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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

North Woodward Financial Corp. and Douglas A. Troszak

For Review of Disciplinary Action Taken by

FINRA

File No. 3-15990

FINRA'S BRIEF IN OPPOSITION TO REQUEST FOR STAY

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I. INTRODUCTION

Applicants Douglas A. Troszak and his firm, North Woodward Financial Corp., have moved to stay the bar and expulsion imposed in a July 21, 2014 decision of FINRA's National Adjudicatory Council ("NAC").[1] In that decision, the NAC found that Troszak and North Woodward violated FINRA Rules 8210 and 2010 by failing to provide requested information to FINRA and imposed the bar and expulsion to remedy the egregious flouting of FINRA rules.[2] *Id.* at 9-13, 15-22. FINRA was investigating Troszak's borrowing of funds from his and North

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[1] A copy of the NAC's decision is attached as Appendix A. References to the NAC's July 21, 2014 decision will be cited as "Decision."

[2] The NAC also found that the applicants failed to amend Troszak's Form U4 to disclose a federal tax lien. Decision at 8-9. In light of the bar and expulsion for applicants' failure to provide information, the NAC declined to impose a sanction for the Form U4 violation. *Id.* at 25. Thus the only sanctions in effect are the bar of Troszak and expulsion of North Woodward for the Rule 8210 violations. *Id.* Applicants' contention that they "not be banned from the financial industry for a U-4 filing error" is therefore misplaced. (Motion at 2.)

Woodward's customers. Troszak was experiencing financial difficulty and needed $188,689.52 in order to redeem his ownership of a condominium that had been foreclosed upon. Troszak issued promissory notes totaling $200,000 to ten North Woodward customers in an effort to save his property. Despite multiple requests, Troszak and North Woodward refused to provide FINRA with critical information related to the specifics of these transactions, including an accounting of the $11,310.48 difference between the amount borrowed and the redemption payment and documentation showing whether these customers were being repaid timely with interest. Troszak and North Woodward instead claimed this information was "personal and confidential" and "irrelevant" to FINRA's investigation. Troszak and North Woodward flagrantly disregarded their unequivocal obligation to comply fully with FINRA Rule 8210 by refusing to provide information central to FINRA's investigation into whether the applicants harmed customers.

The NAC found that this was an egregious case with no mitigating factors and several aggravating factors, including Troszak's and North Woodward's prior disciplinary histories. In harmony with FINRA's Sanction Guidelines ("Guidelines"), the NAC barred Troszak and expelled North Woodward.

FINRA opposes applicants' request to stay the effectiveness of the bar and expulsion. Troszak and North Woodward placed a roadblock in the path of FINRA's investigation, precluding the Department of Enforcement from determining whether the promissory notes were a legitimate and suitable investment and whether investors were harmed. The facts supporting the NAC's findings of violation related to the bar and expulsion are well-supported, and the imposition of stringent sanctions are necessary for the protection of the public interest. Applicants' disciplinary histories demonstrate that they are unrepentant recidivists who fail to

recognize their basic obligations as FINRA members. Neither Troszak nor North Woodward meets the high burden that is necessary to stay the effectiveness of the sanctions imposed upon them. Indeed, the applicants put forth no cognizable argument in support of their request for a stay. Accordingly, there is no likelihood that the applicants will prevail on the merits of their appeal, and they have failed to satisfy the high burden necessary to stay the effectiveness of the bar and expulsion. The Commission therefore should deny the request for a stay.

II. FACTUAL BACKGROUND

A. Applicants' Background

Troszak is North Woodward's president, chief financial officer, chief compliance officer, financial and operations principal, and sole registered representative. Decision at 2. Troszak is also a certified public accountant, and accounting is Troszak's primary business. *Id.* North Woodward conducts a general securities business, and all of North Woodward's customers are also Troszak's accounting clients. *Id.*

B. Troszak Obtained Loans from Customers

Troszak experienced financial difficulty in February 2009 and was unable to pay the mortgage on a commercial condominium unit that he owned in Michigan. *Id.* at 3. In November 2009, Troszak structured a group of loans totaling $200,000 in order to redeem his ownership in the property after it had been foreclosed upon. *Id.* Troszak obtained these loans from ten North Woodward customers, seven of whom withdrew funds from individual retirement accounts in order to loan Troszak money. *Id.*

Troszak, individually and as president of Troszak Capital Corp., executed a promissory note for each loan with the customers, which directed payment of 10% interest annually to the

note holders.[3] *Id.* at 3, 5 n.7. The notes also directed Troszak to repay the note holders in six consecutive quarterly installments of principal and interest on the first day of each quarter, beginning on February 1, 2010, with the balance paid at the end of the sixth quarter, on May 1, 2011. *Id.* Troszak redeemed his ownership in the property on December 8, 2009, by using $188,689.52 of his customers' funds that he obtained through the loans. *Id.*

C. FINRA's Requests for Information

In February 2010, FINRA began investigating the applicants after receiving a regulatory tip that Troszak borrowed funds from his customers and issued promissory notes to these customers.[4] Decision at 2-3. FINRA subsequently issued to the applicants four successive information requests pursuant to FINRA Rule 8210. *Id.* at 3-6. After responding to the first of these requests in March 2010, the applicants failed to produce documents in response to the subsequent information requests issued on April 22, May 25, and June 10, 2010. *Id.*

Beginning with the April 2010 information request, FINRA asked the applicants to provide copies of customer new account forms, account amendments, and account statements for 2009 and 2010 for each customer from whom Troszak borrowed money; bank and brokerage account statements for accounts in which Troszak had a beneficial interest for the period of January 2009 to April 2010, including the account statements for Troszak Capital Corp.; and all correspondence between the applicants and the IRS. *Id.* at 4-6. FINRA also asked the applicants to produce evidence showing that the customers were receiving payments as required by the

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[3] Troszak formed Troszak Capital Corp. for tax purposes and controlled its funds. *Id.* at 5 n.7.

[4] The applicants state that they want the source of the tip revealed to them. (Motion at 2.) The tipper's identity is not relevant to these proceedings and accordingly is not in the record. FINRA's policy is to treat tip information confidentially. *See* http://www.finra.org/industry/tools/p006647.

terms of the promissory notes and to provide an accounting, with documentation, of the $11,310.48 difference between the amount that Troszak received in loans from the customers ($200,000) and the amount he paid to redeem the property ($188,689.52). *Id.* The applicants, however, refused to produce any of these requested documents prior to FINRA filing the complaint in this matter in May 2011. *Id.* In refusing to supply the information, the applicants claimed that the information was "personal and confidential" to either the customers or Troszak Capital Corp., the entity that issued the promissory notes and that Troszak controlled, and "irrelevant" to FINRA's investigation. *Id.*

D. Applicants' Post-Complaint Production Was Incomplete

More than a year after FINRA requested the information, and approximately five months after Enforcement filed its complaint in this matter, the applicants produced to FINRA more than 5,500 pages of documents.[5] *Id.* at 6. Notwithstanding, the belated document production, the applicants never fully responded to FINRA's Rule 8210 requests. The applicants refused to produce an accounting of the $11,310.48 difference between the amount borrowed from the customers and the redemption payment; evidence of the interest and principal payments to the customers; or the 2009 and 2010 securities account statements for Troszak Capital Corp. *Id.* at 7.

III. PROCEDURAL HISTORY

After a hearing, the Hearing Panel found that Troszak and North Woodward engaged in the misconduct as alleged in the complaint, including failing to respond completely to requests for information and documents, in violation of FINRA Rules 8210 and 2010. *Id.* at 7-8. The

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[5] Troszak also provided on-the-record testimony to FINRA staff in November 2011. *Id.* at 7.

Hearing Panel barred Troszak and expelled North Woodward for failing to provide FINRA with requested information. *Id.* at 7.

On appeal, the NAC affirmed the Hearing Panel's findings of liability in totality. *Id.* at 8-15. Finding that applicants' violations of Rule 8210 were egregious and without mitigation, the NAC affirmed the bar and expulsion imposed for the failures to provide requested information.[6] *Id.* at 15-22. The NAC found that applicants' disciplinary history served to aggravate sanctions and reflected a serial disregard of basic regulatory requirements. *Id.* at 15-16.

The NAC also found the information that the applicants never provided was important and that applicants' failure to provide it curtailed FINRA's ability to determine the extent of applicants' misconduct and whether investors were harmed. *Id.* at 18. The NAC found highly aggravating that the applicants repeatedly frustrated FINRA's attempts to obtain documents, causing FINRA to issue multiple requests and exert significant regulatory pressure. *Id.* Indeed, even with mounting pressure from FINRA, the majority of the requested documents were not provided until five months after FINRA filed its complaint and the applicants never provided several key categories of documents. *Id.* at 18-19. The NAC concluded that applicants' actions "demonstrate a fundamental unwillingness to comply with FINRA rules," necessitating a bar and expulsion. *Id.* at 22.

The bar and expulsion became effective immediately upon the issuance of the NAC's decision. *Id.* at 25. In light of the motion to stay, FINRA will not impose the bar and expulsion

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[6] In contrast to the Hearing Panel's approach to determining the appropriate sanctions, the NAC applied the Rule 8210 Guidelines governing "partial but incomplete" responses. *Id.* at 17-18; *FINRA Sanction Guidelines* 33 (2013), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf. A copy of the relevant Guidelines is attached as Appendix B.

until the Commission rules on the pending motion, and then only if the Commission denies applicants' motion to stay.

IV. ARGUMENT

The applicants fail to demonstrate that the Commission should stay FINRA's sanctions pending resolution of this appeal. The evidence persuasively establishes that Troszak should be barred and North Woodward expelled from the securities industry. The record amply supports the NAC's findings that the applicants failed to provide certain categories of requested documents. Moreover, the matter being investigated—the legitimacy and suitability of the promissory notes and the possible misappropriation of customer funds—was of a very serious nature. This represents a textbook violation of FINRA Rule 8210. *See, e.g.*, *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at *12-19 (Apr. 17, 2014) (finding violation of Rule 8210 where respondent failed to respond to certain document requests); *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *35-36 (June 14, 2013) (affirming violation of Rule 8210 when respondent provided some responsive information but failed to provide requested documents).

After a comprehensive review of the facts, the law, and numerous aggravating factors present, including applicants' disciplinary history, the NAC, consistent with FINRA's Guidelines, barred Troszak and expelled North Woodward for their violations. The applicants cannot demonstrate a likelihood of success on the merits, and they are, moreover, unable to demonstrate that they will suffer irreparable harm without a stay or that granting the stay will serve the public interest. Indeed, the public interest strongly favors precluding applicants from participating in the securities industry without further delays. The Commission should keep the bar and expulsion in place to protect investors.

A. The Applicants Bear the Burden to Prove that the Commission Should Issue a Stay

"[T]he imposition of a stay is an extraordinary and drastic remedy," and the applicants have the burden of establishing that a stay is appropriate. *William Timpinaro*, Exchange Act Release No. 29927, 1991 SEC LEXIS 2544, at *6 (Nov. 12, 1991); *Joseph Ricupero*, Admin. Proc. File No. 3-13727, slip op. at 2 (Jan. 5, 2010) (attached as Appendix C). The applicants have not met that burden.

To obtain a stay, the applicants must show (1) a strong likelihood that they will prevail on the merits; (2) that, without a stay, they will suffer irreparable harm; (3) there would not be substantial harm to other parties if a stay were granted; and (4) that the issuance of a stay would be likely to serve the public interest. *See The Dratel Group, Inc.*, Exchange Act Release No. 72293, 2014 SEC LEXIS 1875, at *7-8 & n.6 (June 2, 2014). Under this standard, the Commission must deny applicants' motion to stay.

B. The Applicants Have No Likelihood of Success on the Merits

1. Troszak and North Woodward Failed to Produce Information in Response to FINRA Rule 8210 Requests

Troszak and North Woodward have not demonstrated that they are likely to succeed on the merits of their appeal. As reflected in the NAC's decision, FINRA has engaged in a detailed review of the evidence and found that the applicants failed to provide requested documents in response to three requests for information issued pursuant to FINRA Rule 8210. *See* Decision at

9-15. Based on this, the NAC found that the applicants violated FINRA Rules 8210 and 2010.[7] *See id.*

At the time of applicants' misconduct, FINRA Rule 8210 authorized FINRA staff, for the purposes of an investigation, to require members and associated persons to provide information or testimony and to permit the inspection and copying of books, records or accounts.[8] "Rule 8210 provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations" and "to police" their activities. *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009); *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). A failure to comply with FINRA's requests for information "frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets." *PAZ*, 2008 SEC LEXIS 820, at *13.

The applicants provided none of the requested documents in response to the April 22, May 25, and June 10, 2010 information requests until after FINRA filed its complaint in this matter. As a result, the applicants shirked their unequivocal obligation to comply with FINRA Rule 8210. *See Manuel P. Asensio*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014, at *14 (June 17, 2010). The Commission has emphasized repeatedly that FINRA "should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant

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[7] A violation of Rule 8210 also constitutes a violation of the standard of just and equitable principles of trade embodied in FINRA Rule 2010. *See CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009).

[8] The NAC relied upon the text of FINRA Rule 8210 as it existed at the time of applicants' misconduct. *See* Decision at 20 & n.39.

to Rule 8210." *See Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *12 (Sept. 10, 2010). Given the importance of Rule 8210 to FINRA's mission to protect investors, these failures to provide documents standing alone are sufficient to justify the NAC's findings of violations.

Even after taking into account applicants' post-complaint document production, the applicants steadfastly refused to provide multiple categories of requested documents. As the NAC found, the applicants never produced an accounting, with supporting documentation, of the $11,310.48 difference between the amount borrowed from the customers and the redemption payment, or the 2009 and 2010 securities account statements for Troszak Capital Corp., which is the entity that issued the promissory notes and that Troszak controlled. Decision at 11, 12. The applicants also never produced proof that the customers were receiving the quarterly interest and principal payments for the six consecutive quarters, beginning in February 2010 and ending by May 1, 2011, as set forth by the terms of the promissory notes. *Id.* at 11.

