 6, Adjudicators should also order disgorgement.

Telemarketing—Failing to Comply With Time-of-Day Restrictions and Do-Not-Call Lists; Failing to Establish and Maintain Procedures to Comply With Rule 2212(a) *(continued)*

NASD Rule 2212

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations In Introductory Section. ***Failure to Comply with Time-of-Day Restrictions or Do-Not-Call Lists*** 1. Whether violations were widespread within the firm. 2. Number of calls that violated restrictions. 3. Whether there are patterns of abuses relating to when telephone calls are placed or to the repeated contacting of persons who have previously requested to be placed on a do-not-call list. 4. Whether firm made reasonable efforts to establish an effective call-blocking system for any members of the public requesting to be placed on a do-not-call list.	***Failure to Comply with Time-of-Day Restrictions or Do-Not-Call Lists*** Fine of $5,000 to $25,000.	***Failure to Comply with Time-of-Day Restrictions or Do-Not-Call Lists*** Consider suspending responsible individual for up to 30 business days. In egregious cases, consider suspending the responsible individual in any or all capacities for up to two years. Also, consider suspending the firm with respect to any or all activities or functions, including telemarketing activities, for up to one year.

Telemarketing—Failing to Comply With Time-of-Day Restrictions and Do-Not-Call Lists; Failing to Establish and Maintain Procedures to Comply with Rule 2212(a)

NASD Rule 2212

Failure to Establish and Maintain Procedures to Comply With Rule 2212(a)	*Failure to Establish and Maintain Procedures to Comply with Rule 2212(a)*	*Failure to Establish and Maintain Procedures to Comply with Rule 2212(a)*
1. Nature and extent of underlying misconduct that resulted from the deficient procedures, if any. 2. Whether firm made reasonable efforts to establish an effective call-blocking system for any members of the public requesting to be placed on a do-not-call list. 3. Whether there are patterns of abuses relating to when telephone calls are placed or to the repeated contacting of persons who have previously requested to be placed on a do-not-call list.	Fine of $5,000 to $50,000. In egregious cases, consider a higher fine.	Consider suspending responsible individual in any or all capacities for up to 30 business days. Consider limiting activities of appropriate branch office or department for up to 30 business days. In egregious cases, consider suspending the responsible individual for up to two years. In egregious cases, also consider limiting activities of appropriate branch office or department for more than 30 days or suspending the firm in any or all activities or functions, including telemarketing activities, for up to one year.

Trading Ahead of Research Reports

FINRA Rules 2010 and 5280

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the respondent member firm had developed "Chinese Wall" procedures to prevent the trading department from utilizing advance knowledge of the content and issuance of research reports in making trading decisions.	Fine of $5,000 to $100,000.[1]	*Firm* Consider suspending the firm with respect to any or all activities or functions and/or suspending the responsible individual for up to two years. In egregious cases, consider expelling the firm and/or barring the responsible individual. *Individual* Consider suspending the individual respondent in any or all capacities for up to two years. In egregious cases, consider barring the individual.

1 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Unauthorized Transactions and Failures to Execute Buy and/or Sell Orders

FINRA Rule 2010 and NASD IM-2310-2[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether respondent misunderstood his or her authority or the terms of the customer's orders. 2. Whether the unauthorized trading was egregious.[2]	Fine of $5,000 to $75,000.[3]	Suspend individual respondent in any or all capacities for a period of 10 business days to one year. In egregious cases,[4] consider a longer suspension (of up to two years) or a bar of an individual respondent. Also consider suspending respondent member firm with respect to any or all activities or functions for up to two years.

1 This guideline also is appropriate for violations of MSRB Rules G-17 and G-19.

2 The NAC has identified in its decisions the following categories of egregious unauthorized trading: 1) quantitatively egregious unauthorized trading, *i.e.*, unauthorized trading that is egregious because of the sheer number of unauthorized trades executed; 2) unauthorized trading accompanied by aggravating factors, such as, efforts to conceal the unauthorized trading, attempts to evade regulatory investigative efforts, customer loss, or a history of similar misconduct (this list is illustrative, not exhaustive); and 3) qualitatively egregious unauthorized trading. Two factors are relevant to a determination as to whether unauthorized trading is qualitatively egregious: 1) the strength of the evidence, and 2) the respondent's motives; *i.e.*, whether the respondent acted in bad faith or as a result of a reasonable misunderstanding. *See, e.g., In re Daniel S. Hellen*, Complaint No. C3A970031 (NAC June 15, 1999).

3 As set forth in General Principle No. 6, Adjudicators should also order disgorgement.

4 *See* note 2.

XI. Supervision

- Disqualified Persons—Failure to Discharge Supervisory Obligations
- Supervision—Failure to Comply With Taping Rule Requirements
- Supervision—Failure to Supervise
- Supervisory Procedures—Deficient Written Supervisory Procedures

Disqualified Persons—Failure to Discharge Supervisory Obligations

FINRA Rule 2010 and NASD Rule 3010

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Extent of disqualified person's misconduct and the existence of "red flag" warnings. 2. Whether disqualification resulted from financial and/or securities misconduct.	Fine of $10,000 to $100,000.	Consider suspending responsible principal in any or all capacities for up to one year. If disqualified person is involved in egregious misconduct about which the supervisor knew or should have known, consider a longer suspension (of up to two years) or a bar.

Supervision—Failure to Comply With Taping Rule Requirements *(continued)*

FINRA Rule 2010 and NASD Rule 3010(b)(2)

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether respondents were responsible for an unjustified delay in complying with the requirements of the rule. 2. The quality of the taping system that the firm installed. 3. The degree of the firm's implementation of follow-up and supervisory procedures. In cases in which the failure to comply with tape recording requirements enabled problematic trading practices to occur, consider nature and extent of the underlying problematic conduct and the potential for resulting harm to the public or to a member firm. 4. In cases involving a failure to report to FINRA or the filing of an inaccurate, untimely or incomplete report, consider whether firm's misconduct concealed from FINRA or other regulatory authorities potential wrongdoing.	***Failure to Establish, Maintain or Enforce Tape Recording Procedures*** Fine of $10,000 to $75,000.	***Failure to Establish, Maintain or Enforce Tape Recording Procedures*** Consider suspending responsible individual in all principal capacities for 30 business days and limiting the activities of the affected branch office for up to 30 business days. Also consider requiring the firm or affected branch office to comply with the tape recording and reporting requirements of NASD Rule 3010(b)(2) for an additional period equal to the time specified in Rule 3010(b)(2). In egregious cases, consider suspending the responsible individual for a longer period in all principal capacities, suspending the responsible individual in all capacities or barring the responsible individual, and limiting the activities of the branch office for a longer period or suspending the firm with respect to any or all activities or functions for a period of up to 30 business days. Also consider requiring the firm or affected branch office to comply with the tape recording and reporting requirements of NASD Rule 3010(b)(2) for an additional period equal to the time specified in Rule 3010(b)(2). In cases involving a firm's steadfast refusal to implement, maintain or enforce tape recording procedures, consider barring the responsible individual and suspending the firm in all capacities for a longer period (of up to two years) or expelling the firm.

Supervision—Failure to Comply With Taping Rule Requirements

FINRA Rule 2010 and NASD Rule 3010(b)(2)

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*Failure Timely to Implement Procedures* Fine of $5,000 to $50,000.	*Failure Timely to Implement Procedures* Consider requiring the firm or affected branch office to comply with the requirements of NASD Rule 3010(b)(2) for an additional period of time equal to the period during which the firm delayed implementation of taping procedures. In egregious cases, consider limiting the activities of the affected branch office for up to 30 business days or suspending the firm with respect to any or all activities or functions for a period of up to 30 business days. Also consider suspending the responsible individual in any or all capacities for up to two years or barring the responsible individual. Also consider requiring the firm or affected branch office to comply with the requirements of NASD Rule 3010(b)(2) for an additional period of time equal at least to the period during which the firm delayed implementation of taping procedures.
	Failure to Report to FINRA or Filing of an Inaccurate, Untimely or Incomplete Report Fine of $1,000 to $25,000.	*Failure to Report to the FINRA or Filing of an Inaccurate, Untimely or Incomplete Report* In egregious cases, consider suspending the responsible individual in any or all principal capacities for up to 30 business days and limiting the activities of the affected branch office for up to 30 business days. In cases involving the fabrication of a report, consider suspending the responsible individual for a longer period in all principal capacities, suspending the responsible individual in all capacities or barring the responsible individual, and suspending the firm for a lengthier period or expelling the firm.

Supervision—Failure to Supervise

FINRA Rule 2010 and NASD Rule 3010[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether respondent ignored "red flag" warnings that should have resulted in additional supervisory scrutiny. Consider whether individuals responsible for underlying misconduct attempted to conceal misconduct from respondent. 2. Nature, extent, size and character of the underlying misconduct. 3. Quality and degree of supervisor's implementation of the firm's supervisory procedures and controls.	Fine of $5,000 to $50,000.[2] Consider independent (rather than joint and several) monetary sanctions for firm and responsible individual(s). Consider suspending responsible individual in all supervisory capacities for up to 30 business days. Consider limiting activities of appropriate branch office or department for up to 30 business days.	In egregious cases, consider limiting activities of the branch office or department for a longer period or suspending the firm with respect to any or all activities or functions for up to 30 business days. Also consider suspending the responsible individual in any or all capacities for up to two years or barring the responsible individual. In a case against a member firm involving systemic supervision failures, consider a longer suspension of the firm with respect to any or all activities or functions (of up to two years) or expulsion of the firm.

1 This guideline also is appropriate for violations of MSRB Rule G-27.

2 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Supervisory Procedures—Deficient Written Supervisory Procedures

FINRA Rule 2010 and NASD Rule 3010[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether deficiencies allowed violative conduct to occur or to escape detection. 2. Whether the deficiencies made it difficult to determine the individual or individuals responsible for specific areas of supervision or compliance.	Fine of $1,000 to $25,000.	In egregious cases, consider suspending the responsible individual(s) in any or all capacities for up to one year. Also consider suspending the firm with respect to any or all relevant activities or functions for up to 30 business days and thereafter until the supervisory procedures are amended to conform to rule requirements.

1 This guideline also is appropriate for violations of MSRB Rule G-27.

Schedule A to the FINRA Sanction Guidelines

Schedule A to the FINRA Sanction Guidelines

Violations That Generally Are Not Subject to Censure When Monetary Sanctions of $5,000 or Less Are Imposed

Quality of Markets Violations

- ACT Violations—FINRA Rules 7210A – 7280A, 7310 – 7380 and 7110B – 7170B
- Backing Away
- Best Execution and Interpositioning
- Confirmation of Transactions (SEC Rule 10b-10)
- ECN Display Rule
- Failure to Display Minimum Size in NASDAQ® Securities, CQS Securities, and OTC Bulletin Board® Securities
- Fixed Income Pricing System℠—Trade Reporting and Participant and Quotation Obligations
- Limit Order Display Rule
- Limit Order Protection Rule
- Locked/Crossed Market
- Options Exercise and Positions Limits
- Options Positions Reporting—Late Reporting and Failing to Report
- Order Audit Trail System (FINRA Rules 7400 – 7460)
- Passive Market Making
- Short Sale Violations
- SOES℠ Rules
- Trades Executed During a Trading Halt
- Trade Reporting—Late Reporting; Failing to Report; Inaccurate Reporting
- 1% Rule - SEC Rule 11Ac1-1(c)(1)

Qualification and Membership Violations

- Continuing Education—Firm Element
- Continuing Education—Regulatory Element
- Registration Violations

Reporting/Provision of Information Violations

- FOCUS Reports—Late Filing
- Form BD-Y2K Reports—Late Filing
- Forms U-4/U-5—Late Filing; Failing to File; Filing Inaccurate Forms or Amendments
- MSRB Rule G-36—Untimely Filing of Offering Documents with MSRB; Late Filing; Failing to File
- Reportable Events Under NASD Rule 3070—Late Reporting; Failing to Report; Filing Inaccurate Reports
- MSRB Rule G-37 Reporting—Late Filing; Failing to File
- Regulation M Reports—Late Filing; Failing to File
- Request for Automated Transmission of Trading Data (Blue Sheets)—Failure to Respond in a Timely and Accurate Manner

Financial and Operational Practices Violations

- Customer Protection Rule violations
- Net Capital violations
- Recordkeeping violations
- Violations of SEC Rule 17a-11 (Notification Provisions for Broker-Dealers) Supervision Violations
- Supervisory Procedures—Deficient Written Supervisory Procedures

Additionally, censures generally will not be imposed for violations disposed of under the Minor Rule Violation Plan pursuant to FINRA Rules 9216 and 9217.

Index

Index

(Please click on the page numbers below.)

Anti-Intimidation/Coordination—Failure to Comply With Rule Requirements 48

Applicability 8

Arbitration Award—Failure to Honor or Failure to Honor in a Timely Manner 18

Backing Away 49

Best Execution—Failure to Comply With Requirements for Best Execution 50

Branch Offices—Failure to Register 39

Cheating, Using an Impostor, or Possessing Unauthorized Materials in Qualifications Examinations or in the Regulatory Element of Continuing Education 40

Churning or Excessive Trading 77

Communications With the Public—Late Filing; Failing to File; Failing to Comply With Rule Standards or Use of Misleading Communications 78

Confidentiality Agreements—Settling With Customer in Exchange for Customer Agreement Not to Cooperate With Regulatory Authorities 32

Continuing Education (Firm Element)—Failure to Comply With Rule Requirements 41

Continuing Education (Regulatory Element)—Failure to Comply With Rule Requirements 42

Conversion or Improper Use of Funds or Securities 36

Corporate Financing Rule—Failure to Comply With Rule Requirements 20

Customer Account Transfer Contracts—Failure to Comply With Rule Requirements 81

Customer Confirmations—Failure to Comply With Rule Requirements 26

Customer Protection Rule—Failure to Comply With Rule Requirements 27

(Please click on the page numbers below.)

Day-Trading Accounts—Failure to Comply With Risk Disclosure Requirements; Failure Appropriately to Approve an Account For Day Trading; Failure to Preserve Required Day-Trading Records 84

Discretion—Exercise of Discretion Without Customer's Written Authority 85

Disqualified Person Associating With Firm Prior to Approval; Firm Allowing Disqualified Person to Associate Prior to Approval 43

Disqualified Persons—Failure to Discharge Supervisory Obligations 100

ECN Display Rule—Failure to Comply With Rule Requirements 51

Engaging in Prohibited Municipal Securities Business 21

Escrow Violations—Prohibited Representations in Contingency Offerings; Transmission or Maintenance of Customer Funds in Underwritings 22

Extended Hours Trading Risk Disclosure—Failure to Comply With Rule Requirements 47

Failure to Display Minimum Size in NASDAQ Securities, CQS Securities and OTC Bulletin Board® Securities 52

Failure to Respond, Failure to Respond Truthfully or in a Timely Manner, or Providing a Partial but Incomplete Response to Requests Made Pursuant to FINRA Rule 8210 33

FOCUS Reports—Late Filing; Failing to File; Filing False or Misleading Reports 68

Forgery and/or Falsification of Records 37

Forms U4/U5—Late Filing of Forms or Amendments; Failing to File Forms or Amendments; Filing of False, Misleading, or Inaccurate Forms or Amendments 70

General Principles Applicable to All Sanction Determinations 2

Guaranteeing a Customer Against Loss 86

Index

(Please click on the page numbers below.)

Institutional Sales Material—Failing to Establish and Maintain Written Procedures in Compliance With Rule Standards; Failing to Comply With Rule Standards Regarding Recordkeeping 87

Limit Order Display Rule—Failure to Comply With Rule Requirements 53

Limit Order Protection Rule—Failure to Comply With Rule Requirements 54

Locked/Crossed Market—Failure to Comply With Rule Requirements 55

Marking the Close or Open 56

Member Agreement Violations 44

Misrepresentations or Material Omissions of Fact 88

MSRB Rule G-36 (Timely Filing of Offering Documents With the MSRB)—Late Filing and Failing to File 71

MSRB Rule G-37 Reporting—Late Filing; Failing to File; Filing False or Misleading Reports 72

Net Capital Violations 28

Options Exercise and Positions Limits—Failure to Comply With Rule Requirements 57

Options Positions Reporting—Late Reporting and Failing to Report 58

Order Audit Trail System (OATS)—Late Reporting; Failing to Report; False, Inaccurate or Misleading Reporting; and Clock Synchronization Failure 59

Outside Business Activities—Failure to Comply With Rule Requirements 13

Overview 1

Passive Market Making Violations 60

Penny Stock Rules—Failure to Comply With Rule Requirements 89

Pricing—Excessive Markups/Markdowns and Excessive Commissions 90

(Please click on the page numbers below.)

Principal Considerations in Determining Sanctions 6

Prohibition on Transactions, Publication of Quotations or Publication of Indications of Interest During a Trading Halt 61

Recordkeeping Violations 29

Registration Violations 45

Regulation M Reports—Late Filing; Failing to File; False or Misleading Filing 73

Regulation T and Margin Requirements—Violations of Regulation T and/or FINRA Margin Requirements 30

Reportable Events Under NASD Rule 3070—Late Reporting; Failing to Report; Filing False, Inaccurate or Misleading Reports 74

Reports of Execution Quality and Order Routing 62

Request for Automated Submission of Trading Data—Failure to Respond in a Timely and Accurate Manner 75

Research Analysts and Research Reports—Failing to Comply With Rule Requirements Regarding (1) Relationships Between Research Department and Investment Banking Department; (2) Compensation for Research Analysts; and (3) Relationships Between Research And Subject Companies 91

Research Analysts and Research Reports—Failing to Comply With Rule Requirements Regarding (1) Restrictions on Publishing Research Reports and Public Appearances of Research Analysts; (2) Restrictions on Personal Trading of Research Analysts; and (3) Disclosure Requirements for Research Reports and Public Appearances of Research Analysts 92

Restrictions on the Purchase and Sale of Initial Equity Public Offerings Violations 23

Schedule A to the FINRA Sanction Guidelines 106

Selling Away (Private Securities Transactions) 14

Settling Customer Complaints Away From the Firm 34

Short Sale Violations 63

Index

(Please click on the page numbers below.)

