BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

David B. Tysk

For Review of Disciplinary Action Taken by

FINRA

Administrative Proceeding File No. 3-17294r

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Andrew Love
Associate General Counsel

Lisa Jones Toms
Associate General Counsel

FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
(202) 728-8044 Telephone

July 23, 2019

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 3

A. Tysk Uses the ACT! Notes Program to Document His Communications with Firm Customers 3

B. Ameriprise's Document Retention Policies Prohibits Altering Documents during A Firm Investigation 4

C. GR Becomes Tysk's "Biggest and Most Important" Customer at Ameriprise 4

D. GR Complains to Ameriprise About Tysk's Unsuitable Recommendations and the Firm Conducts an Investigation 5

E. Tysk Substantially Alters and Backdates His Notes in ACT! regarding His Communications with GR 7

F. GR's Arbitration Claim and the Discovery Sanctions Imposed Against Tysk 8

III. PROCEDURAL BACKGROUND 13

A. The Amended Complaint 13

B. The Hearing Panel's Decision 13

C. The NAC's Original Decision 14

D. The Commission's Remand Order 15

E. The NAC's Remand Decision 15

IV. ARGUMENT 16

A. Tysk Violated Ameriprise's Document Retention Policies and Just and Equitable Principles of Trade 16

B. Tysk Violated FINRA's Code of Arbitration Procedure for Customer Disputes and FINRA Rule 2010 28

C. The Sanctions Imposed Are Neither Excessive Nor Oppressive 35

1. The NAC Correctly Relied on the Forgery and/or Falsification of Records Sanction Guideline 36

2. The NAC Rejected Mitigating Factors That Tysk Raised and Found Only Aggravating Ones 37

3. The NAC's Sanctions Serve to Remediate Tysk's Conduct 40

V. CONCLUSION 42

TABLE OF AUTHORITIES

Page

Federal Decisions

C.E. Carlson, Inc. v. SEC, 859 F.2d 1429 (10th Cir. 1988) 29

Reading Health Sys. v. Bear Stearns & Co., 900 F.3d 87 (3rd Cir. 2018) 28

Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006) 23

United States v. Cheek, 3 F.3d 1057 (7th Cir. 1993) 39

Federal Rules and Codes

15 U.S.C. § 78f(b)(5) 16-17

15 U.S.C. § 78s 35

SEC Decisions and Releases

Howard Brett Berger, Exchange Act Release No. 58950, ... 39
2008 SEC LEXIS 3141 (Nov. 14, 2008)

Edward S. Brokaw, Exchange Act Release No. 70883, ... 17, 32
2013 SEC LEXIS 3583 (Nov. 15, 2013)

Joseph R. Butler, Exchange Act Release 77984, ... 19, 37
2016 SEC LEXIS 1989 (June 2, 2016)

Ralph Calabro, Exchange Act Release No. 75076, ... 22
2015 SEC LEXIS 2175 (May 29, 2015)

Mitchell H. Fillet, Exchange Act Release No. 75054, ... 19, 25, 37
2015 SEC LEXIS 2142 (May 27, 2015)

Harry Friedman, Exchange Act Release No. 64486, ... 40
2011 SEC LEXIS 1699 (May 13, 2011)

Brian L. Gibbons, 52 S.E.C. 791 (1996) 41

Harry Gliksman, 54 S.E.C. 471 (1999) 27

Chris Dinh Hartley, 57 S.E.C. 767 (2004) 17

IFG Network Sec., Inc., Initial Decisions Release No. 273, ... 24
2005 SEC LEXIS 335 (Feb. 10, 2005)

IFG Network Sec., Inc., Exchange Act Release No. 54127, ... 24
2006 SEC LEXIS 1600 (July 11, 2006)

Henry Irvin Judy, Jr., 52 S.E.C. 1252 (1997) 20

John Edward Mullins, Exchange Act Release No. 66373, ... 21
2012 SEC LEXIS 464 (Feb. 10, 2012)

John F. Noonan, 52 S.E.C. 262 (1995) 30

Order Approving Proposed Rule Change, Exchange Act Release No. 58643, ... 29
2008 SEC LEXIS 2279 (Sept. 25, 2008)

Steven Robert Tomlinson, Exchange Act Release No. 73825, ... 17, 40, 41
2014 SEC LEXIS 4908 (Dec. 11, 2014)

Blair Alexander West, Exchange Act Release No. 74030, ... 23, 30
2015 SEC LEXIS 102 (Jan. 9, 2015)

FINRA Decisions

DBCC v. John Francis Noonan, Complaint No. C04930026, ... 38
1994 NASD Discip. LEXIS 25 (NASD NBCC Aug. 3, 1994)

Dep't of Enforcement v. Josephthal & Co., Complaint No. CAF000015, ... 35
2002 NASD Discip. LEXIS 8 (NASD NAC May 6, 2002)

Dep't of Enforcement v. McGee, Complaint No. 2012034389202, ... 21
2016 FINRA Discip. LEXIS 33 (FINRA NAC July 18, 2016)

Dep't of Enforcement v. Pierce, Complaint No. 2007010902501, ... 36
2013 FINRA Discip. LEXIS 25 (FINRA NAC Oct. 1, 2013)

Dep't of Enforcement v. Respondent, Complaint No. 20070119154 01 .... 22, 23
(FINRA OHO Oct. 11, 2011),
www.finra.org/sites/default/files/OHODecision/p125275_0.pdf

Dep't of Enforcement v. Shvarts, Complaint No. CAF980029, ... 29, 36, 38
2000 NASD Discip. LEXIS 6 (NASD NAC Jun. 2, 2000)

Dep't of Enforcement v. Taboada, Complaint No. 2012034719701, 2017 FINRA Discip. LEXIS 29 (FINRA NAC July 24, 2017) 26

Dep't of Enforcement v. Westrock Advisors, Inc., Complaint No. 2006005696601, 2010 FINRA Discip. LEXIS 26 (FINRA NAC Oct. 21, 2010) 31, 33, 34, 38

FINRA By-Laws, Guidelines, Notices, and Rules

FINRA By-Laws, Article XI, Sec. 1 29

FINRA Regulatory Notice 14-40, 2014 FINRA LEXIS 53 (Oct. 2014) 32

FINRA Rule 0130 29

FINRA Rule 0140 17

FINRA Rule 2010 17

FINRA Rule 9348 40

FINRA Rule 9349 40

FINRA Rule 12100 34

FINRA Rule 12104 29

FINRA Rule 12212 ..... 12, 29

FINRA Rule 12505 28

FINRA Rule 12506 28

FINRA Sanction Guidelines (2013 ed.) 36, 38, 41

IM-12000(c) of FINRA Rule 12000 29

Miscellaneous

Merriam-Webster, https://www.merriam-webster.com/dictionary/backdate 25

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

David B. Tysk

For Review of Disciplinary Action Taken by

FINRA

Administrative Proceeding File No. 3-17294r

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. INTRODUCTION

David B. Tysk, formerly a general securities representative at Ameriprise Financial Services, Inc. ("Ameriprise"), twice engaged in patently unethical conduct that violated the high standards of commercial honor and just and equitable principles of trade. In the first instance, unbeknownst to the firm and Tysk's customer, Tysk secretly altered and backdated his customer notes to bolster his defense during the firm's investigation of the customer's complaint that alleged he made unsuitable recommendations. Tysk's altering of a customer record during the firm's investigation violated Ameriprise's Code of Conduct, and his misconduct failed to meet the high ethical standards of the securities profession.

In the second instance, Tysk engaged in arbitration discovery misconduct. Tysk produced his altered and backdated notes concerning his interactions with his customer as misleading evidence in the customer's arbitration proceeding and neglected to inform his firm and the customer that the notes he produced were not what they seemed. Tysk also—in bad

faith—withheld from his customer critical discovery by failing to produce the edits to his notes in accordance with the arbitration discovery rules and his customer's explicit requests.

On remand from the Commission to clarify the precise basis of Tysk's misconduct, FINRA's National Adjudicatory Council ("the NAC") found that Tysk violated FINRA Rule 2010 and Ameriprise's policies by altering and backdating his customer notes. It also found that Tysk violated FINRA's Code of Arbitration Procedure for Customer Disputes ("Arbitration Code") IM-12000 and FINRA Rule 2010 by producing to his customer the altered notes and failing to produce his edits to the notes. In reassessing sanctions, the NAC determined that, given Tysk's serious misconduct and the presence of numerous aggravating factors, the sanctions that it originally imposed remained appropriate. The NAC explained that Tysk's purported reliance on his attorney's advice to withhold critical discovery information until the arbitration hearing was not supported by the evidentiary record and thus not a mitigating factor. Accordingly, the NAC again suspended Tysk from associating with any FINRA member firm for one year and fined him $50,000.

The evidentiary record wholly supports the NAC's findings of Tysk's misconduct. Moreover, the NAC's sanctions are neither excessive nor oppressive and are appropriately remedial. The Commission should therefore sustain the NAC's decision in all respects.

II. FACTUAL BACKGROUND

A. Tysk Uses the ACT! Notes Program to Document His Communications with Firm Customers

Tysk was a general securities representative and industry veteran in Ameriprise's Bloomington, Minnesota office. RP 540, 2048-49.[1] Since 1993, Tysk and other firm representatives regularly used a computer software program called "ACT! Notes" to maintain customer contact information, records of meetings, and notes.[2] RP 2055-58, 2295-96, 3481, 5759, 6323. ACT! Notes is a contact relationship management system that was designed to chronicle events as they occur. RP 5759.