The NAC's findings that applicants failed to supply requested documents are further substantiated by Troszak's own testimony. Troszak acknowledged at the hearing before the Hearing Panel that FINRA received "piece-meal documents" and "did not have the full ability to put together that 11 grand." *Id.* And despite testifying that FINRA now had all the necessary documents to make that accounting, he identified no such documents. *Id.*

Troszak also provided a shifting narrative related to the repayment of the customers, and ultimately admitted that several of his customers who lent him funds had not been fully repaid. *Id.* at 11-12. Troszak initially claimed in a May 20, 2010 letter to FINRA that the payments were made "according to schedule," but included no documentary proof of that assertion. *Id.* at 11. At the hearing, Troszak reversed course and admitted that he did not make some payments

to customers, contending he did so because one or more of them did not want to be paid or had agreed to an extension. *Id.* & n.20. Troszak, however, offered no documents to show that these customers had agreed to these purported extensions. Instead, Troszak provided testimony that illustrates his repudiation of his obligations as a FINRA member to provide requested information related to his customers. Troszak testified that he did not produce any documents reflecting the purported change in loan repayment terms because "FINRA has never requested any. FINRA has never requested an update on any of this. . . . I don't understand how it's my obligation to give private client information to FINRA." *Id.* at 12 n.21. The Hearing Panel and the NAC rejected his assertion of a modification of the repayment schedule as not credible. *Id.* at 12.

Applicants' motion to stay points to nothing to show why this abundant evidence does not support the NAC's findings of violations. If anything, the motion fully supports FINRA's findings. The applicants argue that they have substantially complied with FINRA's requests with the exception of "private client tax data" related to preparation of tax returns. (Motion at 2, 6.) Substantial compliance is not relevant to a finding of liability under Rule 8210. *See* Rule 8210(c) (stating under requirements to comply that "[n]o member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule"). The requests moreover did not seek confidential tax information of customers, and the information that applicants withheld relate to Troszak and his company through which he issued the promissory notes. However the applicants choose to characterize the withheld information, it was either "information . . . with respect to any matter involved in an investigation" or records "of" the applicants regarding a matter involved in the investigation, and required to be produced. *See* Rule 8210(a).

The applicants mistakenly contend that FINRA has no jurisdiction to investigate the promissory notes because they were loans from his customers and were not securities. (Motion at 2, 3, 6.) Applicants' challenge to the breadth of FINRA's jurisdiction must fail. FINRA's authority to request documents pursuant to FINRA Rule 8210 stems from the contractual relationship entered into voluntarily by FINRA members and persons associated with those members with FINRA. *See Kidder, Peabody & Co. v. Zinsmeyer Trusts P'ship*, 41 F.3d 861, 863 (2d Cir. 1994). Upon joining FINRA, North Woodward and Troszak agreed to comply with *all* FINRA rules, including Rule 8210. *See* Article IV, Section 1 of FINRA By-Laws; *UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 649 (2d Cir. 2011); *Berger*, 2008 SEC LEXIS 3141, at *10.

Rule 8210 expressly states that its scope applies to "an investigation . . . authorized by the FINRA By-Laws or rules." In turn, FINRA's By-Laws authorize FINRA to impose sanctions for, among other things, violation by a member or an associated person of FINRA rules or the federal securities laws. Article XIII, Section 1 of FINRA By-Laws. And FINRA rules contain requirements and prohibitions that reach business-related conduct, even if the activity does not involve a security. *See Dep't of Enforcement v. DiFrancesco*, Complaint No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at *15-16 & n.11 (FINRA NAC Dec. 17, 2010) (collecting cases), *aff'd*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54 (Jan. 6, 2012); FINRA Rule 2010 (providing that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade"). Rule 8210 thus confers upon FINRA broad discretion to inquire about any matter involved in a FINRA

investigation, complaint, examination, or proceeding.[9] *See, e.g.*, *Daniel C. Adams*, 47 S.E.C. 919, 921 (1983) (investigation of respondent's solicitation and sale of a tax shelter was properly within FINRA's reach). The applicants should have responded fully and promptly to FINRA's inquiries.

The applicants further assert that their transactions with customers complied with FINRA Rule 3240.[10] This fact is irrelevant to applicants' failure to supply FINRA with requested information about these transactions. While the applicants were not charged with violating Rule 3240 in this matter, their borrowing from customers is within FINRA's authority to investigate. *Cf. Berger*, 2008 SEC LEXIS 3141, at *26.

FINRA's efforts to investigate Troszak's loans with his and North Woodward's customers are squarely within FINRA's regulatory mandate. FINRA investigators often commence investigations before they have a clear picture as to the nature and breadth of the potential misconduct. As the Commission has held, FINRA should not be required to explain the materiality of its requests or justify the relevance of its investigations before receiving cooperation from associated persons. *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *21.

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[9] Applicants' reliance upon sections in the Internal Revenue Code as a rationale to withhold the requested information likewise fails. (Motion at 3.) The applicants refused to provide information and documents related to *Troszak's* use and repayment of customer funds. Federal law does not preclude applicants' provision of these documents to FINRA. Rather, as FINRA members, Rule 8210 mandated applicants' compliance.

[10] FINRA Rule 3240 prohibits an associated person from borrowing money from or lending money to any customer, subject to certain conditions.

Rather, FINRA members have an obligation to respond fully to FINRA's inquiries, including those that, like applicants', are related to their activities with their customers.[11]

The other excuse that the applicants raise—that they already provided sufficient information—also has no basis in law or fact and provides the applicants with no respite from their compliance obligations under Rule 8210. (Motion at 6.) Such assertions have been consistently rejected by the Commission, and for the same reasons, they fail here as well. *See PAZ*, 2008 SEC LEXIS 820, at *21 ("We emphasize that the importance of the information requested must be viewed from NASD's perspective at the time it seeks information."); *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007) (stating that a "member or an associated person may not second guess[ ] an NASD information request or set conditions on their compliance" and that a "belief that NASD does not

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[11] Applicants' reliance upon *Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 SEC LEXIS 1926 (Aug. 25, 2006), is misplaced. (Motion at 3.) In *Ochanpaugh*, the Commission set aside FINRA's action purely on factual grounds because FINRA had failed to show that the checks that it sought to obtain from Ochanpaugh were in fact in his possession and control. 2006 SEC LEXIS 1926, at *23. The Commission did not rule that documents related to an associated person's transactions with his and his broker-dealer's customers, such as those at issue in this case, are outside of FINRA's reach. Indeed, the Commission restated in *Ochanpaugh* that "Rule 8210 is an essential cornerstone of [FINRA's] ability to police the securities markets and should be rigorously enforced." *Id.* at *19. As the NAC held, FINRA's requests for information did not seek information of an unrelated third party but, rather, information of a member, North Woodward, and an associated person, Troszak. For example, the applicants refused to provide information about repayment to their broker-dealer customers from a transaction that Troszak entered into with them and account statements from an entity that Troszak controlled. *Cf. Dep't of Enforcement v. Gallagher*, Complaint No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *17 (FINRA NAC Dec. 12, 2012) (rejecting argument that FINRA lacked jurisdiction to request information about respondent's involvement with an outside issuer or his marketing of the issuer's securities to customers of his broker dealer). *Ochanpaugh* does not authorize the applicants to refuse to provide documents and information to FINRA. *See also Goldstein*, 2014 SEC LEXIS 1350, at *17-18 (holding that 80% ownership established associated person's possession and control of consulting firm's bank and brokerage statements and rejected contention that the documents were owned by a non-FINRA member).

need the requested information provides no excuse for a failure to provide it"), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

Applicants' actions kept FINRA from determining the full extent of the misconduct. As the Commission has emphasized repeatedly, a failure to respond to a FINRA request for information undermines FINRA's ability to carry out its regulatory mandate. *See Ricupero*, 2010 SEC LEXIS 2988, at *21. Applicants' failure to provide documents harmed the regulatory process by undermining FINRA's investigation into the appropriateness of Troszak's loans from his customers and the potential conversion or misappropriation of funds. *See PAZ*, 2008 SEC LEXIS 820, at *18.

In sum, the applicants were required to respond fully to FINRA's requests, and their repeated failures to do so violated FINRA rules and jeopardized FINRA's ability to investigate possible misconduct. The record provides ample evidentiary support for the NAC's findings of violations, and applicants' motion to stay points to nothing to undo those findings.

2. The Sanctions Imposed by the NAC Are Appropriate and Are Neither Excessive Nor Oppressive

Troszak and North Woodward are also unlikely to overturn the bar and expulsion, which are within the range of sanctions recommended in FINRA's Guidelines and not excessive or oppressive. Both the Hearing Panel and the NAC determined that applicants' failure to provide key information to FINRA warranted barring Troszak and expelling North Woodward. *See* Decision at 7-8, 15-22. The record fully supports this conclusion.

A partial, but incomplete, response to FINRA's request for information, documents, or testimony presents the functional equivalent of a failure to respond in any manner because individuals have selectively kept certain information from FINRA. *See Gallagher*, 2012 FINRA Discip. LEXIS 61, at *48. Under such circumstances, FINRA's Guidelines state that "a bar is

standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request." *Guidelines*, at 33. In an egregious case like this one, expulsion of the firm is appropriate. *See id.* The NAC correctly concluded that applicants' partial responses did not comply substantially with all aspects of the FINRA Rule 8210 requests, that there were no mitigating factors in this case, and that aggravating factors supported barring Troszak and expelling North Woodward from FINRA membership. Decision at 11, 15-22.

Applicants' violations were accompanied by numerous aggravating factors. At the outset, the NAC found that Troszak's and North Woodward's disciplinary histories aggravated their misconduct significantly and reflected a serial disregard of fundamental regulatory obligations.[12] Decision at 15-16; *see Midas Sec., LLC*, Exchange Act Release No. 66200, 2012 SEC LEXIS 199, at *66-67 (Jan. 20, 2012); *Guidelines*, at 2 ("Disciplinary sanctions should be more severe for recidivists"—particularly in cases where "past misconduct [is] similar to that at issue" or "evidences a disregard for regulatory requirements, investor protection, or commercial integrity.").

Despite their disciplinary histories, the applicants contend they have no customer complaints. (Motion at 2.) However, an absence of customer complaints, just like an absence of disciplinary history, is not mitigating. Customers may fail to realize they have been mistreated

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[12] Applicants' disciplinary histories include the Commission's findings that North Woodward failed to prepare and maintain a current general ledger and trial balance for two months and that Troszak was responsible for North Woodward's violations. *N. Woodward Fin. Corp.*, Exchange Act Release No. 60505, 2009 SEC LEXIS 2796, at *23 (Aug. 14, 2009). North Woodward, acting through Troszak, also engaged in securities-related activities without a FINOP for 13 months. *Id.* at *29. In May 2014, another FINRA Hearing Panel found in an unrelated matter that Troszak and North Woodward engaged in other misconduct, including additional failures to provide FINRA with requested information pursuant to Rule 8210. Decision at 16 n.28; *Dep't of Enforcement v. N. Woodward Fin. Corp.*, Complaint No. 2011028502101, 2014 FINRA Discip. LEXIS 11 (FINRA OHO May 16, 2014) (NAC appeal pending).

and not complain. *Quest Capital Strategies, Inc.*, 55 S.E.C. 362, 373 (2001). As the NAC correctly determined, the applicants are recidivists whose disregard for FINRA rules and regulatory requirements place the public interest at risk. Decision at 16; *see Ricupero*, 2010 SEC LEXIS 2988, at *24.

The NAC also found aggravating that the applicants repeatedly frustrated FINRA's attempt to obtain documents and forced FINRA to make numerous requests for the information over the course of three months. Decision at 19. The NAC further determined that FINRA had to exert a significant amount of regulatory pressure before the applicants provided any requested documents responsive to the April, May, and June 2010 requests, as demonstrated by the fact that FINRA had to file a complaint in this matter. *Id.* 18-19. As the NAC noted, even the filing of the complaint did not cause the applicants to readily produce documents; they failed to produce the documents for another five months after FINRA filed its complaint and three categories of important documents remained outstanding. *Id.*

The NAC determined that the missing documents were important because, without them, FINRA was impeded from determining whether the promissory notes were a legitimate investment, whether the notes were suitable for customers, and whether investors were harmed. *Id.* at 18. The NAC found that applicants' refusal to provide documents hindered FINRA from determining whether Troszak engaged in other serious misconduct, such as the misappropriation or conversion of his customers' funds. *Id.* at 19. The applicants actively attempted to delay FINRA's investigation by refusing to provide key documents and demonstrate a fundamental unwillingness to comply with FINRA rules.

The NAC also found that the applicants failed to provide valid reasons for failing to respond fully to the information requests. *Id.* In response to FINRA's repeated requests for an

accounting of the $11,310.48 disparity between the loaned and redemption amounts, the applicants claimed that they could not produce records because they were "personal and confidential" to Troszak Capital Corp. They similarly cited "personal and confidential" as the reasons for refusing to produce records from accounts Troszak controlled to show a payment history on the loans. *Id.* The NAC, relying on Commission precedent, rejected the assertions of privacy and confidentiality as justifiable reasons for failing to provide FINRA with information. *Id.* at 19-20. "Given that so much of the securities industry involves non-public information, allowing such abstract worries about privacy to overcome the critical role of Rule 8210 would eviscerate FINRA's critical regulatory responsibilities." *Gregory Evan Goldstein*, Exchange Act Release No. 68904, 2013 SEC LEXIS 552, at *17 (Feb. 11, 2013). Troszak's continued assertion that he can shield his activities from FINRA under the guise of privacy concerns is perilous to investors.[13] (Motion at 3, 6.)

In addition, the NAC determined that the applicants acted intentionally. Decision at 21-22. Troszak's own testimony illustrates his low regard for his responsibilities under FINRA rules, which continues to this day. Troszak testified that "when it comes down to a request for information, I just go down the totem pole and . . . FINRA isn't the IRS and [it] isn't the Department of Labor." *Id.* at 21. The applicants moreover failed to accept responsibility for their misconduct and instead blamed FINRA for "maliciously exert[ing] predatory regulation into affairs it has no jurisdiction over." *Id.* The NAC also noted Troszak's changing explanations regarding repayment of his customers and that he was not forthcoming at the

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[13] Troszak also tries to shield his activities with his customers from other regulators. (Motion at 7-8.) Troszak states in his customer engagement letter that he will not disclose customer tax or financial information to the "IRS, Department of Labor or any other governmental or regulatory agency for any purpose or request" without the customer's written consent. (*Id.* at 8.)

hearing where the Hearing Panel found that his testimony was "evasive, obfuscatory, and lacked credibility." *Id.* at 11-12 & n.22, 22. The NAC concluded that Troszak's attitude demonstrated applicants' failure to appreciate the unequivocal obligations under Rule 8210 and the requirements of the securities business. *Id.* at 22.