Suitability—Unsuitable Recommendations 94

Supervision—Failure to Comply With Taping Rule Requirements 102

Supervision—Failure to Supervise 103

Supervisory Procedures—Deficient Written Supervisory Procedures 104

Technical Matters 9

Telemarketing—Failing to Comply With Time-of-Day Restrictions and Do-Not-Call Lists; Failing to Establish and Maintain Procedures to Comply With Rule 2212(a) 95

Trade Reporting and Compliance Engine (TRACE)—Late Reporting; Failing to Report; False, Inaccurate or Incomplete Reporting 64

Trade Reporting—Late Reporting; Failing to Report; False, Inaccurate or Misleading Reporting 66

Trading Ahead of Research Reports 97

Transactions for or by Associated Persons—Failure to Comply With Rule Requirements 16

Unauthorized Transactions and Failures to Execute Buy and/or Sell Orders 98

Unregistered Securities—Sales of 24

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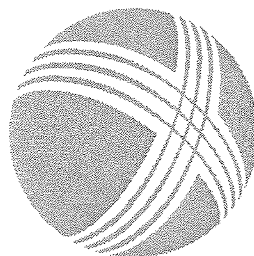
xerox 

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District Business Conduct Committee For District No. 4, Complainant, v.
Tammy S. Kwikkel-Elliott, Respondent.

Complaint No. C04960004

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE
NASD REGULATION, INC.

1998 NASD Discip. LEXIS 4

January 16, 1998

TEXT:

[*1] DECISION

Introduction

This matter was called for review by the National Business Conduct Committee ("NBCC") pursuant to NASD Procedural Rule 9310. We affirm the finding of the District Business Conduct Committee for District No. 4 ("DBCC") that Tammy S. Kwikkel-Elliott ("Kwikkel-Elliott") violated NASD Conduct Rule 2110 (formerly Article III, Section 1 of the Rules of Fair Practice) by obtaining funds from her employer under false pretenses. We order that Kwikkel-Elliott be censured, fined $ 5,000 and barred from associating with any member of the NASD in any capacity. We also uphold the imposition of costs for the DBCC hearing. n1

n1 The NBCC called this case for review to determine whether the sanctions imposed by the DBCC were appropriate in light of the conduct in question. The parties were provided notice that a hearing of this matter was scheduled for October 7, 1997. Despite receiving this notice, Kwikkel-Elliott did not attend the hearing, either in person or by telephone. The NASD regional attorney who presented this matter to the DBCC was available by telephone, but determined that no further argument was required because Kwikkel-Elliott failed to attend. Accordingly, the matter was decided on the basis of the record below and any timely filed briefs.

[*2]
Background

During all relevant times Kwikkel-Elliot was associated with member firm AAL Capital Management Corporation ("AAL") as a sales representative and was registered with the NASD as an investment company and variable contract products representative. She is not currently associated with any member firm.

Facts

In November 1993, Kwikkel-Elliott became associated with AAL as a district representative and member of its field staff. She was employed in an AAL office located in Jackson, Missouri ("Jackson Office"). Throughout most of the relevant period, the field staff at the Jackson Office was composed of Kwikkel-Elliott, another district representative, and a district manager. The Jackson Office field staff shared in paying the rent, telephone expenses, and the secretary's salary. There was also evidence that they, along with the field staff of other AAL district offices, jointly advertised and conducted seminars, and shared in these expenses.

As a district representative and member of the field staff, Kwikkel-Elliott was obligated to pay for certain sales and promotional materials from AAL, known as "cost items," for use in sales presentations. Kwikkel-Elliott received [*3] a memorandum from AAL addressed to "All Field Staff," dated May 2, 1994, entitled "Urgent Update 92." Urgent Update 92 advised the field staff immediately to cease using listed obsolete cost items. The field staff was instructed to retain all obsolete cost items until a process for obtaining credit was established.

Kwikkel-Elliott received another memorandum from AAL, dated May 31, 1994, entitled "Procedure Update 273." Attached to this mailing was a copy of AAL's "Promotional Materials Reimbursement Request Form" ("Reimbursement Request"), which provided the means for AAL field staff to seek reimbursement for obsolete cost items. Directly above the signature line, the Reimbursement Request included the following attestation: "I have completed the form to the best of my knowledge and have destroyed the materials noted on the Inventory Worksheet." AAL required those seeking reimbursement to return the Reimbursement Request by June 30, 1994.

Kwikkel-Elliott completed, signed and submitted the Reimbursement Request to AAL on June 18, 1994. Kwikkel-Elliott requested reimbursement of $ 913.60, but she ultimately received $ 879.60 on or about July 1, 1994, due to an adjustment calculated [*4] by an AAL home office employee. n2

n2 Kwikkel-Elliott received $ 840 in her payroll check from AAL on July 1, 1994. This amount represents the adjusted Reimbursement Request amount of $ 879.60, minus $ 39.60 for other supplies that she had ordered.

Thereafter, the other district representative in the Jackson Office happened across a copy of Kwikkel-Elliott's reimbursement request of $ 913.60. Believing that Kwikkel-Elliott's request was excessive for a person who had been with AAL for less than a year, this district representative made a photocopy of Kwikkel-Elliott's Reimbursement Request and forwarded it to a supervisor outside the

Jackson Office. AAL's Special Investigation Department ("Investigation Department") investigated the matter and discovered that, of the 697 Reimbursement Requests received from AAL field staff, Kwikkel-Elliott's Reimbursement Request was one of only 10 that exceeded $ 200. The Investigation Department determined that Kwikkel-Elliott actually had ordered and paid for only $ 7.60 worth [*5] of cost items deemed obsolete by Urgent Update 92 and eligible for reimbursement. The Investigation Department also confirmed that Kwikkel-Elliott received her funds pursuant to the Reimbursement Request. n3

n3 The Investigation Department also verified that AAL did not review or alter Kwikkel-Elliott's Reimbursement Request, other than to adjust it to $ 879.60 because of a miscalculation of the quantity in a unit of one of the cost items.

When an AAL supervisor confronted Kwikkel-Elliott with this information on August 3, 1994, she did not claim that she had ordered or paid for all of the cost items listed in her Reimbursement Request. Kwikkel-Elliott asserted, however, that she and the other field staff at the Jackson Office jointly may have ordered some cost items and, therefore, AAL records would not accurately reflect all of the cost items that she had ordered. She offered no proof that she had ordered or paid for $ 913.60 worth of cost items. She also stated that she simply had estimated the quantity of cost [*6] items included in her Reimbursement Request. AAL terminated Kwikkel-Elliott's employment at this meeting. n4

n4 Kwikkel-Elliott was the only AAL employee terminated for submission of an inaccurate Reimbursement Request.

Discussion

The complaint in this matter alleged, and the DBCC found, that Kwikkel-Elliott violated NASD Conduct Rule 2110 by obtaining funds from AAL under false pretenses. Rule 2110 provides that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." n5 It is well established that conduct that is not directly related to the securities industry may violate Rule 2110. See, e.g., Vail v. SEC, 101 F.3d 37, 38 (5th Cir. 1996) ("The SEC has consistently held that the NASD's 'disciplinary authority is broad enough to encompass business related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security'.")(citations omitted); In re Leonard John Ialeggio, Exchange [*7] Act Rel. 37910, at 7 (Oct. 31, 1996) (upholding NASD's finding that respondent violated Article III, Section 1 of the Rules of Fair Practice -- now Conduct Rule 2110 -- by inducing his employer to pay for country club fees and emphasizing that misconduct not directly related to the securities industry nonetheless may violate the NASD rules); In re George R. Beall, 50 S.E.C. 230, 231-32 (1990) (finding that respondent's passing of bad checks to his firm in connection with options trading in his personal account was a violation of Article III, Section 1 of the Rules of Fair Practice, now Conduct Rule 2110). n6

n5 Rule 2110 is applicable to associated persons pursuant to Rule 115(a), formerly Article I, Section 5(a), which states that "[t]hese Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."

n6 See also In re Howard B. Labow, 48 S.E.C. 134, 135 (1985) (affirming NASD finding that insurance agent violated just and equitable principles of trade by falsifying insurance application and retaining commission for policy after policy was canceled); In re Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) (finding that insurance agent's falsification of insurance applications to earn commissions violated Article III, Section 1).

[*8]
In the current case, it is undisputed that the Reimbursement Request submitted by Kwikkel-Elliott was inaccurate. She admitted that she personally did not order and pay for all of the items included in her Reimbursement Request. Nevertheless, Kwikkel-Elliott claimed that she did not act in bad faith in preparing and submitting an inaccurate Reimbursement Request. She argued that the Reimbursement Request was confusing and that she believed that it was supposed to have been submitted on behalf of the other field staff at the Jackson Office, as well as on her own behalf. Kwikkel-Elliott explained that, as a result of this misunderstanding, all of the cost items ordered by the Jackson Office field staff were included in her Reimbursement Request. She also stated that in preparing the Reimbursement Request, she did not intentionally exaggerate the number of cost items. Rather, she estimated the promotional materials in the office storage cabinets. She further asserted that once she received the reimbursement funds, she intended to divide them among all the members of the field staff at the Jackson Office. We do not find Kwikkel-Elliott's explanation of the events to be credible.

Kwikkel-Elliott's [*9] assertion that the Reimbursement Request was confusing and that she was led to believe that it should be submitted on behalf of the Jackson Office is belied by the facts. Procedure Update 273 and the attached Reimbursement Request were addressed to "All Field Staff." They were not addressed and sent to the Jackson Office or even to the district manager. In addition, Procedure Update 273 provided that the "home office will reimburse you for those materials that have a cost associated with them." (emphasis added). The Reimbursement Request instructed the field staff to "compile all materials you have that are listed on the Inventory Worksheet . . ." and "calculate the amount to be reimbursed to you. . . ." (emphasis added). Neither the manner of distribution of the correspondence, the instructions contained therein nor the method of reimbursement suggested that the Reimbursement Requests should be submitted on behalf of anyone other than an individual person. n7

n7 The Reimbursement Request also had a section where the party seeking reimbursement was supposed to check the box that represented his or her position with AAL. Kwikkel-Elliott checked the box marked "DR" for district representative. There was no box that could be checked to submit the form for the office as a whole. In addition, Kwikkel-Elliott placed her registered representative number and Social Security number on the form. She did not place the numbers of any other member of the Jackson Office field staff on the form.

[*10]
Moreover, notwithstanding her assertion that she found the Reimbursement Request confusing, Kwikkel-Elliot never sought clarification of the proper procedure to follow. She did not ask anyone from AAL, including co-workers at the Jackson Office, for assistance in filling out the Reimbursement Request, despite the fact that she executed the Reimbursement Request and submitted it to AAL on June 18, 1994, 12 days before the June 30, 1994 due date. n8 She also did not consult her co-workers for help in calculating the quantity of cost items to be included.

n8 Both "Procedure Update 273" and the Reimbursement Request provided express instructions regarding the proper department to contact with questions about the Reimbursement Request.

Even if the evidence supported Kwikkel-Elliott's claim that she thought that the Reimbursement Request was to be made on behalf of the entire office, which it does not, her "estimate" included both cost items and non-cost items. Kwikkel-Elliott testified that she merely performed a visual [*11] inspection of certain cabinets where promotional materials were kept when she made her estimate. These cabinets, however, contained both cost items and non-cost items and Kwikkel-Elliott admitted that she did not distinguish between the two, notwithstanding that only the former items were reimbursable. Thus, her "estimate" would not have been accurate in any event. n9

n9 Kwikkel-Elliott also failed to destroy the obsolete cost items, even though she attested on the Reimbursement Request that she had destroyed such materials.

Kwikkel-Elliott's claim that she planned to divide the reimbursement funds among all the members of the Jackson Office field staff is also untenable. She made no attempt to determine what portion of the cost items included in her Reimbursement Request belonged to which members of the Jackson Office. Thus, she had no means to determine how to allocate the reimbursement funds. She also never told anyone that she had submitted the Reimbursement Request on behalf of the Jackson Office.

In addition, [*12] Kwikkel-Elliott never offered any reimbursement funds to any members of the Jackson Office field staff after the funds were deposited in her account on July 1, 1994. In fact, within five days of receipt of the reimbursement funds, Kwikkel-Elliott did not have sufficient funds to share with other members of the Jackson Office field staff. She claims not to have known that the funds had been directly deposited into her credit union account. However, Urgent Update 273 advised that the reimbursement funds would be included in the payroll checks of those making requests. She was also sent a payroll document from AAL confirming that the reimbursement funds had been deposited into her account. Furthermore, if she had intended to share the funds with the

other members of the field staff, it is likely that she would have been watching for the reimbursement funds. n10

> n10 We note, as well, that the Securities and Exchange Commission ("SEC") has held that a respondent's claim that the act in question resulted merely from his or her disorganization or forgetfulness provides no justification for misconduct of the type alleged in this case. See In re Ernest A. Cipriani, 51 S.E.C. 1004, 1006 n.7 (1994) ("We have held that disorganization and absentmindedness are no excuse for misappropriation.") (citing In re Stanley D. Gardenswartz, 50 S.E.C. 95 (1989)).

[*13]
Under these circumstances, we do not find Kwikkel-Elliott's version of events to be plausible. The evidence indicates that Kwikkel-Elliott did not make an inadvertent mistake, but rather that she acted in bad faith. She made no attempt to separate cost items from non-cost items, grossly exaggerated the number of cost items, submitted a Reimbursement Request under false pretenses, and received reimbursement funds of $ 879.60. Her conduct was inconsistent with high standards of commercial honor and just and equitable principles of trade. Accordingly, we find that Kwikkel-Elliott violated NASD Conduct Rule 2110.

Sanctions

The DBCC determined that Kwikkel-Elliott should be censured, suspended for 30 days from association with any member firm in any capacity, required to requalify by examination prior to reassociating with a member firm, and assessed costs of $ 1,291.90. In mitigation, the DBCC considered that Kwikkel-Elliott was under a great deal of personal and work-related stress at the time she prepared the Reimbursement Request. The DBCC also found that AAL did nothing to determine the accuracy of other Reimbursement Requests and did not terminate any other employees for submitting [*14] inaccurate Reimbursement Requests. In addition, the DBCC considered that the Reimbursement Request was a one-time program and that no one at AAL, including Kwikkel-Elliott, had any prior experience with it. Finally, the DBCC noted that Kwikkel-Elliott had no prior disciplinary history and that she offered to return the reimbursement funds at the meeting that resulted in her termination.

We find that the mitigating factors considered by the DBCC do not warrant the lenient sanctions imposed on Kwikkel-Elliott in light of the severity of her misconduct. First, Kwikkel-Elliott's conduct cannot be excused by the fact that she may have been under personal and work-related stress. See In re Leonard John Ialeggio, Exchange Act Rel. No. 37910, at 3-4 (Oct. 31, 1996) (rejecting contention that misconduct was caused, in part, by respondent's extremely busy travel schedule); In re Joel Eugene Shaw, 51 S.E.C. 1224, 1226 (1994) (holding that respondent's conduct cannot be justified by his personal and financial circumstances). Nothing in the record convinces us that the conduct in question resulted from or was exacerbated by Kwikkel-Elliott's personal or work-related circumstances. The evidence [*15] clearly supports the finding that Kwikkel-Elliott intended to obtain funds under false pretenses and there is no indication in the record before us that she would have acted differently under other circumstances.

Second, whether AAL attempted to verify the accuracy of other Reimbursement Requests and whether it terminated other employees for similar conduct has no bearing on a determination of the appropriate sanctions here. As the SEC has emphasized, "it is no defense that others in the industry may have been operating in a similarly illegal or improper manner." In re Patricia H. Smith, Exchange Act Rel. No. 35989, at 4 n.8 (June 27, 1995). See also In re Bison Securities, Inc., 51 S.E.C. 327, 330 n.10 (1993) ("[O]ne dealer's improper pricing practices cannot legitimize another's."); In re Donald T. Sheldon, 51 S.E.C. 59, 66 n.32 (1992) ("[E]ven if Sheldon had established that other firms also misused customer fully-paid securities, that would not have exonerated him."), aff'd, 45 F.3d 1515 (11th Cir. 1995). AAL discovered, inadvertently, that Kwikkel-Elliott had engaged in misconduct by filing an inaccurate Reimbursement Request. AAL then terminated Kwikkel-Elliott and notified the [*16] NASD of her conduct through a Uniform Termination Notice for Securities Industry Registration ("Form U-5"). AAL's vigilance with regard to the accuracy of other Reimbursement Requests is of little consequence.