Features of ACT! Notes included a chronological display of customer-related events, calendar appointments, notes, "to-do" lists, and summaries of meetings and conversations. RP 5874, 6323. Upon entering new information, ACT! Notes automatically populated the date of the new entry. RP 2712. A user could, however, bypass the default prompts in ACT! Notes and change the date of a new entry by manually deleting the default date and entering a previous date to make it appear as if the note was already recorded, which, as described below, is exactly what Tysk did to the notes in question. RP 2760-62. Tysk documented his communications with customers, including any notes regarding his investment recommendations, in ACT! Notes. RP 2056, 6323.

---

1 "RP" refers to the page number in the certified record of this case filed with the Commission. Tysk was associated with Ameriprise his entire registered career (from 1987 to 2017). He voluntarily terminated his registration in March 2017 and currently is not associated with a FINRA member. RP 6602.

2 Tysk purchased ACT! in the early 1990s and regularly used it for business. RP 5759. Although Ameriprise did not require its employees to use ACT! Notes, at least half of Ameriprise's Bloomington, Minnesota office used the program. RP 2056-57, 5874, 6323.

B. Ameriprise's Document Retention Policies Prohibit Altering Documents during A Firm Investigation

Ameriprise's Code of Conduct "outline[d] the basic business ethics and legal requirements applicable to all Ameriprise Financial employees and advisors." RP 5157. The Code of Conduct required firm representatives to maintain complete and accurate business records. As part of the firm's document retention policies, the Code of Conduct expressly prohibited the "shred[ing], destroy[ing], or alter[ing] in any way documents that are related to any imminent or ongoing investigation, lawsuit, audit, [or] examination." RP 5183-84. Adhering to the Code of Conduct was "non-negotiable." RP 5157. Tysk, as a firm registered representative, was obligated to read and become familiar with the Code of Conduct. RP 5157.

C. GR Becomes Tysk's "Biggest and Most Important" Customer at Ameriprise

In or around 2004, Tysk met GR through a mutual friend at a holiday party. RP 8, 541, 5875. At the time, GR was a 75-year-old wealthy businessman with a net worth of approximately $55 million. RP 541, 596. Shortly after they met, GR signed Ameriprise's client service agreement and became Tysk's customer in March 2005. RP 3537-44. GR first invested $750,000, primarily in mutual funds. RP 2320-21. After achieving positive returns on his initial investment, GR then invested an additional $250,000 in June 2006. RP 2322. Ultimately, GR transferred his $20 million fixed income portfolio to Ameriprise, and GR became "by far" Tysk's "biggest and most important client."[3] RP 1129, 2323, 4194.

In December 2006, Tysk recommended that GR purchase $2 million of Ameriprise variable annuities. RP 2325-26. Based on Tysk's recommendation, GR initially purchased $1

[3] GR eventually had eight accounts opened at Ameriprise with approximately $30 million of total investments from March 2005 to 2008. RP 541, 596, 2129.

million in variable annuities in December 2006. He then purchased another $1 million in variable annuities in July 2007, which raised red flags at the firm due to GR's total investment in variable annuities and his age.[4] RP 542, 596, 1129-30, 2326-28.

Around October 2007, after the market regressed, GR became dissatisfied with his investment portfolio's performance and the corresponding fees he incurred. RP 2132. Tysk met with GR and GR's business partner in January 2008, and again in February 2008, to discuss GR's concerns. Nevertheless, GR closed his accounts at Ameriprise. RP 2330-34, 2351. By March 2008, GR had transferred the assets in his Ameriprise accounts to another firm, except for his variable annuity investments. RP 597.

D. GR Complains to Ameriprise About Tysk's Unsuitable Recommendations and the Firm Conducts an Investigation

In a letter dated April 2, 2008, GR complained to Ameriprise about Tysk's variable annuity recommendations, raising suitability concerns.[5] RP 4207. GR's letter unequivocally requested that Ameriprise liquidate the annuities, waive any surrender fees, and return his invested funds. RP 4207. GR's letter also threatened that if GR could not resolve his complaint

---

4 GR's July 11, 2007 variable annuity purchase triggered an internal exception report at Ameriprise based on GR's total investment amount in variable annuities and his age. In his response dated on August 16, 2007, Tysk defended his recommendation of the annuity purchase to GR as suitable. RP 1129-30, 3549-50. Tysk's supervisor, Brett Strorrar ("Strorrar"), also reviewed the annuity transactions and determined that GR's annuity investments were suitable. RP 1130.

5 GR's complaint letter expressly raised suitability concerns. GR stated that he did not need to insure any of his assets for his heirs. He further stated, "I am currently 78-years old. I do not know how it could possibly be in my best interest to have my money in an investment with a ten-year surrender charge." RP 4207. GR was concerned that he would pay federal tax on his assets at the ordinary income rate instead of the lower capital gains tax rate. He was disappointed to learn that his annuity investments did not include a step-up in basis for his heirs, and thus they would have to pay higher taxes upon his death. He also expressed concern that he was paying for a death benefit that he did not need. RP 4207.

with Ameriprise, he might seek to involve "the NASD, SEC or Minnesota Attorney General." RP 4207.

From April 21 through July 7, 2008, Ameriprise investigated GR's complaint "in anticipation of litigation and for evaluation of whether settlement is warranted." RP 3600. Specifically, Lisa Zapko ("Zapko"), an analyst in Ameriprise's compliance and investigations department, opened a case, assigned a case number, and emailed Tysk's supervisor, Strorrar, an "Information Request for this investigation," which included attachments of GR's complaint letter, a memorandum providing inquiry instructions, and an advisor brochure. RP 3554-55.

Tysk was aware that GR had complained about the suitability of his recommendations and Ameriprise was investigating GR's claims. He testified that he received a copy of GR's complaint letter, along with the firm's request that he provide information. RP 2134, 2136. Tysk also testified that when he received GR's complaint, he believed the firm was going to fire him.[6] RP 2177. Tysk had previously been the subject of customer complaints and a customer arbitration and the firm verbally had cautioned him about documenting his communications with customers. RP 2097-2125, 3501-16. After GR complained, Tysk also knew that his business relationship with GR had severed and he would no longer be GR's trusted advisor. RP 2156-57.

As part of its investigation, Ameriprise interviewed Tysk, along with GR and GR's business partner around April 21, 2008, and Tysk provided his written response to the firm's request for information around April 25, 2008. RP 3561-63, 3600. Ameriprise also requested that Tysk provide supporting documentation, including "a copy of the client meeting/smart pad

---

6 In an attempt to downplay GR's complaint, on appeal Tysk now claims that he did not view GR's complaint as "an implied threat of an arbitration claim," did not believe that it would ever amount to anything, and that litigation with GR was "an unthinkable prospect" around the time he received the complaint and altered his notes. Br. at 9, 22.

notes" and other customer records. RP 3552. The firm, however, did not receive any documents from Tysk—including his customer file notes—until sometime after Tysk had submitted his written response. RP 2530.

Ameriprise completed its investigation of GR's complaint, and, by letter dated July 7, 2008, denied GR's demands to reverse the variable annuity purchases and waive the surrender charges, stating that "we are unable to substantiate your allegations of lack of disclosure and suitability." RP 3565-67.

E. Tysk Substantially Alters and Backdates His Notes in ACT! regarding His Communications with GR

From May 13 through May 27, 2008, after Tysk received GR's complaint letter, and during Ameriprise's investigation, Tysk opened ACT! Notes on his computer and substantially altered his notes reflecting his conversations with GR. RP 9, 1143-44, 5872, 5879, 6323.

Tysk did not just open a new note and add new comments reflecting his past dealings with GR. Instead, for 54 separate note entries, Tysk opened a new note, *manually* deleted the default prompts in ACT! Notes that automatically populated the current date for each new note, typed in *an older date* to make it appear as if his notes were recorded contemporaneously with the past event, when they were not, and entered diaries of past communications he had with GR. RP 2215, 2217, 2219, 2221-22.

Tysk substantively altered and backdated 67 note entries in total, including 54 backdated notes and 13 supplemented entries to pre-existing notes. RP 1144-45, 1159. Tysk's altered notes included quoting GR and extensively detailing events and conversations he had with GR, in some cases up to three years prior. A comparison between Tysk's notes on GR before he altered them and after he altered them is staggering. *Cf., e.g.*, RP 3673-3720 (CX-66) to RP 3721-40 (CX-68). Several notes that Tysk altered contained substantial details about GR's

investment strategy and defended the recommendations that he made to GR. For example, Tysk depicted GR as being pleased with his investment recommendations when he backdated a new note to "January 9, 2006," and inserted: "[GR] confirmed that we are going ahead with my suggestions on buying the suggested funds . . . Frankly, he did not care much about my suggestions he said that the account was doing well and whatever changes could improve already good performance would be icing on the cake." RP 3723.

Knowing GR had become dissatisfied with his investment performance after the market regressed, Tysk also backdated the following note: "I did not want to pay the price if the markets dropped . . . for the first year with the account [GR] was very, very happy." RP 3723.

Tysk defended his recommendation of an annuity to GR with a ten-year surrender charge when he backdated a note to December 14, 2006, and wrote: "I reviewed the surrender charge options and [GR] said 'Why wouldn't I take the 10yr [annuity] with the 3% bonus?' . . . I said that he was right, for tax deferred growth he[] would likely never spend this money and his heirs would inherit it. [GR] said fine, 'they can pay the taxes...What do I care.'" RP 3726.

