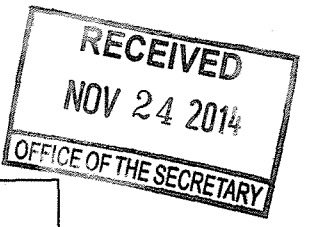


**BEFORE THE**
**SECURITIES AND EXCHANGE COMMISSION**
**WASHINGTON, DC**

In the Matter of the Application of

Blair C. Mielke and Frederick W. Shultz

For Review of Disciplinary Action Taken by

FINRA

File No. 3-16022

# FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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## I. INTRODUCTION

Blair Mielke and Frederick Shultz (collectively, the "Applicants") founded, owned, and managed a limited liability company that identified investment opportunities for investors, while utilizing the customers of their member firm as their potential pool of investors. To facilitate their enterprise, Mielke, the limited liability company's President and Chief Executive Officer, and Shultz, the company's Chief Financial Officer, decided to enrich themselves and raise capital for the company by offering the company's nonvoting membership interests to investors. Over a 21-month period, Mielke and Shultz promoted and sold the limited liability company's membership interests to 31 investors, including customers of their member firm, and raised $4.62 million in capital for their company.

Mielke and Shultz owned and operated the limited liability company and participated in the company's securities offering without notifying their member firm or obtaining the firm's approval. Mielke and Shultz not only failed to provide their member firm with notice of the securities sales or business activities, they also took affirmative steps to conceal their private securities transactions and outside business activities from the firm through lies and omissions on

firm compliance forms – all while the firm was deciding whether to offer the securities through the firm.

Mielke's and Shultz's undisclosed sales of the membership interests placed the investors' assets at substantial risk, as Mielke and Shultz placed the offering's proceeds with hedge fund managers who were engaged in a fraudulent offering scheme. The unsupervised securities sales and undisclosed business activities also gave rise to a myriad of other misconduct, including Mielke's and Shultz's false statements on the member firm's compliance disclosures, Shultz's misuse of the investors' funds, Shultz's failing to record the securities sales on the firm's books and records, and Mielke's and Shultz's refusal to respond to FINRA's inquiries about the limited liability company and the company's sales of membership interests to customers of the member firm. The shortsighted and self-serving nature of Mielke's and Shultz's misconduct was profound, and FINRA's National Adjudicatory Council's (the "NAC") imposed sanctions that were commensurate with the misconduct.

Before the Commission, Mielke and Shultz fail to offer any basis to depart from the NAC's findings of liability or the sanctions that the NAC imposed. Instead, Mielke and Shultz rehash a host of post hoc explanations for their failure to provide written notice and obtain written approval for their participation in the limited liability company's securities offering and their undisclosed employment with the company. The NAC reviewed Mielke's and Shultz's explanations for the undisclosed private securities transactions and outside business activities, rejected them, and properly barred them for their misconduct.

The NAC also analyzed the mitigation claims that Mielke and Shultz offered for their false statements on their member firm's compliance disclosures and failure to comply with FINRA's requests for information, documents, and testimony. The NAC consulted FINRA's Sanction Guidelines (the "Guidelines"), applied the principles articulated in the Guidelines, and

imposed sanctions that were within the recommended range of sanctions for the specific violations at issue. The resulting sanctions are consistent with the Guidelines and are neither excessive nor oppressive.

For these reasons, the Commission should dismiss Mielke's and Shultz's appeals.

## II. FACTUAL BACKGROUND

During the period relevant to the misconduct at issue here, Mielke was registered as an Investment Company Products/Variable Contracts Limited Representative with Brookstone Securities, Inc. ("Brookstone Securities"). RP 2492-2493. Mielke joined Brookstone Securities in June 2007. RP 2492. Brookstone Securities discharged Mielke in November 2009 because of his misconduct. RP 2492.

Shultz knew Mielke and his parents since Mielke was a child. RP 2065. Mielke encouraged Shultz, a retired mathematician, to enter the securities industry, which Shultz did in 2006. RP 2064-2065. Shultz registered as an Investment Company Products/Variable Contracts Limited Representative with a FINRA firm in November 2006. RP 3255. Shultz remained associated with that firm until June 2007, when he followed Mielke to Brookstone Securities. RP 3254-3255. Shultz was registered with Brookstone Securities from June 2007 to November 2009. RP 3254. Brookstone Securities also discharged Shultz because of the misconduct in this case.[1] RP 3254.

### A. Mielke and Shultz Form MIP and Promote and Sell Membership Interests in the Limited Liability Company

In January 2008, Mielke and Charles McCue, a non-associated person, formed Midwest Investment Partners, LLC ("MIP") as a limited liability company. RP 1898, 2345-2346. Mielke

[1] Neither applicant is currently associated with another FINRA member firm. RP 2492, 3254.

was MIP's President and Chief Executive Officer. RP 2346. Shultz was the Chief Financial Officer. RP 2346.

MIP was formed primarily as an investment vehicle, to "own, purchase, sell and manage certain investments in fixed income financial instruments (or entities that invest in fixed income financial instruments), forward purchase agreements, precious metals, real estate, physical commodities transactions and other instruments." RP 2345. The company stated that its "primary investment objective . . . is to pursue medium to long-term capital appreciation." RP 2345.

MIP sought to raise capital by offering "up to $100 [million] of [the company's] nonvoting membership interests to 'accredited investors,' as that term is defined in Rule 501 promulgated under the Securities Act of 1933, as amended." RP 6853. The private placement memorandum for the offering stated that the minimum subscription amount from any investor was $250,000 but noted that "lesser amounts may be accepted." RP 6859. The offering documents also explained that the individuals who purchased the membership interests in MIP did so in a passive capacity and stressed that the "Manager" of MIP was Harvest Midwest Group, LLC ("Harvest Midwest Group"). RP 6858-6859.

### B. Mielke's and Shultz's Other Corporate Entities, Harvest Midwest Group and Harvest Holding Company, Facilitate MIP's Securities Offering

Harvest Midwest Group was an Indiana-based limited liability company and a subsidiary of Harvest Holding Company, LLC ("Harvest Holding Company") (d/b/a Harvest Companies, LLC and Harvest Financial, Inc.).[2] RP 1896, 6873. Mielke was the President and Chief Executive Officer of Harvest Midwest Group. RP 6873. Mielke founded Harvest Holding

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2 Harvest Holding Company and its affiliates, Harvest Companies, LLC and Harvest Financial, Inc. are collectively referred to as "Harvest Holding Company."

Company in 1995, and served as Harvest Holding Company's President and Chief Executive Officer. RP 6873-6874. Mielke was a Director on Harvest Holding Company's Board of Directors and owned 75 percent of the company's stock during the events in this case. RP 6873.

Shultz was Harvest Midwest Group's and Harvest Holding Company's Chief Financial Officer. RP 6874. Shultz also was a Director of Harvest Holding Company and owned 5 percent of the company's stock.[3] RP 6873-6874.

According to MIP's offering documents, Harvest Midwest Group and the investors would split equally any profits earned from the investment. RP 6859. The offering documents also stated that Harvest Midwest Group had the "exclusive right and power" to manage MIP's investments and to operate the company. RP 6858-6859. Specifically, Harvest Midwest Group owned all of MIP's "voting [i]nterests" and controlled the company. RP 6858.

Between January 2008 and October 2009, approximately 31 investors purchased membership interests in MIP, and MIP raised a total of $4.62 million from the private placement. RP 2739. Of the 31 securities transactions,[4] Mielke made five direct sales between January 2008

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[3] Mielke and Shultz owned 80 percent of Harvest Holding Company's stock. RP 6873. The record does not disclose who owned the remaining 20 percent of the company.

[4] The record contains two versions of MIP's offering documents, a version that Brookstone Securities never approved, and a version that it approved in August 2009. RP 2547-2614 (unapproved offering documents), RP 6853-6952 (approved offering documents). Approximately 22 of the 31 investors who invested their funds with Mielke and Shultz received unapproved offering documents. RP 2739, 5696-5706. The remaining nine investors received approved offering documents. RP 2739, 5096-5103.

There are several differences between the unapproved and approved version of MIP's offering documents. RP 2547-2614, 6853-6952. For example, the unapproved private placement memorandum for the offering set the minimum subscription price at $500,000. RP 2547. The minimum subscription price in the approved private placement memorandum was $250,000. RP 6853. The unapproved offering documents listed Shultz as MIP's "Manager," while the approved documents stated that Harvest Midwest Group would fulfill that role. RP 2565, 6858. Finally, the unapproved and approved offering documents contained differing methods for the distribution of profits. RP 2567, 6859. The unapproved offering documents

[Footnote Continued on Next Page]

and February 2009, which totaled $1.1 million: (1) Keith Loven, January 22, 2008, $500,000, (2) Charles McCue, August 13, 2008, $100,000, (3) Carol Chumley, November 17, 2008, $100,000, (4) Howard Gibson, December 2, 2008, $300,000, and (5) Marshall Davis, February 19, 2009, $100,000. RP 26, 6375-6376. Two other registered representatives, who were named as respondents in the complaint, were responsible for the remaining 26 direct sales. RP 26-27, 6375-6376. Shultz did not make any direct sales. At least two of the five individuals to whom Mielke made direct sales, Chumley and Davis, were Mielke's customers at Brookstone Securities prior to purchasing the MIP membership interests. RP 4549-4552, 4681-4683.

### C. Mielke and Shultz Place the Proceeds from MIP's Offering with Hedge Funds Involved in a Fraudulent Offering Scheme

MIP invested the proceeds of the offering in two hedge funds, Vestium Equity Fund, LLC ("Vestium Equity Fund") and Arcanum Equity Fund, LLC ("Arcanum Equity Fund"). RP 1899, 6858. Mielke testified that Vestium and Arcanum Equity Funds were "basically the same company" and explained that the hedge funds purchased and sold "medium term notes." RP 1899. MIP's offering documents describe medium term notes as "debt securities issued by corporations, typically with a maturity ranging from [one] to 10 years, but which may have other maturities." RP 6858.

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[Cont'd]

explained that the investors would receive 50 percent of the profits, but only after MIP paid its expenses and donated the first 10 percent of the profits to Harvest Foundation, Inc., a tax-exempt subsidiary of Harvest Holding Company. RP 2567. The approved private placement memorandum divided profits equally between Harvest Midwest Group and MIP's investors, without any subtractions for expenses or donations. RP 6859.

This brief cites the final, approved version of the offering documents, which Brookstone Securities reviewed, and subsequently approved, in June and August 2009, respectively. RP 6853-6952. *See infra* Part II.D.

In December 2010, the Commission initiated a civil injunctive action against the managers of Vestium and Arcanum Equity Funds in Florida district court. *See SEC v. Buckhannon*, Litigation Release No. 21787, 2010 SEC LEXIS 4397, at *1 (Dec. 21, 2010). The Commission alleged that, from April 2008 through April 2010, the hedge funds' managers used the hedge funds as part of a fraudulent offering scheme, which raised $34 million from 101 investors throughout the United States and Canada. *See id.* As a result of the Commission's injunctive action, Vestium and Arcanum Equity Funds' managers were barred as investment advisers, brokers, dealers, municipal securities dealers, and transfer agents. *E.g. Dale E. St. Jean*, Initial Decisions Release No. 442, 2011 SEC LEXIS 4053, at *18-20 (Nov. 17, 2011). Neither Mielke nor Shultz was named as a defendant in the Commission's injunctive action, and the record contains no evidence that they played a role in Vestium and Arcanum Equity Funds' fraudulent offering scheme.

Before the Commission initiated its injunctive action, MIP transferred its entire investment in Vestium and Arcanum Equity Funds to a company called Shea Mining and Milling, LLC ("Shea Mining and Milling"). RP 1935. Shea Mining and Milling mills precious metals. RP 1935, 1949-1950.

### D. Mielke and Shultz Approach Brookstone Securities for Approval After They Already Had Begun Selling the Securities to Customers of the Firm

Mielke formed MIP in January 2008, and made his direct first sale of the company's membership interests that same month. RP 2345, 2739. Shultz joined MIP in September 2008 and immediately assumed responsibility for the administration and operation of the company. RP 6873-6874. Nearly one year after Mielke formed MIP and sold his first membership interest, and three months after Shultz joined the company and began managing the company's operations, Mielke and Shultz approached their broker-dealer, Brookstone Securities, to obtain permission to sell MIP's membership interests through the firm. RP 1202-1203.

### 1. Mielke and Shultz Discuss the Offering with Brookstone Securities' President

In December 2008, Mielke, Shultz, Mielke's attorney (Steve Goodman), and another registered representative met in Orlando, Florida, with Antony Turbeville, the President of Brookstone Securities. RP 1195, 1202-1203. The purpose of the meeting was to discuss the sale of MIP's membership interests through Brookstone Securities. RP 1202-1203. Turbeville testified that Mielke and Shultz described MIP and the offering as an investment for institutional investors involving "medium-term notes" that was "extremely safe" and that offered "high return[s] to the investor[s]" and "high commission[s]" to sales representatives. RP 1204. Turbeville was skeptical and directed Mielke and Shultz to submit the proposal to David Locy, Brookstone Securities' Chief Compliance Officer and the principal responsible for reviewing and approving the sale of private placements through the firm. RP 1204-1205, 1250. Turbeville testified that there was no indication that Mielke and Shultz were already promoting and selling MIP's membership interests when the meeting occurred in December 2008. RP 1207.

### 2. Brookstone Securities' Chief Compliance Officer Approves the Offering 17 Months After the Sales of Membership Interests Begin

Turbeville received electronic copies of the private placement memorandum and operating agreement for MIP on January 8, 2009. RP 6623-6625. On January 9, 2009, Turbeville forwarded the offering documents to David Locy and Denise Zumbrun, another compliance officer at Brookstone Securities. RP 6623.

Locy reviewed the private placement memorandum and found it to be "totally inadequate." RP 1265. Locy informed Mielke that he could not approve the private placement memorandum at that time because the private placement memorandum was incomplete and contained insufficient disclosures. RP 1266. Locy recommended that Mielke find an attorney familiar with securities offerings to assist with revisions to the offering documents. RP 1266.

Locy testified that he did not have any idea that Mielke and Shultz were selling membership interests when they discussed the private placement memorandum's deficiencies in January or February 2009. RP 1266-1267.