Third, the fact that the Reimbursement Request was a one-time program with which no one had any prior experience does not provide Kwikkel-Elliott with a basis for mitigation. The forms involved in this matter were not overly complex or confusing. Moreover, Kwikkel-Elliott never sought assistance in interpreting the procedures or in filling out the forms. Under these circumstances, Kwikkel-Elliott cannot shift responsibility for her misconduct to AAL. Cf. In re Thomas C. Kocherhans, Exchange Act Rel. No. 36556, at 6 (Dec. 6, 1995) ("[W]e have repeatedly held that a respondent cannot shift his or her responsibility for compliance with an applicable requirement to a supervisor. . . ."); In re Ernest A. Cipriani, 51 S.E.C. 1004, 1007 (1994) (rejecting contention that the lack of adequate supervision justified conduct in question).

Fourth, Kwikkel-Elliott's lack of any disciplinary history offers little solace given the short time in which she had been registered with the NASD [*17] and considering the seriousness of her misconduct. At the time of the infraction, Kwikkel-Elliott had been registered with the NASD for less than a year. n11 Receiving funds under false pretenses within a year of becoming registered with the NASD does not evince an exemplary track record. Cf. In re Henry E. Vail, Exchange Act. Rel. No. 35872, at 5 (June 20, 1995) (rejecting contention that bar for misappropriation of funds was unwarranted because of no past disciplinary history), aff'd, 101 F.3d 37 (5th Cir. 1996).

n11 Kwikkel-Elliot became associated with member firm AAL in August 1993. She took the Series 6 exam on September 23, 1993, and became registered with the NASD as an investment company and variable contract products representative on September 28, 1993. The violative conduct occurred on June 18, 1994.

Finally, the DBCC viewed Kwikkel-Elliott's offer to pay back the reimbursement funds as a mitigating factor. We note, however, that Kwikkel-Elliott's offer occurred only after she was approached by AAL about [*18] her wrongdoing. There is no evidence suggesting that she would have made the offer absent such a confrontation. Under these facts, we do not find Kwikkel-Elliott's repayment offer to be a mitigating factor. See Henry E. Vail, supra, at 6 (rejecting contention that repayment of money was a mitigating factor when only done because criminal charges had been filed); Joel Eugene Shaw, supra, at 1227 ("Nor does the fact that Shaw ultimately repaid . . . the

money [to the customer] warrant permitting him to remain in the securities business. It appears that Shaw would have retained [the customer's] money if she had not discovered his conversion."). n12

n12 See also Ernest A. Cipriani, supra, at 1007-08 (holding that the fact that respondent ultimately paid back the money afforded no justification for the misconduct which, presumably, would have continued had it not been discovered); In re Raymond M. Ramos, 49 S.E.C. 868, 872 (1988) ("[T]he fact that Ramos ultimately paid the money back does not warrant permitting his return to the securities business where he poses a threat to other investors.").

[*19]
Considering the evidence as a whole, we find that there are no mitigating facts which would warrant the lenient sanctions imposed by the DBCC below. To the contrary, the facts support the finding that Kwikkel-Elliott engaged in serious misconduct. As discussed above, Kwikkel-Elliot acted in bad faith by submitting a materially false Reimbursement Request to her employer, culminating in her obtaining funds under false pretenses. Although Kwikkel-Elliott's wrongdoing in this instance did not involve securities or customer funds, the willingness to acquire a sum of money through questionable means indicates a troubling disregard for basic principles of ethics and honesty which, on another occasion, might manifest itself in a securities- or customer-related transaction. See Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) ("Although Jackson's wrongdoing in this instance did not involve securities, the NASD could justifiably conclude that on another occasion it might."). As the SEC has noted, the securities industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants." In re Bernard D. Gorniak, Exchange Act Rel. No. [*20] 35996, at 5 (July 20, 1995) (citations omitted). See also In re Mayer A. Amsel, Exchange Act Rel. No. 37092, at 11 (April 10, 1996) (noting that the securities industry is "rife with opportunities for abuse.").

In light of our duties to protect the investing public and to ensure the integrity of the market, we would be remiss in not acting decisively in cases, like the present matter, where the evidence calls into question the honesty and the veracity of a person associated with a member firm. Because we find that Kwikkel-Elliott's continued participation in the securities industry presents a risk to the public, we hold that she is barred in all capacities from associating with any member firm. See Mayer A. Amsel, supra, at 11 ("Amsel has exhibited a disturbing disregard for the standards that govern the securities industry. . . . In light of his deliberate and serious misconduct, we consider his exclusion from that business a desirable safeguard for both broker-dealers and members of the investing public."); Henry E. Vail, supra, at 6 ("Through his mishandling of these funds, Vail demonstrated a serious misunderstanding of the fiduciary obligations he subjected himself to by becoming [*21] the Club's treasurer. His actions make us doubt his commitment to the high fiduciary standards demanded by the securities industry."). n13

n13 See also In re Stanley D. Gardenswartz, 50 S.E.C. 95, 97-98 (1989) (upholding NASD's decision to increase to a bar the one-year suspension imposed on respondent by the DBCC for misappropriating funds belonging to his employer).

Accordingly, we impose a censure, a $ 5,000 fine, and a bar from associating with any NASD member firm in any capacity. We also affirm the imposition of costs of $ 1,291.90 for the DBCC hearing. n14 In light of the bar, we eliminate the requirement that Kwikkel-Elliott requalify by examination prior to reassociating with a member firm. The bar is effective immediately upon the issuance of this decision. n15

n14 In addition, we agree with the DBCC that restitution is inappropriate. AAL took no action on Kwikkel-Elliott's offer to return the reimbursement funds. AAL also has withheld all trailing and renewal commissions due to Kwikkel-Elliott.

[*22]

n15 We have considered all of the arguments of the parties. Such arguments are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days notice in writing, will summarily be revoked for non-payment.

On Behalf of the National Business Conduct Committee,

Joan C. Conley, Corporate Secretary

Distribution of the Kwikkel-Elliott decision for final review and comment before being sent to the parties:

Deborah McIlroy ____

Norman Sue, Jr. ____

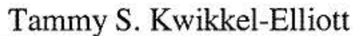
(Return to Jim Wrona)

Direct: (202) 728-8381
Fax: (202) 728-8894

Joan C. Conley
Corporate Secretary

January 16, 1998

VIA FIRST CLASS/CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Tammy S. Kwikkel-Elliott


RE: Complaint No. C04960004: Tammy S. Kwikkel-Elliott

Dear Ms. Kwikkel-Elliott:

Enclosed herewith is the Decision of the National Business Conduct Committee in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. [*24] If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W., Stop 6-9
Washington, D.C. 20549

The address of NASD Regulation is:
Office of General Counsel
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley
Corporate Secretary

Enclosure

cc: Regional Attorney

BEFORE THE BOARD OF GOVERNORS

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of	
Department of Enforcement,	DECISION
Complainant,	Complaint No. 2010023349601
vs.	Dated: May 9, 2014
Denise M. Olson Lakeville, MN,	
Respondent.	

Respondent submitted a false expense report and converted firm funds. Held, findings and sanction affirmed.

Appearances

For the Complainant: Jonathan Golomb, Esq., Christopher Perrin, Esq., Daniel Gardner, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Bruce M. Bettigole, Esq.

Decision

Denise M. Olson ("Olson") appeals a January 4, 2013 Hearing Panel decision. The Hearing Panel found that Olson falsified an expense report and converted her member firm's funds by obtaining payment for personal expenses for which corporate reimbursement was not allowed, in violation of FINRA Rule 2010.[1] For this misconduct, the Hearing Panel barred Olson from associating with any FINRA member in any capacity. We affirm the Hearing Panel's findings of a violation and the sanction it imposed.

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1 The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

I. Background

Olson entered the securities industry in 1991. From September 2004 to June 2010, Olson was associated with Wells Fargo Advisors, LLC ("Wells Fargo") (formerly Wachovia Securities, Inc.). She registered through the firm as a general securities representative and general securities sales supervisor and served as branch manager of the firm's Bloomington, Minnesota office. Wells Fargo terminated Olson's registrations on June 17, 2010, after uncovering the misconduct that is at issue in this matter. She is not currently associated with a FINRA member.[2]

II. Procedural History

The Department of Enforcement ("Enforcement") filed a single-cause complaint on October 7, 2011. Enforcement alleged that Olson purchased personal items using her corporate credit card and later falsely claimed the expenditure as a business expense. Consequently, Enforcement averred, Wells Fargo made a $740.10 payment to Olson's corporate credit card for a non-reimbursable, personal expense, and she converted firm funds for her personal use, in violation of FINRA Rule 2010.

On November 7, 2011, Olson filed an answer largely admitting the facts alleged in Enforcement's complaint. Olson's counsel subsequently conceded that her actions violated FINRA Rule 2010. A disciplinary hearing, held on October 12, 2012, was therefore limited to presentations of evidence for the purpose of assessing the sanctions to impose for Olson's wrongdoing.

The Hearing Panel issued its decision on January 4, 2013. Consistent with Enforcement's allegations, and given the respondent's admitted liability, the Hearing Panel found that Olson falsified an expense report and converted firm funds, in violation of FINRA Rule 2010. The Hearing Panel concluded that barring Olson's further association with any FINRA member served as an appropriate, remedial sanction for her misconduct. This appeal followed.[3]

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[2] After Wells Fargo terminated her, Olson briefly associated with another FINRA member before registering through Ameriprise Financial Services, Inc. ("Ameriprise"), as a general securities representative and general securities sales supervisor. Olson associated with Ameriprise, and worked as a recruiter for the firm, from March 2011 until December 2012, when she voluntarily resigned.

[3] Olson appealed the Hearing Panel's decision to the National Adjudicatory Council ("NAC"). Under FINRA Rule 9349(c), the NAC provided its proposed written decision to the FINRA Board of Governors ("FINRA Board"), which exercised its discretionary review powers under FINRA Rule 9351(a). The decision of the FINRA Board constitutes the final disciplinary action of FINRA in this matter.

III. Facts

Wells Fargo issued Olson a corporate credit card. As Wells Fargo permitted, Olson periodically used the corporate credit card for both business and personal reasons. An expenditure that was not reimbursable as a corporate expense under the firm's expense allowance policies, however, remained Olson's personal responsibility.[4]

On April 2, 2010, Olson purchased two Apple® iPods® for her niece and nephew. She charged the $740.10 purchase to her corporate credit card. Olson later accounted for the charge using Wells Fargo's expense-management system. She did not, however, designate the expenditure as a personal expense. Instead, Olson falsely claimed that she incurred the expense to purchase branch office equipment, entering the description "branch equip for new conf room" in the space provided to justify the outlay as a business cost. Consequently, Wells Fargo paid the $740.10 charge that Olson incurred to purchase two iPods®.

Wells Fargo began an investigation in May 2010 to address discrepancies in Olson's use of her corporate credit card. On June 2, 2010, a Wells Fargo auditor questioned Olson about each of the greater than 140 charges she made to her corporate credit card during an eight-month period. When they reached the April 2, 2010 charge for $740.10, Olson read the entry description she provided in Wells Fargo's expense-management system and explained that the expense represented branch office equipment that she purchased for a conference room. After the Wells Fargo auditor asked her which conference room the purchase supported, Olson volunteered that she had in fact purchased two iPods® and admitted that she falsely submitted the expenditure for approval as a business expense.

Olson provided Wells Fargo a voluntary, hand-written statement acknowledging her misconduct. Wells Fargo then immediately terminated Olson's employment.[5] Olson reimbursed Wells Fargo the $740.10 that the firm paid to her corporate credit card as a result of her false entry.

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[4] Wells Fargo's expense-management system, which was computer based, included a pre-populated option to identify an expense charged to the corporate credit card as "personal," in which case the employee used another on-line system to pay for the personal charge using his or her own funds.

[5] The Uniform Termination Notice for Securities Industry Registration ("Form U5") that Wells Fargo submitted to end Olson's registrations with the firm contained the termination comments: "violation of company policy – misuse of corporate credit card – not compliance related."

IV. Discussion

FINRA Rule 2010 states that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[6] The rule reaches beyond ordinary legal requirements. *See Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12 (NASD NAC June 2, 2000) (discussing the scope of NASD Rule 2110, the exact predecessor to FINRA Rule 2010). It sets forth a standard that encompasses "'a wide variety of conduct that may operate as an injustice to investors or other participants'" in the securities markets. *Id.* (quoting *Daniel Joseph Alderman*, 52 S.E.C. 366, 369 (1995), *aff'd*, 104 F.3d 285 (9th Cir. 1997)). In FINRA disciplinary proceedings, "[t]he analysis that is employed [under the rule] is a flexible evaluation of the surrounding circumstances with attention to the ethical nature of the conduct." *Id.* at *15. FINRA's authority to pursue discipline for violations of FINRA Rule 2010 is sufficiently broad to encompass any unethical, business-related misconduct, regardless of whether it involves a security. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) ("We . . . have concluded that [NASD] Rule 2110 applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business . . . .").

The Hearing Panel found, and Olson does not dispute, that she failed to abide by the fundamental ethical requirements imposed on her as a person associated with a FINRA member firm. Olson knowingly falsified an expense report, deceitfully obtained Wells Fargo's payment of personal expenses, and converted her firm's funds.[7] FINRA has consistently found that such conduct, or equivalent conduct, is dishonorable and violates FINRA Rule 2010. *See Dep't of Enforcement v. Saad*, Complaint No. 2006006705601, 2009 FINRA Discip. LEXIS 29, at *19-20 (FINRA NAC Oct. 6, 2009) (finding that the respondent violated NASD Rule 2110 by submitting false expense reimbursement forms for a trip he did not take and a cell phone he did not buy to obtain a disallowed reimbursement), *aff'd*, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761 (May 26, 2010), *aff'd in relevant part*, 718 F.3d 904 (D.C. Cir. 2013); *Dist.*

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[6] FINRA Rule 2010 applies also to persons associated with a member under FINRA Rule 0140(a), which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."

[7] "'Conversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it'" and is conduct that violates FINRA Rule 2010. *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012) (quoting *FINRA Sanction Guidelines* 38 (2007)). Although Olson's false expense reporting did not result in Wells Fargo paying Olson directly for the two iPods® that she purchased, Wells Fargo, in effect, paid for Olson's personal expenditure. Under these facts, we agree with the Hearing Panel's conclusion that Olson, with intent, converted for her own use firm funds that she was not entitled or authorized to possess, in violation of FINRA Rule 2010. *See id.* (finding that the respondent's personal use of gift certificates and wine, purchased with the funds of a charitable foundation, constituted conversion).

Bus. Conduct Comm. v. Kwikkel-Elliott, Complaint No. C04960004, 1998 NASD Discip. LEXIS 12, at *13 (NASD NBCC Jan. 16, 1998) (finding that a registered representative violated NASD Rule 2110 when she requested and received from her employer reimbursement for expenses that she did not incur); *see also Keith Perkins*, 54 S.E.C. 989, 992 (2000) (affirming FINRA findings that a registered representative's submission of false reimbursement requests for seminar expenses he did not incur violated NASD Rule 2110), *aff'd*, 31 F. App'x 562 (9th Cir. 2002).

We therefore affirm the Hearing Panel's findings.

V. Sanctions

The Hearing Panel barred Olson from associating with any FINRA member in any capacity as a sanction for her misconduct.[8] Olson argues that a bar is excessive and punitive, and she requests that we replace it with a fine and a period of suspension during which she would not be permitted to associate with a FINRA member firm. Enforcement, on the other hand, steadfastly objects to our imposing sanctions that result in anything less than Olson's exclusion from the securities industry. After carefully considering the issues presented on appeal, and the record that confronts us, we affirm the sanction imposed by the Hearing Panel.

First, in deciding upon the fitting sanction to impose for Olson's misconduct, we have considered the FINRA Sanction Guidelines ("Guidelines").[9] The Guideline for conversion is expressed in remarkably specific terms and instructs that adjudicators "[b]ar the respondent regardless of [the] amount converted."[10] Olson's misconduct, absent mitigating factors, poses such a substantial a risk to investors and the markets "as to render [her] unfit for employment in the securities industry" and "a bar is therefore an appropriate remedy." *See Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *22 n.27 (Nov. 8, 2007) (noting that the Guideline for conversion is one of only three that propose a bar as the standard sanction for the underlying rule violation).

Second, we discern from the record a number of troubling, aggravating factors that further justify barring Olson for her wrongdoing. By intentionally taking funds to which she was not entitled, Olson exhibited flagrant dishonesty.[11] Moreover, when it came time to account for

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8 A majority of the Hearing Panel concurred in the decision to bar Olson. The Hearing Panel's dissenting panelist concluded that a bar was excessive and punitive, and asserted that a $5,000 fine and a six-month suspension in all capacities would better serve to remediate Olson's misconduct.

9 *FINRA Sanction Guidelines* (2013), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

10 *Id.* at 36. Because a bar is standard, the Guidelines for conversion do not recommend a fine. *Id.*

11 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

her purchase of two iPods® in Wells Fargo's expense-management system, Olson knowingly failed to designate the expenditure as a personal expense. Instead, she falsely claimed that she incurred the expense to purchase branch office equipment and deceitfully entered an untruthful description to justify the outlay as a business cost, thus misleading her firm in an attempt to conceal her misconduct and evade detection.[12] Olson's self-serving behavior resulted in her obvious financial gain and caused Wells Fargo to pay her for expenses that were her obligation alone to bear.[13]

Finally, we do not find any evidence of mitigation that warrants deviating from the standard sanction of a bar in this case. As an initial matter, we note that Olson has throughout these disciplinary proceedings urged FINRA adjudicators to impose no more than a "brief suspension" for her misconduct, drawing parallels to the misconduct examined and the sanctions FINRA imposed in the matters of *Department of Enforcement v. McCartney* and *Department of Enforcement v. Leopold*. In those cases, FINRA found that the respondents falsely reported expenses to their member firms in an effort to obtain reimbursements or other financial benefits to which they were not entitled, in violation of NASD Rule 2110. *See McCartney*, Complaint

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[12] *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 10).