F. GR's Arbitration Claim and the Discovery Sanctions Imposed Against Tysk

On November 21, 2008, GR filed with FINRA an eleven-count arbitration claim, alleging that Ameriprise and Tysk recommended and sold more than $2 million in "unsuitable" variable annuities and charged excessive fees in connection with managing GR's fixed income account. RP 4631-51.

On December 1, 2008, FINRA's arbitration case administrator sent Tysk GR's Statement of Claim and FINRA's Discovery Guide. RP 3569-73, 4653-61. For customer arbitration cases, the Discovery Guide lists presumptively discoverable items that the parties must produce, including: "All notes by the firm/Associated Person(s) or on his/her behalf, including entries in

any diary or calendar, relating to the custom[]er's account(s) at issue."[7] RP 4655. At the hearing, Tysk's counsel testified that his initial meeting with Tysk was for several hours and they discussed, among other things, document preservation. RP 3173. Tysk, however, did not inform his counsel at that meeting that he had altered his customer notes.

On March 25, 2009, Tysk produced to GR his first set of documents in discovery, which included his altered ACT! Notes. RP 2815, 3103-04, 3137, 3575-78, 4717-20. When Tysk produced his ACT! Notes, he did not inform his counsel, the firm, or GR's counsel that he had made substantial edits to them. RP 2415-16. The printed copy of the notes Tysk produced, however, stated that they were "Edited on 5/27/2008" and "Last edited by David Tysk." RP 3722, 4846.

Because the edited date on the ACT! Notes version that Tysk produced came after GR's complaint to Ameriprise, GR's counsel testified he had a hunch that Tysk had tampered with the notes. GR's counsel further testified that "the notes were, seemed too contrived to be extraordinarily complete" and thus "these were not notes that were made contemporaneously but that had been made later to support the story."[8] RP 2816, 2820. Based on his suspicions, GR's counsel, in his Third Set of Document and Information Requests dated May 8, 2009,[9] asked that

---

7 The Discovery Guide further instructs, "Absent a written objection, documents on Document Product Lists 1 and 2 shall be exchanged by the parties within the time frames set forth in the . . . Code." RP 4653.

8 Although Tysk attempts to downplay his notes as personal and unimportant, Br. 24, GR's counsel explained before the Hearing Panel why Tysk's notes would be important evidence in a customer arbitration case. According to GR's counsel, "brokers will often rely on their contemporaneous notes of meetings [], to show that disclosures were made, that conversations happened, that meetings happened, and they can be difficult to rebut [], at a hearing." RP 2817.

9 GR's Second Set of Document and Information Requests did not specifically ask for information regarding Tysk's ACT! Notes. RP 4725-32.

Tysk produce "[a]ll documents showing edits made by Mr. Tysk to the notes in the Contact Report . . . including but not limited to the edits made on May 27, 2008." RP 4724.

Before responding to GR's discovery request, on June 22, 2009, Tysk's counsel emailed Tysk and asked whether he made edits to his ACT! Notes. Tysk's counsel specifically stated, "Do you know anything about any edits being made to the contact reports?" RP 4198. Rather than divulge that he altered and backdated his ACT! Notes shortly after GR complained, Tysk remained silent. Instead, Tysk replied: "There are no other documents showing edits per the request." RP 4197. Based on Tysk's response, Tysk's counsel responded to GR's discovery request on July 7, 2009, stating, "there are no such responsive documents." RP 5284.

A three-day arbitration hearing was scheduled to begin on December 14, 2009. RP 3585. On the eve of the hearing, counsel for Ameriprise and Tysk produced an exception report that was purportedly inadvertently left out of their previous document production that related to GR's second annuity purchase for $1 million. RP 3603-16. As GR's counsel explained at the hearing, the exception report was "the most important document you could get" in a suitability case because it could prove that Ameriprise had previously questioned whether GR's annuity investments were suitable. RP 2828.

Referring to the report's late production as a "smoking gun" document, on December 12, 2009, GR's counsel requested a continuance of the hearing so that he could propound additional discovery. RP 3617-64. Because GR's counsel also suspected that previous versions of Tysk's ACT! Notes existed but were not produced in discovery, he further requested that Ameriprise and Tysk "turnover all relevant computer files and back-up media" so that a forensic examination and search for all relevant files could be performed. RP 3619. Although Ameriprise and Tysk opposed GR's counsel's request, the arbitration panel granted the

postponement of the hearing until April 2010 and ordered an expedited discovery schedule.[10] RP 4733-34, 5287, 5291.

On December 16, 2009, GR's counsel asked in its Fourth Set of Document and Information Requests that Tysk, among other things, identify all computer hard drives and other electronic media that contained data entries of his notes on GR. RP 4736-39. Ameriprise and Tysk, however, refused to respond to GR's discovery request. GR's counsel therefore filed a motion to compel Tysk to turnover his computer files as the fourth discovery request provided, which the arbitration panel granted on March 18, 2010. RP 4749-58, 5310.

Ameriprise and Tysk still refused to comply with GR's discovery request. On April 6, 2010, the arbitration panel granted a *second* motion to compel discovery by GR's counsel. RP 4811. The panel this time ordered that Tysk provide access to his computer and allow a forensic expert to conduct an electronic search of his files and server. RP 4811. ML, a forensic specialist, examined Tysk's computer and accessed multiple ACT! database files. ML testified that, at least five of Tysk's ACT! database files were "viewable"—meaning that within the ACT! software, any user could open previously saved versions of Tysk's ACT! Notes files by clicking "file, open, or file, open database." RP 3275-77.[11] Based on the saved dates of the files, ML determined when and to what extent Tysk altered his notes. *See, e.g.*, RP 3224, 3267, 3275,

---

[10] GR's counsel also requested a $50,000 sanctions award against Ameriprise and Tysk to compensate GR for the additional fees and expenses he would incur due to postponing the hearing. RP 3620. The arbitration panel, by order dated December 21, 2009, deferred GR's sanctions request, but assessed a postponement fee of $1,200 against Ameriprise and Tysk. RP 5287, 5291.

[11] Forensic tech investigator, Christopher Leigh, also confirmed at the hearing that a simple click on "file" and then "open database" within the ACT! Program would have displayed the previous versions of Tysk's ACT! Notes. RP 2729-30.

3535, 4870, 4872, 6325; *see also* RP 4270 (listing 12 saved ACT! Notes database files that existed on Tysk's computer at the time GR's counsel requested the edits to his notes).

On May 14, 2010, the arbitration panel ruled in favor of GR. RP 4813-44. The panel awarded GR $197,000 in compensatory damages, plus fees, as resolution of the arbitration case. The panel then sanctioned Tysk (and Ameriprise) for circumventing the discovery process in violation of the Arbitration Code, ordering them to pay, jointly and severally, $20,000 in damages. RP 4822-23.

In direct reference to Tysk's conduct during discovery, the arbitration panel made the following findings:

- Respondent Tysk altered the record of his contacts with [GR] after [GR] complained about the suitability of the annuity he purchased;
- Ameriprise failed to update its discovery responses to [GR] after it became aware that Tysk had altered the file;
- Only after an Emergency Motion to Compel Discovery was filed at the eve of the rescheduled hearing did Ameriprise make Tysk's computer available to [GR] and allow [him] to discover the changes; and
- [Ameriprise and Tysk] engaged in other attempts to block discovery by [GR].

RP 4822.

The arbitration panel thereafter referred Tysk's discovery abuses to FINRA's Department of Enforcement ("Enforcement") for possible disciplinary action.[12] RP 3671.

---

[12] FINRA Rule 12212 permits the arbitration panel to issue sanctions for failing to comply with any provision of the Arbitration Code and refer the matter for disciplinary action under FINRA's conduct rules.

II. PROCEDURAL BACKGROUND

A. The Amended Complaint

On July 24, 2013, Enforcement filed a four-cause amended complaint, alleging two causes of action against Tysk. RP 539-552. Cause one alleged that Tysk violated NASD Rule 2110 and FINRA Rule 2010 when he "altered his customer contact notes after receiving the customer's demand letter in order to bolster his defense to the customer's claim, and continued to make alterations after the arbitration claim was filed, all in violation of his firm's policies." RP 548. Cause two alleged that Tysk violated IM-12000 of the Arbitration Code and FINRA Rule 2010 when he "altered his own ACT! Notes after he received the customer's demand letter and arbitration claim against him" and "did not notify the claimant, or his firm, of these edits when Tysk responded to discovery requests for his notes and when he responded to subsequent requests for edits to his notes." RP 549.