After this initial interaction, Locy testified that he did not hear anything further about MIP "for a long time." RP 1265. Eventually, in June 2009, Mielke gave Locy a revised private placement memorandum, operating agreement, selling agreement, and subscription agreement. RP 1267-1268. On June 26, 2009, Locy approved the selling agreement, which authorized representatives registered with Brookstone Securities to sell membership interests in MIP.[5] RP 1268-1269, 2685-2688. Locy approved the private placement memorandum for distribution on August 13, 2009.[6] RP 1285-1287, 6853.

### 3. Brookstone Securities Fires Mielke and Shultz for the Unauthorized Sales of MIP's Membership Interests

In November 2009, Brookstone received a call from FINRA inquiring about Mielke's and Shultz's sales of MIP's membership interests. RP 1294-1295. It was only then that Brookstone Securities learned of their private sales. RP 1207, 1266-1267. Denise Zumbrun, the compliance officer, testified that Turbeville and Locy were "surprised and pissed" when they found out that Mielke and Shultz already had been selling the membership interests to customers

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[5] Locy approved the offering documents and selling agreement, but Turbeville signed the selling agreement on behalf of Brookstone Securities. RP 2685-2688.

[6] The offering documents contain a handwritten approval date of August 13, "2008." RP 6853. Locy testified that he made that handwritten notation on the offering documents, and that the "2008" was a "typographical error." RP 1286. Locy reiterated his testimony that the approval date of MIP's offering was August 13, 2009. RP 1286-1287. Locy's contemporaneous notes from meetings with Mielke support his testimony. RP 4153-4163. Locy's handwritten meeting notes begin with a meeting with Mielke on July 11, 2009, after the firm had approved the selling agreement. RP 1274-1275, 4153. The notes end on August 24, 2009, with handwritten notes documenting a telephone call between Locy and Mielke. RP 1283-1284, 4161. Locy called Mielke to inform him that the private placement memorandum had been approved for sale through Brookstone Securities. RP 1283-1284, 4161.

of the firm. RP 2199. Brookstone Securities immediately fired Mielke and Shultz for participating in the unapproved securities sales. RP 2492, 3254.

### E. Mielke and Shultz Fail to Disclose Their Ownership and Management of MIP on Brookstone Securities' Outside Business Interests Schedules

Brookstone Securities' written supervisory procedures required that all representatives registered with the firm disclose all outside business activities and certify annually that they were not engaged in any outside business activity for which they had not received formal approval from the firm. RP 2522, 2526, 2530, 2533. In April 2008, Mielke completed Brookstone Securities' annual certification concerning outside business activities, the Outside Business Interests Schedule. RP 2917. By April 2008, Mielke had made his first sale of membership interests to an investor, and MIP had raised $500,000 from the offering. RP 2739. Mielke, however, certified that he was not engaged in any undisclosed outside business activities, and he did not include any information on the Outside Business Interests Schedule about MIP or the offering. RP 2917.

Mielke and Shultz each completed Outside Business Interests Schedules in April 2009.[7] RP 2919-2920, 3258-3259. Shultz testified that he consulted with Mielke when he received the Outside Business Interests Schedule, and that he completed his own schedule and a schedule on behalf of Mielke. RP 2165-2166, 2170-2171. Shultz also stated that the language on the schedule came from Mielke, and that he wrote exactly what Mielke told him to write. RP 2166. By April 2009, MIP had sold membership interests to 22 investors and raised more than $3.13 million in capital. RP 2739. When Shultz completed the Outside Business Interests Schedules, however, he wrote only, "in the planning stages of . . . working with an investment group dealing

[7] Mielke and Shultz received compensation as the owners of MIP. RP 6859, 6873. Shultz also received a monthly salary of $1,000 for serving as the Chief Financial Officer of the company. RP 2109-2110. MIP provided the "bulk" of Mielke's income. RP 1705-1706.

in medium term notes." RP 2920, 3259. Neither Mielke nor Shultz provided any information concerning their employment with, or receipt of compensation from, MIP on the Outside Business Interests Schedules. RP 2919-2920, 3258-3259.

### F. Shultz Misuses Investor Funds by Improperly Distributing Profits to Harvest Midwest Group

As MIP's Chief Financial Officer, one of Shultz's primary responsibilities was to calculate the profits that MIP's investments in Vestium and Arcanum Equity Funds generated for the company. RP 2136. Once Shultz calculated the profits earned for a particular period, he was responsible for dividing the profits between MIP and the investors. RP 2136.

In September 2009 and October 2009, MIP received $374,500 in investments from three customers – Wanda Hendrix, Lloyd Harris, and Mildred Harris. RP 2739, 2876. These funds were to be invested in Vestium or Arcanum Equity Fund. Shultz, however, did not invest the funds. Instead, Shultz left the funds in MIP's checking account, and in a series of withdrawals between September 2009 and November 2009, misallocated $45,000 to Harvest Midwest Group. RP 2876-2878. Shultz described the payments to Harvest Midwest Group as "Part of [P]rofits" or "Part of Harvest Profits." Shultz conceded that he mistakenly paid Harvest Midwest Group more profits than he should have, and he attributed the mistake to "bad accounting." RP 2144-2148.

Brad Pund, an accountant that MIP hired to assist with the company's books and records, testified that he discovered the accounting error while reviewing MIP's books and records in June 2010. RP 2177-2178. Pund explained that he rectified the error with a cash infusion from Harvest Holding Company to MIP. RP 2177-2178.

### G. Shultz Fails to Ensure That the Sales of MIP's Membership Interests Are Recorded in Brookstone Securities' Books and Records

Shultz was the Chief Financial Officer of MIP and the individual responsible for reviewing and approving investors' documentation. RP 2117-2118. Once Brookstone Securities approved the sales of MIP membership interests in June 2009, it was incumbent upon Shultz to ensure that Brookstone Securities received sales documentation to record the sales.[8] RP 2117-2118, 2685-2688. In nine transactions between August and October 2009, investors purchased over $1.47 million of MIP's membership interests. RP 2739. Shultz did not route any of the sales documentation to Brookstone Securities. RP 2135.

### H. Mielke Fails to Respond Completely and Timely to FINRA's Requests for Information and Documents

On January 14, 2010, Mielke provided on-the-record testimony to FINRA staff. RP 1989, 2401-2490. After Mielke appeared for the interview, a FINRA examiner sent Mielke's attorney a request for information and documents to follow-up on statements that Mielke had made during his testimony. RP 2945-2948. For example, Mielke testified that Brookstone Securities was aware that he was selling membership interests in MIP to customers of the firm, that the firm had authorized him to promote and sell the interests, and that correspondence between his attorney for the offering, Steve Goodman, and representatives of Brookstone Securities substantiated his claim. RP 2429, 2945. On January 22, 2010, the examiner sent the request, which was made pursuant to FINRA Rule 8210, to Mielke's attorney. RP 2945-2948.

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[8] Brookstone Securities' written supervisory procedures stated that all approved private securities transactions should be recorded in the firm's books and records. RP 2523, 2527, 2531, 2534. Locy also testified, and his contemporaneous meetings notes underscore, that all sales of MIP's membership interests should be processed through Brookstone Securities for recording in the firm's books and records. RP 1271, 1276, 4153.

The request detailed categories of information and documents that Mielke should produce, including: (1) correspondence between Steve Goodman and Brookstone Securities, (2) Mielke's personal bank account statements and tax returns, including his check registers and documentation of the compensation that he received from MIP, (3) documentation of the due diligence that Mielke claimed to have conducted prior to promoting the offering, and (4) a listing of investors that purchased the membership interests, including an accounting of the funds received from the investors and profits paid to the investors. RP 2945-2948. The request required that Mielke respond on or before February 5, 2010. RP 2948. On February 15, 2010, after requesting (and receiving) an extension of the production deadline, Mielke's attorney produced copies of MIP's offering documents and Mielke's tax returns for 2007 and 2008. RP 2953-2954, 2973-3181.[9]

On February 19, 2010, the FINRA examiner sent a second letter to Mielke's attorney to inform him that Mielke's response was incomplete because Mielke did not provide a response for several categories of information or documents listed in the request. RP 2963. The examiner's letter stated that the request was "final," and that "[t]he previously requested materials must arrive in this office on or before March 5, 2010." RP 2963. Mielke sent no documents or response by March 5, 2010.

For nearly two years, Mielke provided no additional information or documents in response to FINRA's requests. Two months before the hearing began, however, Mielke's attorney submitted an email with a spreadsheet that contained investor and profit information. RP 6641-6647. Mielke's attorney sent the email on January 18, 2012, and followed-up with

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[9] The extension allowed Mielke to produce several categories of documents on February 12, 2010, with the balance of the documents due on February 19, 2010. RP 2953-2954.

several subsequent emails, containing information and documents, between January 19, 2012, and February 27, 2012. RP 6641-6742. These subsequent emails provided FINRA with updated copies of Mielke's tax returns, investor logs, and disbursement information from MIP. RP 6641-6742.

To date, Mielke still has not produced several categories of information and documents from FINRA's original request on January 22, 2010. RP 2945-2948. Mielke has yet to produce the correspondence between Steve Goodman and Brookstone Securities, check registers, copies of interest payment checks to the investors, or documents pertaining to his compensation for selling the membership interests.

### I. Shultz Fails to Appear Timely to Provide FINRA with His On-the-Record Testimony

On December 3, 2009, a FINRA examiner sent Shultz a letter pursuant to FINRA Rule 8210, requesting that he appear to provide on-the-record testimony in FINRA's Chicago district office on December 18, 2009. RP 3289-3291. Soon thereafter, the examiner rescheduled Shultz's appearance to coincide with Mielke's scheduled appearance because Mielke and Shultz intended to travel together to provide the testimony. RP 3293-3296. Shultz's appearance therefore was rescheduled to occur in Louisville on January 15, 2010, the day after Mielke was scheduled to provide his testimony. RP 3293.

When Mielke's testimony concluded on January 14, 2010, Mielke's attorney, who then was representing both Mielke and Shultz, stated that he would have a conflict of interest if he also represented Shultz during his testimony. RP 3305-3306. The attorney withdrew, leaving Shultz without counsel, and the FINRA examiner adjourned Shultz's on-the-record testimony to enable him to retain new counsel. RP 3305-3306. Shultz's on-the-record testimony was rescheduled to take place in FINRA's Chicago district office on February 18, 2010. RP 3310-

3312. Shultz then requested and received an extension, which rescheduled his on-the-record testimony for March 5, 2010. RP 3314-3316.

On March 3, 2010, however, Shultz's new counsel sent the examiner a letter, stating that Shultz would not appear for his on-the-record testimony. RP 3319-3320. The letter explained that Shultz's "familial situation makes traveling extremely difficult,"[10] and noted that Harvest Holding Company was awaiting the results of an accounting audit that would render Shultz's testimony "moot." RP 3320. The attorney requested a postponement of Shultz's on-the-record testimony until FINRA received and reviewed the results of the audit. RP 3320.

The examiner responded to the letter from Shultz's attorney the following day. RP 3321. The examiner denied Shultz's request for a postponement and explained that Shultz's failure to appear to provide testimony may result in disciplinary action. RP 3321. Shultz's attorney replied. RP 3323-3324. He stated that he informed Shultz of the ramifications of failing to appear, that Shultz was choosing not to attend, and that Shultz wanted to know "where to send his license." RP 3324. Shultz did not appear to provide testimony on March 5, 2010, and offered no cooperation with FINRA's request for nearly two years. On February 17, 2012—a month before the hearing in this disciplinary proceeding, and concerned about the collateral impact that disciplinary sanctions might have on his ability to manage MIP—Shultz finally appeared to provide testimony. RP 2101, 2097-2098, 6743-6824.

## III. PROCEDURAL HISTORY

FINRA initiated the investigation of Mielke and Shultz in October 2009, after a FINRA examiner discovered evidence of Mielke's and Shultz's sales of MIP's membership interests

[10] Shultz testified that his daughter and wife have serious health issues that require his full-time attention. RP 2063-2064.

during a routine examination of their branch office at Brookstone Securities. RP 1501. Enforcement filed the complaint against Mielke and Shultz in April 2011. RP 6-28.

### A. The Proceedings Before the FINRA Hearing Panel

After a four-day hearing in March 2012, a FINRA Hearing Panel issued a decision concluding that Mielke and Shultz engaged the misconduct alleged in the complaint. RP 7023-7078. The Hearing Panel found that, as alleged, Mielke and Shultz participated in undisclosed private securities transactions, engaged in undisclosed outside business activities, and made false statements on Brookstone Securities' Outside Business Interests Schedules. RP 7030-7049. The Hearing Panel also concluded that, as alleged, Mielke failed to respond completely and timely to FINRA's requests for information and documents, and Shultz misused customer funds, caused his firm to maintain inaccurate books and records, and failed to appear timely for on-the-record testimony. RP 7049-7058.

The Hearing Panel imposed three bars on Mielke and Shultz, one for their undisclosed private securities transactions and outside business activities, a second for their false statements on the Outside Business Interests Schedules, and a third for their violations of FINRA Rule 8210. RP 7058-7069, 7073-7077. The Hearing Panel declined to assess additional sanctions against Shultz for his other violations, in light of the bars that were imposed. RP 7069-7073.

### B. The Proceedings Before the NAC

Mielke and Shultz appealed the Hearing Panel's decision to the NAC. RP 7091-7092. The NAC affirmed the Hearing Panel's findings, each of the bars imposed, and modified some of the remaining sanctions. RP 7556.

#### 1. The NAC Bars Mielke and Shultz for Participating in Undisclosed Private Securities Transactions and Outside Business Activities

The NAC found that Mielke and Shultz each participated in private securities transactions and outside business activities, received compensation in connection with the transactions and

activities, and participated in the transactions and activities without providing written notice to Brookstone Securities or receiving Brookstone Securities' written approval. RP 7564-7572. In reaching this conclusion, the NAC reviewed the Hearing Panel's credibility determinations concerning the testimony of Brookstone Securities' President, Antony Turbeville, and the firm's Chief Compliance Officer, David Locy, and determined that the documentary evidence thoroughly supported Turbeville's and Locy's testimony concerning Mielke's and Shultz's private securities transactions and outside business activities. RP 7568-7569.

For sanctions, the NAC determined that Mielke's role in the private securities transactions and outside business activities, his direct sales to investors, including customers of Brookstone Securities, and his disciplinary history were highly aggravating factors that supported the imposition of a bar. RP 7585.

The NAC considered Shultz's role in MIP, found that Shultz was integral to the operation and administration of the company, and determined that Shultz intentionally engaged in the undisclosed private securities transactions and outside business activities because he knew that he was required to provide written notice prior to participating in private securities transactions or outside business activities. RP 2129- 2130, 7585-7586. The NAC concluded that Shultz's participation in the private securities transactions and outside business activities were egregious, and the NAC barred Shultz for the misconduct. RP 7585-7586.