[13] *See id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 11, 17). Olson testified that she often personally purchased items for her branch office and did not seek reimbursement from Wells Fargo because she viewed the purchases as an opportunity for "giving back" or "reinvest[ing]" in the branch. On one such occasion, in September 2009, when Wells Fargo renovated the branch, Olson purchased two refrigerators with her personal credit card for $2,056.25, and she did not seek reimbursement. She explained that, at the moment she falsely claimed her purchase of the two iPods® as a business expense, she made a "quick decision" based on a momentary and "fleeting thought" to obtain partial "reimbursement" for the refrigerators by designating her April 2, 2010 charge as a business expense. Olson self-rationalized her acts based on an ill-formed belief that she "was being reimbursed for something that [she] had already paid for out of [her] own pocket." The fact that Olson "may have been able to obtain reimbursement for other legitimate expenses if submitted properly does not exonerate or lessen the significance of [her] unethical conduct." *See Saad*, 2009 FINRA Discip. LEXIS 29, at *22. Even were we to assume that Olson did not profit from her misconduct, which we do not, it would not alter our assessment that barring Olson is in order. *See Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *91-92 & n.66 (Feb. 1, 2010) (sustaining a bar although the respondent "may not have profited directly from misappropriating some of her clients' funds"). Her deliberate self-help and conscious unwillingness to follow proper reimbursement channels within her firm reflect negatively on her ability to comply with basic regulatory requirements. *See James A. Goetz*, 53 S.E.C. 472, 477 (1998) ("Goetz's misconduct here – disregarding his employer's foundation's fundamental rules for securing payment of matching gifts . . . – reflects directly on Goetz's ability both to comply with regulatory requirements fundamental to the securities business and to fulfill his fiduciary responsibilities in handling other people's money.").

No. 2010023719601, 2012 FINRA Discip. LEXIS 60, at *9 (FINRA NAC Dec. 10, 2012) ("McCartney does not dispute that he intentionally prepared and submitted to Hartford Life a false expense report and, to support the false report, a fabricated receipt, a fabricated verification letter, and a falsified check, for which he received a monetary reimbursement of $500 to which he was not entitled."); *Leopold*, Complaint No. 2007011489301, 2012 FINRA Discip. LEXIS 2, at *11 (FINRA NAC Feb. 24, 2012) ("There is no dispute that Leopold created fictitious hotel invoices and forged the signatures of registered representatives on false verification letters for the purposes of reducing his tax liability . . . ."). After considering the relevant Guidelines at play in those cases, FINRA determined that barring the respondents would not serve a remedial purpose. *See McCartney*, 2012 FINRA Discip. LEXIS 60, at *19 & n.17 ("FINRA sanctions may be remedial, but must not be punitive."); *Leopold*, 2012 FINRA Discip. LEXIS 2, at *24 & n.15 (same).

In *McCartney* and *Leopold*, FINRA tailored remedial sanctions that did not include a bar after considering the Guidelines, including the specific Guidelines for the violations found: improper use of funds and the forgery or falsification of records. *See McCartney*, 2012 FINRA Discip. LEXIS 60, at *11-12 & n.9; *Leopold*, 2012 FINRA Discip. LEXIS 2, at *15. Unlike the Guideline for conversion, the Guideline for improper use of funds recommends that adjudicators "[c]onsider a bar" and, where mitigation exists, suspend the respondent in any or all capacities for a period of six months to two years and thereafter until the respondent pays restitution. *Guidelines*, at 36. The Guideline for forgery and falsification of records recommends that adjudicators "consider," in cases where mitigation exists, suspending the respondent in any or all capacities for up to two years and, in "egregious" cases, a bar. *Id.* at 37.

The decisions in *McCartney* and *Leopold* do not mandate that a suspension is the correct sanction for Olson. "It is well established that the determination of the appropriate sanction depends on the facts and circumstances of each case and is not dependent on the sanctions imposed in other cases."[14] *Justin F. Ficken*, Exchange Act Release No. 58802, 2008 SEC LEXIS 3047, at *14 (Oct. 17, 2008). More importantly, the respondents in *McCartney* and *Leopold* were not charged with conversion and their sanctions were assessed using Guidelines that allow adjudicators flexibility in imposing sanctions for their violations. Enforcement's decision to charge Olson with conversion, and to seek her bar from the securities industry under the conversion Guideline, is entitled to deference. *Cf. Butz v. Economou*, 438 U.S. 478, 515

[14] FINRA's decisions in *McCartney* and *Leopold* were highly fact specific and did not rest on the presence or absence of any one aggravating or mitigating factor. *See McCartney*, 2012 FINRA Discip. LEXIS 60, at *19 ("Based on the presence of both aggravating and mitigating factors, and our balancing of these factors, we have determined that McCartney's misconduct was serious, but not egregious, and warrants a sanction less than a bar."); *Leopold*, 2012 FINRA Discip. LEXIS 2, at *23 ("Based on the presence of both aggravating and mitigating factors, and our assigning of moderate weight to mitigating factors, we have determined that Leopold's conduct was serious and warrants a downward departure from a bar."). We caution adjudicators that relying on discrete statements from *McCartney* and *Leopold* to support a claim of mitigation in another case is unsound.

(1978) ("An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought.").

FINRA and other self-regulatory organizations have regularly barred members of the securities industry who, like Olson, have engaged in the conversion, theft, or misappropriation of funds belonging to others. *See Mullins*, 2012 SEC LEXIS 464, at *80 ("We support the NAC's conclusion that J. Mullins's misconduct 'reveals a troubling disregard for fundamental principles of the securities industry' . . . ."); *Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *50 (Dec. 7, 2010) ("Applicants' conduct was egregious, and we see no basis for setting aside FINRA's imposition of sanctions here."); *Manoff*, 55 S.E.C. at 1166 ("We agree with the NASD that Manoff's continued presence in the securities industry threatens the public interest."); *Katz*, 2010 SEC LEXIS 994, at *88 ("Misappropriating client funds and making misstatements are serious misconduct, and we have sustained bars as appropriate sanctions in the past for such conduct."); *Eliezer Gurfel*, 54 S.E.C. 56, 63 (1999) ("We note that the censure and bar are within the range of sanctions recommended . . . ."); *Henry A. Vail*, 52 S.E.C. 339, 342 (1995) ("His actions make us doubt his commitment to the high fiduciary standards demanded by the securities industry."), *aff'd*, 101 F.3d 37 (5th Cir. 1996); *Ernest A. Cipriani*, 51 S.E.C. 1004, 1007 (1994) ("These various factors . . . afford no justification for the misappropriation of a customer's funds."); *Joseph H. O'Brien II*, 51 S.E.C. 1112, 1117 (1994) ("It is clear that his continued presence in the securities industry threatens the public interest."); *Richard J. Daniello*, 50 S.E.C. 42, 46 (1989) ("Daniello misappropriated his employer's funds. Protection of the securities industry and public investors requires that a severe sanction be imposed . . . ."); *Raymond M. Ramos*, 49 S.E.C. 868, 871 (1988) ("The various factors that Ramos cites afford no basis for leniency."); *Richard Dale Grafman*, 48 S.E.C. 83, 85 (1985) ("The hardship visited on Grafman is outweighed by the necessity of ensuring that the exchange community and public investors are protected against a recurrence of the dishonest actions in which Grafman engaged."); *Dep't of Enforcement v. Paratore*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *13 (FINRA NAC Mar. 7, 2008) ("[W]e find that Paratore's misconduct constitutes a serious departure from the ethical principles prescribed by Rule 2110, and that the Hearing Panel's imposition of separate bars is therefore warranted."); *Kwikkel-Elliott*, 1998 NASD Discip. LEXIS 4, at *20 ("Because we find that Kwikkel-Elliott's continued participation in the securities industry presents a risk to the public, we hold that she is barred . . . ."); *Lisa A. Ferlitto*, NYSE Disc. Action 96-29, 1996 NYSE Disc. Action LEXIS 38, at *4 (NYSE Mar. 19, 1996) ("[T]he Hearing Panel . . . determined that Ms. Ferlitto be censured and permanently barred from membership . . . .").

Olson also asks that we consider her expressions of remorse and acceptance of responsibility for her actions as evidence that she will not repeat her wrongdoing in the future. When questioned about her corporate credit card use during a Wells Fargo audit, Olson ultimately disclosed that she falsely submitted a personal expenditure for approval as a business expense, contemporaneously provided a voluntary statement in which she admitted her misconduct, and repaid her firm. In response to a FINRA information request issued shortly after Wells Fargo terminated her, Olson again acknowledged that she knowingly claimed a personal purchase as a business expense, stating that she "obviously made a mistake" and an "error" which she regretted. Finally, during her disciplinary hearing, Olson repeatedly accepted

that she intentionally misled her firm, conceded that her actions were wrong, and testified that she would not repeat her misconduct.

We, however, decline to give mitigative effect to these facts.[15] Acceptance of responsibility is mitigating "only when it occurs 'prior to detection and intervention by the firm . . . or a regulator.'" *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *28 (Feb. 20, 2014) (quoting *Guidelines*, at 6 (2007)). Here, in response to questioning by a Wells Fargo auditor, Olson initially clung to the falsehood that the expense in question was a business expense. Instead of accepting responsibility, she resisted it until her lie became undeniable. Olson apparently would have remained silent, and her acceptance of responsibility and repayment of the converted funds to her firm likely would not have occurred, absent Wells Fargo's inquiry into her corporate credit card use. *See Shaw*, 51 S.E.C. at 1127 ("It appears that Shaw would have retained Luthi's money if she had not discovered his conversion."); *Kwikkel-Elliott*, 1998 NASD Discip. LEXIS 4, at *18 ("There is no evidence suggesting that she would have made the offer absent such a confrontation."); *Dist. Bus. Conduct Comm. v. Gurfel*, Complaint No. C9B950010, 1998 NASD Discip. LEXIS 52, at *21 (NASD NAC June 12, 1998) ("[H]is repayment of the funds is not a mitigating factor, as the offer of repayment occurred only after he was confronted about his wrongdoing . . . ."), *aff'd*, 54 S.E.C. 56 (1999); *cf. Cipriani*, 51 S.E.C. at 1008 (finding that the respondent's conversion "would have continued even longer had it not been inadvertently detected" by his customer).

Olson's pledge that she will not repeat her misconduct is unconvincing. Olson failed to appreciate the gravity of her actions at the time she submitted the false expense report or soon thereafter. Olson testified that, after marking the charge for the iPods® as a business expense to avoid paying for them, she had no concern for what she had done and was unbothered by her actions. She admittedly did not realize the seriousness of her wrongdoing and did not grasp the nature of her "mistake" until after Wells Fargo terminated her. We recognize that Olson has no prior disciplinary history, but her conversion of Wells Fargo's funds was accomplished by her deliberate falsification of firm records.[16] "These were acts of deception, and we therefore reject this mitigation argument." *See Mark F. Mizenko*, 58 S.E.C. 846, 856 (2005) (declining to find mitigation where the respondent, who forged a signature on a corporate resolution to guarantee

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[15] The Hearing Panel made no findings concerning Olson's credibility or the credibility of any other witness who appeared and testified at the hearing below. We therefore make our findings based upon our review of the entire record. *See Dep't of Enforcement v. Masceri*, Complaint No. C8A040079, 2006 NASD Discip. LEXIS 29, at *42 n.26 (NASD NAC Dec. 18, 2006). While we have considered the testimony of two character witnesses who attested to Olson's general reputation for honesty, we conclude that barring Olson is an appropriately remedial remedy. *See Joel Eugene Shaw*, 51 S.E.C. 1224, 1227 n.11 (1994) ("We nonetheless conclude that it is appropriate in the public interest that Shaw be barred . . . .").

[16] We do not accept Olson's argument that her lack of a disciplinary history is mitigating. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) ("Lack of a disciplinary history is not a mitigating factor.").

loans and leases for potential customers, asserted that his misconduct was "aberrant and not part of a pattern of conduct intended to deceive his employer").

There can be no credible dispute that conversion constitutes one of the most grievous offenses that can be committed by a securities industry professional. *See Mullins*, 2012 SEC LEXIS 464, at *73. Olson's wrongdoing did not involve customer securities or funds, but her "willingness to acquire a sum of money through questionable means indicates a troubling disregard for basic principles of ethics and honesty which, on another occasion, might manifest itself in a securities- or customer-related transaction."[17] *See Kwikkel-Elliott*, 1998 NASD Discip. LEXIS 12, at *19; *accord Dep't of Enforcement v. Manoff*, Complaint No. C9A990007, 2001 NASD Discip. LEXIS 4, at *34 (NASD NAC Apr. 26, 2001), *aff'd*, 55 S.E.C. 1155. "Notwithstanding the lack of recurrence and [Olson's] expressions of remorse and assurances against future violations, . . . such factors do not outweigh our concern that [she] will present a threat if we permit [her] to remain in the securities industry."[18] *See Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *26-27 (Feb. 13, 2009).

The facts and circumstances of this case lead us to conclude that barring Olson serves a remedial interest and protects the investing public. *See McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005) ("[T]he purpose of expulsion or suspension from trading is to protect investors, not to penalize brokers."). It will also serve to deter others who may be inclined to steal from their firms or customers. *See Mullins*, 2012 SEC LEXIS 464, at *80 ("We support the NAC's conclusion . . . that a bar is 'necessary to deter him and others similarly situated from engaging in similar misconduct.'"); *see also McCarthy*, 406 F.3d at 189 ("Although general deterrence is not, by itself, sufficient justification for expulsion or suspension, we recognize that it may be considered as part of the overall remedial inquiry."). We therefore affirm the bar prescribed by the Hearing Panel for Olson's misconduct.[19]

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[17] Olson's misconduct was no less serious because it did not involve customers. *See Grafman*, 48 S.E.C. at 85 n.2 ("The fact that he defrauded a brokerage firm instead is hardly a factor in his favor.").

[18] Olson argues repeatedly that her conversion of Wells Fargo's funds represented a "single, fleeting mistake" and that we should find it mitigating that she did not engage in an ongoing pattern of misconduct over an extended period. *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9). We disagree. "[T]he presence of certain factors may be aggravating, but their absence does not draw an inference of mitigation." *Id.* (citing *Rooms*, 444 F.3d at 1214-15). The Guideline for conversion, which states that a bar is standard "regardless of [the] amount converted," obviously indicates that a single instance of theft provides ample justification to bar an individual from the securities industry, no matter the sum involved.

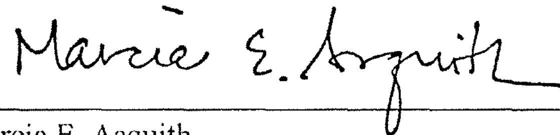
[19] In doing so, we do not accept Olson's proposition that we should lessen her sanctions because of certain financial hardships that she claims she suffered after leaving Wells Fargo. As the Commission has explained, "[w]e . . . do not consider mitigating the economic disadvantages [respondent] alleges [she] suffered because they are a result of [her] misconduct." *See Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008)

[Footnote continued on next page]

VI. Conclusion

We affirm the Hearing Panel's findings that Olson violated FINRA Rule 2010 by falsifying an expense report and converting firm funds. We also affirm the bar imposed by the Hearing Panel for Olson's misconduct. Finally, we affirm the Hearing Panel's order that Olson pay costs in the amount of $1,909.71, and we impose appeal costs of $1,468.85.[20] The bar imposed herein shall be effective upon service of this decision.

On Behalf of the Board of Governors,



Marcia E. Asquith,
Senior Vice President and Corporate Secretary

[cont'd]

(rejecting argument that the "amount of time, money, and loss of work" suffered as a result of misconduct was mitigating). We also do not find it mitigating that Wells Fargo terminated Olson after discovering her misconduct. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 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."). "As a general matter, we give no weight to the fact that a respondent was terminated by a firm when determining the appropriate sanction in a disciplinary case. We consider the disciplinary sanctions we impose to be independent of a firm's decisions to terminate or retain an employee." *Dep't of Enforcement v. Prout*, Complaint No. C01990014, 2000 NASD Discip. LEXIS 18, at *11 (NASD NAC Dec. 18, 2000). In this respect, we note that Wells Fargo terminated Olson for what it termed a "violation of company policy." We are imposing sanctions for conversion, a violation that strikes at the heart of the integrity of the securities industry. Moreover, the sanctions that we impose in this case, as in all cases, represent the public announcement of what FINRA condemns, under its rules, as unacceptable conduct for securities industry professionals.

20 We also have considered and reject without discussion all other arguments advanced by the parties.

20

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DENISE M. OLSON (CRD No. 2190824), Respondent.	Disciplinary Proceeding No. 2010023349601 Hearing Officer – MAD HEARING PANEL DECISION January 4, 2013

Respondent is barred from associating with any member in any capacity for converting firm funds by falsifying an expense report, in violation of FINRA Conduct Rule 2010. One panelist dissented as to the sanction.

Appearances

For the Complainant: Jonathan Golomb, Esq., and Daniel Gardner, Esq., FINRA, DEPARTMENT OF ENFORCEMENT, Rockville, MD.

For Respondent: Bruce Bettigole, Esq., Sutherland, Ashbill, and Brennan, LLP, Washington, DC.