B. The Hearing Panel's Decision

A FINRA Extended Hearing Panel ("Hearing Panel") found that Tysk violated just and equitable principles of trade when he altered his ACT! Notes after receiving GR's complaint "to strengthen his defense against a possible suitability claim." RP 5785. The Hearing Panel found that Tysk attempted to conceal his alterations by deliberately disguising his notes to "giv[e] the false impression that he made the edits earlier than he actually did," and failing to disclose his note alterations to the firm until he confessed in August 2009. RP 5784-92. The Hearing Panel also found that Tysk violated Ameriprise's document retention policies, stating that Tysk's testimony that he was unfamiliar with the firm's policies and unaware that the firm had a Code

of Conduct at the time of his misconduct was "disingenuous" and "not credible." RP 5785, 5790.[13]

The Hearing Panel also found that Tysk violated IM-12000 of the Arbitration Code and FINRA Rule 2010 when, during discovery, he produced his altered notes covering his interactions with GR "that were misleading absent a disclosure that he altered them." RP 5794-96. By keeping silent after his counsel pointedly asked about the edits made to his contact notes, the Hearing Panel determined that Tysk acted in bad faith. RP 5796. The Panel also concluded that Tysk "fell far short of [his] obligation to 'cooperate to the fullest extent practicable in the exchange of documents and information to expedite' arbitrations, as FINRA Rule 12505 requires, by his continuing to conceal information that GR was entitled to discover. RP 5796. For his misconduct, the Hearing Panel suspended Tysk from associating with a FINRA member in all capacities for three months and fined him $50,000. RP 5806-07.

C. The NAC's Original Decision

On appeal, NAC affirmed the Hearing Panel's findings of violation. RP 6319-33. The NAC found that Tysk acted unethically when he deceptively altered his notes after receiving GR's complaint to strengthen his defense during the firm's investigation. RP 6327. The NAC also found that Tysk violated the Arbitration Code and FINRA Rule 2010 when he produced a misleading document during arbitration discovery and, in bad faith, withheld the edits to his notes after repeated discovery requests. RP 6328-29. While the NAC considered Tysk's claims

---

[13] The Hearing Panel further explained that Tysk was not a newly hired novice. RP 5790. Indeed, "[d]uring his two decades as an Ameriprise broker, he had encountered customer complaints, and a customer had filed an arbitration against him." RP 5790. The Hearing Panel therefore concluded that Tysk "knew or should have known that altering the notes as he did ran afoul of Ameriprise's document retention policy." RP 5790.

of mitigation for lesser sanctions, it instead found only aggravating factors associated with his misconduct. RP 6331. In particular, the NAC found the extent that Tysk concealed altered notes and misled his firm and the customer "demonstrated a troubling lack of integrity," weighing in favor of imposing a higher sanction to discourage future wrongdoing and protect the public interest. RP 6331. The NAC accordingly increased Tysk's suspension from three months to one year and affirmed the $50,000 fine. RP 6333.

D. The Commission's Remand Order

On March 1, 2017, the Commission remanded the case to FINRA and requested that it address three issues. RP 6495-6500. The Commission first asked FINRA to clarify whether Tysk violated his firm's policies by altering his notes, and, if so, which policies he violated. RP 6498. Second, it questioned whether Tysk's unethical conduct during arbitration rested on his failure to satisfy the discovery requirements under FINRA Rule 12506(b)(1). RP 6498-99. Third, the Commission asked FINRA to address Tysk's reliance-on-counsel defense, with particular regard to the alleged discovery violations he committed during the arbitration proceeding. RP 6499. The Commission on remand suggested no view as to the outcome of this matter. RP 6499.

E. The NAC's Remand Decision

On remand, the NAC considered the record anew, including additional briefing by the parties on the Commission's requests for clarification. In a decision dated March 11, 2019, the NAC reaffirmed its findings of violations, while clarifying that Tysk's conduct violated his firm's policies and FINRA Rules. Specifically, the NAC found that Tysk violated his firm's policies that "prohibited its registered persons from altering documents that were related to any investigation." RP 6608. Moreover, the NAC found that Tysk acted unethically when he, in

violation of his firm's policies, engaged in a deceptive business practice that did not conform to the moral norms or standards of professional conduct by altering and backdating his ACT! Notes to create the false impression that he documented his conversations with a customer at the time of those conversations. RP 6609.

The NAC further found that Tysk's unethical conduct persisted when he produced his misleading notes in discovery while failing to disclose that altered and backdated them. RP 6611. The NAC clarified that Tysk acted in bad faith, in contravention of just and equitable principle of trade, when he violated the arbitration discovery rules and "knowingly withheld providing his edits to his ACT! Notes in response to GR's discovery request." RP 6611-12. In reassessing the sanctions, the NAC found that several aggravating factors existed but none of the claims that Tysk raised for lower sanctions were mitigating. In particular, the NAC found that Tysk's argument that he relied on his attorney's judgment in failing to produce his note edits notwithstanding GR's discovery request was unsupported by the record and therefore not mitigating. RP 6616. Given the severity of Tysk's misconduct, the NAC again imposed its previous sanctions of a one-year suspension and $50,000 fine. RP 6618.

IV. ARGUMENT

A. Tysk Violated Ameriprise's Document Retention Policies and Just and Equitable Principles of Trade

The NAC correctly found that Tysk acted unethically when, after receiving GR's complaint, he deceptively altered his ACT! Notes by creating the false impression that they were contemporaneous notes of his communications with GR, in defense of GR's claims and in violation of Ameriprise's policies. The Commission should affirm the NAC's findings.

FINRA is statutorily mandated by Congress to protect the investing public from dishonest and unfair practices that hinder transparency in the securities industry. *See* 15 U.S.C. §

78f(b)(5). To advance this mandate, FINRA Rule 2010 obligates associated persons to observe high standards of commercial honor and just and equitable principles of trade.[14] The rule "center[s] on the 'ethical implications' of . . . conduct" and thus "encompass[es] 'a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace.'" *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *17 (Dec. 11, 2014), *aff'd* 637 F. A'ppx 49 (2d Cir. 2016). An associated person violates FINRA's just and equitable principles of trade rule when his conduct is either unethical or committed in bad faith. *Chris Dinh Hartley*, 57 S.E.C. 767, 773 n.13 (2004). "Unethical conduct is defined as conduct that is '[n]ot in conformity with moral norms or standards of professional conduct.'" *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013).

In early April 2008, after several months of expressing concerns to Tysk about his account, GR complained in writing to Ameriprise about the suitability of Tysk's recommendations to purchase annuities, and the firm commenced an internal investigation. RP 3554-55, 4207. It is undisputed that, after receiving GR's complaint letter and during the firm's investigation, Tysk opened his business computer and, from May 13 through May 27, 2008, substantively altered his ACT! Notes on GR, making 67 substantive modifications by creating significant details to his existing notes and creating new, detailed notes and manually backdating them to make it appear that they were created contemporaneously. RP 1144-45, 1159. The record also establishes that Ameriprise was investigating GR's complaint when Tysk

---

[14] FINRA Rule 2010; *see also* FINRA Rule 0140(a) (providing that associated persons have the same duties and obligations as members). Tysk was subject to both NASD Rule 2110 and FINRA Rule 2010 at the time of his misconduct. For purposes of this matter, a reference to either rule is substantively equivalent.

impermissibly altered his notes relating to that investigation, which violated his firm's policies—in particular, the firm's Code of Conduct.[15] RP 6608-09. Per the Code of Conduct, Tysk was required to "maintain complete and accurate business records." RP 5183. It also prohibited Tysk from "shred[ing], destroy[ing], or *alter*[ing] *in any way* documents that are related to *any* imminent or ongoing investigation, lawsuit, audit, [or] examination." RP 5184. By failing to maintain the integrity of his business records as the Code of Conduct required, Tysk unquestionably violated Ameriprise's policies.

The record further establishes that Tysk acted unethically in the manner in which he altered his notes.[16] After GR complained in writing about the suitability of his investment recommendations and unbeknownst the firm, Tysk opened his computer file notes on GR and altered a previously stored record of events. RP 2216-22. Instead of providing the firm his ACT! Notes in its original form, Tysk created for the first time 54 new notes and intentionally backdated them by manually changing the dates to make it appear that he had already documented his interactions with GR, when he had not. Tysk also supplemented 13 pre-existing note entries to make it appear that the alterations were part of the original notes.

---

[15] Tysk belatedly claims there was no evidence that Ameriprise's Code of Conduct dated 2005/2006 "was still in effect when Tysk supplemented his Notes years later." Br. 28. The firm, however, conceded well before the hearing and during Enforcement's investigation that this policy was still in effect. *See* RP 5222 (firm confirming that "[o]n the enclosed CD . . . is the Code of Conduct *in effect at the time Mr. Tysk added to his ACT! notes*" and "[n]o firm policies or procedures were revised or enhanced in any way since Mr. Tysk's addition to his ACT! notes.") (Emphasis added).

[16] Tysk claims that his liability depends on FINRA proving "an unethical violation of firm policy." Br. 31. Enforcement, however, did not allege that Tysk was unethical *solely* because he violated firm policies. Rather, the amended complaint charged and the record fully establishes that Tysk deceptively altered his notes to bolster his defense during the firm's investigation of a customer complaint, which violated the firm's policies, and constituted conduct that violated just and equitable principles of trade.

Tysk's alterations detailed events and conversations that he had with GR up to three years prior. RP 1144-45, 1159, 6323 n.6. Many altered notes directly addressed Tysk's investment recommendations that were the subject of GR's complaint. For example, Tysk knew that one of GR's concerns regarded the suitability of investing in an annuity with a ten-year surrender charge given GR's age. RP 4207. Dissatisfied with the existing condition of his notes, almost a year and a half later and during the firm's investigation, Tysk defended his recommendation by backdating a note to December 14, 2006, and writing, "[GR] very pleased with the pace of changes . . . "I reviewed the surrender charge options" and "[GR] said 'Why wouldn't I take the 10yr [annuity] with the 3% bonus?" RP 3726. As Tysk admitted at the hearing, this backdated note contradicted the surrender charge concern GR raised in his complaint. RP 2230. Tysk did not inform the firm or GR that he altered his customer notes for over a year, even after the customer filed an arbitration claim against him. *Cf. Mitchell H. Fillet,* Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *50 (May 27, 2015) (attempting to deceive by deliberately backdating customer records is unethical conduct in violation of FINRA's just and equitable principles of trade rule).