### 2. The NAC Bars Mielke and Shultz for Making False Statements on Brookstone Securities' Outside Business Interests Schedules

The NAC found that Mielke and Shultz made false statements on Brookstone Securities' Outside Business Interests Schedules when they failed to disclose their activities with MIP. RP 7575-7576. The NAC found that Mielke's and Shultz's responses on the Outside Business Interests Schedules did not identify MIP or the offering, and failed to give Brookstone Securities

any notice that Mielke and Shultz already were promoting and selling membership interests in MIP. RP 7576.

The NAC's sanctions discussion emphasized that Mielke and Shultz intentionally gave false statements that minimized their activities with MIP while they negotiated with Brookstone Securities to sell the company's membership interests through the firm. RP 7588-7589. The NAC also found that the false statements were important and prevented Brookstone Securities from properly monitoring Mielke's and Shultz's private securities transactions and outside business activities. RP 7588-7589. The NAC barred Mielke and Shultz for their false statements on Brookstone Securities' Outside Business Interests Disclosures. RP 7588-7589.

### 3. The NAC Affirms Shultz's Additional Violations

The NAC found that Shultz misused MIP's investors' fund because he withdrew investor funds that were intended for investment in Vestium and Arcanum Equity Funds and improperly diverted those funds as profits to MIP's Manager, Harvest Midwest Group. RP 7577. In discussing sanctions for this violation, the NAC found that Shultz's misuse of the investors' funds was a "mistake" due to "poor accounting" practices. RP 7589. The NAC indicated that it would fine Shultz $10,000 and suspended him in all capacities for one year for misusing MIP's investors' funds. RP 7590. The NAC, however, declined to impose these sanctions in light of the bars that it had imposed for Shultz's other misconduct. RP 7590.

The NAC also determined that Shultz failed to ensure that the sales of MIP's membership interests were recorded in Brookstone Securities' books and records, once the firm approved the sales of the securities through the firm in June 2009. RP 7574-7575. Here again, the NAC declined to impose sanctions in light of the bars that it had imposed for Shultz's other misconduct. RP 7587.

### 4. The NAC Bars Mielke and Shultz for Failing to Adhere to FINRA's Requests Made Pursuant to FINRA Rule 8210

Finally, the NAC concluded that Mielke failed to respond completely and timely to FINRA's requests for information and documents, and that Shultz failed to appear timely for on-the-record testimony. RP 7578-7581. Before the NAC, Mielke and Shultz conceded liability for their failures under FINRA Rule 8210, but argued that the NAC should not bar them for their violations of the rule. RP 7303. The NAC fully considered Mielke's and Shultz's arguments in favor of mitigation, but found that their arguments did not warrant the imposition of sanctions that were less than a bar. RP 7591-7593.

## IV. ARGUMENT

The standards articulated in Section 19(e) of the Securities Exchange Act of 1934 ("Exchange Act") provide that the Commission must dismiss Mielke's and Shultz's application for review if it finds that Mielke and Shultz engaged in conduct that violated FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Exchange Act, and FINRA imposed sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition.[11] 15 U.S.C. § 78s(e).

The record, which contains the credible testimony of two witnesses and a wealth of corroborating documentary evidence, conclusively supports that Mielke and Shultz participated in undisclosed private securities transactions and outside business activities. The record similarly supports that Mielke's and Shultz's unfettered securities sales and outside business activities resulted in a variety of other FINRA rule violations, including Mielke's and Shultz's false statements on Brookstone Securities' Outside Business Interests Schedules, Shultz's misuse

[11] Neither Mielke nor Shultz contends that FINRA applied its rules in a manner inconsistent with the Exchange Act or that FINRA's sanctions impose an undue burden on competition.

of MIP's investors' funds, Shultz's failure to ensure that the securities sales were recorded in Brookstone Securities' books and records, and Mielke's and Shultz's refusal to cooperate in FINRA's investigation of the securities sales and outside business activities.

On appeal, Mielke and Shultz have not presented any new or legitimate reason to disturb the NAC's findings of liability, or the sanctions that the NAC imposed. The NAC's findings of liability are sound, and the NAC's sanctions, three bars, are appropriately remedial. The Commission should dismiss Mielke's and Shultz's application for review.

### A. Mielke and Shultz Participated in Private Securities Transactions Without the Required Written Notice or Written Approval

NASD Rule 3040 prohibits any person associated with a firm from participating in any manner in private securities transactions outside the regular course or scope of his employment without providing prior written notice to the firm.[12] NASD Rule 3040(a), (b), (e)(1). If an associated person is compensated for the transactions, he must receive the firm's written permission before engaging in the transactions. NASD Rule 3040(c)(1).

There is no dispute that Mielke's and Shultz's promotion and sales of MIP's membership interests constituted private securities transactions. The transactions involved securities (MIP's membership interests) and were outside the regular course and scope of Mielke's and Shultz's employment with Brookstone Securities. *See SEC v. Parkersburg Wireless LLC*, 991 F. Supp. 6, 8 (D.D.C. 1997) (concluding that "memberships" in a wireless cable limited liability company

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[12] Mielke's and Shultz's participation in the undisclosed private securities transactions also violated NASD Rule 2110 and FINRA Rule 2010. NASD Rule 2110, FINRA's ethical standards rule, states that, "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." In December 2008, NASD Rule 2110 was transferred without change to FINRA's consolidated rulebook and codified as FINRA Rule 2010. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50, at *32-33 (Oct. 2008). A violation of any FINRA rule, including NASD Rule 3040, violates NASD Rule 2110 and FINRA Rule 2010. *See Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999).

constitute securities); *Don A. Long*, Admin. Proceeding No. 3-5788, 1980 SEC LEXIS 2352, at *32-33 (June 30, 1980) (finding that membership interests in investment clubs are investment contracts and securities).

It is also undisputed that Mielke's and Shultz's activities in conjunction with MIP's offering constituted participation within the meaning of NASD Rule 3040. *See Mark H. Love*, 57 S.E.C. 315, 319-21 (2004) (holding that representative participated in private securities transactions where he solicited investments, told customers of his own interest in investing, and facilitated funds transfers); *Gluckman*, 54 S.E.C. at 182-183 (explaining that "[t]he reach of Conduct Rule 3040 is very broad, encompassing the activities of 'an associated person who not only makes a sale but who participates 'in any manner' in the transaction'").

Mielke founded, owned, and managed MIP, the investment vehicle for the private securities transactions. RP 6873-6874. Mielke decided that MIP should conduct an offering to raise capital for the company. Mielke hired Steve Goodman, a securities attorney, to prepare the offering documents and recruited Shultz and another registered representative to promote and sell the membership interests in MIP. RP 1559-1601, 1887, 1898, 2068-2069. Mielke conducted due diligence on investing in Vestium and Arcanum Equity Funds and handled the relationships with the hedge funds' managers. RP 1899-1902. Between January 2008 and June 2009—when Brookstone finally approved sales of MIP interests through the firm—Mielke participated in 22 undisclosed private securities transactions, which raised a total of $3.14 million for MIP.[13] RP 2739, 6375-6376. Mielke also directly sold $1.1 million in MIP's

[13] The figures in the introduction and Part II.C (31 transactions, totaling $4.62 million) cover the entire period under review, January 2008 through October 2009. The NAC did not base its findings of private securities transactions violations on transactions that occurred after June 2009, which was the date that Brookstone Securities approved Mielke's and Shultz's sales of MIP's membership interests through the firm. RP 1268-1269, 2685-2688.

membership interests to five individuals, at least two of whom were customers of Brookstone Securities.[14] RP 2739, 4549-4552, 4681-4683, 6375-6376.

Shultz managed MIP, served as the company's Chief Financial Officer, and acted as the primary administrator of MIP and its offering. RP 6873-6874. Shultz "handled the money" and performed general office and accounting duties essential to the operation of MIP. RP 1809, 2346. Shultz reviewed and approved the investors' subscription agreements, calculated the earnings owed to each investor, and filed documents on behalf of MIP with the Commission. RP 1810, 2136, 6384, 6392.

An associated person's liability for participating in undisclosed private securities transactions under NASD Rule 3040 is predicated upon the associated person's failure to provide the member firm with written notice before the transactions occur. *See Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *23 (May 13, 2011) (explaining that applicant should have provided his member firm with written notice of the private securities transactions *before* engaging in the transactions) (emphasis added); *see also* NASD Rule 3040(a), (b). When selling compensation is a component of the private securities transactions (as it was for MIP), the associated person also is required to obtain the firm's written approval before participating in the transactions. *See* NASD Rule 3040(c)(1). The record conclusively proves that Mielke and Shultz violated NASD Rule 3040 because they participated in private securities transactions without the required written notice and written approval.

On appeal before the Commission, Mielke's and Shultz's attempts to revive their old arguments are as unconvincing now as they were before the NAC.

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[14] Each of Mielke's five direct sales occurred before Brookstone Securities approved the sales of the securities through the firm in June 2009. RP 2739.

### 1. The NAC Correctly Credited Antony Turbeville's and David Locy's Testimony and Found that Mielke and Shultz Did Not Provide Written Notice of the Sales to Brookstone Securities

Mielke and Shultz do not claim to have complied with the requirements of NASD Rule 3040. To the contrary, they tacitly concede that they did not satisfy the rule's unambiguous requirement of advance written notice to the firm of any private securities transaction. On appeal before the Commission, Mielke and Shultz insist that Brookstone Securities knew of their participation in MIP's offering from the time that the offering began, through discussions that Mielke and Shultz had with individuals at the firm. Applicant Br. at 7-8. Even if true, oral notice and oral approval do not satisfy the requirements of NASD Rule 3040. *See Friedman*, 2011 SEC LEXIS 1699, at *15-16 (rejecting applicant's claims that oral notice satisfies NASD Rule 3040). NASD Rule 3040 plainly requires that the associated person shall provide his or her firm with "written notice" and shall obtain approval for the transactions "in writing." (emphasis added).

Regardless, Mielke's and Shultz's vague and self-serving statements that they provided oral notice about their sales of MIP interests are contrary to the credible testimonial evidence in the record. Antony Turbeville, Brookstone Securities' President, and David Locy, the firm's Chief Compliance Officer each testified that Brookstone Securities did not approve Mielke's and Shultz's sales of MIP's membership interests until Turbeville signed the selling agreement in June 2009. RP 1268-1269, 2685-2688. When asked whether he had approved the sales of the membership interests when he met with Mielke and Shultz in the Orlando airport in December 2008, Turbeville answered, "Absolutely not." RP 1203.

Locy corroborated Turbeville's testimony. Locy testified that he did not hear of MIP or the offering until late 2008 or early 2009, after Turbeville attended the Orlando airport meeting and asked him to review the sales of the membership interests through Brookstone Securities.

RP 1262. Turbeville testified that when he began his review of MIP's offering in January 2009, he had "no reason to suspect that [Mielke and Shultz] would be selling an unapproved . . . offering." RP 1267.

Relying on Turbeville's and Locy's testimony, the Hearing Panel found that, "Turbeville and Locy, on behalf of Brookstone, neither knew [of] nor approved [MIP's] sales prior to Locy's final approval of the selling agreement in June 2009." RP 7044. The Hearing Panel also expressly rejected Mielke's and Shultz's uncorroborated version of events. The Hearing Panel stated, "The [Hearing] Panel finds unreasonable, and does not credit, [Mielke's and Shultz's] uncorroborated claims that they gave written and oral notice to Brookstone, and that Turbeville and Locy gave oral approval to Mielke [and] Shultz . . . to sell interests in Midwest." RP 7044.

The Hearing Panel's credibility determinations, which were based on its observations of Turbeville's, Locy's, Mielke's, and Shultz's testimony and demeanor, are entitled to deference and should not be disturbed absent substantial evidence for doing so. *See Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at *27 (Oct. 6, 2008) (stating that Commission defers to fact-finder's credibility determinations), *aff'd in relevant part*, 592 F.3d 147 (D.C. Cir. 2010).

The Hearing Panel's credibility determinations are particularly compelling here. As an initial matter, the documentary evidence corroborates Turbeville's and Locy's testimony. The selling agreement, approving the sales of MIP's membership interests through Brookstone Securities, is dated June 2009. Locy's contemporaneous notes of meetings with Mielke and Shultz, finalizing the terms of Brookstone Securities' participation in the offering, are dated from July 2009 through August 2009. And the private placement memorandum has Locy's handwritten notation approving the memorandum for public distribution in August 2009. RP 2688, 4153-4163, 6853.

Second, Mielke's and Shultz's own statements corroborate Turbeville's and Locy's account of events and undercut their arguments to reject Turbeville's and Locy's testimony. Mielke and Shultz admit that Turbeville advised them that Brookstone Securities would need to review and approve the offering materials for MIP before Mielke and Shultz would be permitted to sell the membership interests through the firm. Applicants' Br. at 7. Mielke and Shultz acknowledge that, after they met with Turbeville at the Orlando airport in December 2008, Turbeville directed them to send MIP's offering documents to Locy for review and approval. Applicants' Br. at 7. Mielke and Shultz concede that Locy informed them that the offering documents that they submitted to Brookstone Securities in January or February 2009 were inadequate, and that Locy "rejected" the documents and advised them to seek assistance from an attorney with an expertise in securities offerings. Applicants' Br. at 7. Mielke and Shultz also admit that Locy did not approve the offering documents until June 2009. Applicants' Br. at 8.

Third, the lack of evidence concerning Mielke's and Shultz's purported notice to Brookstone Securities is telling. Mielke and Shultz assert that there are emails between their securities attorney, Steve Goodman, and Brookstone Securities that document Mielke's and Shultz's disclosure of the private securities transactions and Brookstone Securities' approval of the transactions. Applicants' Br. at 7-8. But that argument goes well beyond Mielke's own testimony about the issue.[15] And despite Mielke's and Shultz's claims of the existence of emails, they have produced no such records.