DECISION

I. INTRODUCTION

The Department of Enforcement initiated this disciplinary proceeding against Respondent Denise M. Olson, a former General Securities Representative and General Securities Sales Supervisor with Wachovia Securities, Inc. (later known as Wells Fargo Advisors, LLC), a FINRA member firm. The Complaint charges Olson with converting firm funds by falsifying an expense report, in violation of FINRA Conduct Rule 2010, which provides that "[a] member, in the conduct of its business, shall observe high

standards of commercial honor and just and equitable principles of trade." Specifically, the Complaint alleges that Olson used her corporate credit card to purchase two iPods for her relatives, and then falsely marked the charge as a business expense when submitting her expense report.

Olson filed an Answer and requested a hearing. In her Answer, she admitted that she submitted an inaccurate expense report to Wachovia and received reimbursement for the iPods. However, Olson argued that the Hearing Panel should not sanction her for her "lapse in judgment." During a pre-hearing conference and at the hearing, Olson confirmed that (1) she did not contest liability for the conversion cause of action, and (2) the only issue before the Hearing Panel was a determination of sanctions.[1]

For the reasons discussed below, the Hearing Panel concluded that Olson committed the violation alleged in the Complaint: conversion of firm funds by falsifying an expense report, in violation of Rule 2010. A majority of the Panel also concluded that the appropriate sanction for Olson's misconduct was a bar.[2]

[1] The Initial Pre-Hearing Conference was held on November 17, 2011. During the conference, Olson, through her counsel, stated that she was not contesting liability. The November 18, 2011 Order confirmed the parties' statements and the Hearing Officer's rulings during the conference. On October 2, 2012, the hearing was conducted in Minneapolis, Minnesota, at which the Hearing Panel confirmed that Olson did not contest liability. Tr. 16-17, 86-87.

[2] Enforcement's hearing exhibits are labeled CX-1 through CX-6, and Olson's are labeled RX-1 through RX-11. The parties also submitted three joint exhibits, labeled JX-1 through JX-3. All of the exhibits were admitted into evidence.

II. FINDINGS OF FACT

A. Olson's Background and Experience in the Securities Industry

Olson entered the securities industry in 1991.[3] She joined Wachovia in 2004.[4] At Wachovia, Olson was registered with FINRA as a General Securities Representative and a General Securities Sales Supervisor.[5] Olson was a Wachovia branch manager from approximately June 2005 until June 2010.[6] In that position, she supervised approximately 50 financial advisors.[7] When supervising the financial advisors, Olson was responsible for approving their expense reports.[8]

Wachovia terminated Olson in June 2010 as a result of the misconduct alleged in the Complaint: the conversion of firm funds.[9] In early 2011, Olson re-entered the securities industry when she joined Ameriprise Financial Services, Inc.[10] She is currently employed at Ameriprise as a recruiter and registered with FINRA as a General Securities Representative and General Securities Sales Supervisor.[11]

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[3] Answer ¶ 2.

[4] JX-1, at 3.

[5] JX-1, at 5.

[6] *Id.* ¶ 2.

[7] Tr. 19.

[8] Tr. 20, 72. Her responsibilities also included the integration of an acquired branch and resulting building modifications. Answer ¶ 2.

[9] Answer ¶ 2.

[10] Tr. 43; Answer ¶ 2; JX-1, at 3.

[11] Tr. 43; JX-1, at 5. FINRA has jurisdiction of this proceeding pursuant to Article V, Section 4 of FINRA's By-Laws. The alleged misconduct occurred while she was registered with FINRA and associated with Wachovia, and Olson is currently registered with FINRA.

B. Olson Converted Firm Funds and Falsified an Expense Report

Wachovia provided Olson with a corporate credit card for business expenses.[12] Wachovia's expense policies permitted employees to seek reimbursement for legitimate business expenses, not personal expenses.[13] Olson periodically used her corporate credit card for personal purposes.[14] When she did so, she designated those expenditures as personal on the firm's internal computer system so that she, and not the firm, paid for her personal expenses.[15]

Olson admitted that in April 2010 she converted firm funds by charging two iPods, which were gifts for her relatives, to the firm.[16] Olson's purchase of the iPods, including her submission of the charge as a business expense, and her explanation for her misconduct are discussed below.

1. Olson's Purchase of iPods and Submission of False Expense Report

On April 2, 2010, Olson purchased two iPods at a Best Buy store as gifts for her niece and nephew.[17] She charged the $740.10 cost of the iPods on her corporate credit card.[18] On April 30, 2010, Olson posted the credit card charges she incurred during March and April to the firm's computerized expense reporting system.[19] Rather than designate the iPod purchases as a personal expense, she knowingly designated the

[12] Answer ¶ 5.

[13] JX-2, at 6-7. Despite her supervisory role that required approval of expense reports, Olson never read the relevant Wachovia policies. Tr. 73.

[14] *See generally* CX-1.

[15] Answer ¶ 6.

[16] Tr. 26, 56-57; Answer ¶ 6.

[17] Tr. 55.

[18] Tr. 55; Answer ¶ 7.

[19] Tr. 56; CX-1, at 9.

$740.10 charge as a business expense.[20] She falsely described the expense as office equipment for a branch-office conference room, entering the words "branch equip for new cof room" in the "description" column of the expense report.[21]

As a result of Olson's submission of the false expense report, Wachovia paid $740.10 for the purchase of the iPods.[22] Olson repaid her firm for the iPods after she was fired.[23]

2. Olson's Explanation for Her Conversion of Firm Funds

Olson's falsification of the expense report came to light in the course of an internal audit by Wachovia. A Wachovia auditor met with Olson in June 2010 and reviewed her expense reports.[24] When questioned by the auditor regarding the $740.10 charge, Olson initially stated that it was for branch-office equipment for a conference room.[25] However, when the auditor asked which conference room the equipment was for, Olson acknowledged using the card for personal purposes and failing to identify the iPod purchase as personal.[26] She also asserted that she had previously paid for branch expenses personally, including two refrigerators she purchased in September 2009 when the branch office was being renovated, without seeking reimbursement.[27] Olson explained that, at the time she submitted the report, her "fleeting thought" was that she would get reimbursed

[20] Tr. 67, 77, 78; CX-1, at 9; Answer ¶ 8.

[21] Tr. 74; CX-1, at 9; Answer ¶ 8.

[22] Answer ¶ 9.

[23] Answer ¶¶ 1, 9; Olson's Pre-hrg Br. at 3.

[24] Tr. 62-63.

[25] Tr. 64.

[26] Tr. 65.

[27] CX-2.

for the refrigerators by designating the iPod charge as a business expense.[28] She "felt ... it would have possibly balanced itself out in the end."[29]

During FINRA's investigation, Olson described her misconduct as a "mistake."[30] However, at the hearing, she admitted that she "intentionally misled [her] company."[31]

III. Conclusions of Law

The Hearing Panel finds that Olson converted $740.10 from Wachovia by purchasing two iPods with her corporate credit card, which she then paid using firm funds by falsifying her expense report, in violation of FINRA Conduct Rule 2010.[32]

Rule 2010 is an ethical rule. It requires members and associated persons to observe high standards of commercial honor and just and equitable principles of trade. FINRA's authority to pursue disciplinary action for violations of Rule 2010 is sufficiently broad to encompass any unethical business-related misconduct, regardless of whether it involves a security.[33] The test to determine whether conduct violates Rule 2010 is whether "the misconduct reflects on the associated person's ability to comply with the

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[28] Tr. 56-57.

[29] CX-2.

[30] CX-3, at 3. Olson also stated that she mistakenly used the wrong credit card when purchasing the iPods, using her corporate card instead of her personal credit card. Tr. 51. She stated that she did not correct the mistake because of the line of people behind her. Tr. 51. That said, the basis for the violation was Olson's deliberate choice, made after the purchase occurred, to obtain reimbursement for a personal expenditure and to falsify the expense report, not the use of the corporate card. *See Dep't of Enforcement v. Kaplan*, No. 20070077587, 2008 FINRA Discip. LEXIS 22 (OHO June 20, 2008) (involving falsified claims for payment of credit card charges where the firm allowed the corporate credit card to be used for personal purposes, so long as personal expenses were paid by the employee).

[31] Tr. 67.

[32] *See Henry E. Vail*, 52 S.E.C. 339, 342 (1995), *aff'd* 101 F.3d 37 (5th Cir. 1996).

[33] *Dep't of Enforcement v. Saad,* No. 2006006705601, 2009 FINRA Discip. LEXIS 29, at *11 (NAC Oct. 6, 2009) (finding that a registered person's submission of false expense reimbursement requests and receipts to his broker-dealer violated Rule 2110 (now Rule 2010)), *aff'd,* Exchange Act Rel. No. 62178, 2010 SEC LEXIS 1761 (May 26, 2010).

regulatory requirements of the securities business and to fulfill [her] fiduciary duties in handling other people's money."[34]

Here, not only did Enforcement prove by a preponderance of the evidence that Olson violated Rule 2010 by charging personal expenses on her Wachovia credit card and then obtaining reimbursement from the firm by falsifying her expense report, but Olson admitted to liability. Accordingly, the Hearing Panel concludes that Olson violated FINRA Conduct Rule 2010.

IV. SANCTIONS

A. Sanction Guidelines

FINRA's Sanction Guidelines ("Guidelines") for conversion or the improper use of funds recommend a bar.[35] The Guidelines define conversion for purposes of imposing sanctions generally as "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."[36] As discussed above, the Hearing Panel concluded that Olson converted $740.10 from Wachovia. Accordingly, consistent with the Guidelines, the Panel majority concluded that a bar is the appropriate sanction in this case.[37]

B. Principal Considerations

The parties argued that certain factors set forth in the Principal Considerations in Determining Sanctions section of the Guidelines were applicable. Upon review of the

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[34] *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002).

[35] FINRA Sanction Guidelines 36 (2011), *available at* www.finra.org/sanctionguidelines.

[36] Guidelines at 36 n.2.

[37] One panelist dissents as to sanctions. The Dissent tracks the National Adjudicatory Council's recent decision in *Dep't of Enforcement v. McCartney*, No. 2010023719601, slip op. (NAC Dec. 10, 2012). However, in *McCartney*, the complaint did not allege conversion. *McCartney*, slip op. at 5-6 n.9.

Principal Considerations, the Panel majority found several aggravating factors.[38] First, the Panel majority determined that Olson's misconduct was intentional.[39] Crediting Olson's version of events, she knew when she purchased the iPods that she had charged $740.10 to her corporate credit card. Then, when the charge for the iPods appeared on the credit card statement, she processed it as a business expense. Olson did not inadvertently record the charge as a business expense; rather, she made a deliberate decision to do so.[40] She claimed that she saw an opportunity to recoup money she thought was owed to her, and took that opportunity.[41]

Second, Olson concealed her misconduct.[42] When seeking reimbursement, she posted the charges to Wachovia's books and records in a manner to conceal the fact that she was using corporate funds to pay for the iPods. Specifically, she marked her personal expense as "branch equip for cof room." She made no entries to denote the true nature of the iPod charge, and she never brought her alleged mistake to anyone's attention.

Third, Olson's misconduct resulted in her wrongful gain of $740.10 from her firm.[43] Olson argued that it is mitigating that her misconduct did not result in financial harm to any customers. "[W]hile the theft of funds from a customer is an extremely

[38] *See McCarthy v. SEC*, 406 F.3d 179 (2d Cir. 2005) (finding that, in connection with sanctions, it is appropriate to consider: (1) all mitigating factors that the respondent has raised; (2) the seriousness of respondent's offenses; (3) the corresponding harm that respondent caused to members of the trading public; (4) respondent's potential gain for disobeying the rules; (5) the potential for repetition of respondent's misconduct in light of the current regulatory regime; and (6) the deterrent value to the respondent and others). By addressing the Principal Considerations raised by the parties, the Panel majority is not implying that any sanction guideline other than conversion is applicable to this case.

[39] Guidelines at 7 (Principal Consideration No. 13).

[40] Tr. 78.

[41] Tr. 56-57, 81.

[42] Guidelines at 6 (Principal Consideration No. 10).

[43] *Id.* at 7 (Principal Consideration No. 17).

serious offense, so too is any type of theft."[44] The Securities and Exchange Commission ("SEC") has emphasized that a theft or violation not involving a customer is not considered as mitigation.[45] Further, the Principal Consideration addressing "injury" is not limited solely to financial injury to public customers.[46] Rather, it directs adjudicators also to consider the nature and extent of injury to the member firm with which a respondent is associated.[47] In conversion cases, the amount of the gain is irrelevant; there is no *de minimis* exception.[48] The Panel majority finds that Olson violated her firm's trust and caused financial injury to her firm.

C. Olson's Mitigation Arguments

Olson presented several arguments in mitigation. Each is addressed separately below.[49]

1. Acceptance of Responsibility

Olson argued that she is a good, moral person. She contended that she accepts responsibility for her actions and understands that she made a mistake in marking the charge as a business expense. However, the Panel majority found the opposite for three reasons. First, Olson miscoded the iPod charge so that it could not be discovered. Second, it was only when the Wachovia auditor confronted her that she came forward to correct

[44] *Dep't of Enforcement v. Zulick*, 2001 NASD Discip. LEXIS 22, at *36 (OHO Feb. 27, 2001).

[45] *See Leonard John Ialeggio*, 53 S.E.C. 601, 605 (1998) (fact that respondent abused only his employer's trust is not mitigative); *Livada Securities Co.*, 45 S.E.C. 598, 600 (1974) (fact of no customer losses does not mitigate violations).

[46] Guidelines at 6 (Principal Consideration No. 11).

[47] *Id.*

[48] *Id.* at 36. *See also Saad*, 2009 FINRA Discip. LEXIS 29, at *10 (involving false claims totaling $1,144), and *District Bus. Conduct Comm. No. 4 v. Kwikkel-Elliott*, 1998 NASD Discip. LEXIS 4, at *3 (NBCC Jan. 16, 1998) (involving false claims of $913.60, only about $840 of which was paid). The respondents in those cases were barred.

[49] In addressing Olson's mitigation arguments, the Panel majority is not implying that any sanction guideline other than conversion is applicable to this case.

her "mistake."[50] Third, Olson failed to appreciate the wrongfulness of her actions at the time she submitted the report or soon thereafter.[51] After marking the charge as a business expense to avoid paying for the iPods, Olson stated that she was not concerned about what she had done and that it never bothered her.[52] Olson testified, "while I'm being terminated I realized that [Wachovia] took it much more serious. I mean, obviously, I was terminated for it, so, yes, I realized when I was terminated that I should never have marked it as a business expense."[53]

2. Lack of Disciplinary History

The Panel majority rejected Olson's argument that her clean disciplinary history should mitigate sanctions.[54] "While the existence of a disciplinary history is an aggravating factor when determining appropriate sanctions, its absence is not mitigating. ... A respondent should not be rewarded because [s]he may have previously acted appropriately as a registered person."[55]

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[50] Guidelines at 6 (Principal Consideration No. 2) (adjudicators should consider whether an individual accepted responsibility for and acknowledged the misconduct to his or her employer prior to detection and intervention by the firm).

[51] Unlike the Dissent, the Panel majority did not find that Olson recognized the seriousness of her behavior. She accepted responsibility only *after* the firm detected her misconduct. *See Dep't of Enforcement v. Hunt,* No. 2009018068701, slip op. at 11 (NAC Dec. 18, 2012) (finding acceptance of responsibility is not mitigating when respondent acknowledges his misconduct after detection by his firm).

[52] Tr. 74.

[53] Tr. 80.

[54] Unlike the Dissent, the Panel majority did not find that Olson's clean disciplinary history warranted a reduced sanction. The SEC has "repeatedly stated that a 'lack of disciplinary history is not a mitigating factor for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional.'" *Howard Braff,* Exchange Act Rel. No. 66467, 2012 SEC LEXIS 620, at * 25 (Feb. 24, 2012) (quoting *Dennis S. Kaminiski,* Exchange Act Rel. No. 65347, 2011 SEC LEXIS 3225, at *43 (Sept. 16, 2011) (citations omitted) (noting that respondent's 32-year industry career with an unblemished record was not mitigating); *see also Dep't of Enforcement v. Hunt,* No. 2009018068701, slip op. at 9 (NAC Dec. 18, 2012) (rejecting argument that lack of disciplinary history was mitigating).

[55] *Saad,* 2009 FINRA Discip. LEXIS 29, at *20; *see also Manoff,* 55 S.E.C. at 1165-66 n.15; *Saad,* 2010 SEC LEXIS 1761, at *28-29 (May 26, 2010); *Dep't of Enforcement v. Newman,* 2011 FINRA Discip. LEXIS 33, at *29 (OHO Mar. 30, 2011).

3. Aberrant Lapse in Judgment

Olson also argued that her conduct was an aberrant lapse in judgment, and not part of a pattern of conduct intended to deceive her employer.[56] Although the Panel majority recognizes that Olson has no prior disciplinary history, her conversion of firm funds was compounded by her falsification of firm records. Her misconduct was intentional, evidencing deliberate concealment rather than mere oversight. These were acts of deception, and the Panel majority therefore rejects this mitigation argument.[57]

4. Financial Difficulties

Olson asserted that she has suffered enough. Specifically, she lost her job at Wachovia, and then ultimately found a lower paying position at Ameriprise.[58] The Panel majority found that Olson's job loss and resulting financial difficulties are irrelevant factors in determining the appropriate remedial sanction for her misconduct. Sanctions are remedial in nature, not punitive. They are designed to prevent future harm.[59] Accordingly, the fact that Olson was fired, or has already suffered, is not a factor in determining sanctions.[60]

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[56] Guidelines at 6 (Principal Consideration No. 8).