Tysk suggests that creating or adding notes shortly after a customer meeting is a normal business practice. Br. 4. Even if Tysk were to establish this, which he did not, it does not defend Tysk's misconduct. For the notes in question, Tysk did not just jot down notes shortly after his business meeting with GR. Rather, up to three years after the fact, Tysk *altered* and *backdated* notes, some concerning the suitability of his recommendations to GR, to *falsely* create the appearance that they were written contemporaneously, when they were not. There was nothing "standard" about what Tysk did. *Joseph R. Butler*, Exchange Act Release 77984, 2016 SEC LEXIS 1989, at *24 (June 2, 2016) ("[F]alsifying documents is a practice that is inconsistent

with just and equitable principles of trade."). The NAC appropriately found that Tysk engaged in a deceptive business practice and failed to meet the ethical norms or standards of professional conduct that FINRA expects of its members "[i]n a business that relies heavily on candor and truthful representation." *See* RP 6609; *see also Henry Irvin Judy, Jr.*, 52 S.E.C. 1252, 1256 (1997). The Commission should affirm the NAC's findings.

On appeal, Tysk raises numerous arguments that purportedly demonstrate that he did not engage in misconduct. All of Tysk's arguments lack merit. First, Tysk argues that the Code of Conduct applies to firm documents and not his personal notes and there was no imminent or ongoing firm investigation when he altered his ACT! Notes. Br. 28-29. Although not required by Ameriprise, Tysk and other firm representatives regularly used the ACT! Notes software program to store confidential customer information that was subject to the firm's supervision. RP 2056-57, 5759, 5874, 6323. Thus, the firm's document retention policies applied to his customer notes. Furthermore, the firm was conducting an investigation when Tysk altered his notes. After GR complained in writing, the firm opened a case file to conduct—in its own words—an "*investigation* of [the] complaint." RP 3600. Indeed, Zapko referred to the firm's review of GR's complaint as an "investigation" when she forwarded GR's demand letter along with an information request to Strorrar. RP 3555. Strorrar also testified at the hearing that GR's complaint led to a *formal investigation* by the firm. RP 2523. Conversely, Tysk has yet to provide a shred of evidence that Ameriprise's investigation of GR's complaint meant something other than what the Code of Conduct intended to cover.

Second, Tysk argues that he could not be liable for violating the firm's policies because Ameriprise concluded that Tysk committed no violation and therefore he did not need to bolster his defense in connection with GR's complaint. Br. 27. But the plain language of the Code of

Conduct unequivocally prohibited Tysk from "alter[ing]" business documents "in any way" during "any imminent or ongoing investigation." RP 5184. The NAC correctly determined that Tysk's actions contravened this firm policy. Moreover, Tysk's argument that the firm found no wrongdoing is unsupported by the record. As Strorrar testified, the firm initially concluded that Tysk *did* violate the firm's policies. RP 5700 ("[W]e both concluded that the code of conduct policy was the one in violation because of the notes."). The firm ultimately reprimanded Tysk, however, via an Education Clarification Notice, which softened the language describing Tysk's misconduct and instead stated that his actions "raised the question whether the Code of Conduct was properly followed." RP 3771. As the NAC concluded, Ameriprise's final action was a far cry from Tysk's claim that the firm found no violation.[17] RP 6610.

FINRA nevertheless has the authority to discipline its associated persons for rule violations, even if a member firm chooses not to enforce its own policies and procedures or chooses a different course of action. *Cf. Dep't of Enforcement v. McGee*, Complaint No. 201203489202, 2016 FINRA Discip. LEXIS 33, at *54 n.28 (FINRA NAC July 18, 2016) (explaining that "FINRA 'is not bound by' another adjudicator's investigation or findings, and

---

[17] Tysk quotes the firm stating that it did not perceive his "addition of notes" as wrongful. Br. 27. But the mere insertion of additional notes was not the violative conduct alleged here. Tysk *altered* and *backdated* his notes after GR complained about his recommendations and during the firm's investigation of GR's complaint, which unquestionably violated the firm's document retention policies. *See, e.g.*, RP 5222 (explaining that the firm issued Tysk the Education Clarification Notice after considering the spirit of the Code of Conduct in its entirety and in light of the arbitration panel's finding that Tysk "altered" his record of customer contacts).

Separately, the Commission should reject Tysk's mistaken claim that, because Enforcement did not call certain firm employees as witnesses to determine policy violations, FINRA did not meet its burden of proof. Br. 27. It is within Enforcement's discretion to present the evidence and select the witnesses to testify in support of its case. *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *40 (Feb. 10, 2012).

that FINRA's investigations and disciplinary actions are independent of other investigations or adjudications"), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 27, 2017), *aff'd*, 733 F. App'x 571 (2d Cir. 2018).

Third, Tysk argues that FINRA did not prove he intentionally or even recklessly violated his firm's policies because it was unclear that the Code of Conduct, which "did not require or address the use of ACT!," applied to his misconduct. Br. 30-31. Although proof of motive or scienter is not required to show that Tysk violated the firm's policies, the Code of Conduct plainly stated Tysk's obligation to preserve his business records and not alter them during the firm's investigation. Yet, for two weeks during the firm's investigation, Tysk failed to follow the firm's policies and intentionally added significant details to his notes and manually altered the dates of the notes. Further, Ameriprise's Code of Conduct did not—nor could it—identify every hard copy or electronic document that a firm representative has to preserve under the firm's document retention policies. If, however, Tysk was uncertain about whether the firm's policies applied to his conduct or his customer notes, per the Code of Conduct, he was required to check with his leader or the General Counsel's Organization for further questions. RP 5184. Tysk did not.[18]

---

[18] Tysk cites a redacted FINRA Office of Hearing Officers ("OHO") decision to support his mistaken belief that it was unclear that Ameriprise's Code of Conduct prohibited his misconduct. Br. 30-31. The OHO decision, which is not binding to the NAC or the Commission, *Ralph Calabro*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175, at *170 n.205 (May 29, 2015), is distinguishable from this case for two reasons. First, the respondent in the OHO decision proactively sought guidance on his firm's policies to be compliant in facilitating his client's trades by consulting with his manager. *See Dep't of Enforcement v. Respondent*, Complaint No. 2007011915401, at 12 (FINRA OHO Oct. 11, 2011), www.finra.org/sites/default/files/OHODecision/p125275_0.pdf. Conversely, Tysk undisputedly made no attempts to contact Strorrar or the firm's compliance or legal department to ascertain whether Ameriprise's policies prohibited his note alterations. Second, the respondent's manager in the OHO case was uncertain about "what procedures were required to ensure that the trades

(Footnote continued on next page)

Moreover, the Hearing Panel observed Tysk's testimony about his awareness the firm's policies on document retention and found his claimed ignorance of such policies not credible. *See* RP 2071 ("Q. All right. When you started at Ameriprise you were provided with a copy of its policies and procedures, correct? . . . A. I'm not sure what you mean policies and procedures . . . A. I don't know what WSP's mean."); *see also* RP 5789-90 (finding Tysk's unfamiliarity with Ameriprise's policies and ignorance of the term "WSP" disingenuous and not credible). Finding no reason to disturb the Hearing Panel's credibility determination, the NAC agreed that, as an experienced securities professional of 26 years, Tysk knew or should have known of his obligation to comply with the firm's policies on preserving his customer-related records. *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006).

Fourth, Tysk argues that Enforcement did not prove that he acted with the intent to "bolster his defense" in response to GR's complaint. Br. 19-26. But again, "[p]roof of scienter is not required" for FINRA Rule 2010 violations. *Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *20 (Jan. 9, 2015), *aff'd*, 641 F. App'x 27 (2d Cir. 2016). Nevertheless, the record evidence demonstrated that Tysk intentionally altered several ACT! Notes to directly contradict the claims raised in GR's complaint and that Tysk engaged in his misconduct after GR complained and while Ameriprise was investigating GR's allegations. That some note entries did not directly regard his annuity recommendations or were conceivably

---

(cont'd)

were completed appropriately," so he admittedly did not fully explain the firm's procedures for proper execution. *Id.* at 13. Contrarily, the Code of Conduct's prohibition on altering firm records is unambiguous, calling for no interpretation. Moreover, Tysk's supervisor, Strorrar, concluded that the Code of Conduct was "infringed upon." RP 2574; *see also* RP 2575 ("Based on our policy, our code of conduct, I believe . . . [Tysk] shouldn't have done that.").

against his interest, as Tysk suggests (Br. 10), does not diminish strong evidence that Tysk intentionally acted in his defense of GR's complaint to the firm. For example, in response to his allegedly improper sale of the $1 million variable annuity to GR, Tysk admitted at the hearing that the December 14, 2006 backdated note, *directly contradicted* the allegations raised in GR's complaint letter. RP 2229-31, 2246, 3726. This was just one of several examples where Tysk's altered notes addressed the suitability concerns raised in GR's complaint.