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[15] In their brief, Mielke and Shultz state that, "Mielke testified that he later saw email exchanges between [Steve] Goodman and Brookstone regarding the offering." Applicants' Br. at 7. That statement misconstrues, however, Mielke's testimony concerning these purported emails. Mielke testified only to have "know[n] there was emails going back between the two of them [David Locy and Steve Goodman]." RP 1913. Mielke did not claim to have read any of these emails, Mielke did not provide any testimony concerning the content of the emails, and Mielke and Shultz did not call Steve Goodman as a witness to testify about the purported email

[Footnote Continued on Next Page]

Finally, common sense should prevail.[16] Brookstone Securities had nothing to gain by allowing Mielke and Shultz to sell the membership interests without the firm's supervision. To the contrary, as Turbeville testified, "[a]nything sold puts the firm at risk . . . so we have risk, [but] we have no revenue from the product being sold . . . it just doesn't make much business sense." RP 1207-1208. Indeed, when Turbeville and Locy found out about Mielke's and Shultz's unapproved sales of MIP's membership interests, they were "surprised and pissed," and Brookstone Securities immediately fired Mielke and Shultz for participating in the unapproved securities sales. RP 2199, 2492, 3254. The record demonstrates that Mielke and Shultz did not provide Brookstone Securities with written notice of their participation in the sales of MIP's membership interests.

**2. Only Written Notice Satisfies the Requirements of NASD Rule 3040**

Seeking to undermine the Hearing Panel's reasoned credibility findings concerning Turbeville's and Locy's testimony, Mielke and Shultz argue that they provided Brookstone Securities with constructive notice of the private securities transactions when they were the subject of a routine internal audit in December 2008, completed Brookstone Securities' Outside Business Interests Schedules in April 2008 and April 2009, and submitted the draft private placement memorandum to Locy in January or February 2009. Applicants' Br. at 9-10.

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exchanges. In short, Mielke and Shultz have proffered no evidence of any emails between Goodman and Locy, other than Mielke's unsubstantiated claims that such emails existed.

[16] Mielke and Shultz do not address why, if Brookstone Securities approved their private securities transactions as they claimed, they were not providing Brookstone Securities with records concerning their sales as required by the firm's procedures for private securities transactions. Nor do they explain why Brookstone Securities continued to allow Mielke and Shultz to sell securities privately when Brookstone Securities rejected the initial set of offering documents.

Mielke's and Shultz's arguments demonstrate a deeply flawed understanding of the disclosure requirements of NASD Rule 3040. Constructive notice and constructive approval, similar to oral notice and oral approval, do not satisfy the requirements of NASD Rule 3040. *Cf. Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *15 (July 1, 2008) (rejecting applicant's argument that constructive notice satisfies the written notice requirements of NASD Rule 3030). The rule requires actual written notice and written approval prior to an associated person's participation in any private securities transaction involving compensation. NASD Rule 3040(b)-(c)(1).

Mielke's and Shultz's constructive notice arguments also fall flat for several factual reasons. The internal audit report from December 2008, which Mielke and Shultz point to as a document that notified Brookstone Securities of their participation in MIP's offering, is problematic. RP 6601-6622. Neither Mielke nor Shultz prepared the audit report or submitted the report to Brookstone Securities. RP 6601. The report was prepared by an examiner at Brookstone Securities named Brian Sweeney. RP 6601. The audit report was issued in December 2008, 11 months after Mielke and Shultz began promoting and selling MIP's membership interests. RP 2739, 6601. The audit report also was not an affirmative written notice from Mielke and Shultz to Brookstone Securities to inform the firm of their participation in the private securities transactions because the report did not explain MIP or Mielke's and Shultz's roles in the company's securities offering. RP 6616. The audit report simply flagged Mielke's and Shultz's participation in the offering for further firm review and advised Brookstone Securities to "[l]ook into Vestium [Equity Fund]." RP 6616. Contrary to Mielke's and Shultz's suggestion, the audit report advised Brookstone Securities that a further review of Vestium Equity Fund was required because Brookstone Securities was unaware of Mielke's and

Shultz's participation in the offering when the internal audit occurred in December 2008. RP 1202-1203, 1266-1267, 6616.

Mielke's and Shultz's assertion that their responses on Brookstone Securities' "Outside Business Interests Schedules" notified the firm of the private securities transactions fail for similar reasons. Applicants' Br. 9-10. Mielke completed Outside Business Interests Schedules in April 2008 and April 2009. RP 2917, 2919-2920. Shultz completed the disclosure in April 2009. RP 3258-3259. The schedule that Mielke submitted to Brookstone Securities in April 2008 did not mention anything about MIP or the offering. RP 2917. The schedules that Mielke and Shultz submitted in April 2009, which were prepared by Shultz at Mielke's direction and completed and worded identically, stated that Mielke and Shultz were, "[i]n the planning stages of . . . working with an investment group dealing in medium term notes." RP 2919-2920, 3258-3259. The schedules that Mielke and Shultz completed in April 2009 did not identify MIP or the offering, and failed to give Brookstone Securities any notice that Mielke and Shultz were actively promoting and selling membership interests in MIP. RP 2919-2920, 3258-3259.

Finally, Mielke and Shultz claim that the draft private placement memorandum put Brookstone Securities on notice that they were "*currently* market[ing] and sell[ing] [MIP's] investments through licensed agents throughout the United States." Applicants' Br. at 9 (emphasis added). Yet Mielke and Shultz did not submit the private placement memorandum until January or February 2009, more than one year after they had begun promoting and selling MIP's membership interests. *See* NASD Rule 3040(b) (explaining that the associated person should provide written notice *prior to* participating in the transactions) (emphasis added). Submission of the private placement memorandum, standing alone, also did not contain all of the information necessary for written notice under NASD Rule 3040. NASD Rule 3040 requires that the associated person "describ[e] in detail the proposed transaction and the person's

proposed role therein and stat[e] whether he has received or may receive selling compensation in connection with the transaction." NASD Rule 3040(b). The draft private placement memorandum did not meet these criteria.

There is no documentary evidence to support that Mielke and Shultz notified Brookstone Securities of their sales of MIP's membership interests prior to engaging in those sales. Mielke and Shultz also have failed to identify any evidence that warrants setting aside the Hearing Panel's credibility determinations. In short, there is no credible support for Mielke's and Shultz's contention that they notified Brookstone Securities of their participation in MIP's offering before June 2009.

### 3. Mielke and Shultz Did Not Meet the Standards Necessary to Establish an Advice of Counsel Defense

Mielke and Shultz argue that they relied on the attorney who assisted them with MIP's securities offering to ensure their compliance with FINRA's rules. Applicants' Br. at 6. Mielke's and Shultz's purported reliance on counsel to fulfill their compliance obligations with FINRA is unproven and does not absolve them of misconduct.

Foremost, a violation of NASD Rule 3040 is not a scienter-based cause of action. *See Alvin W. Gebhart, Jr.*, 58 S.E.C. 1133, 1166 (2006) ("A showing of scienter is not required for a violation of [NASD] Rule 3040."), *aff'd*, 255 F. App'x 254 (9th Cir. 2007). Because a Rule 3040 violation occurs when an associated person fails to take a required action, the advice of counsel defense is not available. *See Dist. Bus. Conduct Comm. v. Goldsworthy*, Complaint No. C05940077, 2000 NASD Discip. LEXIS 13, at *35-36 (NASD NAC Oct. 16, 2000) (explaining that advice of counsel is only available as a defense when scienter is an element of the offense), *aff'd*, Exchange Act Rel. No. 45926, 2002 SEC LEXIS 1279 (May 15, 2002).

Even if the defense was available—which it is not—Mielke and Shultz failed to establish it. To do so requires demonstrating that they: (1) completely disclosed their intended action to

the attorney; (2) requested the attorney's advice of the legality of the intended action; (3) received counsel's advice that the conduct would be legal; and (4) relied in good faith on the advice. *See Goldsworthy*, 2000 NASD Discip. LEXIS 13, at *35.

Mielke's and Shultz's testimony concerning their discussions with counsel was, at best, scant and incoherent. Mielke testified, "I don't know what I discussed with Steve [Goodman] in the aspect of what was to be disclosed and what wasn't to be disclosed. I just – I mean I can tell you that we were communicating." RP 1926. Shultz's testimony was equally unconvincing. In response to questions concerning his conversations with Goodman about Brookstone Securities' approval of MIP's offering, Shultz testified, "[T]hrough meetings with him [Steve Goodman], face-to-face, and with also conference calls, he [Steve Goodman] let us know that he had been discussing Midwest with Brookstone all along and that they knew that we were operating Midwest." RP 2077.

Mielke's and Shultz's testimony demonstrates, and their lack of documentary evidence of their emailed discussions with Goodman reinforce, that neither Mielke nor Shultz discussed their disclosure requirements under NASD Rule 3040 with Goodman, or that Goodman provided them with any advice concerning their compliance with FINRA's rules.[17] Mielke and Shultz did not meet the standards necessary to establish an advice of counsel defense.

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[17] Mielke's and Shultz's advice of counsel defense also represents a thinly-veiled attempt to shift blame to Goodman for their disclosure and compliance failures. But Mielke and Shultz cannot delegate responsibility for their regulatory compliance. An associated person "has responsibility for his or her own actions and cannot blame others for [his or] her own failings." *Justine Susan Fischer*, 53 S.E.C. 734, 741 n.4 (1998); *see Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *73 (Jan. 30, 2009) (stating that associated persons must take responsibility for compliance with regulatory requirements), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). Mielke and Shultz failed to comply with FINRA's rules when they failed to give Brookstone Securities written notice of their participation in private securities transactions.

NASD Rule 3040 stresses that an associated person who participates in private securities transactions must provide his or her member firm with written notice. *See* NASD Rule 3040 (a), (b). The rule applies with equal force to each person associated with a FINRA member firm.[18] The record establishes that neither Mielke nor Shultz provided Brookstone Securities with written notice of their extensive private securities transactions, and that Brookstone Securities did not provide written approval of Mielke's and Shultz's participation in the transactions until June 2009, months after they had begun selling the membership interests. The Commission should affirm the NAC's findings of liability for Mielke's and Shultz's undisclosed private securities transactions, in violation of NASD Rules 3040 and 2110 and FINRA Rule 2010.

**B. Mielke and Shultz Engaged in Undisclosed Outside Business Activities**

NASD Rule 3030 provides that no person registered with a member "shall be employed by, or accept compensation from, any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member . . . in the form required by the member." The purpose of NASD Rule 3030 is to provide member firms with prompt written notice of outside business activities so that the members' objections, if any, to such activities can be raised at a meaningful time and the member can exercise appropriate supervision as necessary under the applicable law. *See*

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[18] Shultz testified that he had no direct information concerning the issue of notice or approval of the transactions, but worked under the "assumption" that Brookstone Securities knew about the transactions and had approved them. RP 2133. Shultz may not claim Mielke's purported notice as his own. NASD Rule 3040 applies to all persons associated with firms and requires each person who participates in a private securities transaction to provide prior written notice to his firm and, where the individual receives or may receive selling compensation, obtain the firm's approval. *See Friedman*, 2011 SEC LEXIS 1699, at *18-19. Shultz had an independent obligation to provide Brookstone Securities with written notice of his private securities transactions and obtain written approval prior to participating in the transactions. *See id.*

*Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Rel. No. 26063, 1988 SEC LEXIS 1841, at *3 (Sept. 6, 1988).

The NAC correctly found that Mielke and Shultz violated NASD Rule 3030 because they owned and managed MIP, received compensation for their activities with the company, and failed to provide Brookstone Securities with prompt written notice of the activities.[19] RP 7573. *See Sears*, 2008 SEC LEXIS 1521, at *15 (finding that respondent's failure to notify member firm of outside business activities constituted a violation of FINRA's rules).

Confronted with the lack of written notice of their outside business activities, Mielke and Shultz argue that their responses on Brookstone Securities' Outside Business Interests Schedules provided the firm with sufficient written notice of their outside business activities. Applicants' Br. at 10. As Mielke and Shultz acknowledge, however, their responses on the Outside Business Interests Schedules were far from "perfect" and did not adequately notify Brookstone Securities of the extent and depth of their involvement with MIP. Applicants' Br. at 10. The schedules did not even inform Brookstone Securities of Mielke's and Shultz's employment with, or receipt of compensation from, MIP, and consequently, failed to satisfy the written notice requirements of NASD Rule 3030. RP 2919-2920, 3258-3259.

Mielke and Shultz also assert that Brookstone Securities had constructive notice of their activities with MIP because "Brookstone was in frequent communication with . . . [Mielke or Shultz] or their counsel about Midwest." Applicants' Br. at 10. Constructive notice does not

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[19] Mielke's and Shultz's undisclosed ownership, management, and employment with MIP violated NASD Rule 3030. Mielke and Shultz do not dispute that the statements on the Outside Business Interests Schedules were false. Applicants' Br. at 14. Rather, on appeal before the Commission, they request a reduction in the sanctions that the NAC imposed. Mielke and Shultz explain that the "problems" with "the compliance questionnaires must be considered in light of the ongoing communications between Midwest and Brookstone." Applicants' Br. at 14.

satisfy NASD Rule 3030, which requires prompt, *written* notice. NASD Rule 3030 (emphasis added); *see Sears*, 2008 SEC LEXIS 1521, at *15. Mielke's and Shultz's arguments also are directly at odds with Turbeville's and Locy's corroborated and credited hearing testimony. Turbeville and Locy insisted that they were unaware of Mielke's and Shultz's undisclosed private securities transactions and outside business activities and fired them when they learned of the misconduct. RP 1207, 1266-1267. Finally, Mielke's and Shultz's constructive notice arguments are at odds with the documentary evidence in the record.

Brookstone Securities was not aware that Mielke and Shultz were engaged in outside business activities. The Commission should affirm the NAC's findings that Mielke violated NASD Rules 3030 and 2110 and FINRA Rule 2010, and that Shultz violated NASD Rule 3030 and FINRA Rule 2010.

### C. Mielke and Shultz Made False Statements on Brookstone Securities' Outside Business Interests Schedules

FINRA Rule 2010, and its predecessor NASD Rule 2110, are FINRA's ethical standards rules. *See John Joseph Plunkett*, Exchange Act Release No. 73124, 2014 SEC LEXIS 3396, at *2 n.2 (Sept. 16, 2014). The reach of NASD Rule 2110 and FINRA Rule 2010 is not limited to rules of legal conduct, but states a broad ethical principle. *See Timothy L. Burkes*, 51 S.E.C. 356, 360 n.21 (1993), *aff'd*, 29 F.3d 630 (9th Cir. 1994) (Table). NASD Rule 2110 and FINRA Rule 2010 apply broadly to all business-related misconduct, regardless of whether the misconduct involves securities. *See id.* The principal consideration of NASD Rule 2110 and FINRA Rule 2010 is whether the misconduct "reflects on the associated person's ability to comply with the regulatory requirements of the securities business." *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002).