[57] *Cf. Mark F. Mizenko,* Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655, at *17 (Oct. 13, 2005) (rejecting aberrant mitigation argument for forgery violation).

[58] Tr. 42-43.

[59] *First California Co.*, Admin. Pro. File No. 3-4647, 1976 SEC LEXIS 2767, at *70 (May 20, 1976).

[60] *Dep't of Enforcement v. Correro,* No. E102004083702, 2008 FINRA Discip. LEXIS 29, at *21 (NAC Aug. 12, 2008); *Dep't of Enforcement v. Prout,* No. C01990014, 2000 NASD Discip. LEXIS 18, at *11 (NAC Dec. 18, 2000); *Dep't of Enforcement v. Hunt,* No. 2009018068701, 2011 FINRA Discip. LEXIS 52, at *28 (OHO Oct. 17, 2011), *aff'd.* (NAC Dec. 18, 2012).

5. Offset for the Purchase of Refrigerators

Olson explained that her reimbursement for the iPods was offset by the fact that she had spent significant sums of money for refrigerators for the firm.[61] Specifically, Olson testified "I had already spent a lot of money out of my own pocket, and that I would let this go through as a business expense and not a personal – not mark it as a personal expense."[62] "The suggestion that [she] may have been able to obtain reimbursement for [such expenses] if submitted properly does not exonerate or lessen the significance of [her] unethical conduct."[63] If Olson wanted to be reimbursed for the cost of the refrigerators, she should have sought reimbursement honestly. The case law is clear that one may not help oneself to her employer's money because she believes that her employer owes her money for something else.[64]

6. Repaid the Firm

Olson asserted that she repaid the firm "long before FINRA contacted her."[65] While she may have repaid the firm before being contacted by FINRA, she did not do so before Wachovia terminated her.[66] Her repayment was a result of being caught, not of being honest or remorseful, and does not undercut the need for a bar here. There is no evidence that she would have repaid Wachovia absent being confronted about the charge. Any mitigation for repaying the money, or for accepting responsibility, must be based on

[61] Tr. 77.

[62] *Id.*

[63] *Saad*, 2009 FINRA Discip. LEXIS 29, at *22.

[64] *Dep't of Enforcement v. Doan*, No. 2009019637001, 2011 FINRA Discip. LEXIS 56, at *9 (OHO Sept. 19, 2011); *Newman*, 2011 NASD Discip. LEXIS 33, at *27; *Saad*, 2009 FINRA Discip. LEXIS 29, at *22; *Zulick*, 2001 NASD Discip. LEXIS 22, at *36.

[65] Answer ¶ 9.

[66] Respondent admits having repaid the money at the firm's request. Olson's Pre-hrg Br. at 3.

a respondent's actions that come before the misconduct is detected and the respondent is confronted by the firm.[67]

D. Conclusion

The Panel majority concluded that a bar is consistent with the Guidelines and is the appropriate remedial sanction. Olson held a position of significant responsibility at Wachovia, supervising approximately 50 financial advisors. Her duties included reviewing expense reports of others. In her position, she should have been highly sensitive to the wrongfulness of her misconduct. Instead, she converted firm funds and never gave it a second thought until she was confronted by Wachovia. As the SEC held in a similar case, "[Olson's] submission of the falsified expense report, and resulting financial benefit, reflects negatively on both [her] ability to comply with regulatory requirements and [her] ability to handle other people's money."[68] Accordingly, the Panel majority bars Olson from associating with any FINRA member.[69]

V. ORDER

Respondent Denise M. Olson is barred from associating with any FINRA member firm in any capacity for conversion of firm funds, in violation of FINRA Conduct Rule 2010. In addition, Olson is ordered to pay costs in the amount of $1909.71, which includes an administrative fee of $750 and hearing transcript costs of $1,159.71.

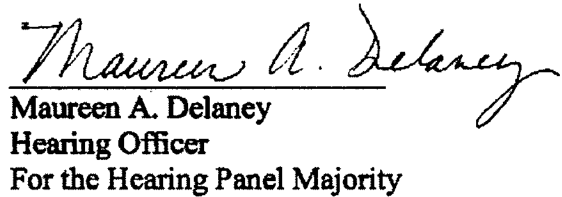
The bar shall be effective immediately if this decision becomes FINRA's final disciplinary action. The payment of costs shall be due on a date set by FINRA, but not

[67] Guidelines at 6 (Principal Considerations Nos. 2, 4); *Kaplan*, 2008 FINRA Discip. LEXIS 22, at *15; *Kwikkel-Elliott*, 1998 NASD Discip. LEXIS 4, at *17-18.

[68] *Saad*, 2010 SEC LEXIS 1761, at *14.

[69] The Panel majority considered the testimony of Olson's two character witnesses who testified as to her honesty and reputation in the community. We nonetheless concluded that it is appropriate in the public interest that Olson be barred from association with any FINRA member.

sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.[70]



Maureen A. Delaney
Hearing Officer
For the Hearing Panel Majority

DISSENT

Panelist, dissenting, with regard to sanctions:

I respectfully dissent from the sanction imposed on Respondent Olson as I would impose a six-month suspension and a $5,000 fine rather than a bar for her violation of Rule 2010.

Here, the evidence supports a sanction for Olson short of a bar. The case involves a single mistake by Olson mischaracterizing a $740.10 personal expense as a business expense. There is no pattern or practice of Olson violating industry rules or violating her employing broker-dealer policies, intentionally or otherwise. Furthermore, there was no customer harm.

I do not agree with the Panel majority's conclusion that several aggravating and no mitigating factors exist and, for the reasons outlined below, I find that Olson's violation was serious, but not egregious. "The relevancy and characterization of [an aggravating or mitigating] factor depends on the facts and circumstances of a case and the type of violation."[71] Balancing the factors present in this case, I find that lesser sanctions

[70] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.

[71] Guidelines at 6.

would be appropriately remedial.[72] In my opinion, simply alleging conversion should not mandate a bar. My position and proposed sanction is consistent with the National Adjudicatory Council's December 10, 2012, decision in *Dep't of Enforcement v. McCartney*[73] where the facts and circumstances are remarkably similar.

Olson's testimony was extremely credible. She recognized the seriousness of her behavior, was truly remorseful, and accepted the consequences of her actions. She acknowledges that a serious sanction is warranted for her misconduct, is genuinely ashamed of her behavior, and avows that her lapse in judgment will not be repeated. Furthermore, Olson took full responsibility for her mistake.[74] I also note that Olson admitted her misconduct from the outset of the inquiry and immediately repaid the funds to her employer. I further find that Olson testified consistently throughout the course of

[72] I am guided by the recent action in *Dep't of Enforcement v. Leopold,* No. 2007011489301, 2012 FINRA Discip. LEXIS 2 (NAC Feb. 24, 2012), which is a similar case. In *Leopold,* the NAC upheld the Hearing Panel's findings that Leopold fabricated in excess of 20 hotel invoices and broker-dealer verification letters. The *Leopold* Hearing Panel barred Leopold. On appeal, the NAC reduced Leopold's bar to a $25,000 fine and a one-year suspension. The NAC found that Leopold demonstrated remorse, recognized the significance of his misconduct, accepted responsibility for his actions, acknowledged that a serious sanction was in order, and vowed that similar misconduct would not recur. The NAC also noted that Leopold admitted his misconduct from the outset to his firm's investigators and to FINRA's examiners, and that his testimony was consistent throughout the course of the proceeding. In *Leopold,* the NAC balanced these factors with the absence of aggravating factors, such as harm to customers and significant loss to the firm, and determined that Leopold's misconduct was serious, but not so egregious as to warrant a bar. In light of the *Leopold* decision and to "promote consistency in the imposition of remedial sanctions," the NAC reached a similar conclusion in *Dep't of Enforcement v. McCartney. See McCartney*, slip op. at 5-6 n.6. (citing *Leopold,* 2012 FINRA Discip. LEXIS 2, at *17).

[73] *Dep't of Enforcement v. McCartney*, No. 2010023719601, slip op. (NAC Dec. 10, 2012).

[74] *See Keith Perkins*, 54 S.E.C. 989, 994 (2000) (finding respondent's recognition that his submission of false expense reimbursement requests was inherently dishonest to be mitigating); *Leopold*, 2012 F1NRA Discip. LEXIS 2, at *20-22 (holding that respondent's expression of remorse, recognition of the severity of his misbehavior, acceptance of responsibility, and vow that lapses in judgment will not be repeated support reducing the sanction from a bar); *Dep't of Enforcement v. Nouchi*, No. E102004083705, 2009 FINRA Discip. LEXIS 8, at *11 (NAC Aug. 7, 2009) (concluding that a sanction should fall within the lower end of the relevant Guidelines range where, among other factors, the respondent expressed "sincere remorse").

the underlying investigations and at the hearing.[75]

Olson has worked in the securities industry for more than 20 years without incident (other than this matter). Olson did not engage in numerous acts of misconduct, a pattern of misconduct, or misconduct that extended over a lengthy period of time, and since then has not repeated her misconduct.[76] I find that Olson's misconduct appears to be a one-time, isolated incident.[77]

Balancing the facts and circumstances of this case, I have determined that Olson's misconduct was serious, but not egregious, and warrants a sanction of less than a bar. I find that Olson breached her duty as an associated person to act ethically and in a manner that comports with high standards of commercial honor and just and equitable principles of trade. I also find that Olson failed to use sound judgment by knowingly submitting a personal expense as a business expense. Olson, however, appears to understand fully the magnitude of her failings and is genuinely remorseful.

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[75] *See Dep't of Enforcement v. Cuozzo*, No. C9B050011, 2007 NASD Discip. LEXIS 12, at *35-36 (NAC Feb. 27, 2007) (holding that factors that militate against finding respondent's misconduct to be egregious include that respondent did not attempt to conceal his false dating of documents from investigators; expressly acknowledged that his conduct may have harmed firm customers; accepted responsibility for his misconduct; and expressed remorse and offered sincere apologies for his actions throughout these proceedings); *Dep't of Enforcement v. Foran*, No. C8A990017, 2000 NASD Discip. LEXIS 8, at *22-23 (NAC Sept. 1, 2000) (reducing Hearing Panel bar where, when confronted, respondent immediately admitted that he had converted firm funds, repaid the firm the amount he converted, and cooperated with investigators and regulators).

[76] Guidelines at 6 (Principal Consideration Nos. 8, 9).

[77] *But see Dep't of Enforcement v. Saad*, No. 2006006705601, 2009 FINRA Discip. LEXIS 29, at *22-24 (NAC Oct. 6, 2009) (finding that misconduct was premeditated and ongoing where respondent covered up his misconduct for nearly a year, and he fabricated an elaborate lie regarding a two-day business trip that never occurred, lied to obtain reimbursement for an acquaintance's purchase of a cell phone, misled his office staff as to his whereabouts for two days, manufactured numerous false receipts, misled a state examiner and FINRA examiner, and hedged his answers in a FINRA on-the-record interview), *aff'd*, 2010 SEC LEXIS 1761; *Dep't of Enforcement v. Manoff*, No. C9A990007, 2001 NASD Discip. LEXIS 4, at *33-34 (NAC Apr. 26, 2001) (finding misconduct egregious where respondent exploited a junior employee, actively concealed his misconduct during the firm's and regulator's investigations, provided conflicting accounts of events, and failed to show remorse or admit wrongdoing), *aff'd*, 55 S.E.C. 1155 (2002).

Unlike the Panel majority, I cannot agree that Olson's misconduct warrants such a severe sanction. Thus, I would suspend Olson from associating with any member firm in any capacity for six months and assess a $5,000 fine rather than bar her from the industry. I find that these sanctions are appropriately tailored to address Olson's misconduct.[78]

Copies to: Denise M. Olson (*via overnight and first-class mail*)
Bruce Bettigole, Esq. (*via electronic and first-class mail*)
Jonathan Golomb, Esq. (*via electronic and first-class mail*)
Daniel Gardner, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

[78] FINRA sanctions may be remedial, but must not be punitive. *McCarthy v. SEC*, 406 F.3d at 188-89; Guidelines at 2. A remedial sanction is designed to correct the harm done by respondent's wrongdoing and to protect the trading public from any future wrongdoing the respondent is likely to commit. *McCarthy*, 406 F.3d at 188. In addition to remediation, deterrence may also be relied upon as an additional rationale for the imposition of sanctions. *Id.*

21

1 FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS
2 DISCIPLINARY PROCEEDING
NO. 2010023349601
3 ---
4 FINRA DEPARTMENT OF ENFORCEMENT,
5 Complainant,
v.
6
7 DENISE M. OLSON (CRD No. 2190824),
8 Respondent.

9
Minneapolis Marriott City Center
10 30 South Seventh Street
Minneapolis Minnesota
11
October 2, 2012
12 9:00 a.m.
13
Panel: Maureen A. Delaney, FINRA Hearing Officer
14 Terry L. Lister, Waddell & Reed
Jennifer Relien, Woodbury Financial Services
15
For the Department of Enforcement:
16 Jonathan Golomb, Esq.,
Senior Special Counsel Enforcement
17
Daniel L. Gardner, Esq.,
18 Counsel Enforcement
19
Lisa Wilcox
20 Principal Investigator Enforcement
21
22 For the Witness:
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25

1 I N D E X

2

WITNESS	EXAMINED BY	PAGE
FRANK DAN MIRABELLA	MR. GOLOMB	18, 117
	MR. BETTIGOLE	27, 123
DENISE OLSON	MR. BETTIGOLE	39, 75, 85, 125
	MR. GOLOMB	72, 86
	MS. RELIEN	75, 82
	MR. LISTER	76, 85
	MS. DELANEY	83
CRAIG DAHL	MR. BETTIGOLE	88
	MR. GOLOMB	95
	MR. LISTER	99
GEORGE FEKETE	MR. BETTIGOLE	102, 111
	MR. GARDNER	109
	MR. LISTER	113

12

13 E X H I B I T S

14

ENFORCEMENT FOR IDENTIFICATION	PAGE
CX-5: Corrective Action & Counseling Plan	121
CX-6: Letter to Denise Olson and Patricia Bates regarding performance	121

19
20
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22
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1 she shouldn't even be suspended. She should be
2 allowed to continue unfettered in the industry.
3 What you won't see here is any
4 extraordinary circumstances justifying the
5 departure from what the NAC has previously said
6 is and should be the standard sanction for her
7 conversion. We'll see a run-of-the-mill
8 conversion that the guidelines in the case law
9 say should result in a bar.
10 Lastly, working in the securities
11 industry is a privilege; not a right. And,
12 unfortunately, she gave up that right. Thank
13 you.
14 MR. BETTIGOLE: Members of the
15 panel, this case is about whether Ms. Olson
16 should be thrown out of her job as a recruiter
17 for Ameriprise, as well as the entire
18 securities industry, for a single foolish
19 mistake that has already devastated her. I'm
20 sure that you've noticed that Ms. Olson is
21 already crying. This is emotionally
22 devastating for her. And she has repeatedly
23 admitted what she's done. She has taken
24 responsibility for it from the day that it was
25 first brought up here when she thought she was

1 you needed in a hurry.
2 Q. Did she have responsibility for -- did
3 other people in the branch have corporate
4 cards?
5 A. Not that I'm aware of.
6 Q. Were employees of Wachovia and Wells
7 Fargo allowed to use the corporate card for
8 personal expenses?
9 A. As I found out, they could do that.
10 Q. How did you find that out?
11 A. When it happened, I asked -- when it was
12 brought to my attention -- I have two people
13 that do -- that would review the expenses for
14 my managers, and they would roll back up to me
15 and they showed me this. I would have to see
16 these things. I should be looking at them
17 occasionally, at least. And there would be --
18 Denise had a couple of personal items on there.
19 And I asked the question -- at A.G. Edwards we
20 weren't allowed to do that. I said, "Why? How
21 did this happen?" And they just said, "She's
22 allowed to do it, but it's frowned upon."
23 Q. Who told you it was frowned upon?
24 A. The region.
25 Q. Was there a particular person at the

1 agreed to, and I do intend to call her.
2 MS. DELANEY: Let's proceed in that
3 fashion.
4 MR. GOLOMB: Okay. Subject to
5 calling Ms. Olson, having an opportunity to
6 question her, the Department rests.
7 MR. BETTIGOLE: I'll call Denise
8 Olson.
9 MS. DELANEY: Okay.
10 DENISE OLSON,
11 duly sworn, was examined and testified as follows:
12 DIRECT EXAMINATION
13 BY MR. BETTIGOLE:
14 Q. Can you please keep your voice up.
15 A. Okay.
16 Q. Can you start by just telling the panel
17 about your educational background.
18 A. I -- I'm from northern Minnesota. I'm
19 from Duluth, Minnesota. And I attended the
20 University of Minnesota Duluth for just over
21 two years; then left school and got married.
22 So, my education is just a brief history of
23 attending the University of Minnesota Duluth.
24 Q. You went there for two years?
25 A. Correct.