Tysk cites to an SEC initial decision in *IFG Network Sec., Inc.* to support his baseless claim that, to be liable, Enforcement has to prove that every single note he altered was for the sole purpose of bolstering his defense. Br. 25-26. But that is not what Enforcement alleged in this case and the *IFG* decision stood for no such proposition. The administrative law judge in *IFG* found no violation of the federal antifraud provisions when the respondents' omitted disclosure about mutual fund share performance because, although Commission staff alleged that Class A shares produced materially higher returns than the Class B shares, they failed to prove that Class A shares would *always* outperform Class B shares. *See* Initial Decisions Release No. 273, 2005 SEC LEXIS 335, at *92-95 (Feb. 10, 2005). On appeal, however, the SEC overturned this initial finding. *See IFG Network Sec., Inc.*, Exchange Act Release No. 54127, 2006 SEC LEXIS 1600, at *34 n.25 (July 11, 2006). Importantly, the Commission determined that the subtle distinction the initial decision made with respect to the allegations, which served as the basis for finding that no violation occurred, was immaterial. Instead, the Commission found that the staff proved the *material* allegation that the respondents' omissions concerning the differences in cost structure between the mutual fund share classes were misleading. Thus, not only is the *IFG* case is inapposite, the final *IFG* decision supports the material allegation here—

which is that Tysk altered his customer notes after GR complained to generally support his defense.[19]

Fifth, Tysk quibbles over the definition of backdating and argues that his backdated notes were no different than when OHO issues a revised decision using the original decision date. Br. 22-23. Tysk is incorrect. In 54 instances, Tysk himself admitted that he opened the ACT! Notese program on his computer, manually deleted the prepopulated date, and "put a date earlier than the actual one." *Merriam-Webster*, https://www.merriam-webster.com/dictionary/backdate (defining the term "backdate"); *see also* RP 2216-17, 2455. Tysk unquestionably backdated his notes to create the impression that he created them contemporaneously with his meetings with GR rather than supplemented them, in some instances years after a meeting, in response to GR's complaint. And his unethical conduct involved more than just "penciling in" an event that happened "last week." Br. 23. Rather, for two consecutive weeks, Tysk completely overhauled his ACT! Notes, making substantive changes to his customer's record unbeknownst to the firm and GR. *See Fillet*, 2015 SEC LEXIS 2142, at *50 (finding a J&E violation when respondent backdated customer records and attempted to deceive regulatory authorities with documents he deliberately falsified).

---

[19] Tysk argues that his intention to bolster his defense was further belied by that fact that his notes, which were unimportant, were not shared with the firm until *after* the firm responded to GR's complaint and Ameriprise told him "multiple times" that the complaint was meritless. Br. 8, 18, 20 n.15. This is untrue. Strorrar testified that Tysk's notes were part of Tysk's client file that he and his delegate, John Casement, reviewed *before* the firm determined that GR's suitability claim had no merit. RP 2537-48, 2560. Indeed, the firm requested Tysk's notes when it commenced its investigation of GR's complaint and thus they were important. RP 3552. Moreover, Tysk provides no supporting evidence that, before he altered his notes, Ameriprise assured him that GR's complaint had no merit. The evidence unquestionably demonstrates that Tysk deceptively altered his notes during the firm's investigation of GR's complaint, in violation of firm policies and FINRA's rules.

Moreover, comparing Tysk's altered and backdated notes to a revised OHO decision is fundamentally flawed. Tysk did not edit his ACT! Notes in the same manner that an adjudicator might correct a factual error, openly note what the correction was, and issue a revised decision (making both versions of the decisions available). Tysk deceptively fabricated his record of events and investment discussions he had with GR. In 54 instances, he entered a new note with an earlier date rather than the actual date to make it appear that his note content already existed as of the earlier date. The notes Tysk backdated did not just correct technical errors; they substantively altered evidence of events and conversations he had with a firm customer. And, unlike a revised OHO decision, Tysk failed to make available the unaltered version of his notes, even after GR's counsel repeatedly requested them. His conduct was unequivocally impermissible under FINRA rules. *See Dep't of Enforcement v. Taboada*, Complaint No. 2012034719701, 2017 FINRA Discip. LEXIS 29, at *43 (FINRA NAC July 24, 2017) (finding no exception under FINRA rules permitting a registered person to create a backdated replica of a document and then falsely presenting it to a regulator as an original), *appeal dismissed*, Exchange Act Release No. 82970, 2018 SEC LEXIS 823 (Mar. 30, 2018).

Sixth, Tysk's repeated reminders that there is no proof his altered notes contained false statements remain a red herring. Br. 21. His assertion is not relevant to this disciplinary proceeding. Enforcement did not allege in its amended complaint that Tysk's altered notes were untrue or incorrect, and neither the Hearing Panel nor the NAC ruled on the accuracy of the content of his notes. Thus, the extent to which Tysk's altered notes contained true accounts of the events is immaterial and was not at issue in these proceedings. RP 6441. Tysk acted unethically when he, against his firm policies, falsely created the appearance that he made contemporaneous notes of his advice to a firm customer, when he actually did not, in the context

of that customer's allegations of misconduct. Tysk then concealed his fabrication for more than a year after he altered his notes. Tysk's actions were unethical and demonstrated low standards of commercial honor, in violation of FINRA's rules.

Seventh, Tysk argues for the first time that he altered his notes "through no fault of his own" but because his ACT! Notes software "was improperly installed." Br. 1, 5, 23, 31. He theorizes that, because FINRA did not prove that Tysk knew about the faulty installation, it could not establish that he acted unethically. Br. 1, 5, 23, 31. Not only is Tysk's argument waived as a defense, his argument defies logic. Tysk never argued before now that the faulty installation of his ACT! Notes program caused him to improperly alter his notes. By failing to defend this theory before the Hearing Panel, the NAC, or the Commission in his first appeal, Tysk failed to ensure proper briefing on the issue and analysis in the proceedings below. Thus, Tysk's argument is waived. *See Harry Gliksman*, 54 S.E.C. 471, 480 (1999) (finding that applicants before the Commission failed to preserve their objection to the introduction of evidence in the proceedings below), *aff'd sub nom.*, Gallagher v. SEC, 24 F. App'x 702 (9th Cir. 2001).

Even if Tysk did not waive this argument, it is fundamentally flawed. By his own admission at the hearing, Tysk, and not the ACT! software, doctored 13 pre-existing notes and backdated 54 new notes by bypassing the system prompts, manually deleting the prepopulated date, and entering an older date to falsely make it appear that his communications with GR were documented all along. RP 2216-17. Tysk cannot now blame his deliberate unethical acts on a faulty software installation.

In sum, none of Tysk's arguments undermine the NAC's ruling that Tysk engaged in conduct in violation of just and equitable principles of trade. The Commission should therefore affirm the NAC's findings.

B. Tysk Violated FINRA's Code of Arbitration Procedure for Customer Disputes and FINRA Rule 2010

The NAC correctly found that Tysk violated IM-12000 of the Arbitration Code and FINRA Rule 2010 for two reasons. Tysk deliberately produced a misleading document in discovery and failed to disclose that the notes he produced were altered. Tysk further acted in bad faith in violation of just and equitable principles of trade when he failed to produce the edits to his altered notes after repeated discovery requests to do so. The Commission should sustain these findings.

FINRA's customer arbitration "provides investors with a 'fair, efficient and economical alternative to litigation.'" *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 93 (3rd Cir. 2018). FINRA's Arbitration Code explicitly demands cooperation between the parties in the exchange of documents and information to expedite the arbitration. *See* FINRA Rule 12505. FINRA Rule 12506(a) identifies the lists of documents in FINRA's Discovery Guide that are presumed to be discoverable in all customer arbitrations. FINRA Rule 12506(b) requires that the parties must either respond, or object, to discovery requests. FINRA Rule 12506(b)(1) requires that the parties produce all documents in their possession or control. If they cannot do so, they must either identify and explain why the document cannot be produced or object to its production in accordance with FINRA Rule 12508. Subparagraph (b)(2) of Rule 12506 states that the parties must act in "good faith" when complying with their discovery obligations, meaning that each party must "use its best efforts to produce all documents required or agreed to be produced."

FINRA Rule 2010 states a broad equitable principle that goes "beyond legal requirements" and depends on "general rules of fair dealing." *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12 (NASD NAC Jun. 2, 2000). IM-12000(c) of the Arbitration Code warns that it may be inconsistent with just and equitable principles of trade and a violation of FINRA Rule 2010 for an associated person to "fail to . . . produce any document in his possession or control as directed pursuant to provisions of the Code."[20] The failure to produce documents and information in accordance with the Arbitration Code, along with other discovery abuses, may subject the violator to disciplinary action under FINRA's Conduct Rules.[21]

After GR filed an arbitration claim against him in November 2008, Tysk produced misleading discovery. Tysk's ACT! Notes were listed as a presumptively discoverable item in the Discovery Guide in connection with GR's arbitration claim. RP 4655. Therefore, Tysk was required to produce them to GR. In his initial response to discovery, Tysk produced a copy of his ACT! Notes, but never informed the firm or GR's counsel that he had substantively altered them. RP 2415-16, 2815, 3103-04, 3137, 3578, 4717-20. Absent disclosing that he altered his

---

[20] IM-12000(c) ("Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes"). Tysk's suggestion that he cannot violate the provisions of IM-12000 of the Arbitration Code because it is not a freestanding rule should be rejected. Br. 31. IM-12000 is interpretive material that was subject to Commission approval upon the filing of a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 19b-4 thereunder, and thus is legally binding. *See Order Approving Proposed Rule Change*, Exchange Act Release No. 58643, 2008 SEC LEXIS 2279, at *10 (Sept. 25, 2008); FINRA Rule 0130 (governing the interpretation of FINRA rules); FINRA By-Laws, Article XI, Sec. 1 (authorizing FINRA to adopt, administer, and enforce any rules or amendments thereto approved by the Commission).