Based upon all of the forgoing, the NAC properly concluded that applicants' egregious misconduct made them a danger to the investing public, and that a bar of Troszak in all capacities and expulsion of North Woodward were the only effective remedies. *Id.* North Woodward and Troszak are not likely to have the sanctions overturned on appeal, and the Commission should reject applicants' request to stay the bar and expulsion pending its full review of this matter.

C. The Applicants Have Not Demonstrated that a Denial of the Stay Will Impose Irreparable Harm

To make the required showing of irreparable injury, the applicants must show that complying with the NAC's order will impose injury that is "irreparable as well as certain and great." *Whitehall Wellington Invs., Inc.*, Exchange Act Release No. 43051, 2000 SEC LEXIS 1481, at *5 (July 18, 2000). "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy . . . are not enough." *Timpinaro*, 1991 SEC LEXIS 2544, at *8. Indeed, the applicants have offered no evidence or credible argument to support a finding that they would be irreparably injured unless the bar and expulsion are stayed during the pendency of their appeal.

The applicants state that without a stay, they will have difficulty obtaining "cash to purchase legal representation" and their customers' tax information from North Woodward's clearing firm in order to service accounting customers. (Motion at 2, 6.) The applicants' claims of financial harm are unsupported and they fail to articulate why the customers would be unable

to obtain this tax information directly from the clearing firm. The applicants' vague and unsupported assertion does not establish irreparable injury. Moreover, any possibility that the applicants may suffer some financial detriment during an appeal does not rise to the level of an irreparable injury and provides no basis for relief. *See Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960); *see also The Dratel Group*, 2014 SEC LEXIS 1875, at *17 (denying stay and finding that bar from business that provided only source of income does not rise to level of irreparable harm); *Hans N. Beerbaum*, Admin. Proc. File No. 3-12316, slip op. at 3 (Aug. 25, 2006) (concluding no irreparable harm from Beerbaum's exclusion from the industry, which he argued would force him to close his broker-dealer and his customers to lose his services) (attached as Appendix C).[14]

The applicants furthermore have not demonstrated that a denial of their stay request will substantially harm anyone else, including their customers loss of applicants' broker-dealer services. The Commission previously has rejected a customer's loss of a broker's services as sufficient to warrant a stay. *See Harry W. Hunt*, Exchange Act Release No. 68755, 2013 SEC LEXIS 297, at *17-18 (Jan. 29, 2013). The applicants offer no evidence that the outcome that they posit will result while this appeal is pending. Applicants' customers, moreover, will likely be better protected if the applicants are no longer participating in the securities industry during this appeal.

Even if the applicants could show irreparable injury, which they cannot, the Commission should still deny the motion for stay. A showing of irreparable injury is not, standing alone,

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[14] The applicants argue that they should be granted a stay to "allow" them "an opportunity to appeal." (Motion at 6.) The applicants misunderstand the rules of procedure. While FINRA rules do not stay a bar or expulsion upon an appeal to the Commission, the denial of a stay does not preclude an appeal. *See* FINRA Rule 9370.

sufficient grounds upon which to grant a stay, particularly given the strength of the other three factors that overwhelmingly weigh against them. *See Hamilton Bank, N.A. v. OCC*, 227 F. Supp. 2d 1, 7 (D.D.C. 2001). The potential harm to the public interest, as discussed below, and applicants' inability to demonstrate a likelihood of success on the merits overwhelmingly outweigh any minor injury to Troszak or North Woodward.

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

Because the balance of equities weighs against a stay of the bar and expulsion, the Commission should further the public interest by permitting the sanctions to remain in effect during this appeal. Applicants' misconduct goes to the very heart of FINRA's investor protection mission. By failing to provide information critical to Enforcement's investigation into whether investors were harmed by loaning money to Troszak, the applicants demonstrated a dangerous disregard toward complying with a FINRA investigation. Indeed, as the NAC found, the applicants did not simply fail to provide information and documents to FINRA; they actively blamed FINRA for investigating the loans and failed to understand their unequivocal obligation to provide FINRA with requested documents. *See* Decision at 21-22. Troszak revealed his attitude towards FINRA regulatory requirements by stating that FINRA is "down the totem pole" and not as important to him as the IRS or the Department of Labor. *Id.* at 21. The applicants fail to recognize the importance of complying with FINRA information requests. Those failures continue to this day and are evident in their description of FINRA continuing "to request information on matters outside the scope of its regulatory authority" in their motion to stay. (Motion at 3.)

Applicants' contention that no investors complained implies that a stay imposes no risk to the investing public. (*Id.* at 2.) The Commission has squarely rejected this risk-based approach

to Rule 8210 compliance. *See PAZ*, 2008 SEC LEXIS 820, at *13. To the contrary, the Commission has explained that failing to provide requested information frustrates FINRA's ability to detect misconduct and threatens investors. *Id.* "When an investigator seeks to verify the proper use of funds by an associated person, any missing documents can frustrate the investigation." *Dep't of Enforcement v. Eplboim*, Complaint No. 2011025674101, 2014 FINRA Discip. LEXIS 8, at *34 (FINRA NAC May 14, 2014). Granting the applicants the ability to remain in the industry during the pendency of their appeal raises unnecessary risk to the investing public. The applicants' failure to cooperate fully with FINRA requests for information is fundamentally incompatible with FINRA's self-regulatory functions and poses an ongoing risk to investors that can only be remedied by keeping the bar and expulsion in place. *See Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *21-22 (Nov. 8, 2007). In balancing the possibility of injury to North Woodward and Troszak against the possibility of harm to the public, the necessity of protecting the public far outweighs any potential injury to the applicants. *See John Montelbano*, Exchange Act Release No. 45107, 2001 SEC LEXIS 2490, at *12-13 (Nov. 27, 2001). In light of the seriousness of applicants' actions, the Commission will further the public interest by denying the stay request.

V. OBJECTION TO ATTACHMENT OF CERTAIN EXHIBTS

Commission Rules of Practice 154 and 401 together provide that parties seeking and opposing stays may attach to their requests pertinent portions of the record. FINRA does not object to applicants' attachment of Exhibits 1 and 3 to the stay request. (Motion at 4, 7-8.) The applicants also, however, attach Exhibits 2 and 4 to the stay request, which are not part of the record. (*Id.* at 5, 9.) The Commission should decline to admit this new evidence. Under Rule 452 of the Commission's Rules of Practice, the "Commission may accept or hear additional

evidence . . . as appropriate." 17 C.F.R. § 201.452. A motion under Rule 452 must establish "that there were reasonable grounds for failure to adduce such evidence previously" *and* "show with particularity that such additional evidence is material." *Id.* The applicants fail to carry their significant burden under the rule. Exhibit 2 appears to postdate the misconduct at issue in this appeal and applies to an unrelated transaction on a different condominium property. With respect to Exhibit 4, the applicants indicate they were purportedly precluded from introducing this evidence previously, but the record does not substantiate that claim. (Motion at 2.) In any event, the applicants also do not establish that either exhibit is material to the issues raised in their appeal of FINRA's action. The Commission should therefore decline to admit this additional evidence.[15] *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *58 (Nov. 9, 2012) ("Tucker failed to satisfy either of these requirements and we therefore decline to admit them.").

VI. CONCLUSION

By refusing to provide information and documents related to an extremely important investigation, Troszak and North Woodward disregarded their obligations to comply with FINRA rules. The bar and expulsion that the NAC imposed are fully warranted by the facts of this case and are consistent with FINRA's Guidelines and the public interest. The extraordinary circumstances necessary to grant a stay are not present here. The Commission should deny applicants' stay request.

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[15] The Commission should likewise reject applicants' request to later produce other documents "that were not available prior to the determination." (*Id.* at 2.) The applicants have not shown with particularity that such additional evidence is material. SEC Rule of Practice 452.

Respectfully submitted,

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August 1, 2014

CERTIFICATE OF COMPLIANCE

I, Jennifer Brooks, certify that the foregoing Brief in Opposition to Motion to Stay complies with the length limitation set forth in the Commission's Rules of Practice. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 6,982 words.

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Appendix A

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. North Woodward Financial Corp. Birmingham, MI, and Douglas A. Troszak Birmingham, MI, Respondents.	DECISION Complaint No. 2010021303301 Dated: July 21, 2014

Respondents failed to amend principal's Form U4 to disclose that he was subject to a federal tax lien and failed to respond completely to FINRA information requests. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Dale A. Glanzman, Esq., and Mark A. Koerner, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Douglas A. Troszak, Pro Se

Decision

Pursuant to FINRA Rule 9311, North Woodward Financial Corp. ("North Woodward") and its sole owner, Douglas A. Troszak ("Troszak"), appeal the Hearing Panel's decision in this matter. The Hearing Panel found that the respondents violated Article V, Section 2 of the FINRA By-Laws, FINRA Rule 2010, and NASD Rule 2110 by failing to amend Troszak's Uniform Application for Securities Industry Registration or Transfer ("Form U4") to disclose a

federal tax lien.[1] The Hearing Panel further found that the respondents violated FINRA Rules 8210 and 2010 by failing to respond to FINRA requests for information.

For the failure to respond to requests for information, the Hearing Panel expelled North Woodward, barred Troszak, and fined the respondents $50,000 jointly and severally. For the Form U4 violation, the Hearing Panel fined the respondents $10,000, jointly and severally, and suspended them for 30 business days. The Hearing Panel declined, however, to impose the sanctions for the Form U4 violation, as well as the $50,000 fine for the Rule 8210 violation, in light of the expulsion and bar. After a complete review of the record, we affirm the Hearing Panel's findings of violation but modify the sanctions it imposed.

I. Background

Troszak is North Woodward's president, chief financial officer, chief compliance officer, financial and operations principal ("FINOP"), and sole registered representative. Troszak entered the securities industry in 1992 when he was associated with another FINRA member firm as a general securities representative. Troszak left that firm in 2000 when he founded North Woodward. North Woodward conducts a general securities business. Troszak is currently registered as a general securities representative, principal, and FINOP with North Woodward.

Troszak is also a certified public accountant. Since the mid-1980s, Troszak has owned and operated Troszak, C.P.A. Troszak describes accounting as his primary business. All of North Woodward's customers are also Troszak's accounting clients.

II. Facts

A. Troszak's Federal Tax Lien

On October 6, 2008, the IRS filed a federal tax lien in the amount of $19,802.07 against Troszak individually and against his accounting business. Troszak admitted that he received notice of the tax lien from the IRS in October 2008, and he understood that he was personally subject to the lien. Question 14M on the Form U4 asked: "Do you have any unsatisfied judgments or liens against you?". The respondents failed to update Troszak's Form U4 to disclose the tax lien until October 2011.[2]

B. Troszak Obtained Loans from His Customers

In February 2010, FINRA began investigating respondents after receiving a regulatory tip that Troszak borrowed funds from his customers to pay for a mortgage on property that he

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[1] The conduct rules that apply are those that existed at the time of the conduct at issue.

[2] Troszak testified that he satisfied the lien in full in October 2010.

owned and issued promissory notes to customers.[3] The respondents, through their counsel at the time, provided information and documents on March 10, 2010, in response to FINRA's initial written inquiry.[4] Based on this response, FINRA learned the following facts:

Troszak owned several commercial condominiums in Michigan. In February 2009, he experienced financial difficulty and was unable to pay the mortgage on one of the units. On February 27, 2009, the mortgage holder gave notice of foreclosure. The mortgage holder purchased the property at a sheriff's sale on June 11, 2009.

Under Michigan law, the owner of foreclosed property may redeem his ownership by paying the sale price plus interest within six months of the sale. The redemption date for Troszak's property was December 11, 2009. In November 2009, Troszak structured a group of loans totaling $200,000 to redeem his property. Troszak obtained these loans from ten North Woodward customers. Seven of these customers withdrew funds from individual retirement accounts ("IRAs") in order to loan Troszak money.

Troszak executed a promissory note for each loan, which directed payment of 10% interest annually. The notes also directed Troszak to repay the note holders in six consecutive quarterly installments of principal and interest on the first day of each quarter, beginning on February 1, 2010, with the balance paid at the end of the sixth quarter, on May 1, 2011. Troszak redeemed his ownership in the property on December 8, 2009, by using $188,689.52 of the customers' funds that he obtained through the loans.[5]

C. FINRA Issued Successive FINRA Rule 8210 Requests to the Respondents

After receiving respondents' March 10, 2010 response, FINRA issued to the respondents three successive FINRA Rule 8210 requests for additional information and documents focusing on the details of the loan transactions, the customers' accounts, and any tax liens to which

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[3] The respondents argue that FINRA should reveal to them who filed the tip. FINRA's policy, however, is to treat tip information, and the source of such information, confidentially to the fullest extent possible. *See* http://www.finra.org/industry/tools/p006647. Accordingly, the record before us does not reveal the tipper's identity. The respondents, moreover, are not entitled to that information as reflected by FINRA's policy, and that information is not relevant to these proceedings.

[4] The respondents were represented by counsel throughout FINRA's investigation and until the day before commencement of the hearing below.

[5] Respondents' counsel provided copies of the notice of foreclosure sale on Troszak's property, the sheriff's deed on the foreclosure sale, an affidavit as to the redemption amount, a letter from Troszak to North Woodward's clearing firm related to the loans from customers, the promissory notes, a redemption certificate reflecting Troszak's payment of $188,689.52 to recover the property, a document giving the note holders a $200,000 mortgage as security, and a portion of North Woodward's supervisory procedures manual.

Troszak was subject. Troszak admitted that he received FINRA's written requests, and he authorized counsel to respond on respondents' behalf. Respondents' failure to supply requested information in response to these three requests is at the center of this matter.

1. April 22, 2010 Request

By letter dated April 22, 2010, FINRA requested additional documents and information related to the loans from customers and associated promissory notes. Among other things, FINRA requested whether any disclosures about the foreclosure were made to the customers who lent Troszak money. FINRA also asked whether the seven customers who withdrew funds from their IRAs to loan Troszak money were informed of potential tax consequences. FINRA asked whether the loans were reflected in the customers' North Woodward accounts and requested copies of new account forms, account amendments, and account statements for 2009 and 2010. FINRA requested that the respondents produce evidence showing that the customers were receiving payments as required by the terms of the promissory notes and to provide an accounting, with documentation, of the $11,310.48 difference between the amount that Troszak received in loans from the customers and the amount he paid to redeem the property. FINRA also asked about public records indicating that Troszak was subject to three tax liens (two federal and one state), requested an explanation of why the liens had not been disclosed on Troszak's Form U4, and directed the respondents to disclose them on Troszak's Form U4. FINRA, in addition, requested copies of all correspondence between the respondents and the IRS.