1 Q. Did you ever go back to school after
2 that?
3 A. I have not.
4 Q. So, when did you start working in the
5 securities industry?
6 A. I started at Piper Jaffray -- a
7 subsidiary of Piper Jaffray called Piper
8 Capital Management in September of 1991 as a
9 receptionist.
10 Q. Take the panel through your job history
11 in the industry.
12 A. Okay. I started as a receptionist at
13 Piper. I did that for about six weeks before I
14 was promoted to a different role in the
15 marketing department.
16 I worked in the marketing department and
17 I helped them develop a contact management
18 system for fulfillment for our closed end
19 mutual fund products to send out literature to
20 outside advisors at outside firms.
21 I worked in the marketing department for
22 about two years. Then I went and worked in a
23 branch. I went from marketing -- from Piper
24 Capital out to being a sales assistant in the
25 Bloomington office of Piper Jaffray. I worked

1 as a sales assistant in training for one year.
2 Then I was asked to work with two advisors in
3 the office no longer in training. And I -- I
4 was there for six years working with one
5 advisor. I ended up being his junior partner.
6 My last year at Piper, I loved working
7 with Charlie, and became the product manager
8 for 401(k) plans and 529s. That was kind of
9 our specialty on our team was working with the
10 529 plans and participants. So, I went into
11 the home office to help the whole firm with the
12 401(k) plans.
13 I took that role when Piper Jaffray was
14 about to be spun off by US Bank and US Bank
15 started shutting down departments that we
16 didn't need. And, so, I knew that our
17 department was going to be -- it had already
18 been cut in half and then again in half again,
19 so there were only two people left.
20 So, I decided to take a role as
21 financial advisor in training with Morgan
22 Stanley. It was just Morgan Stanley then. I
23 did that for a year, and they closed our branch
24 in Edina, Minnesota.
25 At that time when that was closing down

1 I had met Craig Dahl, my former supervisor, at
2 Wachovia, and he asked me if I would consider
3 coming over as their operations manager to help
4 with their Prudential Securities merger into
5 the Wachovia Securities office. And, so, I was
6 hired on to be the operations manager. And I
7 helped move all the advisors in the Prudential
8 office over to -- literally across the street
9 to the Wachovia Securities office due to that
10 merger.
11 I did that role for six months before my
12 complex manager, unfortunately, drove his
13 snowmobile into a tree and passed away. And,
14 so, my supervisor was promoted to be the
15 complex manager, who was Craig Dahl. And then
16 I was asked to consider taking the role of
17 branch manager for that office.
18 I was asked to take my 9/10 licensing.
19 So, I took my license and they offered me a
20 couple other branches outside of state, and I
21 decided to not move away. They did eventually
22 offer me my own office to supervise, so I
23 supervised the Wachovia Securities office in
24 Bloomington for several years.
25 I was terminated by Wells Fargo and was

1 out of work for nine months. And then I was
2 offered a job at Ameriprise. So, I've been at
3 Ameriprise in the recruiting department,
4 experienced advisory recruiting. So, I help
5 recruit advisors from other firms. I'm
6 actually the internal resource. I travel on
7 occasion, but my job is based here in the
8 headquarters. It's a role I very much enjoy.
9 And I've been doing that for about a year and a
10 half.
11 Q. Okay. Thank you. In your last full
12 year at Wachovia before you were terminated,
13 what was your approximate total compensation,
14 so it would have been, I think, 2009?
15 A. 2009, I believe that was $203,000.
16 Q. And when you got your current position,
17 what was the salary?
18 A. My base is $70,000.
19 Q. $70,000?
20 A. Correct.
21 Q. And at that point you had the
22 possibility of some small bonuses?
23 A. We have the possibility of making
24 bonuses when we hire advisors.
25 Q. Now, in your current position, do you

1 Q. Let's go back to your time at Wachovia
2 and your use of the credit card.
3 A. Yes.
4 Q. First, more generally, did you make any
5 purchases with your own money for your branch?
6 A. Yes.
7 Q. Can you describe for the panel what you
8 did?
9 A. Sure. I saw my office as being a
10 business, so it was something to reinvest in.
11 So, I would -- we were under construction
12 several times over many years. So, there were
13 many times where I would buy decorative items
14 or furniture-type items or meals. I even
15 bonused the staff out of my own paycheck. And
16 it was my way of giving back to the branch and
17 making it a more comfortable place for people
18 to work.
19 Q. And you used your own money for those
20 things?
21 A. Yes. The -- when I did the bonus, that
22 came out of my paycheck, though. I mean, that
23 wasn't -- I didn't pay the people separately.
24 Q. But, still, your money?
25 A. Correct.

1 Q. And it wasn't -- there wasn't some
2 policy calling for you to pay people bonuses,
3 was there?
4 A. No.
5 Q. We've heard a little bit about some
6 refrigerator purchases. Can you describe those
7 for the panel?
8 A. Would you like me to describe just the
9 refrigerators or -- I don't understand.
10 Q. Well, I was asking particularly about
11 buying the refrigerators, yes.
12 A. Okay.
13 Q. What were the circumstances? How did
14 that come up that you were buying the
15 refrigerators?
16 A. The A.G. Edwards office was about a mile
17 away from the Wachovia office that I manage.
18 And with the A.G. Edwards and Wachovia merger
19 we closed the A.G. Edwards office. I was still
20 the branch manager. There were two of us. The
21 other manager did not get the role. We had to
22 reinterview for our job. So, I got to keep the
23 job as branch manager. And in bringing over
24 the advisors from the A.G. Edwards office, we
25 had to close down their space and move

1 everybody into a space that wasn't big enough
2 for this many people. So, I had multiple
3 phases of build-out. We added space on one
4 floor and then we remodeled the space that most
5 of the advisors sat on, which was 17, which is
6 also where I sat. We built out the lower level
7 first and then we did the 17th floor, which
8 took a lot longer. It took about three months
9 to build out that space because of the number
10 of advisors it affected. I'm sorry. I'll slow
11 down.
12 Q. Take your time.
13 A. We had to do it in phases because we had
14 to move advisors from one half of the floor to
15 take up the carpet and to knock down walls and
16 to refurbish the space. So, we moved people
17 into temporary spaces. And after doing this
18 all summer, moving people around, I was very
19 excited to be done with the construction, and
20 everybody was supposed to move back over a long
21 weekend.
22 Friday night -- everybody went home on
23 Friday at approximately 3:00, and the movers
24 came in, and we were putting everything back
25 after it being a mess for quite some time. We

1 brought everybody's furniture back in, set up
2 all the offices. And at the end of the evening
3 they brought back the kitchen. That was the
4 last thing to be put back together. We had a
5 refrigerator in storage during the entire
6 build-out. When we opened it up, it was filled
7 with mold because it had been closed for the
8 entire time. And, so, myself and another
9 coworker tried to clean out the refrigerator.
10 And we just could not get it clean enough for
11 what I felt was okay for people to put their
12 food or to need ice -- or put ice in their
13 beverages for. So, I decided that I would go
14 buy -- anything that we did for one floor we
15 always had to do for the other floor just to
16 make sure that everything was even. So, I went
17 to Lowe's and purchased two refrigerators. I
18 had them delivered so that when everybody came
19 back to the office everything was done; there
20 wasn't more that needed to be taken care of.
21 We were all so excited to finally be finished
22 with all of the moving. So I made a decision
23 to go buy new refrigerators.
24 Q. If you'll take a look at the white
25 binder at Exhibit RX-6, can you tell us what

1 that exhibit is?
2 A. That is a receipt for the refrigerators
3 I had purchased for the office.
4 Q. I'm sorry. Can you keep your voice up,
5 please.
6 A. Those are the receipts for the
7 refrigerators I purchased for the office.
8 Q. And, so, according to this receipt, it's
9 about $958.40 for each of the refrigerators?
10 A. Correct.
11 Q. And how did you pay for this?
12 A. My credit card.
13 Q. Your personal credit card?
14 A. Yes.
15 Q. If you'll take a look at Exhibit RX-5.
16 A. Yes, sir.
17 Q. Is that the statement from your personal
18 credit card?
19 A. Yes.
20 Q. If you'll turn to the last page, back to
21 the refrigerator item, that over $2,000 charge
22 that's identified as Lowe's, is that the same
23 as what we just talked about for the
24 refrigerators?
25 A. Yes.

1 Q. You paid that off with your own funds?
2 A. Correct.
3 Q. Did you ever seek reimbursement
4 specifically for this? Leaving aside the iPod
5 transaction, did you ever put in to be
6 reimbursed for these refrigerators?
7 A. No. After I was terminated I asked if I
8 could be reimbursed and they said no.
9 Q. But before all of that came up and you
10 bought the refrigerators -- this was September
11 7 of '09, is that right?
12 A. Correct.
13 Q. You didn't ask to be reimbursed then,
14 right?
15 A. No.
16 Q. Why not?
17 A. I didn't have any intention of being
18 reimbursed for them.
19 Q. Did you see this as yet another way that
20 you were going to just sort of give back to the
21 branch?
22 A. Yes.
23 Q. Let's tell the panel about the iPod
24 purchases. How did this start being at Best
25 Buy?

1 card, directing your attention to page 9 of 11,
2 the second item from the top, the Best Buy
3 purchase, it looks like you entered "Branch
4 equipped for new" -- it says "COF" -- for
5 conference room. Did you make that entry?
6 A. I did.
7 Q. Describe to the panel what the
8 circumstances were of making this entry. Take
9 your time.
10 A. When you enter onto the system an
11 expense, it comes into an expense system. And
12 you can either mark it as personal or mark it
13 as business. And I inaccurately marked this
14 purchase as a business expense when it was
15 truly a personal expense.
16 Q. You understand that that's wrong?
17 A. Yes, I do.
18 Q. Was this something that you were
19 dwelling on, spending any amount of time
20 thinking about when you did it?
21 A. No, I didn't. It was a fleeting thought
22 of the fact that I had already paid for the
23 refrigerators. I marked this inaccurately.
24 Q. Now, you could have submitted separately
25 for the refrigerators, right?

1 A. Yes.
2 Q. So, you're not claiming that it's okay
3 to have done it like this?
4 A. No.
5 Q. But, as you said, this was a fleeting
6 thought when you entered it?
7 A. Yes.
8 Q. Had you done anything like this before?
9 A. No.
10 Q. Have you done anything like it since?
11 A. No.
12 Q. If we look back through this exhibit, as
13 you've already heard during Mr. Mirabella's
14 testimony, there are a lot of personal charges
15 of yours.
16 A. Yes.
17 Q. At least some every month for what we
18 have records of here, right?
19 A. Yes.
20 Q. Did you share the understanding that
21 Mr. Mirabella talked about, that using the card
22 for personal expenses was permitted?
23 A. Yes.
24 Q. He testified about somebody who isn't
25 here to testify saying it was frowned on. Do

1 you ever remember anyone saying it was frowned
2 on?
3 A. No.
4 Q. You had used the card on occasion for
5 personal expenses before this occasion which
6 seems to have just been started in October of
7 2009?
8 A. As far as I can remember, yes.
9 Q. Had anybody ever said anything to you
10 about that you shouldn't do that?
11 A. No.
12 Q. Now, you heard Mr. Mirabella say that he
13 recalled talking to you as early as October of
14 '09, and perhaps on more than one occasion,
15 about not using your corporate card for
16 personal expenses. Is that accurate?
17 A. No, it's not.
18 Q. Can you tell the panel what is accurate?
19 A. Yes. So, I talked to Dan about not
20 using my corporate card within a day or two
21 before the purchase on page 11 on 5/6, because
22 he told me I was not allowed to use my
23 corporate card for personal expenses. And
24 Mandalay Bay called me to let me know that they
25 needed to run my card again from -- when I was

1 there on 3/29; something must have happened
2 with the transaction, and that they were
3 submitting it through my credit card. Well, I
4 was so upset that -- he had told me I couldn't
5 use the card, so I was so worried, that I
6 called him and told him that this was happening
7 and that there was going to be one item coming
8 through on my expenses, because I was very
9 worried that this would come up and I would
10 have been using my card after he spoke to me.
11 Q. You seem to have marked it as "old
12 personal item."
13 A. Correct.
14 Q. Why did you do that?
15 A. Just to reiterate and remind him that it
16 was not something -- that I had not done this
17 after we had the conversation that I was not
18 supposed to use the card for personal expenses.
19 Q. Now, let's talk for a moment about that
20 column. If you look back to the first page of
21 Exhibit CX-1, that second to last column from
22 the right where it says "Entry Status."
23 A. Yes.
24 Q. Can you tell us what that column
25 represents? How does that show up?

1 to your knowledge?
2 A. Someone in the major market, so either
3 Dan, Laura Bloomquist, or Susan Casper.
4 Q. And before your conversation, shortly
5 before that entry, the conversation you've
6 testified to about Dan -- that's Dan
7 Mirabella -- shortly before the May 6 entry,
8 had anybody talked to you about that you
9 couldn't use your card for personal charges?
10 A. No.
11 Q. Is that why you continued to use the
12 card in the preceding months?
13 A. Yes.
14 Q. There's an entry that you heard us talk
15 about on page 4 of 11 of CX-1 for Kabuki
16 Restaurant. There's actually two entries.
17 It's the fourth line item and the eighth line
18 item. Can you explain those to us?
19 A. Yes. Kabuki was a restaurant that was
20 not too far away from the office. It was also
21 close to my home. And we -- I went to dinner
22 with advisors that were in -- from my office.
23 And my daughter was also at the restaurant.
24 So, I paid for her meal, but they ran it for me
25 on a separate transaction so that I wouldn't --

1 could submit that as a personal expense; not as
2 a business expense, because that was her meal.
3 Q. And on page 5 of 11, the fourth line
4 down, there's a transaction listed for $11.12
5 for Walgreen's. Do you see that?
6 A. Yes.
7 Q. Did you make that $11.12 transaction in
8 defiance of Dan Mirabella telling you never to
9 use your card for personal transactions?
10 A. No.
11 Q. Let's talk now about June 2 of 2010.
12 A. May I close this?
13 Q. Sure, you can close that exhibit.
14 Now, this turned out to be the date of
15 your termination.
16 A. Yes.
17 Q. Can you describe for the panel what you
18 recall about what happened that day?
19 A. I was the only female manager for the
20 Twin Cities, and we had several female
21 advisors. I was hosting an advisor summit a
22 week or two weeks after my meeting with Dan to
23 do a marketing plan and an event for the female
24 advisors in town. So, Dan called me and asked
25 me to come to the home -- to his office. And I

1 some issue about the iPod purchase?
2 A. No, none whatsoever.
3 Q. Was that even on your mind?
4 A. No, it didn't even enter my mind that
5 there was something -- that I had done
6 something to cause this.
7 Q. This woman that was meeting with you and
8 going through these items, did she confront you
9 with a copy of the receipt showing the iPod
10 purchases?
11 A. No.
12 Q. Or anything to indicate she already knew
13 about the iPod purchase?
14 A. No. We went through each individual
15 expense.
16 Q. So, when you got to the item -- and
17 let's look back at CX-1 while we do this, and,
18 again, turn to page 9 of 11, the second item
19 from the top. When you got to this item, what
20 did you say this transaction was about?
21 A. Originally when I first looked at it I
22 looked at it and said that -- I just read
23 through each item. And initially when I looked
24 at it I said that it was for branch equipment
25 for a conference room. And she asked which

1 conference room, and I said, "Well, I only
2 recently had bought equipment for one
3 conference room." So she asked me if this was
4 equipment for the conference room. And I
5 looked at the dollar amount and I realized that
6 that was actually my iPod purchase. So, I
7 said, no, actually this purchase is a personal
8 purchase. This purchase was something that I
9 had purchased for my family but put through as
10 a business expense. And she asked me if I
11 would write that down. She handed me like the
12 voluntary statement sheet and she asked me to
13 write up what I had told her. So, I wrote it
14 down and handed it to her, and she left the
15 room. A few moments later Dan came back and
16 read for me a prepared statement that I was
17 being terminated for misuse of corporate card
18 noncompliance-related.
19 Q. If you'll look at Exhibit CX-2, is that
20 the statement that you were just referring to?
21 A. Yes.
22 Q. And you indicated in here as you wrote
23 this down about three-quarters of the way down
24 the page: "I felt that in the end it would
25 have possibly balanced itself out in the end,"

1 referring to the $2,000 purchase for the
2 refrigerators, right?
3 A. Yes.
4 Q. Is that what you had also told this
5 person?
6 A. Yes, this is what I told her.
7 Q. Were you trying to say that it was
8 actually okay, as you now reflected on it, to
9 have, you know, bought the refrigerators and
10 then put this through as if it were a business
11 expense?
12 A. No, it's definitely not okay.
13 Q. And your comment on the bottom
14 right-hand corner, "I no longer carry my
15 corporate card in my wallet to keep from
16 confusing my cards."
17 A. Yes.
18 Q. That was a reference to you having
19 confused the cards?
20 A. That is correct.
21 Q. You didn't put in here that the cashier
22 rolled her eyes, et cetera, right?
23 A. No. It was -- it's a very limited
24 space, so I just summarized my conversation
25 with her.

1 Q. And then if you'll turn the page to
2 CX-3, is this the August 12, 2010, letter to
3 you from FINRA, and then your response to that
4 letter?
5 A. Yes.
6 Q. And, again, did you put in all the
7 details in your letter of everything that had
8 happened?
9 A. No. I just wrote a brief response.
10 Q. Was it painful for you to be putting
11 this together?
12 A. Yes, it's terrible.
13 Q. And when you said on the second page of
14 it -- your response, so the last page of the
15 exhibit -- "I made an error in marking the
16 transaction as a business expense. I would
17 never put my family or myself in a situation
18 like this again," why were you saying that?
19 A. I -- having intentionally misled my
20 company by marking the expense was very wrong.
21 And I would never, ever jeopardize my family
22 the way I did this day when I did this.
23 Q. Now, I'd like you to turn back to the
24 other binder, the white binder. Let's look at
25 RX-7, if you would.