[21] *See generally* FINRA Rule 12104(e) ("Effect of Arbitration on FINRA Regulatory Activities: Arbitrator Referral During or at Conclusion of Case"); FINRA Rule 12212(b) ("Sanctions").

notes, which created the impression that they were created contemporaneously and were thus more reliable than they actually were, Tysk produced a misleading document in an arbitration proceeding, which is conduct inconsistent with just and equitable principles of trade. *Accord John F. Noonan*, 52 S.E.C. 262, 265 (1995).

Tysk also acted in bad faith when he did not produce the edits to his notes pursuant to GR's counsel's discovery request. Having a hunch that Tysk produced notes that were materially altered, GR's counsel sent a subsequent discovery request asking Tysk to provide "[a]ll documents showing edits made by Mr. Tysk to the notes . . . including but not limited to the edits made on May 27, 2008." RP 4724. Tysk's counsel asked Tysk outright whether he knew anything about "any edits being made to the contact reports." RP 4198. Although Tysk knew he extensively altered his notes, and could have divulged this to his counsel, he chose to remain silent. Tysk instead responded: "There are no other documents showing edits per the request." RP 4197. Tysk's counsel then repeated Tysk's falsehood in response to GR's discovery request, stating "there are no such responsive documents." RP 5284. No documents showing Tysk's edits were produced to GR in response to multiple requests; indeed, GR was forced to seek to postpone the December 2009 hearing and compel Tysk to produce the edits. RP 3619, 4749-58, 4811, 5310.

Because Tysk responded evasively to his counsel's direct question knowing that he recreated his notes, the NAC properly concluded that Tysk acted in bad faith. RP 6612-13; *see also West*, 2015 SEC LEXIS 102 at *23 (finding respondent's concealed actions from his customer and his deceit further demonstrated deliberate intent and bad faith). Tysk deliberately diverted his counsel's question and concealed important information from GR and the arbitration panel. His intentional withholding of discoverable information constituted conduct inconsistent

with just and equitable principles of trade. *Accord Dep't of Enforcement v. Westrock Advisors, Inc.*, Complaint No. 2006005696601, 2010 FINRA Discip. LEXIS 26, at *19 (FINRA NAC Oct. 21, 2010) (finding the intentional withholding of discoverable information in one's possession or control constitutes conduct inconsistent with just and principles of trade).

In light of the Commission's remand order, the NAC clarified that Tysk also violated the Arbitration Code discovery rules, which require that the parties either respond, or object, to discovery requests. RP 6612. When Tysk received the discovery request to produce the edits to his notes, he was required under FINRA Rule 12506(b)(1) to produce the edits, object to the production, or state the reason why he could not supply the documents showing the edits. Tysk, however, took none of these courses of action. If Tysk did not have the previous versions of his notes, despite evidence to the contrary, the rule nonetheless obligated him *to explain* his inability to produce the requested edits. He did not. By failing to act as required in response to GR's discovery request, Tysk violated FINRA Rule 12506(b)(1).

Tysk also failed to satisfy FINRA Rule 12506(b)(2), which required Tysk to act in "good faith" when complying with his discovery obligations, including using his best effort to produce all documents required to be produced. RP 6612. The record evidenced, however, that Tysk made no reasonable attempt to search ACT! and determine whether back-ups of his notes existed. Had he done so, he would have seen that several ACT! database files were accessible at the time GR's discovery request. RP 4270. Two forensic experts, ML and Leigh, testified before the Hearing Panel that a simple click on "file" and then another click on "open database" would have taken Tysk to a default location within the ACT program where Tysk's previously

saved notes existed. RP 2729-30, 3277. Tysk's failure to use his best effort to produce the discoverable information requested violated FINRA's arbitration rules.[22]

The NAC's findings were bolstered by the arbitration panel's sanctioning of Tysk's improper attempts to block discovery. RP 4822, 6613 n.11. Not until after the arbitration panel granted GR's motion to compel discovery *for the second time* and ordered a forensic search of Tysk's computer did GR learn the truth—that Tysk altered his notes. Had the arbitration panel not granted GR's motions, Tysk may well have hidden the truth from the arbitration panel. As the NAC found, Tysk's discovery abuse and bad faith harmed the integrity of the arbitration process, which violated IM-12000 of the Arbitration Code and FINRA Rule 2010. RP 6613.

Tysk on appeal reargues the exceedingly technical point that the Arbitration Code does not require "affirmative explanations" or "narrative answers" to discoverable documents. Br. 32. This, however, is beside the point. The essential goal of the discovery process is to ensure that the parties to an arbitration expediently obtain all relevant facts and information to prepare for the hearing. *See FINRA Regulatory Notice 14-40*, 2014 FINRA LEXIS 53, at *5 (Oct. 2014). The Arbitration Code expressly requires full cooperation in the exchange of documents *and information*—not solely the exchange of documents—and the parties must participate in good faith. Tysk, however, knowingly produced a falsified document in discovery without telling anyone that the evidence he produced was tainted and potentially made his defense look stronger than it was. He knew firsthand that he substantially altered his notes related to his

[22] Tysk argues that Enforcement did not charge him for directly violating specific provisions of the Arbitration Code. Br. 37. Although his Rule 12506 infractions further informed the NAC of his alleged misconduct, Tysk's liability under FINRA rules stems from his inability to act consistently with just and equitable principles of trade. *See Brokaw*, 2013 SEC LEXIS 3583, at *50 (finding a Rule 2010 violation does not require an accompanying specific rule violation).

communications with GR, yet he deliberately ignored his discovery obligation and withheld this vital information notwithstanding repeated discovery requests in an attempt to conceal his misconduct. Tysk acted in bad faith—not in good faith—which violated FINRA's rules. *Westrock*, 2010 FINRA Discip. LEXIS 26, at *24 (finding that "[a] party's noncompliance with its discovery obligations is not an 'acceptable part of arbitration strategy.'").

Although the discovery rules did not require Tysk to create new data, Br. 33-34, the evidence showed that several versions of his ACT! Notes on GR were already stored on his computer. Both ML and Leigh confirmed at the hearing that a simple click on "file" and then another click on "open database" in ACT! would have taken Tysk to a "default location within the ACT program of the databases that have been created and saved."[23] RP 2719-20, 3237, 3277. Moreover, the ACT! Notes that ML produced were not *creations* or *brand new* as Tysk suggests. Br. 14, 34-35. The data already existed. ML generated a "report" from each ACT! database file saved on the hard drive and then printed it. *See* RP 1116, 3275-85. As ML testified, "generating the reports only took a few minutes." RP 3304. Even if, for argument's sake, Tysk could not open the ACT! Notes database files that were stored on his computer—which he could—a reasonable search would have at least produced a list of the ACT! database

---

[23] Tysk claims that the backed-up ACT! database files were overwritten on a weekly basis and therefore he could not have recovered any data more than a month old. Br. 4. As the NAC stated, his argument is contradicted by direct evidence identifying eleven ACT! database files that were available on Tysk's computer, some of which were created as early as 2005. RP 3275, 3535, 4870, 4872, 6613 n.12. Furthermore, contrary to Tysk's assertion, Br. 34, ML never stated that he found "incomplete" files. If anything, ML testified that he produced *more* data from hidden files on Tysk's computer than a normal user could view. RP 3218, 3280. Rather, ML explained that ACT! "should have three different *types* of data files" and Tysk's computer only displayed one. RP 3306. This discrepancy, however, does not explain why Tysk could not produce the requested edits to his notes. Indeed, the ACT! database files of Tysk's notes—both before and after he altered them—were accessible.

files saved on his computer.[24] The evidence overwhelmingly shows that previous versions of his ACT! Notes were in Tysk's possession and control, and a reasonable search on his computer would have produced the discovery requested.[25]

Tysk claims that he turned over every responsive document in his possession or control because he produced an already printed copy of his altered notes in his initial discovery response and was required to do nothing more. Br. 33-34. He is mistaken. IM-12000(c) of the Arbitration Code required Tysk to produce any document via hard copy or *electronic* that was in his possession or control. *Cf. Westrock*, 2010 FINRA Discip. LEXIS 26, at *19 (rejecting respondent's not in their possession claim and finding Arbitration Code and J&E violations for withholding electronic documents requested in discovery). Tysk's discovery obligation was not limited to the last print out of his ACT! Notes. Per the Arbitration Code, Tysk had to use his best

---

[24] Tysk claims that he did an "extensive" search of ACT! for documents showing his note edits before he responded to his counsel stating there were no documents showing his note edits. Br. 12. The record contains no evidence, however, that Tysk conducted a *reasonable*, much less an extensive search. According to his testimony, Tysk made no attempts to search for backups of his notes. Nor did he ask his associate financial advisor, Mike Kotila, who was responsible for backing up the ACT! database, for his assistance. RP 2064. Moreover, Tysk never called the ACT! software helpdesk or an outside consultant to assist in retrieving the requested discovery. RP 2422-23.