On May 20, 2010, respondents' counsel provided a written response but failed to provide any of the requested documents. The letter stated that:

- the customers' IRA withdrawals caused no taxable event and new account forms and monthly account statements could not be disclosed because the information was "personal and confidential to the customers," and advised FINRA to obtain that information from North Woodward's clearing firm;
- interest payments on the promissory notes were made according to the schedule;
- the customers were "verbally" told that the property was in foreclosure;
- the $11,310.48 difference between the loaned amount and the redemption payment was reserved for payment of taxes and interest, and this sum was not maintained in an account owned by North Woodward;
- Troszak was unaware of any state tax lien, and the federal tax liens originated in Troszak's CPA firm, and he did not have to disclose them on his Form U4; and
- the respondents were willing to produce documents regarding accounts owned by North Woodward, but they were "not willing to produce information regarding any other account, as such information is personal and confidential and is irrelevant to the subject matter of this examination."

2. May 25, 2010 Request

FINRA issued a second FINRA Rule 8210 request on May 25, 2010, informing the respondents that they had provided an incomplete response to the April 22, 2010 request. FINRA reiterated its request for, among other things, customer account statements for 2009 and

2010; documentation reflecting an accounting of the $11,310.48 in loan proceeds; copies of the principal and interest payments on the loans in February and May 2010; correspondence with the IRS; and bank and brokerage account statements in which Troszak had a beneficial interest for the period of January 2009 to April 2010. The May 25 letter also reiterated that Troszak's Form U4 should be amended to reflect any federal tax liens.

Respondents' counsel responded on June 8, 2010. The response provided none of the requested documents and stated:

> Mr. Troszak and North Woodward Financial Corp. have nothing additional to disclose to FINRA. . . . [M]uch of the information sought by FINRA is personal and confidential to the firm's clients, and to the extent any tax issues are implicated, Mr. Troszak and North Woodward Financial Corp. are prohibited by statute and relevant regulations from disclosing such information.[6]

3. June 10, 2010 Request

On June 10, 2010, FINRA issued a third, and final, FINRA Rule 8210 written request to the respondents. This request attached the April 22 and May 25, 2010 requests and cautioned the respondents that a failure to comply with the requests could result in disciplinary action against them. On that same day, FINRA staff spoke by telephone with respondents' counsel to stress the importance of responding in full to the FINRA Rule 8210 requests and warn counsel that, if the requested documents were not provided, FINRA would pursue formal action against the respondents.

Respondents' counsel responded by letter dated June 18, 2010. Again, the respondents provided none of the requested documents. The respondents claimed that no new account forms were created for the loan transactions and customer account statement information could not be disclosed because it was "personal and confidential" to the customers. The respondents directed FINRA to North Woodward's clearing firm to obtain customer account statements, but they noted that the statements would not reflect the amount of the loans or the outstanding balance. The respondents represented that the balance of the loans ($11,380.48) was in an account belonging to Troszak Capital Corp., the entity that issued the promissory notes to the customers.[7] They stated that they would not disclose information about this account because it was "personal and confidential to Troszak Capital Corp." The respondents further refused to provide documentary evidence that principal and interest payments were made on the promissory notes

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[6] Troszak in his on-the-record investigative testimony to FINRA and at the hearing below adopted counsel's response.

[7] The promissory notes, however, were signed by Troszak individually and as president of Troszak Capital Corp. Troszak testified in an on-the-record interview with FINRA staff that he created Troszak Capital Corp. for tax purposes and controlled the funds going into and out of the corporation's account.

in February and May 2010 because that information was "personal and confidential" to respondents' customers. The respondents represented that "interest payments have been made and the individual lenders are satisfied." They also refused to provide bank and brokerage account statements in which Troszak had a beneficial interest, characterizing the information as "personal and confidential" and "irrelevant" to FINRA's investigation.

With respect to the federal tax lien against Troszak, the respondents stated it was "an ongoing matter that does not involve the broker-dealer," was a "contingent liability," and "may ultimately be resolved in favor of" Troszak. Troszak did not update his Form U4 to reflect the tax lien until 16 months later, in October 2011.

D. FINRA Pursues Formal Action Against the Respondents

On February 15, 2011, FINRA notified the respondents that it intended to recommend formal disciplinary action against them and invited the respondents to make a Wells submission in response. Troszak, by a letter dated February 25, 2011, responded in relevant part that "North Woodward ha[d] supplied an inordinately large amount of information and documentation" and that FINRA was requesting "privileged documents" "not within the scope of the examination." The respondents produced no documents in response. Therefore, the only documents that the respondents produced during FINRA's investigation were those they provided with their March 10, 2010 letter.

Enforcement subsequently filed a two-cause complaint against the respondents on May 18, 2011. Cause one alleged that the respondents failed to disclose a federal tax lien against Troszak on his Form U4, in violation of Article V, Section 2 of the FINRA By-Laws, FINRA Rule 2010, and NASD Rule 2110.[8] Cause two alleged that the respondents failed to respond completely to requests for information and documents, in violation of FINRA Rules 8210 and 2010.

E. The Respondents Produce Some Information and Documents Post Complaint

From October 5, 2011, to November 23, 2011, the respondents produced to FINRA 5,601 pages of documents.[9] These documents included correspondence with the IRS, litigation records related to respondents' taxes and liens, various bank account statements belonging to Troszak and his business ventures, North Woodward securities account statements from January 2009 through October 2011 for three customers who were promissory note holders pursuant to the November 2009 loan to Troszak, and North Woodward securities account statements for 2009 and 2010 for the remaining customers who were note holders.

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[8] Enforcement did not allege in the complaint that respondents' failure to disclose was willful.

[9] An index of these documents was admitted into the record. The underlying documents were not offered into evidence.

These documents, however, were not entirely responsive to FINRA's earlier Rule 8210 requests. The respondents never produced an accounting of the $11,310.48 difference between the amount borrowed from the customers and the redemption payment; evidence of the interest and principal payments to the customers; or the 2009 and 2010 securities account statements for Troszak Capital Corp., which issued the promissory notes.[10]

On November 1, 2011, Troszak provided on-the-record testimony to FINRA staff.

III. Procedural History

After a one-day hearing, the Hearing Panel found North Woodward and Troszak liable for the two violations alleged in the complaint.[11] The Hearing Panel barred Troszak, expelled North Woodward, and fined the respondents $50,000 jointly and severally for failing to provide FINRA with requested information. The Hearing Panel also determined that suspending the

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[10] As part of their post-complaint production in November 2011, respondents produced Troszak Capital Corp.'s North Woodward securities account statements for January 2011 through October 2011.

[11] The respondents were represented by counsel during the investigation that gave rise to this proceeding up until a short time before the hearing. Troszak explained during his oral argument before the FINRA National Adjudicatory Council ("NAC") subcommittee ("Subcommittee") empanelled to consider this appeal that he "fired his attorneys because they disclosed . . . confidential client information" to FINRA. The respondents now argue that Enforcement "exclud[ed]" and "misclassified" "relevant information" at the hearing that the NAC should admit "as additional testimony." Pursuant to FINRA Rule 9346(b), a party seeking to introduce additional evidence on appeal must describe each item of new evidence proposed, demonstrate good cause excusing the failure to introduce the evidence below, and establish the materiality of the evidence to the issues before the NAC. It is unclear what additional testimony respondents seek to add, why respondents failed to introduce such testimony below, and whether that testimony is material. *See, e.g.*, *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, *32 (July 17, 2009) (stating that an adjudicator "cannot manufacture arguments for an appellant"). We therefore reject respondents' request to admit "additional testimony." In any event, the record shows that respondents received a fair process in accordance with FINRA's Code of Procedure and the Securities Exchange Act of 1934 ("Exchange Act"). *See* 15 U.S.C. § 78o-3(b)(8), (h)(1) (requiring that self-regulatory organizations provide fair procedures); *Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding requirements of the Exchange Act met when FINRA brought specific charges, the respondent had notice of such charges, the respondent had an opportunity to defend against such charges, and FINRA kept a record of the proceedings). For example, the respondents were permitted to include exhibits in the record and the Hearing Officer gave Troszak great latitude in his questioning of witnesses and in his own testimony. The record reflects that respondents were afforded a full opportunity to litigate and defend themselves.

respondents for 30 business days and fining them $10,000 jointly and severally would be appropriate for respondents' failure to amend Troszak's Form U4. The Hearing Panel declined to impose the sanctions for the Form U4 violation, as well as the $50,000 fine, in light of the bar and expulsion for the Rule 8210 violation. This appeal followed.[12]

IV. Discussion

We affirm the Hearing Panel's findings that the respondents failed to amend Troszak's Form U4 to disclose a federal tax lien against Troszak, in violation of Article V, Section 2 of the FINRA By-Laws, FINRA Rule 2010, and NASD Rule 2110. We further affirm the Hearing Panel's findings that the respondents failed to provide requested information to FINRA, in violation of FINRA Rules 8210 and 2010. We discuss the violations in detail below.

A. The Respondents Failed to Amend Troszak's Form U4 to Disclose a Tax Lien

Article V, Section 2(c) of FINRA's By-Laws requires that "[e]very application for registration filed with [FINRA] shall be kept current at all times by supplementary amendments." In addition, the By-Laws require that any amendments be filed with FINRA "not later than 30 days after learning of the facts or circumstances giving rise to the amendment." *Id.* "The duty to provide accurate information and to amend the Form U4 to provide current information assures regulatory organizations, employers, and members of the public that they have all material, current information about the securities professional with whom they are dealing."[13] *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *25-26 (Apr. 18, 2013) (internal quotation marks omitted); *see also Rosario R. Ruggiero*, 52 S.E.C. 725, 728 (1996) (explaining that the Form U4 is utilized to determine and monitor the fitness of securities professionals). Thus, the importance of the accuracy of an applicant's Form U4 "cannot be overstated." *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *26 (Nov. 9, 2012); *see also Guang Lu*, 58 S.E.C. 43, 55 (2005) (recognizing that "the candor and forthrightness of applicants is critical" to the usefulness of the Form U4), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006). FINRA Rule 2010 and NASD Rule 2110 require associated persons to observe the high standards of commercial honor and just and equitable principles of trade, which includes disclosing accurately and fully information required in the Form U4 such as a federal

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[12] The respondents attached several documents to their appellate brief. Three of these documents were already admitted into the record. The Subcommittee admitted into evidence the other attached documents and informed the parties that the weight to accord these documents would be determined during the appellate review of the complete record. The substance of these documents has been considered and does not excuse respondents' misconduct or mitigate the sanctions imposed in this matter.

[13] Information is material if it would have "significantly altered the total mix of information made available." *Mathis v. SEC*, 671 F.3d 210, 220 (2d Cir. 2012). A respondent's failure to disclose a tax lien on his Form U4 is material information that other regulators, employers, and investors would want to know because it may signals financial difficulty. *See id.*

tax lien.[14] *See Tucker*, 2012 SEC LEXIS 3496, at *30; *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *8 (Dec. 22, 2008); *see also Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *18 (Dec. 7, 2009) (finding that the failure to file timely Form U4 amendments is a violation of NASD Rule 2110), *aff'd*, 671 F.3d 210.

Question 14M of the Form U4 requires registered representatives to disclose any unsatisfied judgments or liens against them. It is undisputed that the IRS filed a tax lien against Troszak on October 6, 2008. It is also undisputed that Troszak had timely notice of the lien. Troszak admitted that he received notice of the lien from the IRS in October 2008.[15] In addition, the April 22, May 25, and June 10, 2010 letters from FINRA staff instructed the respondents to disclose the lien on Troszak's Form U4. The respondents nonetheless failed to disclose the lien until October 2011, approximately three years after entry of the lien (and a year after Troszak had satisfied the lien). Accordingly, we affirm the Hearing Panel's findings that the respondents failed to amend Troszak's Form U4 to disclose the tax lien within 30 days of learning of the lien, in violation of Article V, Section 2 of the FINRA By-Laws, FINRA Rule 2010, and NASD Rule 2110.

B. The Respondents Failed to Provide Requested Information to FINRA

We affirm the Hearing Panel's findings that the respondents violated FINRA Rules 8210 and 2010 when they failed to provide information and documents responsive to FINRA's requests.

1. FINRA Rule 8210

FINRA Rule 8210 requires FINRA members and persons associated with a member to "provide information orally [or] in writing . . . with respect to any matter involved in [a FINRA] investigation." The language of Rule 8210—"No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule"—is "unequivocal" and "unqualified." *See Dep't of Enforcement v. Asensio Brokerage Servs., Inc.*, Complaint No. CAF030067, 2006 NASD Discip. LEXIS 20, at *44 (NASD NAC July 28, 2006), *aff'd*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014 (June 17, 2010); Rule 8210(c). Because FINRA lacks subpoena power, it must rely upon Rule 8210 "to police the activities of its members and associated persons." *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008) (citation omitted), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). The Commission repeatedly has found that failure to provide information impedes FINRA's ability to carry out its self-regulatory

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[14] NASD Rule 2110 applied until December 15, 2008, when its identical successor, FINRA Rule 2010, became effective. FINRA Rule 0140 and NASD Rule 0115 make all FINRA and NASD rules applicable both to FINRA members and all persons associated with FINRA members.

[15] Troszak also had constructive notice of the lien when it was filed because the IRS sent the notice to respondents' CRD addresses.

functions and is a serious violation. *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009); *Elliot M. Hershberg*, 58 S.E.C. 1184, 1190, *aff'd*, 210 F. App'x 125 (2d Cir. 2006).[16] Indeed, the failure to respond to FINRA's information requests "frustrates [its] ability to detect misconduct, and such inability in turn threatens investors and markets." *PAZ Sec., Inc.*, 2008 SEC LEXIS 820, at *13.

2. The Respondents Had Notice of the Information Requests

FINRA sent the requests for information to the respondents at North Woodward's business address, and Troszak admitted that he received FINRA's requests.[17] Thus, the respondents received actual notice of the April 22, May 25, and June 10, 2010 requests for information.