A registered representative's failure to disclose material information to his firm violates NASD Rule 2110 and FINRA Rule 2010 and is misconduct that calls into question the registered

representative's "ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public." *Dep't of Enforcement v. Davenport*, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *9-10 (NASD NAC May 7, 2003); *cf. Dep't of Enforcement v. Skiba*, Complaint No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13 (FINRA NAC Apr. 23, 2010) (holding that registered representative's submission of false and misleading forms to his member firm violated NASD Rule 2110). Mielke's and Shultz's responses on Brookstone Securities' Outside Business Interests Schedules were false and did not disclose their sales of MIP's membership interests or their employment with the company.

Mielke completed an Outside Business Interests Schedule in April 2008, but did not include any information on the schedule about MIP or the offering. RP 2917. Mielke and Shultz each completed Outside Business Interests Schedules in April 2009. RP 2919-2920, 3258-3259. In that instance, they each wrote, "in the planning stages of . . . working with an investment group dealing in medium term notes." The information that Mielke provided on the Outside Business Interests Schedule in April 2008, and that Mielke and Shultz provided in April 2009, was false because Mielke's and Shultz's activities with MIP were well beyond the "planning stages" at that point in time. By April 2008, MIP had raised $500,000 from the offering. RP 2739. By April 2009, the company had completed 22 transactions and raised more than $3.13 million in capital. RP 2739. When Mielke and Shultz completed the pertinent schedules, they each already owned interests in MIP. RP 6873-6874. Mielke was MIP's President and Chief Executive Officer, and Shultz was the company's Chief Financial Officer. RP 6873-6874. Indeed, when Mielke and Shultz completed the Outside Business Interests Schedules, MIP already was a fully operational business, which had begun promoting and selling membership interests. RP 2739.

The record demonstrates that Mielke and Shultz made false statements on Brookstone Securities' Outside Business Interests Schedules. The Commission should affirm the NAC's findings that Mielke violated NASD Rule 2110, and that Mielke and Shultz violated FINRA Rule 2010.[20]

**D. Shultz Misused Customer Funds**

FINRA Rule 2150 states that, "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." An associated person misuses customer funds when he or she fails to apply the funds, or uses the funds for some purpose other than, as directed by the customer. *See Dep't of Enforcement v. Patel*, Complaint No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-26 (NASD NAC May 23, 2001).

Between September 2009 and November 2009, Shultz withdrew funds that investors had placed with MIP for investment in Vestium and Arcanum Equity Funds and improperly diverted $45,000 of those funds to Harvest Midwest Group as profits. RP 2144-2148, 2876-2878. Shultz acknowledges that he misused the investors' funds, and that he paid Harvest Midwest Group more profits than he should have. Applicants' Br. at 12. RP 2144-2148. Shultz attributes his misuse of the funds to "bad accounting,." An explanation that the NAC accepted. RP 2144-2148. The record demonstrates that Shultz misused customer funds. The Commission should affirm the NAC's findings that Shultz violated FINRA Rules 2150 and 2010.

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[20] Mielke made the false statements on the schedule that he completed in April 2008 and April 2009, and violated NASD Rule 2110 and FINRA Rule 2010. RP 2917, 2919-2920. Shultz made misstatements on the Outside Business Interests Schedule that he completed in April 2009, and violated FINRA Rule 2010. RP 3258-3259.

### E. Shultz Caused Brookstone Securities to Maintain Inaccurate Books and Records

NASD Rule 3110 requires firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by SEC Rule 17a-3. The record keeping format, medium, and retention period shall comply with Rule 17a-4 under the [Exchange Act]." NASD Rule 3110.

Exchange Act Rules 17a-3 and 17a-4 require member firms to make and keep current certain books and records relating to their business activities. *See* 17 C.F.R. § 240.17a-3(a)(6)(i) (2014), § 240.17a-4(b)(1) (2014). Causing a firm to enter false information in its books or records violates NASD Rule 3110. *See North Woodward Fin. Corp.*, Exchange Act Release No. 60505, 2009 SEC LEXIS 2796, at *23 (Aug. 14, 2009) (explaining that individuals violate NASD Rules 3110 and 2110 when they fail to comply with Exchange Act Rules 17a-3 or 17a-4, or are otherwise responsible for creating and maintaining inaccurate books and records).

Once Brookstone Securities approved Mielke's and Shultz's participation in the private securities transactions in June 2009, it was incumbent upon Shultz to ensure that Brookstone Securities received the securities sales documentation, so the firm could record the sales in its books and records. RP 2117-2118, 2685-2688.

In nine transactions between July and October 2009, investors purchased over $1.47 million of MIP's membership interests. RP 2739. Shultz did not route any of the documentation related to these sales to Brookstone Securities. RP 2135. Shultz's failure caused Brookstone Securities to maintain inaccurate books and records and prevented the firm's books and records from reflecting basic, yet essential, information about the sales of MIP's membership interests, information such as the investors' names, the dates and amounts of the investments, and the names of the registered representatives that recommended the sale.

Shultz argues that he is not liable for the violation of NASD Rule 3110 because his securities attorney, Steve Goodman, did not provide him with instructions on how to handle the sales documentation. Applicants' Br. at 11. Shultz does not satisfy the standards to establish an advice of counsel defense.[21] *See Goldsworthy*, 2000 NASD Discip. LEXIS 13, at *35. Shultz not only failed to demonstrate that he sought and followed the advice of counsel in failing to provide Brookstone Securities with the sales documentation, but the record also supports that Shultz's purported reliance would not be reasonable under the circumstances presented.

As an initial matter, the transmission of sales documentation to a firm's main office for processing and recording in the firm's books and records is a matter of due course, which falls squarely within a registered representative's compliance obligations. Moreover, Locy and Brookstone Securities' written supervisory procedures informed Shultz of his recordkeeping obligations and explained to him that all approved private securities transactions should be processed through the firm and recorded in the firm's books and records.[22] RP 1271, 1276, 2523, 2527, 2531, 2534, 2538, 4153.

The record demonstrates that Shultz did not send the sales documentation to Brookstone Securities, as he was required to do, and, consequently, failed to ensure that the sales of MIP's membership interests were properly recorded in Brookstone Securities' books and records. RP

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21 An advice of counsel defense is not available for Shultz's violation of NASD Rule 3110 because NASD Rule 3110 is not a scienter-based violation. *See Goldsworthy*, 2000 NASD Discip. LEXIS 13, at *35 (explaining that an advice of counsel defense is only available for scienter-based violations); *Joseph G. Chiulli*, 54 S.E.C. 515, 522 (2000) (finding no scienter requirement for a violation of NASD Rule 3110).

22 Shultz similarly argues that Brookstone Securities' selling agreement with MIP did not direct him to transmit the sales documentation to the firm's main office for processing and recording in the books and records. Applicants' Br. at 11. As explained above, Shultz had sufficient notice of his compliance obligations with regard to the handling of MIP's sales documentation.

2135. Shultz's failure caused Brookstone Securities to maintain inaccurate books and records, and Shultz violated NASD Rule 3110. His purported claims of ignorance provide him with no basis for relief. *See ACAP Financial, Inc.*, Exchange Act Release No. 70046, 2013 SEC LEXIS 2156, at *82 (July 26, 2013) (rejecting respondent's claims of lack of understanding and ignorance of FINRA's rules). The Commission should affirm the NAC's findings that Shultz violated NASD Rule 3110 and FINRA Rule 2010.

**F. Mielke and Shultz Violated FINRA Rule 8210**

FINRA Rule 8210 requires that associated persons provide information orally or in writing with respect to any matter involved in a FINRA investigation, complaint, examination, or proceeding. Because FINRA lacks subpoena power, it must rely on FINRA Rule 8210 "to police the activities of its members and associated persons." *Joseph Patrick Hannan*, 53 S.E.C. 854, 858-59 (1998). "Delay and neglect on the part of members and their associated persons undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12-13 (Apr. 11, 2008).

FINRA Rule 8210 is unequivocal and grants FINRA broad authority to obtain from an associated person information regarding matters that are involved in FINRA's investigation. *See Dep't of Enforcement v. Fawcett*, Complaint No. C9A040024, 2007 NASD Discip. LEXIS 2, at *11-12 (NASD NAC Jan. 8, 2007), *aff'd*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *1 (Nov. 8, 2007). Associated persons therefore must cooperate fully in providing FINRA with information and may not take it upon themselves to determine whether the information FINRA has requested is material. *See CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009) (stating that associated persons

"may not ignore NASD inquiries . . . nor take it upon themselves to determine whether information is material to an NASD investigation of their conduct").

### 1. Mielke Failed to Respond Completely and Timely to FINRA's Requests for Information and Documents

Mielke appeared for on-the-record testimony in January 2010, and during his testimony, stated that there were documents that evidenced his disclosure of the private securities transactions to Brookstone Securities. RP 2429. FINRA sent Mielke requests for information and documents to follow-up on Mielke's statements and provide him with the opportunity to substantiate his claims. RP 2945-2948. Mielke provided some responsive documents, but failed to provide information or documents for the bulk of the information and document requests. RP 2973-3181. Two years passed, and, in January 2012, approximately two months before the hearing occurred, Mielke decided to reinitiate his communication with FINRA concerning the information and document requests. RP 6641-6742.

Notwithstanding the belated response and document production, Mielke has failed to respond to the majority of FINRA's requests for information and documents. Mielke did not produce any documents that substantiated his claims that he notified Brookstone Securities of the private securities transactions and outside business activities. Mielke also failed to produce correspondence between Steve Goodman and Brookstone Securities, check registers, copies of interest payment checks to the investors, or documents pertaining to his compensation for selling the membership interests. The record demonstrates that Mielke failed to respond completely and timely to FINRA's requests for information and documents. The Commission should affirm the NAC's findings that Mielke violated FINRA Rules 8210 and 2010.[23]

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[23] Mielke acknowledges that he violated FINRA Rules 8210 and 2010, but requests that the Commission reduce the sanctions because of his health issues. Applicants' Br. at 11-12.

### 2. Shultz Failed to Appear Timely for On-the-Record Testimony

FINRA asked Shultz to appear for testimony in January 2010. RP 3293. When a conflict of interest arose for the attorney who, at that time, represented both Mielke and Shultz, FINRA adjourned Shultz's testimony to afford him the opportunity to obtain new counsel. RP 3305-3306. FINRA rescheduled Shultz's testimony for March 2010. RP 3314-3316.

Shultz obtained new counsel, but refused to appear for testimony. In fact, through his new counsel, Shultz advised FINRA that he would *not* be appearing to provide testimony, and that FINRA should provide him with an address to surrender his securities license. RP 3324.

Shultz waited two years and decided to communicate with FINRA about providing his testimony in the weeks leading up to the hearing. RP 6743-6824. Shultz appeared for testimony in February 2012, and, at the hearing, testified that he only appeared because the consequences of not providing the testimony may include a bar, which would prohibit him from serving as a managing member of MIP. RP 2101, 6743-6824. The record demonstrates that Shultz failed to appear timely for on-the-record testimony. The Commission should affirm the NAC's findings that Shultz violated FINRA Rules 8210 and 2010.[24]

## G. The Sanctions Imposed by the NAC Are Consistent with FINRA's Sanction Guidelines and Are Neither Excessive Nor Oppressive

Section 19(e)(2) of the Exchange Act guides the Commission's review of FINRA's sanctions, and provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003).

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[24] Shultz acknowledges that he violated FINRA Rules 8210 and 2010, but requests that the Commission reduce the sanctions because of his healthcare concerns for his wife and daughter. Applicants' Br. at 11-12.

In considering whether sanctions are excessive or oppressive, the Commission gives significant weight to whether the sanctions are within the allowable range of sanctions under the Guidelines. *See Vincent M. Uberti*, Exchange Act Rel. No. 58917, 2008 SEC LEXIS 3140, at *22 (Nov. 7, 2008) (noting that Guidelines serve as "benchmark" in Commission's review of sanctions). The Commission considers the principles articulated in the Guidelines and has regularly affirmed sanctions that are within the recommended ranges contained in the relevant Guidelines. *See Robert Tretiak*, 56 S.E.C. 209, 233 n.46 (2003).

To assess sanctions, the NAC consulted the Guidelines for each violation at issue,[25] applied the principal and specific considerations outlined in the Guidelines, and considered all relevant evidence of aggravating and mitigating circumstances. RP 7581-7594. The resulting sanctions are neither excessive nor oppressive. The Commission therefore should affirm the sanctions that the NAC imposed.

### 1. The Commission Should Affirm the Bar for Mielke's and Shultz's Private Securities Transactions and Outside Business Activities

The NAC imposed a unitary sanction, a bar, for Mielke's and Shultz's undisclosed private securities transactions and outside business activities. RP 7582-7586. The Commission should affirm these sanctions.

The NAC began its analysis mindful of the fact that the Guidelines permit the "batching" of multiple violations that result from a single systemic problem. *See Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 4) (adjudicators may aggregate or batch violations to determine sanctions). Although the Guidelines allow for the assessment of

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[25] *See FINRA Sanction Guidelines* (2013 ed.), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf. The cited sections of the Sanction Guidelines are attached as Appendix A.

individual sanctions for multiple violations, the NAC concluded that Mielke's and Shultz's private securities transactions and outside business activities were related, and that the circumstances in the case lent themselves to an aggregation of the two violations to impose a unitary sanction. RP 7582. *See Guidelines*, at 4.

The NAC then consulted the specific Guidelines at issue – those related to private securities transaction and those related to outside business activities. RP 7582-7583. For private securities transactions involving sales over $1 million—like the transactions at issue here—the Guidelines recommend, as a starting point, a fine between $5,000 and $50,000, a suspension of at least one year, or a bar. *See Guidelines*, at 14. The Guidelines stress that the "presence of one or more mitigating or aggravating factors may either raise or lower the above-described sanctions." *Id.* For engaging in undisclosed outside business activities, the Guidelines suggest a suspension of up to one year, where the undisclosed outside business activities are accompanied by aggravating conduct. *See id.* at 13. In egregious outside business activities cases, such as those involving a substantial volume of activity, the Guidelines recommend a longer suspension, or a bar. *See id.* The Guidelines for private securities transactions and outside business activities each enumerate a number of specific considerations, which the NAC reviewed and found to weigh in favor of a bar. RP 7583-7586.

The NAC considered the self-serving nature of Mielke's and Shultz's misconduct. RP 7583. The NAC explained that Mielke's and Shultz's proprietary interests in MIP, and the financial benefit that they derived from their undisclosed activities with the company, constituted an aggravating factor. *See Guidelines*, at 13 (Principal Considerations in Determining Sanctions, No. 5).