1 A. No.
2 Q. Would you ever again make a request for
3 reimbursement of personal expenses and call
4 them corporate?
5 A. No.
6 Q. What can you tell this panel about the
7 impact of this mistake that you made on you?
8 A. I lost my job, obviously. I was out of
9 work for nine months. I am the sole provider
10 for my daughter. My daughter and I moved in
11 with my parents. I still live with my parents.
12 I'm very lucky, very grateful. It took me -- I
13 had a hard time finding a job.
14 Q. Did you take some kind of employment
15 before Ameriprise?
16 A. I did. I worked at Macy's in the
17 women's shoe department, so I sold women's
18 shoes. I made $125 a week. But I did get
19 health insurance, so I was able to have health
20 insurance through them. I depleted my 401(k),
21 my IRA to make monthly expenses. It's been a
22 very -- I've had a very tough time, as I'm sure
23 you can imagine.
24 Q. And you're divorced, is that correct?
25 A. Yes.

1 Q. Do you receive any financial support
2 from your husband?
3 A. I do not, no.
4 Q. You have one daughter?
5 A. I do.
6 Q. Do you help her out with her expenses
7 now that she's in college?
8 A. I do, yes.
9 Q. Does your ex-husband help with your
10 daughter's expenses?
11 A. No.
12 MR. BETTIGOLE: Thank you very much.
13 No further questions.
14 MS. DELANEY: Do you want to take a
15 break? Let's take ten, 15 minutes.
16 (Recess taken.)
17 CROSS-EXAMINATION
18 BY MR. GOLOMB:
19 Q. We'll only have a few questions for you.
20 You testified in the investigation that part of
21 your job responsibilities included approving
22 expenses of employees in your branch, right?
23 A. Correct.
24 Q. I'm sorry. What?
25 A. Correct.

1 marked the iPod purchases as a business
2 expense, correct?
3 A. That's correct.
4 Q. Is it -- you knew it was false when you
5 did it?
6 A. Yes.
7 Q. And while you were having what you and
8 counsel both described as a fleeting thought,
9 you stopped and came up with the rationale or
10 the entry of branch equipment for conference
11 rooms, did you not?
12 A. I did.
13 Q. Between the time you put in this false
14 claim and the time you got confronted by the
15 company about it, did you have any concerns
16 about what you had done?
17 A. No.
18 Q. You never during that whole time, from
19 the time you put a false entry and the time you
20 got caught, it never bothered you that you had
21 done that?
22 A. No.
23 MR. GOLOMB: We have no further
24 questions.
25 MS. DELANEY: Do you have any?

1 MR. BETTIGOLE: Just briefly.
2 REDIRECT EXAMINATION
3 BY MR. BETTIGOLE:
4 Q. Denise, did you even recall that you had
5 made that entry earlier in terms of, you know,
6 Mr. Golomb's question about did you have
7 concerns about it? Do you recall that you had
8 made that entry until later on when you were
9 meeting with the person on June 2 and going
10 through your charges?
11 A. No.
12 Q. That was the next time that you sort of
13 focused on it again?
14 A. Correct.
15 MR. BETTIGOLE: No further
16 questions.
17 MS. DELANEY: Do you have any?
18 EXAMINATION
19 BY MS. RELIEN:
20 Q. Ms. Olson, do you know how your firm
21 marked your U5 when you were terminated?
22 A. Yes.
23 Q. Can you share that with me?
24 A. Misuse of corporate card. Violation of
25 company policy. Noncompliance related.

1 decision. I have no other rationale, excuse,
2 or explanation for it. I made an error in
3 judgment and I feel terrible about it. If I
4 could take it back, I would.
5 Q. Can you help me understand, then, how
6 you made the decision to seek reimbursement?
7 A. It was a brief thought going through my
8 mind. Unfortunately, it was not a long
9 process. It was a quick decision on my part.
10 Q. And as we looked at your expense
11 reports -- I guess those are screen shots that
12 we looked at of your expense reports system --
13 there were a number of personal expenses listed
14 on there that were significantly in excess of
15 the iPod expense, correct?
16 A. Correct.
17 Q. That were personal?
18 A. Correct.
19 Q. They were closer, in fact, some of them,
20 to the cost of the refrigerators?
21 A. Correct.
22 Q. Why didn't you offset the refrigerator
23 cost with one of those expenses?
24 A. I have no idea. It never entered my
25 mind.

1 Q. Denise, the word "confronted" seems to
2 be thrown around a lot here. Again, this
3 person that you were talking to about your
4 expenses did not show you any receipts,
5 anything to indicate that she had figured out
6 what might or might not have been a personal
7 expense of yours, correct?
8 A. No.
9 Q. She just got to that line item; you
10 spotted the $740 and recognized it as the iPod
11 purchase, and you told her that's what it was?
12 A. Correct.
13 MR. BETTIGOLE: Thank you.
14 MS. DELANEY: Any other questions?
15 MR. GOLOMB: I have a couple
16 follow-up.
17 RECROSS-EXAMINATION
18 BY MR. GOLOMB:
19 Q. Did she ask you what that purchase was?
20 A. Yes.
21 MR. GOLOMB: No other questions.
22 MR. LISTER: A procedural issue with
23 counsel. I don't have all the documents that
24 you are privy to, so I'm not sure exactly where
25 we stand today on the issue of liability and

1 had to kind of count on her to be thorough and,
2 you know, follow all the rules and regulations,
3 FINRA, New York Stock Exchange, Wachovia's
4 internal rules, so on and so forth, and run, I
5 don't know, an audit-ready branch. And she was
6 the best, I thought.
7 Q. Is it right that the practice at
8 Wachovia with the corporate card was that
9 people could charge personal expenses as long
10 as they paid for them themselves and marked
11 them appropriately?
12 A. That's how I recall it, right.
13 Q. In terms of things that related to
14 investor issues, for example, suitability, did
15 you have any particular impression of how
16 Denise handled herself in terms of making sure
17 that customers had suitable transactions?
18 A. Well, I considered her thorough. And,
19 you know, the -- the computer system as it's
20 evolved in the industry over time, it just
21 generates all this information. And there's
22 stuff that the managers like Denise would have
23 to look at every day, every week, every month.
24 All kinds of red flags might come up. It might
25 -- on the daily reports it might be accounts

1 that have concentration issues or low price
2 security issues or frequent trading issues or
3 whatever that would have to be looked at and
4 documented and so on. And that would be the
5 kind of thing that, you know, you really have
6 to count on your managers to do that, your
7 management team. I could always count on
8 Denise to do that.
9 Q. Did you feel that she really pushed to
10 make sure the trades were suitable?
11 A. Yeah. I think she followed the rules,
12 you know, and the spirit of the rules. You
13 know, we had lots of client assets to look
14 over, look after.
15 Q. Did Denise buy things with her own money
16 for the office?
17 A. She was, you know, always picking up
18 this and that to make the office appearance
19 look nice; particularly the entryway when you
20 walked in. It was kind of like Denise's living
21 room, you know, bowls of this and dried flowers
22 and what have you, you know, just to make it
23 kind of welcoming and nice. And it was -- you
24 know, of all four of my branches, it was the
25 nicest -- that was the nicest kind of entry.

1 So, she was doing that kind of stuff all the
2 time.
3 Q. And she was paying for those things --
4 A. At her own expense, right.
5 Q. You were supervising her expenses,
6 correct?
7 A. Right. Correct.
8 Q. And did you have administrative people
9 helping you with that as well?
10 A. Right. I think the administration
11 people would be watching over it. I would be
12 watching over it. Never saw any issues,
13 really.
14 Q. So, in your mind, were there ever any
15 issues regarding Ms. Olson's honesty or her
16 reputation for honesty, setting aside, of
17 course, what we're here today for?
18 A. Not on my watch.
19 Q. Now, you understand that she's admitted
20 putting in for a personal expense and saying
21 that it was for a business purpose, right?
22 A. Correct.
23 Q. Does that change your opinion of her as
24 an honest person?
25 A. No. You know, I think she's very

1 advisors through the process and making sure
2 that we, you know, follow all the appropriate
3 steps to bring the right advisors to our
4 organization. So, she's very engaged in the
5 due diligence process, which we do with every
6 single advisor that comes into our
7 organization. We look at all the basics: The
8 credit history. We take a look at the history
9 and we take a look at the skill set of the
10 advisor. We take a look at the way they run
11 their practice. And from that, you know, we
12 have very candid conversations regarding every
13 advisor that's coming through. So, part of
14 that would be, in some cases, is it the right
15 advisor? Even though the recruiter might like
16 them at a local level, it's really our job to
17 put another set of eyes on it unbiased and
18 objectively. And she's been instrumental to
19 help us assist in those cases as we work
20 through those advisors.
21 Q. Has she given you any reason to doubt
22 her honesty?
23 A. None whatsoever.
24 Q. What about expenses? Now, does she have
25 a corporate card and do you supervise those

1 expenses?
2 A. I do.
3 Q. Have there been any issues with those?
4 A. None whatsoever.
5 Q. Have you talked with her about the use
6 of the card? Has she given you any indication
7 about how she feels about having to use a
8 corporate card?
9 A. She uses it responsibly. So, you know,
10 again, we all have a corporate card and we use
11 that in recruiting. So, she has used that card
12 throughout the year, and, you know, no charges
13 outstanding there that I would question.
14 Q. Does her job call for her to have any
15 clients of her own?
16 A. No.
17 Q. She doesn't have any contact with
18 investors, for example?
19 A. None whatsoever.
20 Q. She's licensed as a supervisor, but does
21 she actually supervise anyone?
22 A. She does not. She has one direct
23 report. That would be Amber Biehn, which is
24 our recruiting coordinator; more of an
25 administrative capacity.

1 Q. Basically a secretary?
2 A. Correct, unlicensed.
3 Q. Do you think that Denise is in any way a
4 threat to investors?
5 A. No.
6 Q. Or to the securities industry,
7 generally?
8 A. No.
9 Q. Do you think she would ever again make a
10 request for reimbursement for a personal
11 expense calling it a business expense?
12 A. I'm pretty confident that would never
13 happen again.
14 Q. If this panel were to require some kind
15 of heightened supervision for Denise Olson to
16 make absolutely triple sure that she's never
17 going to do this again, would you be willing to
18 undertake that heightened supervision?
19 A. Absolutely.
20 MR. BETTIGOLE: Thank you. No
21 further questions.
22 CROSS-EXAMINATION
23 BY MR. GARDNER:
24 Q. When did you first meet Ms. Olson?
25 A. I met her the -- probably the middle

1 industry. So, regardless of what happened in
2 her past, it's her past; recognize that things
3 can come out of that. But what I've seen out
4 of her work ethic, her determination, her --
5 just integrity in general is unsurpassed in our
6 organization. So, she's been phenomenal. And,
7 again, whether you're under a FINRA
8 investigation or not, I think if there's
9 clearly any issues with somebody, that's always
10 going to rise to the top. And that hasn't been
11 the case with Denise. She's been anything but
12 that. She's been phenomenally professional.
13 Q. You know that she's been very emotional
14 about this whole circumstance?
15 A. Very much so.
16 Q. Is there any doubt in your mind that she
17 has learned a big lesson out of this and would
18 never engage in this conduct again?
19 A. A huge lesson. A huge lesson. So, not
20 only the lesson that she learned here, the
21 financial lesson that she learned, and then in
22 addition to that, of course, what she's gone
23 through here emotionally. I've coached her
24 through beating herself up for a year. She
25 takes accountability for it. I think that's

1 the most important step is somebody taking
2 accountability for their actions. She has.
3 And she recognizes what she did. But it hasn't
4 stopped her from being successful in her role
5 and helping our organization to grow.
6 MR. BETTIGOLE: Thank you. No
7 further questions.
8 MS. DELANEY: Do you have anything
9 else?
10 MR. GARDNER: No.
11 EXAMINATION
12 BY MR. LISTER:
13 Q. Mr. Fekete, do you have policies at
14 Ameriprise about the use of credit cards,
15 corporate credit cards?
16 A. We do.
17 Q. Are you familiar with those policies?
18 A. Relatively familiar. They change over
19 time, but, yes, I'm familiar with them.
20 Q. At Ameriprise, is it appropriate to
21 submit a personal expense as a business expense
22 under those policies?
23 A. No.
24 Q. It is not appropriate?
25 A. No. If you're claiming it as a business

23

Voluntary Statement

I, Denise Olson, make the following voluntary statement to Kelly Pulkrabek-Bacon, who has identified herself as a representative of Wells Fargo Bank. No threats or promises were made to me in order to induce this statement.

I have in the past used my Corporate Card for personal use. While using the Card I did purchase some items from best buy and did not mark it as personal on my Corporate Card in April 2010. To the best of my knowledge this is the only time I have Not marked an item as personal when putting through personal items ~~[illegible]~~ I have payed for items myself for the branch and not charged the office for them. An example would be two New Refrindgerators at a Cost of Approx $2000 that I paid for and had installed in the office. I felt that in the end it would have possibly balanced itself out in the End. I am Caucious about trying to do my best at keeping my personal expenses separate from the offices Including paying for personal portions separate on the same evening. I no longer carry my Corp Card in my wallet to keep from confusing my Cards

Signed By: [signature]

Dated: 6-2-10

Witnessed By: [signature] 6.2.10

Witnessed By: [signature]

24

Oliver P. Kamp
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Financial Industry Regulatory Authority | 14 Wall St. |19th Floor
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Oliver.Kamp@FINRA.org

Certified Article Number
7160 3820 3530 0887 2788
SENDERS RECORD

<u>VIA CERTIFIED MAIL</u>
<u>RETURN RECEIPT REQUESTED</u>
<u>AND FIRST CLASS MAIL</u>

Initial Request

August 12, 2010

Ms. Denise Marie Olson

Re: **20100233496**
Form U5 filing by Wells Fargo Advisors, LLC

Dear Ms. Olson:

This office is conducting an inquiry with respect to a Form U5 filing from Wells Fargo Advisors, LLC, which reported that your employment was terminated for requesting reimbursement for personal charges made on your corporate credit card. The purpose of this inquiry is to determine whether violations of the applicable securities industry rules and regulations have occurred.

To facilitate our inquiry, it is requested that you provide the following information:

1. A signed statement addressed to FINRA in response to the allegations.
2. Copies of all correspondence and memoranda referring or relating to this matter.
3. Are there any other complaints regarding your employment at the Firm, which are open or were resolved within the preceding three years of the date of the current reportable event? If so, please provide additional documentation.

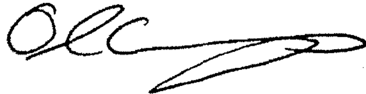
This request is being made pursuant to FINRA Rule 8210 which requires a member firm and persons associated (or formerly associated) with a member firm to provide information with respect to any matter involved in an investigation, complaint or proceeding. Your response must be received in this office no later than **August 26, 2010.**

If you have re-registered with a new FINRA firm, please be reminded that your new firm must determine whether the content of the investor complaint requires disclosure through either Form U-4 or Form U-5, or as an event or statistical report to FINRA pursuant to NASD Rule 3070 or NYSE Rule 351. Moreover, the new firm is responsible for filing an amended Form U-4 Notice, with a copy to this office, of any home address or mailing address change.

Since this is a preliminary inquiry, it does not require reporting under Form U-4, Question 14G, regarding notice of investigations.

If you have any questions, please contact the undersigned at (646) 315-7349.

Sincerely,



Oliver P. Kamp
Associate Principal Investigator

Denise M Olson

FINRA

14 Wall Street

19th Floor

New York NY 10005

RE: 20100233496

Form U5 Filing by Wells Fargo Advisors, LLC

Dear Mr Kamp,

This is to address the letter I received in the mail on August 24th 2010 regarding the above file number.

1. During the last few years the office that I managed at Wells Fargo Advisors was under significant construction. The company had spent thousands of dollars redoing our branch focusing on updating the appearance of the office. This included major construction of our reception, kitchen, and several of the office spaces. This office project required that I spent most evenings and weekends focusing on the required timeline.

   In April 2010, I was at Best Buy making a personal purchase for a total charge of $740.10. I failed to notice that I used the wrong credit card. The cards look very similar, both black credit cards. When I put the transaction on the computer system that uploads our corporate card purchases I marked the purchase at Best Buy as a business purchase instead of a personal purchase. Over the last few years I have charged several thousand dollars for the construction projects with over fifty separate transactions. I obviously made a mistake.

   When asked about the transaction I explained the above circumstances and was terminated for violation of company policy, misuse of corporate card: Non-compliance related. I was a very good employee at Wachovia Securities/Wells Fargo Advisors and

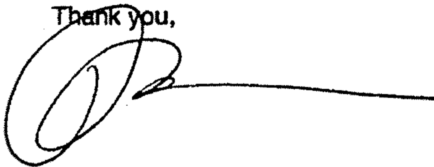
enjoyed the work that I did. My U4 is clean and I worked hard to be honest person and make good decisions. I made an error in marking the transaction as a business expense; I would never put my family or myself in a situation like this again. I have already reimbursed Wells Fargo Advisors for the personal charge on the corporate card.

2. I have no documents.

3. There are no other complaints open or resolved as far as I am aware of.

Please note my above address is my correct home address. The address that the Initial Request was sent to has an incorrect street name.

Thank you,



Denise M Olson