3. The Respondents Violated FINRA Rule 8210

FINRA requested that the respondents produce certain documents in response to the April 22, May 25, and June 10, 2010 information requests. Specifically, FINRA asked the respondents to provide copies of: customer new account forms, account amendments, and account statements for 2009 and 2010 for each customer from whom Troszak borrowed money; bank and brokerage account statements in which Troszak had a beneficial interest for the period of January 2009 to April 2010; and all correspondence between the respondents and the IRS. FINRA also asked the respondents to produce evidence showing that the customers were receiving payments as required by the terms of the promissory notes and to provide an accounting, with documentation, of the $11,310.48 difference between the amount that Troszak received in loans from the customers and the amount he paid to redeem the property. The respondents, however, refused to produce any of the requested documents prior to Enforcement filing its complaint in this matter in May 2011.

In October and November 2011, approximately five months after Enforcement filed its complaint, the respondents produced over 5,500 pages of documents. These documents included correspondence with the IRS; various bank account statements belonging to Troszak and his business ventures; statements for the period from January 2011 through October 2011 for Troszak Capital Corp.'s securities account at the Firm; and the North Woodward account statements from January 2009 through October 2011 for three customers who were promissory

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[16] A violation of Rule 8210 also constitutes a violation of the standard of just and equitable principles of trade embodied in FINRA Rule 2010. *See CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009).

[17] At the time of the misconduct, FINRA Rule 8210(d) stated that "[a] notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the [CRD]." FINRA also sent the April 22, May 25, and June 10, 2010 information requests to the respondents then-current counsel.

note holders pursuant to the loan to Troszak and the requested customer account statements for 2009 and 2010 for the remaining customers who were also note holders. In November 2011, Troszak also provided on-the-record testimony to FINRA staff.

Even after taking into account the post-complaint production, the respondents never provided three categories of information that FINRA requested. First, the FINRA examiner who testified at the hearing stated that the respondents never produced an accounting, with supporting documentation, of the $11,310.48 difference between the amount borrowed from the customers and the redemption payment. Troszak in comparison testified that FINRA had "all of the documents" necessary "to make that accounting." While Troszak acknowledged that FINRA "received piece-meal documents" and "did not have the full ability to put together that 11 grand," he asserted that it could now. Troszak, however, did not identify the documents that he believed accounted for these funds.[18]

The respondents also never produced proof that the interest and principal payments that were required by the promissory notes were made to the customers. The terms of the promissory notes stated that customers would receive quarterly interest and principal payments for six consecutive quarters, beginning in February 2010 and ending by May 1, 2011.[19] Troszak's responses with respect to the repayment shifted throughout these proceedings. Troszak initially claimed in a May 20, 2010 letter to FINRA staff that the payments were made "according to schedule," but included no documentary proof of that assertion. At the hearing, Troszak testified that he did not make some payments to customers because one or more of them did not want to be paid or had agreed to an extension.[20] Troszak, however, offered no documents to show that

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[18] In an effort to explain the $11,310.48 discrepancy, Troszak testified at the hearing as follows: "At the closing, we had the funds to go to a title company, and the title company handled the total transaction. I'm fairly positive . . . of that 11, there was a tax payment made for between 5 or 6 . . . . Then there were some interest payments made. And what happened is the Troszak Capital Corporation had that money, and then we would make journal entries into the IRA accounts." Troszak later explained that "the 11, some of it went to the taxes, and then over a period of time some of it was going out for interest. And then I funded it some more with my money to make it – to make the balance higher. . . . But the whole idea is that I think half of that went to a tax payment and the rest was dwindled down and then it, I don't [know], got to two or three and I funded it, I ponied up more money to make interest payments . . . ."

[19] The FINRA examiner testified that, in October 2011, she received from the respondents as part of their post-complaint production the requested customer account statements for the period from February 2010 through May 2011. The examiner explained that the customers' monthly account statements reflected the promissory notes but did not reflect principal and interest payments or repayment of the notes as of May 2011.

[20] With respect to his assertion that certain customers declined timely repayment, Troszak testified: "People have actually told me and written me, 'Oh, I don't want my interest payment this year. I want it next year.' . . . Well, these are people that are my friends. They said, 'Doug, don't give it to me this year. Give it to me next year because I don't want to pay the taxes on it

[Footnote continued on next page]

these customers had agreed to these purported extensions.[21] The Hearing Panel found Troszak's testimony that his customers did not want to be repaid according to the schedule in the promissory notes not credible. Because the respondents have not demonstrated the existence of substantial evidence sufficient to overturn the Hearing Panel's credibility determination, we affirm that finding. *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *16 n.11 (NASD NAC Dec. 21, 2004), *aff'd*, 58 S.E.C. 846 (2005). Troszak admitted that FINRA would be unable to reconstruct the payments that he made on the loans because some customers were paid in cash[22] and evidence of payments was not recorded in one place.[23] Troszak ultimately admitted at the hearing that several of his customers had not been fully repaid.

With respect to the third category of information, respondents never produced the 2009 and 2010 securities account statements for Troszak Capital Corp., which is the entity that issued the promissory notes and that Troszak controlled.

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this year.' . . . So you want statements showing the payments when the people that actually loaned me the money don't want the money yet." Although Troszak testified that some of his clients had expressed in writing a desire not to be paid in accordance with the promissory note schedule, he offered no such documents into evidence.

[21] Troszak testified that he did not produce any documents reflecting the purported change in loan repayment terms because "FINRA has never requested any. FINRA has never requested an update on any of this. . . . I don't understand how it's my obligation to give private client information to FINRA."

[22] Troszak at the hearing provided an example of how he purportedly repaid an elderly customer her interest on the promissory note in cash. In an effort to substantiate the cash payments, Troszak testified that he had copies of $100 bills and other currency with the customer's purported initials. He testified that "somewhere" was "a sheet of paper" with her initials adjacent to some numbers which represented cash payments to her. He went on to state that, "[s]o when the group here is trying to match up what's going on, [the examiner may say] 'He's not paying her. I can't see payments,' well, you've got 16,000 sheets of paper there, and in there there's payments from [the customer] on sheets of paper with her initials. And then [the customer] says, 'Well, you know, I don't really want that money in December. You owe it to me. Give it to me in January.'" Troszak provided no documentary evidence to show that he had repaid this customer any money or that she agreed to delayed repayment.

[23] On this point, Troszak testified: "[H]ow we would disburse the money. We'd make journal entries, which is where [the examiner], because she doesn't have an accounting background, couldn't put it together. So that's why she sent that bullet saying, 'Provide an accounting.' Well, it's all over the place, including cash payments on notes that have been supplied but she's got to pull from other spots to put it together to make it work."

The FINRA examiner testified that the documents were requested in order to determine that respondents did not misuse customer funds, that the promissory notes were suitable investments for the customers, and that Troszak had the financial wherewithal to make the promised interest payments and return the customers' funds. Respondents' failure to provide these categories of information impeded FINRA's investigation. The examiner stated she was unable to determine whether the promissory notes were a legitimate investment, if the notes were suitable for customers, if there was a misuse of customer funds, and if any investors were harmed.

We determine that the respondents failed to provide requested information to FINRA and therefore violated FINRA Rules 8210 and 2010.

4. Respondents' Exculpatory Arguments Fail

The respondents make several arguments as to why they believe that FINRA has no authority to obtain information from them regarding the loans from Firm customers. For the reasons set forth below, we determine that none of these arguments diminish respondents' regulatory responsibility to comply with FINRA Rule 8210.

The respondents argue that because FINRA is not a governmental agency, FINRA's requests for "private client information" do not "carry the same status" as requests from the IRS or the U.S. Department of Labor, and they have complied to the extent required of them.[24] The respondents misunderstand their obligations as a FINRA member and person associated with a

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[24] The respondents further assert that SEC Regulation S-P prohibits disclosure to FINRA of certain customer information. Rule 10(a)(1) of Regulation S-P generally prohibits the disclosure of "nonpublic personal information" about a consumer to a nonaffiliated third party unless a broker-dealer has provided the consumer with proper notice and "a reasonable opportunity . . . to opt out." 17 C.F.R. § 248.10(a)(1). The application of Regulation S-P is limited to brokers, dealers, investment companies, and registered investment advisers. *Id.* § 248.1(b). Regulation S-P, however, does not exempt FINRA members and their associated persons from complying with information requests issued pursuant to FINRA Rule 8210, even if those information requests seek nonpublic personal information of broker-dealer customers. *See id.* § 248.15(a)(7)(iii) (excepting broker-dealers from Regulation S-P's notice and opt out requirement when providing nonpublic information to regulatory authorities having jurisdiction "for examination, compliance, or other purposes as authorized by law").

Respondents' concerns related to the release of "client data" through FINRA taking Troszak's on-the-record testimony and admitting the transcript as an exhibit in this case are equally without basis. As the Commission explained, "FINRA investigations are non-public and confidential" and "speculative concerns" that "the information FINRA seeks could be subpoenaed by some other party" are "not enough . . . to refuse to comply with Rule 8210." *Gregory Evan Goldstein*, Exchange Act Release No. 68904, 2013 SEC LEXIS 552, at *16-17 (Feb. 11, 2013) (order denying stay).

member. FINRA's authority to request documents pursuant to FINRA Rule 8210 stems from the contractual relationship entered into voluntarily by FINRA members and persons associated with those members. *See Kidder, Peabody & Co. v. Zinsmeyer Trusts P'ship*, 41 F.3d 861, 863 (2d Cir. 1994) ("The rules of a securities exchange are contractual in nature."). Upon joining FINRA, a member organization and its associated persons agree to comply with FINRA rules. *See* Article IV, Section 1 of the FINRA By-Laws. As FINRA members, respondents therefore are bound to comply with *all* FINRA rules, including FINRA Rule 8210. *See UBS Fin. Servs. Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 649 (2d Cir. 2011); *Berger*, 2008 SEC LEXIS 3141, at *10. Respondents' obligation to provide Enforcement with the requested information was unequivocal. *See Berger*, 2008 SEC LEXIS 3141, at *13.

The respondents contend that FINRA has no jurisdiction to investigate the promissory notes because they were loans from his customers and were not securities.[25] FINRA's investigative reach is broad and includes all business-related conduct, even if the activity does not involve a security. *See Dep't of Enforcement v. DiFrancesco*, Complaint No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at *15-16 & n.11 (FINRA NAC Dec. 17, 2010) (collecting cases), *aff'd*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54 (Jan. 6, 2012); *see, e.g., Dep't of Enforcement v. Taylor*, Complaint No. C8A050027, 2007 NASD Discip. LEXIS 11, at *45-47 (NASD NAC Feb. 27, 2007) (finding violation of Rule 8210 when respondent failed to provide accurate information related to her insurance licenses). Moreover, Rule 8210 requires persons subject to FINRA's jurisdiction to respond to requests for information from FINRA staff with respect to matters involved in an investigation, and provides FINRA the right to inspect and copy a member or associated person's "books, records, and accounts," without limiting FINRA's review to only those documents related to securities. *See* FINRA Rule 8210(a). It was entirely proper for Enforcement to investigate Troszak's loans from respondents' customers, and the information requests were directed at legitimate concerns about whether Troszak's activities violated FINRA rules. *See, e.g., Daniel C. Adams*, 47 S.E.C. 919, 921 (1983) (explaining FINRA's disciplinary authority encompasses nonsecurities related business activity and the investigation of respondent's solicitation and sale of a tax shelter was properly within FINRA's reach); *Dep't of Enforcement v. Gallagher*, Complaint No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *17 (FINRA NAC Dec. 12, 2012) (explaining Rule 8210 confers upon FINRA "broad discretion to inquire about any matter involved in a FINRA investigation, complaint, examination, or proceeding").

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[25] Troszak also repeatedly raised this point throughout his hearing testimony. For example, Troszak stated, "There's really problematic jurisdictional questions in my mind about what is a security and the security regulation and what is not." He reiterated, "I will tell you I don't believe this is a securities transaction. This is a private. This has nothing to do with a security. How did this become a security? And how does FINRA get to continue to ask for private documents from my clients? This isn't a security transaction. It's not a securities transaction in my mind . . . ." Troszak later explained the basis for his belief that FINRA was not entitled to information about the loans by stating, "I believe that my [other regulatory and contractual] responsibilities trump FINRA's request for documents in nonsecurities-related transactions."

The respondents assert that the Michigan Department of Licensing and Regulatory Affairs investigated the loans from North Woodward's customers and took no further action. Any investigation by the State of Michigan is immaterial to FINRA's independent investigation. "As a self-regulatory organization, [FINRA] has an independent obligation to investigate possible . . . violations" of FINRA rules. *Dep't of Enforcement v. Respondent Firm*, Complaint No. CAF000013, 2003 NASD Discip. LEXIS 40, at *35 (NASD NAC Nov. 14, 2003). FINRA's investigation of the respondents and the filing of disciplinary charges represent legitimate regulatory exercises in furtherance of investor protection. *See* 15 U.S.C. § 78o-3; *see also Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) ("NASD disciplinary proceedings are treated as an exercise of prosecutorial discretion."). FINRA's requests for information were "in accordance with its legitimate function of protecting the public." *See Adams*, 47 S.E.C. at 921 n.8.

The respondents further assert that pursuant to NASD Rule 2370 they "communicated" to North Woodward's clearing firm the loans from customers.[26] This fact is irrelevant to respondents' failure to supply FINRA with requested information. While the respondents were not charged with violating Rule 2370 in the matter before us, their borrowing from customers is within FINRA's authority to investigate. *Cf. Berger*, 2008 SEC LEXIS 3141, at *26 (explaining that "a request for information is no less serious because NASD issues the request in an effort to prevent or uncover misconduct rather than to unearth the details of misconduct of which it is already aware" (internal quotation marks omitted)).

We thus affirm the Hearing Panel's findings that Troszak and North Woodward violated FINRA Rules 8210 and 2010.

V. Sanctions

The Hearing Panel barred Troszak, expelled North Woodward, and fined them $50,000, jointly and severally, for the FINRA Rule 8210 violation. The Hearing Panel also fined the respondents $10,000, jointly and severally, and suspended them for 30 business days for the Form U4 violation, but it declined to impose these sanctions, as well as the $50,000 fine, in light of the bar and expulsion. For the reasons set forth below, we affirm the sanctions imposed by the Hearing Panel for the FINRA Rule 8210 violation. We nevertheless modify the sanctions imposed for the Form U4 violation.