The NAC also considered whether Mielke and Shultz provided oral notice, and obtained oral approval, to participate in the private securities transactions or outside business activities,

and the NAC concluded that there was no oral notice or approval of the securities transactions or business activities. *See Guidelines*, at 15 (Principal Considerations in Determining Sanctions, No. 9). To the contrary, the NAC determined that Mielke and Shultz intentionally concealed their activities with MIP from Brookstone Securities while they negotiated with the firm to sell the securities through the firm. *See id.* (Principal Considerations in Determining Sanctions, No. 13).

Finally, the NAC considered the fact that the managers of the Vestium and Arcanum Equity Funds were found to have violated the securities laws.[26] The NAC determined that the hedge funds' securities laws violations presented an additional aggravating factor. *See Guidelines*, at 14 (Principal Considerations in Determining Sanctions, No. 4).

After detailing the many aggravating factors that accompanied Mielke's and Shultz's undisclosed private securities transactions and outside business activities, the NAC examined Mielke's and Shultz's individual roles in the misconduct to determine the appropriate sanctions for each of them. RP 7584-7586.

**a. Mielke Orchestrated the Entire Enterprise and Raised Over $3 Million for His Company**

The NAC analyzed Mielke's role in the misconduct and concluded that he orchestrated the entire enterprise at issue. RP 7584-7585. Mielke founded MIP. RP 2345-2346, 6873-6874. Mielke decided that MIP should conduct an offering to raise capital for the company. Mielke hired Steve Goodman, a securities attorney, to prepare the offering documents and recruited Shultz and another registered representative to promote and sell the membership interests in

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[26] Mielke and Shultz assert that there has been no finding that MIP violated any law or harmed any investor. Applicants' Br. at 13. Mielke's and Shultz's assertion overlooks the fact that they jeopardized MIP's investor assets by placing them with hedge fund managers engaged in a fraudulent offering scheme. *See Buckhannon*, 2010 SEC LEXIS 4397, at *1.

MIP. RP 1559-1601, 1887, 1898, 2068-2069. *See Guidelines*, at 15 (Principal Considerations in Determining Sanctions, No. 12). Mielke also conducted due diligence on investing in Vestium and Arcanum Equity Funds and handled the relationships with the hedge funds' managers. RP 1899-1902.

The NAC considered Mielke's relevant disciplinary history,[27] and the fact that Mielke previously participated in undisclosed private securities transactions. RP 2499-2500, 7585. The NAC determined that Mielke's disciplinary history was a significant aggravating factor in the determination of sanctions, particularly because Mielke was serving a six-month suspension for his past misconduct when he engaged in the same kind of misconduct in this case. *See Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2), 6 (Principal Considerations in Determining Sanctions, No. 1).

The NAC also analyzed the depth and length of Mielke's misconduct and found that the application of those factors underscored the need for a bar. RP 7584. Mielke began promoting and selling the membership interests in MIP in January 2008. RP 2345, 2379, 6375-6376. During the 17-month period that Mielke engaged in the misconduct, Mielke participated in 22 private securities transactions and raised a total of $3.14 million for MIP. RP 2379. Mielke even directly sold $1.1 million in MIP's membership interests to five individuals, at least two of

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[27] In April 2008, while associated with Brookstone Securities, Mielke was the subject of a FINRA disciplinary action, which included findings that he previously had engaged in undisclosed private securities transactions. RP 2499-2500, 2503-2512. Mielke settled the disciplinary action by consenting to findings that he participated in undisclosed private securities transactions, failed to provide prior written notice of the proposed transactions to his firm, failed to obtain the firm's written approval to participate in the transactions, and failed to disclose that he referred customers of the firm to a third-party entity. RP 2499. Mielke was fined $5,000 and suspended in all capacities for six months for the violations. RP 2500. Mielke's suspension was in effect from May 19, 2008, through November 18, 2008, which encompasses the period that the misconduct occurred. RP 2500.

whom were customers of Brookstone Securities. RP 6375-6376, 4549-4552, 4681-4683. *See Guidelines*, at 15 (Principal Considerations in Determining Sanctions, No. 11). The NAC found that Mielke's role in the private securities transactions and outside business activities, his direct sales to investors, including customers of Brookstone Securities, and his disciplinary history were highly aggravating factors that supported the imposition of a bar.[28] RP 7585. The sanctions that the NAC imposed against Mielke were appropriately remedial.

**b. Shultz Was Integral to the Operation of MIP**

Although the NAC concluded that Mielke orchestrated the offering, the NAC determined that Shultz was integral to the administration and operation of MIP. RP 7585. Shultz was MIP's Chief Financial Officer. RP 2346, 6874. He maintained a beneficial interest in Harvest Holding Company and served as a company director. RP 6873-6874. In several instances, MIP's offering documents even identify Shultz as the "Manager" of the offering. RP 2565. Shultz also managed financial and accounting matters that were essential to the operation of MIP's offering. He reviewed and approved the investors' subscription agreements, calculated the earnings owed to each investor, and filed documents on behalf of MIP with the Commission. RP 1810, 2136, 6384, 6392.

The NAC reviewed the extent and length of Shultz's misconduct and noted that his misconduct continued for nine months, and that he participated in 19 undisclosed private securities transactions, which raised a total of $2.29 million for MIP. RP 2739, 7586.

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[28] Mielke and Shultz argue that the NAC erred in barring them for the undisclosed private securities transactions and outside business activities "when the most important consideration, protection of the public, leads to a lesser sanction." Applicants' Br. at 13-14. Mielke and Shultz, however, fail to appreciate that the lack of customer harm is not a mitigating factor in the assessment of sanctions. *See Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *35 n.62 (Feb. 20, 2014). To the extent there was no actual customer harm, it is only fortuitous, given that Mielke and Shultz acted without supervision and placed the investors' funds in a fraudulent offering.

The NAC also found that Shultz's misconduct was intentional, which is an aggravating factor. RP 7586. Shultz testified that he knew that he was required to provide written notice prior to participating in private securities transactions or outside business activities, and he understood that his undisclosed employment with MIP was contrary to FINRA's rules and Brookstone Securities' written supervisory procedures. RP 2129-2130. After contemplating Shultz's integral role in MIP and his intentional participation in the undisclosed private securities transactions and outside business activities, the NAC concluded that a bar was the proper sanction for Shultz's misconduct. RP 7586. The Commission should affirm the NAC's sanctions against Shultz.

### 2. The Commission Should Affirm the Bar for Mielke's and Shultz's Misstatements on the Compliance Disclosures

The NAC barred Mielke and Shultz for their false statements on Brookstone Securities Outside Business Interests Schedules. RP 7587-7589. The Commission should affirm these sanctions.

Although there are no specific Guidelines concerning misstatements on firm compliance disclosures, the NAC followed the Commission's and Guidelines' endorsement for the use of analogous Guidelines to determine sanctions for violations that the Guidelines do not specifically address. *See Dep't of Enforcement v. Braff*, Complaint No. 2007011937001, 2011 FINRA Discip. LEXIS 15, at *26-27 (FINRA NAC May 13, 2011) (endorsing NAC's reliance on analogous Guidelines), *aff'd*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *1 (Feb. 24, 2012); *Guidelines*, at 1 (Overview) (encouraging adjudicators to look to analogous Guidelines).

The NAC applied the Guidelines for Forgery and/or Falsification of Records to address Mielke's and Shultz's false statements on Brookstone Securities' Outside Business Interests Schedules. *See Guidelines*, at 37; *see also Braff*, 2011 FINRA Discip. LEXIS 15, at *26-27

(applying the Guidelines related to the falsification of records where the respondent made false statements on firm compliance disclosures concerning outside brokerage accounts). RP 7587-7588. In egregious cases, the Guidelines for the falsification of records recommend a bar. *See Guidelines*, at 37.

The NAC applied the Guidelines and determined that Mielke's and Shultz's false statements on Brookstone Securities' Outside Business Interests Schedules were egregious, intentional, and concealed their private securities transactions and outside business activities. RP 7587-7589. The NAC also took great care to individually evaluate Mielke's and Shultz's false statements on the compliance disclosures. RP 7588-7589. The resulting sanctions are well-reasoned and tailored to each applicant's misconduct.

**a. Mielke Blatantly Input False Statements on the Compliance Disclosures to Conceal His Activities with MIP**

Mielke made materially false statements on the Outside Business Interests Schedules that he submitted to Brookstone Securities in April 2008 and April 2009. RP 2917, 2919-2920. The schedules that Mielke submitted to Brookstone Securities did not mention anything about MIP or the offering. RP 2917, 2919-2920.

By the time that Mielke completed the Outside Business Interests Schedule in April 2008, MIP had raised $500,000 through Mielke's direct sale of membership interests to investor, Keith Loven. RP 2739. When Mielke completed the disclosure in April 2009, MIP had completed 22 transactions and raised more than $3.13 million in capital. RP 2739. Mielke also had completed all five of his direct sales, raising $1.1 million in offering proceeds. RP 2739.

Mielke's false statements concerning his activities with MIP were important and prevented Brookstone Securities from properly monitoring Mielke's activities. *See generally Braff*, 2011 FINRA Discip. LEXIS 15, at *20 (explaining that comprehensive and accurate disclosure permits the firm to monitor the outside activities of its registered representatives).

The record also demonstrates that Mielke gave false statements on the compliance disclosures to intentionally minimize his activities with MIP while he negotiated with Brookstone Securities over the sales of the company's membership interests through the firm. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13). As his subsequent firing demonstrated, if Mielke would have disclosed fully his participation in the private securities transactions, it would have jeopardized his efforts to have Brookstone Securities approve sales of MIP's membership interests through the firm.

On appeal, Mielke states that his responses on the Outside Business Interests Schedules must be viewed "in light of the ongoing communications between Midwest and Brookstone." Applicants' Br. at 14. He similarly asserts that he had a good-faith belief that his responses on the compliance disclosures were accurate because, as he claims, Brookstone Securities already was aware of the sales of the membership interests. Applicants Br. at 14. Once again, the record betrays Mielke's position.

Mielke began selling membership interests in January 2008. RP 2739. He completed the first Outside Business Interest Schedule in April 2008. RP 2917. Mielke, however, did not even meet with Turbeville to discuss MIP, the offering, or Brookstone Securities' potential role in the offering until December 2008. RP 1195, 1202-1203.

When Mielke completed the Outside Business Interest Schedule in April 2009, he did not even mention MIP or the offering. RP 2919-2920. Mielke's argument concerning his disclosures in April 2009 fails to account for the fact that he was promoting the sales of the membership interests while he negotiated the terms of the sales with the firm. RP 2739. His arguments also ignore the fact that, by April 2009, he had distributed unapproved offering materials to potential investors, completed 22 transactions, and directly sold membership interests to customers. RP 2739. If Brookstone Securities were aware of Mielke's activities, as

he claims, common sense dictates that he would have provided a fuller response on the Outside Business Interests Schedules, providing, at a minimum, MIP's name on the disclosure. RP 2917, 2919-2920. Mielke did no such thing.

The NAC determined that Mielke's misconduct was egregious, and that his "dishonesty to his firm reflects directly on his ability to abide by his firm's policies, many of which are designed to protect the public and the firm, and to deal responsibly with the public." *Davenport*, 2003 NASD Discip. LEXIS 4, at *10.

**b. Shultz's False Statements Were Egregious**

The NAC found that Shultz was no passive bystander to the misconduct in this case and that he made intentionally false statements on the Outside Business Interests Schedule that he submitted to Brookstone Securities in April 2009. RP 3258-3259, 7589. The NAC determined that the information that the schedule sought to obtain was important, and that Shultz's false statements on the schedule hindered Brookstone Securities' ability to monitor Shultz's relationship with MIP. RP 7589. *See Braff*, 2011 FINRA Discip. LEXIS 15, at *20. The NAC stressed that, if Shultz had provided more accurate disclosure on the Outside Business Interest Schedule, he may have avoided some of the other missteps that he encountered, such as the poor accounting that led to his misuse of investors' funds or his mishandling of the sales documentation, which resulted in Brookstone Securities maintaining inaccurate books and records. RP 7589.

The NAC contemplated Shultz's relative lack of securities experience and false statements on a single schedule (as opposed to Mielke's two schedules), but the NAC determined that those factors did not lessen the seriousness of his misconduct. RP 7589. The NAC gave similar consideration to Shultz's purported mitigation evidence, i.e., that he was following "Mielke's lead in preparing his answer[s] [on the Outside Business Interests Schedules]."

Applicants' Br. at 15. The NAC, however, rejected Shultz's blame-shifting argument. RP 7589. *See generally Dep't of Enforcement v. Epstein*, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *97 (FINRA NAC Dec. 20, 2007) (rejecting argument that respondent's misconduct resulted from instructions he received from the firm), *aff'd*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *1 (Jan. 30, 2009).

The NAC explained that Shultz was a retired mathematician who had sufficient securities industry and life experiences to differentiate between true and false statements, and that Shultz intentionally chose to give false information to Brookstone Securities. RP 7589. The NAC concluded that Shultz's false statements on the Outside Business Interest Schedule were egregious, and that the Hearing Panel's proposed sanctions, a $10,000 fine and a one-year suspension in all capacities, were insufficient to capture the seriousness of Shultz's misconduct. RP 7589. The NAC barred Shultz for his false statements on Brookstone Securities' Outside Business Interests Schedule. RP 7589. The Commission should affirm the NAC's sanctions.

### 3. The Commission Should Affirm the Bar for Mielke's Failure to Respond Completely and Timely to FINRA's Requests for Information and Documents

The NAC barred Mielke for failing to respond completely and timely to FINRA's requests for information and documents. RP 7591-7592. The NAC determined that Mielke timely appeared for testimony, provided some documents timely in response to the FINRA examiner's request for information and documents, and responded with additional information and documents in an untimely manner.[29] RP 1989, 2401-2490. 2945-2948, 2973-3181. The

[29] Mielke states that FINRA should have considered his violation of FINRA Rule 8210 in light of the fact that he appeared for on-the-record testimony and provided some records. Applicants' Br. at 15-16. FINRA, however, definitively considered these factors in the assessment of sanctions for Mielke's misconduct. The NAC not only credited Mielke with appearing for testimony and providing some documents timely, the NAC also applied the

[Footnote Continued on Next Page]

NAC therefore applied the Guidelines for a partial, but incomplete, response to a request made pursuant to FINRA Rule 8210. RP 7591. In applying that Guideline, the NAC reviewed whether Mielke substantially complied with all aspects of FINRA's requests, and whether there is any evidence of mitigation. RP 7591. The NAC concluded that Mielke did not substantially comply with all aspects of FINRA's request for information and documents, and he did not present any evidence of mitigation to warrant imposing a sanction less than a bar. RP 7591.