A. Respondents' Disciplinary History

Before we apply the violation-specific Sanction Guidelines ("Guidelines"), we begin with a review of respondents' disciplinary history, which is relevant to the level of sanctions for both

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[26] NASD Rule 2370, which is now FINRA Rule 3240, prohibits an associated person from borrowing money from or lending money to any customer, subject to certain conditions.

causes of action.[27] *See Dep't of Enforcement v. N. Woodward Fin. Corp.*, Complaint No. E8A2005014902, 2008 FINRA Discip. LEXIS 47, at *28-29 (FINRA NAC Dec. 10, 2008) (applying disciplinary history as an aggravating factor when determining appropriate sanctions), *aff'd*, Exchange Act Release No. 60505, 2009 SEC LEXIS 2796, at *23 (Aug. 14, 2009). Most recently, on August 14, 2009, the Commission affirmed a FINRA disciplinary decision against the respondents. The Commission found that North Woodward violated Exchange Act Rule 17a-3, and NASD Rules 3110 and 2110, by failing to prepare and maintain a current general ledger and trial balance for two months and Troszak, who was responsible for North Woodward's violations, violated NASD Rules 3110 and 2110. *N. Woodward Fin. Corp.*, 2009 SEC LEXIS 2796, at *23. The respondents were jointly and severally fined $2,500. *Id.* at *25.

On January 6, 2005, the respondents also settled a FINRA disciplinary action by consenting to findings that North Woodward, acting through Troszak, engaged in securities-related activities without a FINOP for 13 months. *Id.* at *29. The respondents agreed to pay, jointly and severally, a $5,000 fine as part of that settlement.

Respondents' disciplinary history presents an aggravating factor in our assessment of sanctions and reflects a serial disregard of fundamental regulatory obligations, including requirements to keep accurate records and to operate with a necessary principal registration. *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *47 (June 14, 2013) (explaining that "[r]elevant' disciplinary history includes past misconduct similar to that at issue or past misconduct that evidences disregard for regulatory requirements, investor protection, or commercial integrity" (internal quotation marks omitted)). The respondents are recidivists whose disregard for FINRA rules and regulatory requirements place the public interest at risk.[28] *See, e.g.*, *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC

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[27] *See FINRA Sanction Guidelines* 2 (General Principles Applicable to All Sanction Determinations, No. 2), 6 (Principal Considerations in Determining Sanctions, No. 1) (2013), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

[28] *See Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2), 6 (Principal Considerations in Determining Sanctions, No. 1). We also note that another FINRA Hearing Panel recently found in an unrelated disciplinary action that the respondents failed to (1) respond in a timely manner to FINRA requests for information and denied FINRA access to the firm's premises in connection with a scheduled cycle examination (and Troszak failed to respond completely to a separate request for information), in violation of FINRA Rules 8210 and 2010; (2) establish and maintain adequate written supervisory procedures, in violation of NASD Rule 3010 and FINRA Rule 2010; (3) prepare required reports and certifications, in violation of NASD Rule 3012, and FINRA Rules 3130 and 2010; (4) establish and implement appropriate AML procedures, in violation of NASD Rule 3011(b), and FINRA Rules 3310(b) and 2010; (5) conduct an independent AML test in a timely manner, in violation of FINRA Rules 3310(c) and 2010; (6) update timely Troszak's Form U4 to disclose a consent judgment, in violation of FINRA Rules 1122 and 2010, and Article V, Section 2 of FINRA's By-Laws; and (7) provide customers with an adequate privacy notice, in violation of Regulation S-P, NASD

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LEXIS 2988, at *24 (Sept. 10, 2010) (considering respondent's disciplinary history and finding that it was further evidence that he posed a risk to the investing public should he re-enter the securities industry), *aff'd*, 436 F. App'x 31 (2d Cir. 2011).

B. Failing to Respond Completely to FINRA Requests

The Guidelines provide that a bar should be the standard sanction when an associated person does not respond in any manner to a request made pursuant to FINRA Rule 8210 or when a respondent does not respond until after FINRA files a complaint.[29] The Hearing Panel considered that because the respondents failed to provide much of the requested information and any documents responsive to the April, May, and June 2010 requests until after the complaint was filed, the standard sanction of a bar was appropriate. The Hearing Panel's determination, however, fails to take into account respondents' full cooperation in response to FINRA's March 2010 request. That request and response were part of the same investigation in which FINRA staff issued the subsequent April, May, and June 2010 requests. *See Plunkett*, 2013 SEC LEXIS 1699, at *55-56; *Kent M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491, at *24-26 (Dec. 20, 2011). Therefore, we determine that the Guidelines governing partial but incomplete responses apply to the facts of this case.

When an associated person provides a partial but incomplete response, the Guidelines state that "a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request."[30] The Guidelines also recommend a fine of $10,000 to $50,000 for a partial but incomplete response.[31] In an egregious case, expulsion of the firm is appropriate.[32] If, however, mitigation exists, the Guidelines recommend suspending

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Rule 2110, and FINRA Rule 2010. *See Dep't of Enforcement v. N. Woodward Fin. Corp.*, Complaint No. 2011028502101, 2014 FINRA Discip. LEXIS 11 (FINRA OHO May 16, 2014). The Hearing Panel barred Troszak from associating with any member firm in all capacities for his failures to comply with the Rule 8210 requests. In addition, the Hearing Panel separately barred Troszak from associating with any member firm in any principal or supervisory capacity for his supervisory violations. The Hearing Panel suspended North Woodward from FINRA membership for one year for its failures to comply timely with the Rule 8210 requests; suspended the firm for 30 business days for its supervisory violations, and fined the firm a total of $25,000. That case is not final and is currently pending on appeal before the NAC, as of the date of this NAC decision.

29 *Guidelines*, at 33 & n.1.

30 *Guidelines*, at 33.

31 *Id.*

32 *Id.*

the firm with respect to any or all activities or functions for up to two years.[33] We determine that respondents' partial responses did not comply substantially with all aspects of the FINRA Rule 8210 requests and aggravating factors support barring Troszak and expelling North Woodward from FINRA membership.

1. FINRA Rule 8210 Guideline Specific Considerations

The Guidelines identify the following factors to consider when a respondent has provided a partial but incomplete response: (1) the 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) the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and (3) whether the respondent thoroughly explained valid reasons for the deficiencies in the response.[34]

We first consider the importance of the information requested that the respondents did not provide and the relevance and responsiveness of the information that they did provide.[35] Prior to the filing of the complaint in May 2011, FINRA issued four information requests. The respondents complied fully with the first request in March 2010 by providing responsive information and documents. The respondents, however, produced none of the documents asked for in the April, May, and June 2010 request letters, primarily claiming that these documents were "personal and confidential." FINRA moreover warned the respondents that their failure to provide requested information could have regulatory consequences and yet they ignored these warnings.

In October and November 2011, approximately five months after FINRA filed the complaint, the respondents produced partial information, providing some, but not all, of the requested documents. The respondents never provided three critical categories of information that FINRA requested. They never produced an accounting, with supporting documentation, of the $11,310.48 difference between the amount that Troszak borrowed from his customers and the redemption payment. They also never produced proof that the interest and principal payments that were required by the promissory notes were made to the customers. In addition, the respondents never produced the 2009 and 2010 securities account statements for the entity that issued the promissory notes, Troszak Capital Corp.

From FINRA's prospective, the missing documents were important because, without them, FINRA was impeded from determining whether the promissory notes were a legitimate investment, whether the notes were suitable for customers, and whether investors were harmed. Troszak's refusal to provide documentation and his provision of contradictory responses raise significant concerns that his customers were harmed. While claiming to FINRA staff that he

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33 *Id.*

34 *Id.*

35 *Id.*

provided adequate proof of interest and principal payments, he also stated that the relevant information is "all over the place," and that FINRA would have "to pull from other spots to put it together to make it work." Moreover, respondents' refusal to provide documents impeded Enforcement from determining whether Troszak engaged in other serious misconduct, such as the misappropriation or conversion of his customers' funds. "When an investigator seeks to verify the proper use of funds by an associated person, any missing documents can frustrate the investigation." *Dep't of Enforcement v. Eplboim*, Complaint No. 2011025674101, 2014 FINRA Discip. LEXIS 8, at *34 (FINRA NAC May 14, 2014); *see also PAZ*, 2008 SEC LEXIS 820, at *13 (explaining that a failure to respond to information requests frustrates FINRA's ability to detect misconduct and threatens investors).

Second, we determine that the number of Rule 8210 requests made, the length of time required to obtain respondents' response to the requests, and the degree of regulatory pressure FINRA applied are aggravating factors supportive of the bar and expulsion.[36] The respondents repeatedly frustrated FINRA's attempt to obtain documents and forced FINRA to make numerous requests for the information. FINRA staff made multiple requests for the documents over the course of three months and, although significant regulatory pressure was brought to bear, the majority of the documents were not provided until approximately 18 months after it was requested and five months after FINRA filed a complaint in this matter. Thus, the degree of regulatory pressure exerted by FINRA in its effort to obtain key documents from the respondents was significant and highly aggravating. *See, e.g., Dep't of Mkt. Regulation v. Lane*, Complaint No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *98 (FINRA NAC Dec. 26, 2013) ("[T]he degree of regulatory pressure that [FINRA] had to bring to obtain [the] category of information was substantial and is a highly aggravating factor."), *appeal pending*, No. 3-15701. The Commission has long emphasized that FINRA "should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant to Rule 8210." *Ricupero*, 2010 SEC LEXIS 2988, at *12. Moreover, even after the filing of the complaint, the respondents refused to provide several categories of documents to FINRA.

Third, we find that the respondents failed to provide valid reasons for failing to respond fully to the information requests.[37] In response to FINRA's repeated requests for an accounting of the $11,310.48 disparity between the loaned and redemption amounts, the respondents claimed that they could not produce records because they were "personal and confidential" to Troszak Capital Corp. They similarly cited "personal and confidential" as the reasons for refusing to produce records from accounts Troszak controlled to show a payment history on the loans. FINRA is not precluded from requesting confidential and private information, and the Commission has rejected assertions of privacy and confidentiality as justifiable reasons for failing to provide FINRA with that information.[38] *See Gregory Evan Goldstein*, Exchange Act

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36 *Guidelines*, at 33.

37 *Guidelines*, at 33.

38 Troszak likewise claimed that he could not produce customer account statements without his clients' written permission. There is no basis in Rule 8210 for such equivocations. Troszak

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Release No. 71970, 2014 SEC LEXIS 1350, at *36 (Apr. 17, 2014). "FINRA investigations are non-public and confidential." *FINRA Regulatory Notice 09-17*, 2009 FINRA LEXIS 45, at *4 (Mar. 2009). As the Commission has emphasized, "[g]iven that so much of the securities industry involves non-public information, allowing such abstract worries about privacy to overcome the critical role of Rule 8210 would eviscerate FINRA's critical regulatory responsibilities." *Goldstein*, 2013 SEC LEXIS 552, at *17; *see Goldstein*, 2014 SEC LEXIS 1350, at *36; *see also CMG Institutional Trading, LLC*, 2009 SEC LEXIS 215, at *21 (rejecting applicant's argument that information request was immaterial and "none of your business" by explaining that associated persons may not ignore information requests or determine for themselves their materiality). Moreover, Troszak Capital Corp. is not some unrelated third party, but rather a company that Troszak formed for tax purposes and one that he controls.

At the time of respondents' misconduct here, FINRA's right to a copy of a member or associated person's documents under Rule 8210 extended to "books, records, and accounts of such member or person."[39] By serving as a member and an associated person, the respondents were "on notice that [they] consented to FINRA's ability under Rule 8210 to request . . . records such as those . . . [sought] here." *Goldstein*, 2013 SEC LEXIS 552, at *17; *see Goldstein*, 2014 SEC LEXIS 1350, at *36. FINRA Rule 8210 precedent makes abundantly clear that the respondents were obligated to cooperate and provide the requested information after FINRA's first request of them and that the respondents had no right to set conditions on their cooperation. *See Berger*, 2008 SEC LEXIS 3141, at *13 & n.20 (explaining that the obligation to cooperate after FINRA's first request for information is unequivocal); *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8. 2007) (stating that a "member or an associated person may not second guess[ ] an NASD information request or set conditions on their compliance" and that a "belief that NASD does not need the requested information provides no excuse for a failure to provide it" (internal quotation marks omitted)), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

[Cont'd]

testified that, "[a]s time went on, we supplied that information and took out the pieces that were the very onerous ones. And I did it without checking with every single person." He further testified that his concerns about providing the information to FINRA were lessened because he did not believe that his customers were "going to come back at [him] legally." Troszak eventually produced customer account statements without securing permission approximately five months after Enforcement filed its complaint.

[39] In December 2012, the Commission approved amendments to Rule 8210. *See Order Approving Proposed Rule Change*, Exchange Act Release No. 68386, 2012 SEC LEXIS 3798 (Dec. 7, 2012). The amendments clarified the scope of FINRA's regulatory reach under Rule 8210. The amended rule now specifies that FINRA has the right to inspect and copy information in the "possession, custody or control" of the member firm, associated person or person over whom FINRA has jurisdiction. *See* Rule 8210(a)(2); *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8 (Jan. 2013).

In favor of mitigation, Troszak and North Woodward argue that they complied with the FINRA Rule 8210 requests because they provided "information relating to FINRA." Their impression of their compliance and FINRA Rule 8210's scope are impermissibly narrow. "[FINRA] Rule 8210 is an essential tool" for FINRA's enforcement responsibilities. *Rooney A. Sahai*, Exchange Act Release No. 55046, 2007 SEC LEXIS 13, at *10 (Jan. 5, 2007). Enforcement often commences an investigation in advance of having a clear picture of the nature and breadth of potential misconduct. In accord with FINRA Rule 8210's importance, the Commission has taken a "broad view" of the rule's scope and the requirement that member firms and associated persons respond to requests without placing conditions or limitations on their compliance. *See id.* As we discussed, "associated persons may not ignore [FINRA] inquiries; nor take it upon themselves to determine whether information is material to an . . . investigation of their conduct." *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *21; *see also Erenstein*, 2007 SEC LEXIS 2596, at *13 (explaining that FINRA has no requirement to explain its information requests or demonstrate their materiality before an associated person is obligated to respond); *Michael J. Markowski*, 54 S.E.C. 830, 838 (2000) ("The determination of when it is appropriate for an investigation to proceed is a matter for the NASD to decide, not the respondent."). Enforcement's efforts to investigate Troszak's borrowing of funds from his customers are squarely within FINRA's regulatory mandate. Enforcement properly requested information and documents regarding Troszak's borrowing of funds from his customers, and the respondents refused to provide documents showing how Troszak used more than $11,000 of his customers' funds and whether he had repaid the customers' principal and the promised interest. Troszak's efforts to shield his activities from regulatory scrutiny by refusing to provide responsive documents warrant a stringent sanction.

2. Other Relevant Considerations Under the Guidelines

We also find that several other principal considerations under the Guidelines are relevant to respondents' misconduct and serve to aggravate sanctions. First, the respondents acted intentionally.[40] This is not a matter where a respondent failed to receive the Rule 8210 information requests, or there was a misunderstanding about a request. Rather, respondents deliberately refused to provide requested documents. Troszak testified that "when it comes down to a request for information, I just go down the totem pole and . . . FINRA isn't the IRS and [it] isn't the Department of Labor." Troszak's testimony illustrates his conscious disregard of FINRA requirements.

Second, Troszak and North Woodward have not accepted responsibility for their misconduct, blaming FINRA for "maliciously exert[ing] predatory regulation into affairs it has no jurisdiction over."[41] Their failure to appreciate the requirements of the securities business, the gravity of their misconduct, and the potential threat that their actions posed warrants significant

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40 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

41 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

sanctions.[42] *See, e.g.*, *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *75 (Jan. 30, 2009) ("We agree with FINRA that Epstein's demonstrated insouciance and indifference towards his responsibilities under NASD rules poses a serious risk to the investing public." (internal quotation marks omitted)), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *Berger*, 2008 SEC LEXIS 3141, at *26-27 ("To allow Berger to justify his refusal to testify by using an after-the-fact assessment of the results of NASD's investigation would shift the focus from NASD's perspective at the time it seeks the information and disregard intervening events."); *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *28 (Aug. 22, 2008) (finding that the fact that respondent never accepted responsibility for his misconduct and blamed others for what occurred were factors that supported a bar). Moreover, Troszak was not forthcoming at the hearing. As the Hearing Panel found, Troszak's testimony was "evasive, obfuscatory, and lacked credibility," a finding that Troszak has not overcome before us.[43] *See, e.g.*, *Jay Houston Meadows*, 52 S.E.C. 778, 784 (1996), *aff'd*, 119 F.3d 1219 (5th Cir. 1997). Troszak's actions and his low regard for his responsibilities under FINRA rules cast serious doubt upon his commitment to the standards demanded of registered persons in the securities industry.[44]

Respondents' partial response fell far short of substantial compliance. Instead, the respondents endeavored to prevent FINRA from ascertaining whether Troszak complied with the terms of the loan with his customers and whether customers were harmed. Respondents' actions demonstrate a fundamental unwillingness to comply with FINRA rules. "In a business that depends so heavily on the integrity of its participants, such behavior cannot be countenanced." *Rita Delaney*, 48 S.E.C. 886, 890 (1987). Under the totality of the circumstances considered, we conclude that a bar is appropriate for Troszak's failure to provide FINRA with complete responses to its requests. We also determine that, in the absence of mitigating factors, this is an egregious case, and accordingly expel North Woodward from FINRA membership.[45]

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[42] Troszak's disregard for professional requirements is further evidenced by a troubling story that he recounted before the Hearing Panel. Troszak testified that he assisted a client, who was going through a divorce proceeding, conceal assets by not paying the client interest on the loan to Troszak until the divorce proceeding was completed.

[43] *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12).

[44] Troszak continues his attempts to evade FINRA's review of his activities with customers. One of the exhibits that the respondents attached to their appellate brief is a June 2012 letter signed by two of Troszak's customers stating that they did not wish to have their accounts reviewed by FINRA and that they were "opting-out" of FINRA regulatory oversight. The respondents state in their brief that, through this letter, they "have started to offer clients the ability to Opt-out of FINRA regulation."

[45] *Guidelines*, at 33. We also determine it would be appropriate to fine the respondents $50,000 jointly and severally, but decline to do so in light of the bar and expulsion.

C. Failure to Amend Troszak's Form U4

The Guidelines provide for a range of sanctions for the violations related to Forms U4.[46] Because respondents never filed an amended Form U4 for Troszak while the tax lien was outstanding, we consider the provisions of the Guidelines for the failure to file an amendment. For the failure to file an amendment, the Guidelines recommend fining the responsible individual $2,500 to $50,000 and the responsible firm $5,000 to $100,000.[47] The Guidelines also recommend suspending the responsible individual for five to 30 business days.[48] In egregious cases, such as those involving repeated failures to file, an adjudicator may consider suspending the responsible individual for up to two years or imposing a bar and suspending a firm with respect to any or all activities until the filing deficiency is corrected.[49] We conclude that respondents' failure to amend Troszak's Form U4 to disclose a federal tax lien was egregious based on the respondents' disciplinary history and the aggravating factors discussed below, and modify the Hearing Panel's sanctions.

The Guidelines for violations related to the filing of a Form U4 provide principal considerations specific to Form U4 violations. One of these considerations is relevant here: whether the information at issue was significant and the nature of that information.[50] The Commission and FINRA have consistently held that an undisclosed tax lien is significant information. *See Tucker*, 2012 SEC LEXIS 3496, at *63; *Dep't of Enforcement v. Mathis*, Complaint No. C10040052, 2008 FINRA Discip. LEXIS 49, at *35 (FINRA NAC Dec. 18, 2008). The undisclosed tax lien that the IRS had filed against Troszak was a material reflection of the state of his finances and reflected the financial pressure he faced while acting as a registered representative. *See Tucker*, 2012 SEC LEXIS 3496, at *63. Moreover, regulators were deprived of information that was relevant to their oversight of Troszak and the Firm. *See Amundsen*, 2013 SEC LEXIS 1148, at *52. Even after FINRA learned of the tax lien and directed the respondents to disclose it on Troszak's Form U4 in 2010, respondents did not disclose it until a year after the lien was satisfied and five months after Enforcement filed its complaint against the respondents. The respondents frustrated the effectiveness of the Form U4

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46 *Id.* at 69-70.

47 *Id.*

48 *Id.* at 69.

49 *Id.* at 70.

50 *Id.* at 69. The other two principal considerations set forth by the Guidelines for Form U4 violations (whether the failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm; and whether the misconduct resulted in harm to a registered person, another member firm, or any person or entity) do not apply to respondents' failure to disclose a tax lien here. *See id.* Because these considerations do not apply, we do not consider them either aggravating or mitigating.

by failing to disclose timely that Troszak was subject to a tax lien. *See Craig*, 2008 SEC LEXIS 2844, at *15 (explaining that the effectiveness of the Form U4 is dependent upon candid disclosure).

It also is relevant to our determination of the appropriate sanctions that Troszak attempted to trivialize his failure to disclose the tax lien. At the hearing below, Troszak stated the following: "I want to establish the fact of who's been harmed here. Eight of my personal friends didn't get a chance to see that I didn't have an exactly correct U4." Troszak's statement is a further illustration of his low regard for his obligations as a registered representative. As the Commission has made clear, "failures to make truthful disclosures on Form U4 are not harmless," and accurate and timely disclosures provide material information to existing and potential customers. *Amundsen*, 2013 SEC LEXIS 1148, at *52. The record in this case shows the potential harm that could have befallen Troszak's customers because the tax lien would have had a preference in repayment over the monies that Troszak owed to his customers who entered into the promissory notes. Troszak, however, did not disclose the tax lien to the promissory note holders. Respondents' actions deprived the customers who lent Troszak money an opportunity to assess for themselves the true risks of the loans had they known that he was subject to a tax lien. In addition, the availability of this information may have affected the decision of existing or potential customers to invest their funds with Troszak.

In favor of mitigation, the respondents argue that their misconduct was not intentional. We disagree and determine that the facts support a finding of respondents' intentionality.[51] Beginning in April 2010, FINRA reminded the respondents three times in Rule 8210 requests that Troszak's Form U4 required an amendment to disclose the tax lien, but they chose not to comply. Troszak only amended his Form U4 to disclose the lien after his attorney at the time "convinced" him that he "had to do it." In addition, respondents' violations extended over a substantial period of time because respondents failed to amend Troszak's Form U4 to disclose the tax lien for three years after Troszak had notice of it.[52]

Respondents argue that they should not be "barred" for the Form U4 violation and rely on several settled cases for support. The Hearing Panel, however, did not bar or expel the respondents for their misconduct related to Troszak's Form U4. Moreover, the sanctions imposed in a settled matter are irrelevant to the sanctions imposed upon the respondents in this case. *See, e.g., Dep't of Enforcement v. Neaton*, Complaint No. 2007009082902, 2011 FINRA Discip. LEXIS 13, *27 (FINRA NAC Jan. 7, 2011) (explaining that settlements "generally are not relevant to the issues litigated in FINRA disciplinary proceedings"); *see also Michael C. Pattison*, Exchange Act Release No. 67900, 2012 SEC LEXIS 2973, at *49 (Sept. 20, 2012) ("Litigated cases typically present a fuller, more developed record of facts and circumstances for purposes of assessing appropriate sanctions than do settled matters."). "It is well recognized that the appropriate sanction depends upon the facts and circumstances of each particular case and

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51 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

52 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 9).

cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding." *Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997). The respondents also exercised their right to a hearing. In settled cases, the parties forgo the cost of litigation and often agree to lesser sanctions. *See Dep't of Enforcement v. Belden*, Complaint No. C05010012, 2002 NASD Discip. LEXIS 12, at *27 (NASD NAC Aug. 13, 2002), *aff'd*, 56 S.E.C. 496 (2003); *see also Howard R. Perles*, 55 S.E.C. 686, 710 (2002) (noting that "pragmatic considerations justify lesser sanctions in negotiated settlements"). We reject respondents' argument as not relevant and without merit. *See, e.g.*, *Kent M. Houston*, Exchange Act Release No. 71589A, 2014 SEC LEXIS 863, at *33 (Feb. 20, 2014) (rejecting as "inappropriate" respondent's comparisons to sanctions in settled cases); *Tucker*, 2012 SEC LEXIS 3496, at *66 n.92 (rejecting as inapposite respondent's reliance on sanctions imposed in other Form U4 cases).

The Hearing Panel suspended Troszak and the Firm for 30 business days and fined respondents $10,000, jointly and severally. In light of the aggravating circumstances that we discussed above, we determine it appropriate to increase Troszak's suspension to 60 days. We affirm the $10,000 fine (joint and several). Because the respondents ultimately amended Troszak's Form U4 to disclose the tax lien, we eliminate the Firm's suspension.[53]

VI. Conclusion

We affirm the Hearing Panel's findings that the respondents failed to amend Troszak's Form U4 to disclose a tax lien within 30 days of learning of the lien, in violation of Article V, Section 2 of the FINRA By-Laws, FINRA Rule 2010, and NASD Rule 2110. We also affirm the findings that the respondents failed to respond completely to FINRA information requests, in violation of FINRA Rules 8210 and 2010. Accordingly, for the failure to respond, we bar Troszak and expel North Woodward, effective upon service of this decision. We also determine it would be appropriate to fine the respondents $50,000, jointly and severally, but decline to do so in light of the bar and expulsion. For the Form U4 violation, we determine that suspending Troszak for 60 days and fining the respondents $10,000, jointly and severally, would be appropriate, but also decline to impose these sanctions in light of the bar and expulsion. We affirm the Hearing Panel's order that the respondents pay $2,712 in hearing costs and order the respondents to pay $1,368.79 in appeal costs.[54]

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[53] *See Guidelines*, at 70 (recommending firm suspension until the firm corrects the filing deficiency).

[54] The respondents object to the Hearing Panel's assessment of hearing costs and request that "reasonable costs related to the U-4 issue be assessed and that all other costs incurred by respondents be reimbursed by FINRA." We reject respondents' request. FINRA Rule 8330 provides that a member or person associated with a member who FINRA has disciplined shall bear the costs of the proceedings as deemed appropriate by the adjudicator. The respondents have not shown that the $2,712 in costs, consisting of a $750 administrative fee and the cost of the hearing transcript, was unreasonable. *See, e.g.*, *Lu*, 58 S.E.C. at 62 n.45 (sustaining hearing and appellate costs in NASD disciplinary matter). In addition, Enforcement was justified in

[Footnote continued on next page]

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith
Senior Vice President and Corporate Secretary

[Cont'd]

bringing this action against the respondents, and as the Commission recognized in FINRA's prior action against these same respondents, there is "no basis" for awarding costs to FINRA member firms or their associated persons related to such actions. *See N. Woodward*, 2009 SEC LEXIS 2796, at *22 n.29.

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

Appendix B

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.

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.

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.

Appendix C

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13727

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
January 5, 2010

In the Matter of the Application of JOSEPH RICUPERO [redacted] For Review of Disciplinary Action By FINRA	ORDER DENYING STAY

On October 1, 2009, the Financial Industry Regulation Authority, Inc. ("FINRA") found that Joseph Ricupero, a former registered representative of America First Associates ("America First"), a FINRA member firm, had failed to respond to written requests for information in violation of NASD Rules 8210 and 2110.[1] As a result, FINRA barred Ricupero in all capacities

[1] Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the conduct at issue occurred in 2006 and 2007, before the consolidated rules took effect, NASD conduct rules applied.

NASD Rule 8210 requires member firms and their associated persons to provide information to NASD in the course of an investigation. NASD Rule 2110 requires NASD members (and, through NASD Rule 115, associated persons) to "observe high standards of commercial honor and just and equitable principles of trade." The Commission has held that a violation of another Commission or NASD rule or regulation also constitutes a violation of Rule 2110. *See, e.g., Frank Thomas Devine*, 55 S.E.C. 1180, 1192 n.30 (2002).

from associating with any FINRA member firm. Ricupero appealed and, in connection with his appeal, requests a stay of the sanction imposed by FINRA.

I.