Mielke's response to FINRA's requests for information and documents was seriously deficient because he failed to comply with the majority of FINRA's request. In response to the FINRA examiner's request in January 2010, Mielke initially provided only his tax returns. RP 2973-3181. Then, for two years, Mielke provided nothing. As the hearing neared, however, Mielke decided to provide additional information and documents. RP 6641-6647. In a series of piecemeal emails between January 2012 and February 2012, Mielke provided some additional information and produced some additional documents that were responsive to the examiner's requests. RP 6641-6742. These emails provided a brief narrative concerning his activities with MIP, updated copies of his tax returns, investor logs, and disbursement information for MIP. RP 6641-6742.

In most respects, however, the request for information and documents remained unfulfilled. The NAC found that Mielke's response to FINRA's requests for information and documents remains substantially incomplete, that the information and documents that FINRA requested were important to determine whether FINRA should proceed with formal disciplinary

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[Cont'd]

appropriate Guideline for individuals who comply with some aspect of FINRA's investigation. RP 7591.

action against Mielke, and that the information and documents were necessary to assist in FINRA's investigation of MIP and the offering. RP 7591.

Contrary to his suggestion, Mielke's belated response to some of FINRA's requests, and his complete lack of response to other parts of the requests, affected and belabored FINRA's investigation of this matter. Applicants' Br. at 12. For example, Mielke asserted that there were documents that substantiated his claims that he had provided Brookstone Securities with notice of his participation in the private securities transactions and outside business activities, and supported his assertion that the firm had approved his involvement in the transactions. RP 2429. Mielke's failure to respond frustrated FINRA's investigation and curtailed FINRA's ability to verify his claims. *See Elliott M. Hershberg*, 58 S.E.C. 1184, 1190 (2006) ("Failure to comply is a serious violation justifying stringent sanctions because it subverts NASD's ability to execute its regulatory functions.").

Mielke also points to health issues to explain his delayed and deficient response. Applicants' Br. at 11. The NAC acknowledged Mielke's health problems, but explained that Mielke failed to establish that those problems interfered with his ability to respond completely and timely to FINRA's request for information and documents. *See Michael David Borth*, 51 S.E.C. 178, 180 (1992) (stating that failure to provide information fully and promptly undermines FINRA's ability to carry out its regulatory mandate). If Mielke was unable to meet the FINRA examiner's deadline to respond because of his health issues, he was obligated to contact the examiner, explain the delay, and propose alternate arrangements. *See Fawcett*, 2007 SEC LEXIS 2598, at *18 ("As we have often noted, recipients of requests under [FINRA] Rule 8210 must promptly respond to the requests or explain why they cannot."). Mielke's health issues are not mitigating.

The NAC considered the importance of the information requested, the length of time it took Mielke to respond, and the degree of regulatory pressure required to obtain Mielke's response, and concluded that Mielke's failure to respond to FINRA's requests for information and documents was egregious and merited a bar. The NAC's sanctions are commensurate with the Guidelines, and are neither excessive nor oppressive.

#### 4. The Commission Should Affirm the Bar for Shultz's Failure to Appear Timely for On-The-Record Testimony

The NAC barred Shultz for failing to appear timely for on-the-record testimony. RP 7592-7593. Shultz made a deliberate decision not to appear for testimony, changed his mind nearly one year after Enforcement filed the complaint against him, and appeared nearly two years after FINRA sent the original request for on-the-record testimony. When a respondent does not respond to a FINRA Rule 8210 request until after FINRA files a complaint, the Guidelines instruct adjudicators to apply the presumption that the respondent's failure constitutes a complete failure to respond. *See Guidelines*, at 33. Because Shultz's violation constituted a complete failure to respond, the NAC acknowledged the Guidelines' statement that a bar should be the standard sanction.[30] RP 7592. *See Guidelines*, at 33. The NAC also considered whether Shultz proffered any evidence of mitigation. RP 7592. The NAC determined that Shultz did not. RP 7592.

In assessing sanctions, the NAC considered Shultz's claims of serious healthcare concerns for his wife and disabled daughter. Applicants' Br. at 12. RP 7592. The NAC,

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[30] Shultz suggests that his "eventual appearance" for testimony should mitigate his misconduct. It does not. Shultz appeared for testimony after Enforcement issued the complaint. As the Commission has repeatedly explained, "We have emphasized repeatedly that [FINRA] should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant to [FINRA] Rule 8210." *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *12 (Sept. 10, 2010), *aff'd*, 436 F. App'x 31 (2d Cir. 2011).

however, found that Shultz had failed to demonstrate that his wife's and daughter's medical conditions interfered with his ability to provide testimony, and that Shultz made no attempt to comply with FINRA's request for testimony by rescheduling his appearance.[31] *See Fawcett*, 2007 SEC LEXIS 2598, at *9. To the contrary, the NAC determined that Shultz made a deliberate decision to "surrender" his FINRA registration, ignore FINRA's request for on-the-record testimony in March 2010, and appear two years later when he realized the consequences of his failure to appear, i.e., that he may be barred.[32] RP 7592. The NAC considered that Shultz's delay stonewalled FINRA's investigation of MIP and the offering, that it took two years (and the filing of Enforcement's complaint) for Shultz to appear, and that Shultz did not offer any valid reason for his delayed appearance. RP 7593. The NAC's sanctions should be upheld.

### 5. Shultz's Other Recommended Sanctions Are Beyond the Scope of This Appeal

The NAC indicated that it would have fined Shultz $10,000 and suspended him in all capacities for one year for his improper diversion of MIP's investors' funds to Harvest Midwest Group. RP 7589-7590. The NAC did not, however, impose these sanctions in light of the bars imposed on Shultz. Because the NAC did not impose the sanctions, the Commission has no issue before it.

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31 The record also shows that the FINRA examiner accommodated the limitations placed on Shultz's travel because of his wife's and daughter's healthcare concerns. The FINRA examiner originally ordered Shultz to appear to provide testimony in FINRA's district office in Chicago. RP 3289-3291. The examiner rescheduled Shultz's testimony, and relocated it to Louisville, to accommodate Shultz. RP 3293-3296.

32 Shultz claims that his failure to appear was due to his lack of legal representation. Applicants' Br. at 12. But the record demonstrates that Shultz obtained counsel shortly after his first counsel announced his conflict. It was Shultz's new counsel who informed FINRA that Shultz would not testify. RP 3319-3320.

In any event, Shultz is incorrect that his misuse of funds should merit only "minimal" sanctions.[33] Applicants' Br. at 15. RP 7589-7590. The NAC pointed out that Shultz's misuse of the funds resulted from his lack of attention to the funding source of MIP's "profits." RP 7589. The NAC also found it troubling that it took the intervention of a third-party accountant, Brad Pund, and nine months, from September 2009 through June 2010, to discover the accounting error. *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 9). Finally, the NAC considered Shultz's misconduct involved $45,000, a significant amount of funds. *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 18).

As to the sanction indicated, but not imposed, for Shultz's recordkeeping violation, this theoretical point is also not under appellate review. Regardless, Shultz argues that his lawyer never instructed him to send sales documentation to Brookstone. Applicants' Br. at 14. *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 7); *see also Dep't of Enforcement v. Fergus*, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3, at *48 (NASD NAC May 17, 2001) (setting out the advice of counsel standard to determine if the advice may mitigate a respondent's misconduct). As the NAC found, however, Shultz failed to demonstrate that he sought and followed the advice of counsel in failing to provide Brookstone Securities with the sales documentation, and any purported reliance on counsel would not have been reasonable. RP 7587. *See Fergus*, 2001 NASD Discip. LEXIS 3, at *46-47 (rejecting

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[33] Shultz also asserts, for the first time in this appeal, that the NAC should have imposed lighter sanctions because his misuse of the customers' funds did not result in any customer harm. Applicants' Br. at 15. *Cf. Mayer A. Amsel*, 52 S.E.C. 761, 767 (1996) (holding that arguments are waived where raised for the first time on appeal). Shultz's argument is legally and factually inaccurate. As initial matter, the lack of customer harm is not a mitigating factor in the assessment of sanctions. *See Houston*, 2014 SEC LEXIS 614, at *35 n.62. In addition, Shultz's misuse of the funds deprived the investors of the opportunity to have their funds properly utilized and invested in order to earn interest and profits.

respondent's argument that his reliance on counsel was a mitigating factor because the reliance was not reasonable).

Shultz also asserts that Brookstone Securities' selling agreement with MIP did not direct him to route the sales documentation to the firm's main office, and that the firm's lack of direction concerning the handling of the documentation lessens the seriousness of his misconduct. Applicants' Br. at 14. Shultz's resurrection of this argument remains unconvincing. Locy and Brookstone Securities' written supervisory procedures each provided Shultz with sufficient notice of his compliance obligations with regard to the handling of MIP's sales documentation. The NAC's reasoning was sound and should not be overturned.

## V. CONCLUSION

The Commission should affirm the NAC's decision and dismiss Mielke's and Shultz's application for review.

Respectfully Submitted,

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# APPENDIX A

FINRA

Financial Industry Regulatory Authority

# Sanction Guidelines

# Overview

The regulatory mission of FINRA is to protect investors and strengthen market integrity through vigorous, even-handed and cost-effective self-regulation. FINRA embraces self-regulation as the most effective means of infusing a balance of industry and non-industry expertise into the regulatory process. FINRA believes that an important facet of its regulatory function is the building of public confidence in the financial markets. As part of FINRA's regulatory mission, it must stand ready to discipline member firms and their associated persons by imposing sanctions when necessary and appropriate to protect investors, other member firms and associated persons, and to promote the public interest.

The National Adjudicatory Council (NAC), formerly the National Business Conduct Committee, has developed the *FINRA Sanction Guidelines* for use by the various bodies adjudicating disciplinary decisions, including Hearing Panels and the NAC itself (collectively, the Adjudicators), in determining appropriate remedial sanctions. FINRA has published the *FINRA Sanction Guidelines* so that members, associated persons and their counsel may become more familiar with the types of disciplinary sanctions that may be applicable to various violations. FINRA staff and respondents also may use these guidelines in crafting settlements, acknowledging the broadly recognized principle that settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle.

These guidelines do not prescribe fixed sanctions for particular violations. Rather, they provide direction for Adjudicators in imposing sanctions consistently and fairly. The guidelines recommend ranges for sanctions and suggest factors that Adjudicators may consider in determining, for each case, where within the range the sanctions should fall or whether sanctions should be above or below the recommended range. These guidelines are not intended to be absolute. Based on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall outside the ranges recommended and may consider aggravating and mitigating factors in addition to those listed in these guidelines.

These guidelines address some typical securities-industry violations. For violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations.

In order to promote consistency and uniformity in the application of these guidelines, the NAC has outlined certain **General Principles Applicable to All Sanction Determinations** that should be considered in connection with the imposition of sanctions in all cases. Also included is a list of **Principal Considerations in Determining Sanctions**, which enumerates generic factors for consideration in all cases. Also, a number of guidelines identify potential principal considerations that are specific to the described violation.

## General Principles Applicable to All Sanction Determinations

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

   When applying these principles and crafting appropriate remedial sanctions, Adjudicators also should consider firm size[1] with a view toward ensuring that the sanctions imposed are not punitive but are sufficiently remedial to achieve deterrence.[2] (Also see General Principle No. 8 regarding ability to pay.)

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

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

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

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

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

3. **Adjudicators should tailor sanctions to respond to the misconduct at issue.** Sanctions in disciplinary proceedings are intended to be remedial and to prevent the recurrence of misconduct. Adjudicators therefore should impose sanctions tailored to address the misconduct involved in each particular case. Section 15A of the Securities Exchange Act of 1934 and FINRA Rule 8310 provide that FINRA may enforce compliance with its rules by: limitation or modification of a respondent's business activities, functions and operations; fine; censure; suspension (of an individual from functioning in any or all capacities, or of a firm from engaging in any or all activities or functions, for a defined period or contingent on the performance of a particular act); bar (permanent expulsion of an individual from associating with a firm in any or all capacities); expulsion (of a firm from FINRA membership and, consequently, from the securities industry); or any other fitting sanction.

   To address the misconduct effectively in any given case, Adjudicators may design sanctions other than those specified in these guidelines. For example, to achieve deterrence and remediate misconduct, Adjudicators may impose sanctions that: (a) require a respondent firm to retain a qualified independent consultant to design and/or implement procedures for improved future compliance with regulatory requirements; (b) suspend or bar a respondent firm from engaging in a particular line of business; (c) require an individual or member firm respondent, prior to conducting future business, to disclose certain information to new and/or existing clients, including disclosure of disciplinary history; (d) require a respondent firm to implement heightened supervision of certain individuals or departments in the firm; (e) require an individual or member firm respondent to obtain a FINRA staff letter stating that a proposed communication with the public is consistent with FINRA standards prior to disseminating that communication to the public; (f) limit the number of securities in which a respondent firm may make a market; (g) limit the activities of a respondent firm; or (h) require a respondent firm to institute tape recording procedures. **This list is illustrative, not exhaustive, and is included to provide examples of the types of sanctions that Adjudicators may design to address specific misconduct and to achieve deterrence. Adjudicators may craft other sanctions specifically designed to prevent the recurrence of misconduct.**

   The recommended ranges in these guidelines are not absolute. The guidelines suggest, but do not mandate, the range and types of sanctions to be applied. Depending on the facts and circumstances of a case, Adjudicators may determine that no remedial purpose is served by imposing a sanction within the range recommended in the applicable guideline; *i.e.*, that a sanction below the recommended range, or no sanction at all, is appropriate. Conversely, Adjudicators may determine that egregious misconduct requires the imposition of sanctions above or otherwise outside of a recommended range. For instance, in an egregious case, Adjudicators may consider barring an individual respondent and/or expelling a respondent member firm, regardless of whether the individual guidelines applicable to the case recommend a bar and/or expulsion or other less severe sanctions. Adjudicators must always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case. In addition, whether the sanctions are within or outside of the recommended range, Adjudicators must identify the basis for the sanctions imposed.

4. **Aggregation or "batching" of violations may be appropriate for purposes of determining sanctions in disciplinary proceedings.** The range of monetary sanctions in each case may be applied in the aggregate for similar types of violations rather than per individual violation. For example, it may be appropriate to aggregate similar violations if: (a) the violative conduct was unintentional or negligent (*i.e.*, did not involve manipulative, fraudulent or deceptive intent); (b) the conduct did not result in injury to public investors or, in cases involving injury to the public, if restitution was made; or (c) the violations resulted from a single systemic problem or cause that has been corrected.

   Depending on the facts and circumstances of a case, however, multiple violations may be treated individually such that a sanction is imposed for each violation. In addition, numerous, similar violations may warrant higher sanctions, since the existence of multiple violations may be treated as an aggravating factor.

5. **Where appropriate to remediate misconduct, Adjudicators should order restitution and/or rescission.** Restitution is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss. Adjudicators may determine that restitution is an appropriate sanction where necessary to remediate misconduct. Adjudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss proximately caused by a respondent's misconduct.[3]

   Adjudicators should calculate orders of restitution based on the actual amount of the loss sustained by a person, member firm or other party, as demonstrated by the evidence. Orders of restitution may exceed the amount of the respondent's ill-gotten gain. Restitution orders must include a description of the Adjudicator's method of calculation.

   When a member firm has compensated a customer or other party for losses caused by an individual respondent's misconduct, Adjudicators may order that the individual respondent pay restitution to the firm.

   Where appropriate, Adjudicators may order that a respondent offer rescission to an injured party.

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3 Other avenues, such as arbitration, are available to injured customers as a means to redress grievances.

6. **To remediate misconduct, Adjudicators should consider a respondent's ill-gotten gain when determining an appropriate remedy.** In cases in which the record demonstrates that the respondent obtained a financial benefit[4] from his or her misconduct, where appropriate to remediate misconduct, Adjudicators may require the disgorgement of such ill-gotten gain by ordering disgorgement of some or all of the financial benefit derived, directly or indirectly.[5] In appropriate cases, Adjudicators may order that the respondent's ill-gotten gain be disgorged and that the financial benefit, directly and indirectly, derived by the respondent be used to redress harms suffered by customers. In cases in which the respondent's ill-gotten gain is ordered to be disgorged to FINRA, and FINRA collects the full amount of the disgorgement order, FINRA's routine practice is to contribute the amount collected to the FINRA Investor Education Foundation.

7. **Where appropriate, Adjudicators should require a respondent to requalify in any or all capacities.** The remedial purpose of disciplinary sanctions may be served by requiring an individual respondent to requalify by examination as a condition of continued employment in the securities industry. Such a sanction may be imposed when Adjudicators find that a respondent's actions have demonstrated a lack of knowledge or familiarity with the rules and laws governing the securities industry.

8. **When raised by a respondent, Adjudicators are required to consider ability to pay in connection with the imposition, reduction or waiver of a fine or restitution.** Adjudicators are required to consider a respondent's *bona fide* inability to pay when imposing a fine or ordering restitution. The burden is on the respondent to raise the issue of inability to pay and to provide evidence thereof.[6] If a respondent does not raise the issue of inability to pay during the initial consideration of a matter before "trial-level" Adjudicators, Adjudicators considering the matter on appeal generally will presume the issue of inability to pay to have been waived (unless the inability to pay is alleged to have resulted from a subsequent change in circumstances). Adjudicators should require respondents who raise the issue of inability to pay to document their financial status through the use of standard documents that FINRA staff can provided. Proof of inability to pay need not result in a reduction or waiver of a fine, restitution or disgorgement order, but could instead result in the imposition of an installment payment plan or another alternate payment option. In cases in which Adjudicators modify a monetary sanction based on a *bona fide* inability to pay, the written decision should so indicate. Although Adjudicators must consider a respondent's *bona fide* inability to pay when the issue is raised by a respondent, monetary sanctions imposed on member firms need not be related to or limited by the firm's required minimum net capital.

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4 "Financial benefit" includes any commissions, concessions, revenues, profits, gains, compensation, income, fees, other remuneration, or other benefits the respondent received, directly or indirectly, as a result of the misconduct.

5 Certain guidelines specifically recommend that Adjudicators consider ordering disgorgement in addition to a fine. These guidelines are singled out because they involve violations in which financial benefit occurs most frequently. These specific references should not be read to imply that it is less important or desirable to order disgorgement of ill-gotten gain in other instances. The concept of ordering disgorgement of ill-gotten gain is important and, if appropriate to remediate misconduct, may be considered in all cases whether or not the concept is specifically referenced in the applicable guideline.

6 *See In re Toney L. Reed*, Exchange Act Rel. No. 37572 (August 14, 1996), wherein the Securities and Exchange Commission directed FINRA to consider financial ability to pay when ordering restitution. In these guidelines, the NAC has explained its understanding of the Commission's directives to FINRA based on the *Reed* decision and other Commission decisions.

## Principal Considerations in Determining Sanctions

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

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

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

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

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

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

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

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

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

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

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

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

# Outside Business Activities—Failure to Comply With Rule Requirements

FINRA Rules 2010 and 3270

| Principal Considerations in Determining Sanctions | Monetary Sanction | Suspension, Bar or Other Sanctions |
|---|---|---|
| ***See Principal Considerations in Introductory Section***<br><br>1. Whether the outside activity involved customers of the firm.<br>2. Whether the outside activity resulted directly or indirectly in injury to customers of the firm and, if so, the nature and extent of the injury.<br>3. The duration of the outside activity, the number of customers and the dollar volume of sales.<br>4. Whether the respondent's marketing and sale of the product or service could have created the impression that the employer (member firm) had approved the product or service.<br>5. Whether the respondent misled his or her employer member firm about the existence of the outside activity or otherwise concealed the activity from the firm. | Fine of $2,500 to $50,000.[1] | When the outside business activities do not involve aggravating conduct, consider suspending the respondent for up to 30 business days.<br><br>When the outside business activities involve aggravating conduct, consider a longer suspension of up to one year.<br><br>In egregious cases, including those involving a substantial volume of activity or significant injury to customers of the firm, consider a longer suspension or a bar. |

1 As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

# Selling Away (Private Securities Transactions) *(continued)*

FINRA Rule 2010 and NASD Rule 3040

| Principal Considerations in Determining Sanctions[1] | Monetary Sanction | Suspension, Bar or Other Sanctions |
|---|---|---|
| ***See Principal Considerations in Introductory Section*** | ***Associated Person*** | ***Associated Person*** |
| 1. The dollar volume of sales.<br>2. The number of customers.<br>3. The length of time over which the selling away activity occurred.<br>4. Whether the product sold away has been found to involve a violation of federal or state securities laws or federal, state or SRO rules.<br>5. Whether the respondent had a proprietary or beneficial interest in, or was otherwise affiliated with, the selling enterprise or issuer and, if so, whether respondent disclosed this information to his or her customers.<br>6. Whether respondent attempted to create the impression that his or her employer (member firm) sanctioned the activity, for example, by using the employer's premises, facilities, name and/or goodwill for the selling away activity or by selling a product similar to the products that the employer (member firm) sells. | Fine of $5,000 to $50,000.[1] | The first step in determining sanctions is to assess the extent of the selling away, including the dollar amount of sales, the number of customers and the length of time over which the selling away occurred. Adjudicators should consider the following range of sanctions based on the dollar amount of sales:<br>► Up to $100,000 in sales: 10 business days to 3 months<br>► $100,000 to $500,000: 3 to 6 months<br>► $500,000 to $1,000,000: 6 to 12 months<br>► Over 1,000,000: 12 months to a bar<br>Following this assessment, Adjudicators should consider other factors as described in the Principal Considerations for this Guideline and the General Principles applicable to all Guidelines. The presence of one or more mitigating or aggravating factors may either raise or lower the above-described sanctions. |

1 As set forth in General Principle No. 6, Adjudicators should also order disgorgement.

# Selling Away (Private Securities Transactions)

**FINRA Rule 2010 and NASD Rule 3040**

| Principal Considerations in Determining Sanctions | Monetary Sanction | Suspension, Bar or Other Sanctions |
|---|---|---|
| ***See Principal Considerations in Introductory Section*** | ***Member Firm*** | ***Member Firm*** |
| 7. Whether the respondent's selling away activity resulted, either directly or indirectly, in injury to the investing public and, if so, the nature and extent of the injury.<br>8. Whether the respondent sold away to customers of his or her employer (member firm).<br>9. Whether the respondent provided his or her employer firm with verbal notice of the details of the proposed transaction and, if so, the firm's verbal or written response, if any.<br>10. Whether the respondent sold away after being instructed by his or her firm not to sell the type of the product involved or to discontinue selling the specific product involved in the case.<br>11. Whether the respondent participated in the sale by referring customers or selling the product directly to customers.<br>12. Whether the respondent recruited other registered individuals to sell the product.<br>13. Whether the respondent misled his or her employer (member firm) about the existence of the selling away activity or otherwise concealed the selling away activity from the firm. | Where member firm receives written notice of a private securities transaction, but fails to provide written notice of approval, disapproval or acknowledgement, fine of $2,500 to $10,000.[2] | Where member firm receives written notice of a private securities transaction, but fails to provide written notice of approval, disapproval or acknowledgement, consider suspending responsible supervisory personnel in any or all capacities for up to two years. |

2 If the allegations involve a member's failure to supervise the selling away activity, then Adjudicators should also consider the Supervision–Failure to Supervise guideline.

# Recordkeeping Violations

**FINRA Rule 2010, NASD Rule 3110 and SEC Rules 17a-3 and 17a-4[1]**

| Principal Considerations in Determining Sanctions | Monetary Sanction | Suspension, Bar or Other Sanctions |
|---|---|---|
| ***See Principal Considerations in Introductory Section*** | Fine of $1,000 to $10,000. | ***Firm*** |
| 1. Nature and materiality of inaccurate or missing information. | In egregious cases, fine of $10,000 to $100,000. | Consider suspending the firm with respect to any or all activities or functions for up to 30 business days.<br><br>In egregious cases, consider a lengthier suspension (of up to two years) or expulsion of the firm.<br><br>***Individual***<br><br>Consider suspending the Financial Principal or responsible party in any or all capacities for up to 30 business days.<br><br>In egregious cases, consider a lengthier suspension (of up to two years) or a bar. |

1 This guideline also is appropriate for violations of MSRB Rules G-8 and G-15.

# 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***<br><br>***Failure to Respond or to Respond Truthfully***<br><br>1. Importance of the information requested as viewed from FINRA's perspective.<br><br>***Providing a Partial but Incomplete Response***<br><br>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.<br>2. Number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response.<br>3. Whether the respondent thoroughly explains valid reason(s) for the deficiencies in the response.<br><br>***Failure to Respond in a Timely Manner***<br><br>1. Importance of the information requested as viewed from FINRA's perspective.<br>2. Number of requests made and the degree of regulatory pressure required to obtain a response.<br>3. Length of time to respond. | ***Failure to Respond or to Respond Truthfully***<br><br>Fine of $25,000 to $50,000.<br><br>***Providing a Partial but Incomplete Response***<br><br>Fine of $10,000 to $50,000.<br><br>***Failure to Respond in a Timely Manner***<br><br>Fine of $2,500 to $25,000. | ***Individual***<br><br>If the individual did not respond in any manner, a bar should be standard.[1]<br><br>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.<br><br>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]<br><br>***Firm***<br><br>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.<br><br>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.

# Conversion or Improper Use of Funds or Securities

FINRA Rules 2010 and 2150[1], and NASD Rule 2330 and IM-2330

| Principal Considerations in Determining Sanctions | Monetary Sanction | Suspension, Bar or Other Sanctions |
|---|---|---|
| ***See Principal Considerations in Introductory Section*** | ***Conversion***[2]<br><br>(No fine recommended, since a bar is standard.)<br><br>***Improper Use***<br><br>Fine of $2,500 to $50,000. | ***Conversion***<br><br>Bar the respondent regardless of amount converted.<br><br>***Improper Use***<br><br>Consider a bar. Where the improper use resulted from the respondent's misunderstanding of his or her customer's intended use of the funds or securities, or other mitigation exists, consider suspending the respondent in any or all capacities for a period of six months to two years and thereafter until the respondent pays restitution. |

1 This guideline also is appropriate for violations of MSRB Rule G-25.

2 Conversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it.

# Forgery and/or Falsification of Records

FINRA Rule 2010

| Principal Considerations in Determining Sanctions | Monetary Sanction | Suspension, Bar or Other Sanctions |
|---|---|---|
| ***See Principal Considerations in Introductory Section***<br>1. Nature of the document(s) forged or falsified.<br>2. Whether the respondent had a good-faith, but mistaken, belief of express or implied authority. | Fine of $5,000 to $100,000. | In cases where mitigating factors exist, consider suspending respondent in any or all capacities for up to two years. In egregious cases, consider a bar. |

## CERTIFICATE OF COMPLIANCE

I, Jante C. Turner, certify that this brief complies with the length limitation set forth in Commission's Order Scheduling Briefs, which is dated September 23, 2014. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 17,092 words, exclusive of the pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits.

Respectfully Submitted,

Jante C. Turner – Assistant General Counsel
FINRA – Office of General Counsel
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Washington, DC 20006
202-728-8264 – Facsimile
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## CERTIFICATE OF SERVICE

I, Jante C. Turner, certify that on November 24, 2014, I caused a copy of FINRA's Brief in Opposition to the Application for Review, Administrative Proceedings File No. 3-16022, to be served via messenger on:

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

and via Federal Express Overnight Delivery and Electronic Mail on:

James E. Stoltz, Esq.
Stoltz Law Office
123 NW Fourth Street, Suite 210
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812-434-6718 – Telephone
jstoltz@stoltzlawoffice.com – Electronic Mail

Different methods of service were used because courier service could not be provided to the applicant's counsel.

Respectfully Submitted,

C.T

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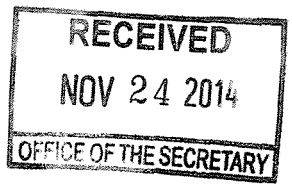
November 24, 2014




**VIA MESSENGER**

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

**RE: APPLICATION FOR REVIEW OF**
**BLAIR C. MIELKE AND FREDERICK W. SHULTZ**
**ADMINISTRATIVE PROCEEDING FILE NO. 3-16022**

Mr. Fields:

Enclosed are the original and three copies of FINRA's brief in opposition to the application for review for the above-referenced matter. Please contact me at 202-728-8317 if you have any questions.

Very truly yours,

Jante C. Turner

cc: James E. Stoltz, Esq.
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Enclosures

[redacted]

FINRA™

Financial Industry Regulatory Authority


# FACSIMILE

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