In the proceedings below, FINRA found that, despite FINRA's repeated requests for documents related to America First's 2006 "FOCUS Reports,"[2] Ricupero did not respond to these requests on behalf of America First until Ricupero "finally provided staff with the requested documents just a few weeks before the hearing, which was approximately one and one-half years after the requests for information were made and five months *after* the complaint had been issued." (emphasis in original). FINRA concluded that "[s]uch prolonged unresponsiveness and noncompliance is tantamount to a complete failure to respond." FINRA also found that Ricupero had failed to file, on behalf of American First, certain FOCUS reports pursuant to Exchange Act Rule 17a-5(a),[3] certain audit reports pursuant to Exchange Act Rule 17a-5(d),[4] and an application to sell America First's assets to another broker-dealer pursuant to NASD Rule 1017(a)(3).[5] FINRA concluded that these failures to file documents violated NASD Rules 1017(a)(3) and 2110.

FINRA determined that a bar from associating with any FINRA member firm in all capacities was appropriate given the facts and circumstances of Ricupero's NASD Rule 8210

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[2] FOCUS Reports, or Financial and Operational Combined Uniform Single Reports, contain a firm's financial statements and net capital calculation. *See Stephen J. Horning*, Securities Exchange Act Rel. No. 56886 (Dec. 3, 2007), 92 SEC Docket 207, 209 & n.4 (noting that "[b]roker-dealers are required to file FOCUS Reports with regulators who use them to monitor firms to ensure that they are financially sound"), *aff'd*, 570 F.3d 337 (D.C. Cir. 2009).

[3] Exchange Act Rule 17a-5(a) requires broker-dealers to file FOCUS reports with FINRA within seventeen business days after the end of each month. 17 C.F.R. § 240.17a-5.

[4] Exchange Act Rule 17a-5(d) requires broker-dealers to file annually a report that is audited by an independent public accountant. 17 C.F.R. § 240.17a-5.

[5] NASD Rule 1017(a)(3) requires, in part, a member to file an application for approval of direct or indirect transfers of twenty-five percent or more, in the aggregate, of the member's assets or an asset, business, or line of operation that generated revenues comprising twenty-five percent or more of the member's earnings measured on a rolling thirty-six-month basis, unless both the buyer and seller are members of the New York Stock Exchange.

violations.[6] In doing so, FINRA did not credit Ricupero's claims that he complied with FINRA's request for information timely and, instead, found Ricupero's "belated and dishonest claim of compliance to be aggravating." FINRA further concluded that "Ricupero's eleventh-hour claim of compliance in addition to his various justifications for failing to provide the documents when requested demonstrate[d] a troubling patten of dishonesty."

II.

In determining whether to grant a stay, the Commission considers four factors: (i) the likelihood that the moving party will eventually succeed on the merits of its appeal; (ii) the likelihood that the moving party will suffer irreparable harm without a stay; (iii) the likelihood that another party will suffer substantial harm as a result of a stay; and (iv) a stay's impact on the public interest.[7] Although the moving party has the burden of establishing that a stay is warranted, Ricupero provides no reason why his request for a stay is warranted here.[8]

In opposing Ricupero's request for a stay, FINRA contends that Ricupero has no likelihood of succeeding on the merits. FINRA argues that "[t]he record amply demonstrates that Ricupero failed, over an extended period, to respond to three Rule 8210 requests." FINRA adds that the record also "amply demonstrates that Ricupero's belated claim of compliance, made just days before the hearing and allegedly documented by a letter dated May 1, 2006, was not credible." FINRA notes that (i) Ricupero waited until just days before his disciplinary hearing before claiming that he had complied with the NASD Rule 8210 requests, (ii) FINRA's correspondence logs contain no record of the letter Ricupero claims he sent to FINRA, and (iii) Ricupero provided no documentary evidence that he sent such a letter. With respect to the sanctions, FINRA argues that Ricupero displayed a pattern of dishonesty and disregard for his obligation to respond to NASD Rule 8210 requests for information. FINRA contends that a bar "serves to deter others from failing to provide [FINRA] Enforcement with requested information promptly" and is consistent with FINRA's Sanction Guidelines.

FINRA claims that denying the stay will not cause Ricupero to suffer irreparable harm because he is not presently working in the securities industry and has not been associated with a

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[6] FINRA also "conclude[d] that a 30-business-day suspension and $15,000 fine would be an appropriate sanction for Ricupero's failures to file FOCUS Reports and the firm's 2005 annual report, and that a $10,000 fine would be an appropriate sanction for Ricupero's failure to fie an application for approval of the transfer of customer accounts to [anther firm]." However, because FINRA bared Ricupero for the NASD Rule 8210 violation, FINRA declined to impose these sanctions.

[7] *See, e.g., Intelispan. Inc.*, 54 S.E.C. 629, 631 (2000).

[8] *See. e.g., Millenia Hope, Inc.*, Exchange Act Rel. No. 42739 (May 1, 2000), 72 SEC Docket 965, 966 ("The party requesting the stay has the burden of proof.").

member firm since December 2006. FINRA also contends that, "[g]iven Ricupero's cavalier disregard for his duty to respond to NASD Rule 8210 requests for information, continued effectiveness of the bar is necessary to protect the public interest."

Final resolution must await the Commission's determination on the merits of Ricupero's appeal, but there does not appear to be a strong likelihood at this point that Ricupero will succeed on appeal. Nor does Ricupero appear likely to suffer irreparable harm without a stay, and the balance of harms does not favor Ricupero.[9] Any detriment Ricupero may incur from the denial of his stay request is outweighed by the danger that his continued presence in the securities industry would pose to the investing public.[10] Therefore, under the circumstances and based on the parties' filings, the granting of Ricupero's stay request is not warranted.

Accordingly, IT IS ORDERED that Joseph Ricupero's request for a stay of the bar imposed against him by FINRA in its decision dated October 1, 2009, pending the Commission's consideration of Ricupero's appeal be, and it hereby is, denied.

For the Commission by the Office of the General Counsel pursuant to delegated authority.

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

Elizabeth M. Murphy
Secretary

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[9] That a moving party "may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay." *Robert J. Prager*, Exchange Act Rel. No. 50634 (Nov. 4, 2004), 84 SEC Docket 171, 172; *see also Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (denying stay by noting, in part, that "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to show irreparable injury); *Richard L. Sacks*, Exchange Act Rel. No. 57028 (Dec. 21, 2007), 92 SEC Docket 894, 897 (denying stay where petitioner claimed that not granting his stay request would destroy his business, which supported him and his wife).

[10] *See John Montelbano*, Exchange Act Rel. No. 45107 (Nov. 27, 2001), 76 SEC Docket 1023, 1029 (denying stay, in part, because detriment was "outweighed by the necessity of protecting the public interest").

ADMINISTRATIVE PROCEEDING
FILE NO. 3-12316

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
June 8, 2006

In the Matter of the Application of HANS N. BEERBAUM and BEERBAUM & BEERBAUM FINANCIAL AND INSURANCE SERVICES, INC. [redacted] For Review of Disciplinary Action Taken by NASD	ORDER DENYING STAY

I.

Hans N. Beerbaum, who during the relevant period was a general securities representative with Beerbaum & Beerbaum Financial and Insurance Services, Inc. (the "Firm"), an NASD member, appeals from NASD disciplinary action barring him from association with any member. NASD found that Beerbaum and the Firm violated NASD Membership and Registration Rule 1021 ("NASD Rule 1021") 1/ and NASD Conduct Rule 2110 ("NASD Rule 2110") 2/ when Beerbaum, from July 5, 2002 through June 3, 2004, acted as a general securities principal for the Firm without being registered as such. 3/ In connection with that appeal, Beerbaum requests that his bar be stayed. NASD opposes this request. 4/

1/ NASD Membership and Registration Rule 1021 requires, among other things, that "[a]ll persons engaged . . . in the . . . securities business of a member who are to function as principals shall be registered as such with NASD . . . ." NASD Manual at 3131 (2003).

2/ NASD Conduct Rule 2110 requires NASD members to observe high standards of commercial honor and just and equitable principles of trade. NASD Manual at 4111.

3/ In addition to the bar imposed on Beerbaum, NASD also fined the Firm $15,000. Under NASD Procedural Rule 9370, the Firm is not required to pay the fine pending the outcome of the Commission's review.

4/ Beerbaum filed a response to NASD's opposition. However, Rule 401(d) of the

(continued...)

II.

This proceeding follows a similar NASD proceeding in 2002, in which Beerbaum and the Firm were found to have violated NASD Rules 1021 and 2110 when Beerbaum acted as a principal for the Firm from March 4, 1996 through January 23, 1998 when he was registered only with another firm. 5/ In that earlier proceeding, NASD required Beerbaum to requalify as a principal within 90 days after the decision became final with the proviso that, if Beerbaum was unable to requalify during the 90-day period, he would be suspended as a principal until he requalified. Although Beerbaum took the principal examination three times in an effort to requalify, he failed to do so until June 2004, when he passed the examination. Notwithstanding his inability to requalify, which resulted in his suspension from July 2002 through June 2004, Beerbaum engaged in, and the Firm permitted him to engage in, activity that required Beerbaum to be registered as a principal.

NASD found that Beerbaum, while suspended as a principal, acted as a principal in that he, among other things, signed annual audit reports as the Firm's president, was designated as the principal submitting seven of the Firm's FOCUS reports, identified himself as the Firm's chief executive officer, executive representative, chief financial officer, contact for compliance issues, and supervisor in charge of training registered representatives, signed the Firm's anti-money laundering program compliance and supervisory procedures, supervised a general securities representative and principal of the Firm, and received override commissions from that person's transactions. In determining to bar Beerbaum, NASD found that he intentionally and knowingly violated NASD rules by ignoring the earlier NASD decision, thereby demonstrating a lack of appreciation for the importance of NASD's registration requirements.

III.

Beerbaum makes several claims in support of a stay. He asserts that NASD erred in that it "ignored mitigation which was the entire defense and was referred to regularly in the defense presentation." According to Beerbaum, in engaging in the actions at issue, he "chose to meet

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4/ (...continued)
Commission's Rules of Practice, under which a stay of an action by a self-regulatory organization is considered, does not contemplate such a filing.

5/ NASD found that Beerbaum, during the relevant period, acted as a principal in that he supervised another registered representative of the Firm, acted as the Firm's president, and filed Financial and Operational Combined Uniform Single ("FOCUS") reports and an amendment to the Uniform Application for Broker-Dealer Registration ("Form BD") on behalf of the Firm.

compliance deadlines on a timely basis since he was the only one who knew how to do it." 6/ He also asserts that the proceeding involves no allegations of "financial harm to clients" and that, therefore, staying the bar "will not pose a risk to the investing public." He further claims that, without a stay, the bar will "impose financial consequences of not just the $15,000 in fines that NASD seeks, but hundreds of thousands of dollars in personal financial losses and tax and other exposure." Moreover, he claims that the bar would prevent him from preparing the Firm's FOCUS and other required reports (or training anyone else to do so), forcing the Firm out of regulatory compliance. 7/

In determining whether to grant a stay, the Commission generally considers (1) whether there is a strong likelihood that the applicant will succeed on the merits of the appeal; (2) whether the applicant will suffer irreparable injury without a stay; (3) whether there will be substantial harm to the public if the stay were granted; and (4) whether a stay will serve the public interest. 8/ The applicant has the burden of demonstrating that a stay is warranted. 9/

In opposing the stay, NASD asserts that Beerbaum has not demonstrated a likelihood of success on the merits, noting that Beerbaum has never disputed the facts supporting NASD's findings of violation. NASD also notes that the sanctions are within the range recommended in NASD's Sanction Guidelines. NASD further asserts that Beerbaum's claim of severe financial harm is unsupported, noting that Beerbaum "fails to articulate why Beerbaum Financial and another principal at the Firm would be unable to pay requisite broker-dealer expenses in Beerbaum's absence" or to file the reports necessary to remain in compliance. 10/ In addition, NASD argues that allowing Beerbaum to remain in the industry during the pendency of his appeal would be "perilous to maintaining the integrity of NASD's membership and to the investing public." NASD asserts that Beerbaum's claim that no investors were harmed is "illogical considering the egregiousness of his misconduct and his repeated disregard for regulatory requirements."

A consideration of the relevant factors does not support Beerbaum's request. While any final determination must await the Commission's consideration of the merits of this proceeding, it does not appear that, at this stage, Beerbaum has demonstrated a strong likelihood that he will

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6/ Beerbaum seems to concede that, in "choosing" to comply with reporting requirements, he and the Firm were violating NASD registration requirements.

7/ Beerbaum also claims, without elaboration, that "[a] bar prevents any action, including filing this appeal, which we intend to file."

8/ E.g., Stratton Oakmont, Inc., 52. S.E.C. 1150 (1996) (citing Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985)).

9/ Id. at 978.

10/ NASD asserts that nothing supports Beerbaum's claim that the bar would prevent Beerbaum from pursuing his appeal.

prevail on appeal. Nor does it appear that Beerbaum's vague and unsupported claim of financial harm justifies a stay. 11/

Granting a stay could result in substantial harm to the public and would not serve the public interest. In determining to impose a bar on Beerbaum, NASD found that his "extensive responsibilities for the Firm while he was suspended as a principal to be a significant aggravating factor" that evidenced egregious misconduct. NASD found as another aggravating factor that Beerbaum and the Firm "ignored the [earlier NASD] decision that found [them] in violation of the same NASD rules at issue in the present case." NASD further found that Beerbaum and the Firm engaged in several activities identical to those that the earlier NASD decision found violative, and thus demonstrated intentional and knowing violations of NASD's rules. NASD also found that Beerbaum's comments, "throughout the course of these proceedings," that the principal examination was "'a waste of everyone's time,' a 'farce,' and 'irrelevant' to the Firm's business" indicated his failure to "appreciate the importance of NASD's registration requirements, which, in turn, reflects on his ability to remain in the securities industry and supports barring him." Under the circumstances, it does not appear that a stay of Beerbaum's bar is warranted.

Accordingly, IT IS ORDERED that the request of Hans N. Beerbaum, for a stay of NASD's action against him be, and it hereby is, denied.

For the Commission by the Office of the General Counsel, pursuant to delegated authority.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

11/ As the Commission has repeatedly held, "the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay." Robert J. Prager, Securities Exchange Act Rel. No. 50634 (Nov. 4, 2004), 84 SEC Docket 171. See also Joseph A. Geraci, II, Admin. Proc. File No. 3-11772 at p.3 (Dec. 22, 2004) (denying stay of personal bar despite applicant's claim of being the family's sole source of income and suffering personal adverse financial effects).