[25] Tysk contends that expert testimony that the Hearing Officer declined would have explained the common understanding of the Arbitration Code, including that it does not require respondents to conduct forensic examinations. Br. 39. Under FINRA Rule 9623, however, Hearing Officers have broad discretion to reject expert testimony as "irrelevant, immaterial, unduly repetitious, or unduly prejudicial" even if the expert is qualified to address the topics at issue. The crucial question is whether expert testimony would be helpful to the Hearing Panel. The Hearing Officer considered Tysk's proposed expert and determined on January 7, 2014, that FINRA's arbitration rules were not novel, obscure, or complex to necessitate their testimony. RP 1111-14. The Hearing Officer abused no discretion here.

efforts to produce all discovery reflecting his edits or state the reason why he could not produce them.[26] Tysk failed to meet these requirements.

In sum, Tysk had an ethical duty to act with fairness and transparency, which covers the conduct of an association person during an arbitration proceeding. *See e.g.*, *Dep't of Enforcement v. Josephthal & Co.*, Complaint No. CAF000015, 2002 NASD Discip. LEXIS 8, at *7 (NASD NAC May 6, 2002) (finding respondent's arbitration code violation as conduct that also violates FINRA's just and equitable principles of trade rule). Tysk's failure to, in good faith, to produce the discovery requested violated the Arbitration Code and FINRA Rule 2010. The Commission should affirm the NAC's findings.

C. The Sanctions Imposed Are Neither Excessive Nor Oppressive

The standards articulated in Section 19(e) of the Exchange Act provide that the Commission must dismiss Tysk's application for review if it finds that FINRA imposed sanctions that are neither excessive nor oppressive and do not impose an unnecessary or inappropriate burden on competition.[27] *See* 15 U.S.C. § 78s(e)(2). For his violative conduct, the NAC suspended Tysk from associating with any FINRA member in any capacity and fined him $50,000. The sanctions are appropriate to remedy Tysk's serious misconduct and are neither excessive nor oppressive. As we discuss below, the Commission should sustain the sanctions.

---

[26] The Commission should further reject Tysk's contention that neither party relied on the substance of his notes in arbitration as irrelevant to his pre-arbitration discovery obligations. Br. 14. Tysk cannot second-guess the importance of required discovery.

[27] Tysk does not contend that FINRA's sanctions imposed an undue burden on competition.

1. The NAC Correctly Relied on the Forgery and/or Falsification of Records Sanction Guideline

The FINRA Sanction Guidelines ("Guidelines") contain recommendations for many, but not all, violations for which FINRA can bring disciplinary actions.[28] When the Guidelines do not have an on-point guideline, adjudicators are instructed to "look to the guidelines for analogous violations." *Guidelines*, at 1. With no sanction guideline directly addressing Tysk's violations, the NAC consulted the Guidelines and determined that the Forgery and/or Falsification of Records was the most analogous guideline to address his misconduct. For falsification of records, the Guidelines recommend a fine between $5,000 to $100,000, a suspension in any or all capacities for up to two years where mitigating factors exist, and in egregious cases, a bar. *Guidelines*, at 37. The sanctions the NAC imposed are well within these recommended ranges.

"Falsifying documents is dishonest and suggests that [respondents] are willing to bend the rules where regulation is concerned to suit their own needs." *Dep't of Enforcement v. Pierce*, Complaint No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *95 (FINRA NAC Oct. 1, 2013). Tysk acted against the customer's best interest when he intentionally altered and backdated a customer record and concealed his misconduct to avoid detection. To make matters worse, Tysk's wrongful conduct persisted in arbitration and he "undermined the regulatory function of fostering an effective dispute resolution system." *Shvarts*, 2000 NASD Discip. LEXIS 6, at *25 n.15.

---

[28] *See FINRA Sanction Guidelines* 1 (2013) (hereinafter "*Guidelines*"). The NAC applied the applicable Guidelines in effect at the time of Tysk's appeal to the NAC. A copy of the relevant Guidelines is provided herein as Attachment A.

Tysk asserts there was no allegation that his alterations contained false or untrue statements. Br. 39-40. The NAC understood this, however, when it tailored the sanctions relying on the falsification of records as the most analogous guideline. *See* RP 6614 n.14. Similar to falsifying records, Tysk deceptively manipulated the dates of 54 note entries to create the false appearance that his notes were written contemporaneously with the past event, when in fact they were not. He then misled the parties in arbitration discovery by falsely depicting his notes as an unmodified version of his interactions with GR. Tysk altering and backdating his notes on a customer is similar to the falsification of records. *Cf. Butler*, 2016 SEC LEXIS 1989, at *34 (applying the falsification of records sanction guideline for a false representation made on an annuity benefit change request form). The NAC correctly applied the most analogous sanction guideline.

2. The NAC Rejected Mitigating Factors That Tysk Raised and Found Only Aggravating Ones

The NAC determined that Tysk engaged in "serious violative misconduct." RP 6618. Tysk self-servingly backdated a customer record and concealed the revisions he made both to his firm and GR for well over a year. *See Fillet*, 2015 SEC LEXIS 2142, at *54 (finding respondent's backdating of customer records and providing those false records to FINRA as egregious misconduct). Tysk's deception impaired Ameriprise's investigation of GR's complaint because, without understanding the true nature of his records, Ameriprise could not prudently evaluate the merits of GR's complaint. Tysk's deception also impeded the discovery process in the arbitration proceeding that followed. His deliberate refrain from producing his note edits caused the parties to make more discovery motions, forced a delay in the hearing, and thereby increased costs. As FINRA held in *Westrock*, "[d]iscovery abuse hinders the efficient and cost-effective resolution of disputes . . . , and undermines the integrity and fairness of the

[arbitration] forum." 2010 FINRA Discip. LEXIS 26, at *24. Had Tysk's deviance gone undetected, he would have succeeded in undermining the arbitrator's ability to discover the truth—that his notes were not a contemporaneous record of his discussions with GR. *See DBCC v. John Francis Noonan*, Complaint No. C04930026, 1994 NASD Discip. LEXIS 25, at *13 (NASD NBCC Aug. 3, 1994) (increasing sanctions for fabricating evidence in an arbitration proceeding, deeming such actions as "serious misconduct, which cannot be condoned"), *aff'd*, 52 S.E.C. 262 (1995).

The NAC particularly found it aggravating that Tysk acted with intent. *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13). He deliberately altered and backdated his ACT! Notes—misleading both his firm and a firm customer for several months. *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 9 and 10). The extent to which Tysk attempted to conceal his misconduct and mislead others to avoid detection both during the firm's investigation of a customer complaint and after he was a party to an arbitration proceeding was further aggravating. *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 10 and 12). For example, Tysk "undermined the regulatory function of fostering an effective dispute resolution system," *Shvarts*, 2000 NASD Discip. LEXIS 6, at *25 n.15, by intentionally remaining silent about altering and backdating his ACT! Notes—even after his attorney directly asked him whether he knew about any edits to his notes. That Tysk's deception was eventually revealed did not less the potential harm to the arbitration process; his prolonged concealment was aggravating. *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 9); *see also Noonan*, 1994 NASD Discip. LEXIS 25, at *13 (barring respondent for knowingly producing fabricated evidence in arbitration and concealing his actions until his later confession).

On the other hand, the NAC found no mitigating factors that warranted lesser sanctions. RP 6616-18. The NAC considered the claims for mitigation that Tysk raised and found them unpersuasive. In particular, the NAC explained in response to the Commission's request for clarification that Tysk's reliance on the advice of counsel defense was unavailable under both causes of action. This is because (1) there was no evidence that Tysk sought legal advice *before* he deceptively altered his notes under the first cause of action, and (2) there was no evidence that Tysk's attorney advised him to withhold the edits to his notes in the face of a discovery request under cause two. RP 6616-17. As the NAC rightly stated, Tysk's ultimate confession to his firm and attorney in August 2009 came too late in the process to correct his production of altered notes in March 2009 and deceiving his attorney about his note edits in June 2009. RP 6616.

On appeal, Tysk argues that his confession to his attorney served as a "mitigating defense to any allegedly unethical discovery before [it]." Br. 43. He is mistaken. Although Tysk continued to refuse GR's discovery requests after the arbitration panel postponed the hearing, what occurred after August 2009 has no bearing on the violations he committed before his confession (i.e., providing his altered notes to GR in discovery in March 2009 and falsely informing his attorney, in who in turn informed GR, that there were no edited notes). *See, e.g.*, *United States v. Cheek*, 3 F.3d 1057, 1061 (7th Cir. 1993) (finding that respondent failed to show that he sought or received legal advice on possible *future* conduct); *C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1436 (10th Cir. 1988) (requiring advice from counsel that the action *to be taken* will be legal); *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *38 (Nov. 14, 2008) (requiring respondent to have sought advice on the legality of the *intended* conduct), *aff'd* 347 F. App'x 692 (2d Cir. 2009).

Tysk also argues that his purported reliance on his attorney's judgment was a complete defense to his discovery infractions that occurred after August 2009. Br. 42. Any infraction that Tysk may have committed after August 2009, however, does not invalidate his unethical misconduct beforehand. To this point, while Tysk and his attorney undoubtedly discussed the impending arbitration hearing, there is no record evidence that Tysk's attorney discussed or employed any advisement or strategy to not provide GR his note edits until the arbitration hearing. In fact, when Enforcement asked at the hearing whether, at the time of his confession, Tysk discussed with his attorney to disclose that he edited his notes to GR or GR's counsel, Tysk replied: "We did not discuss that." RP 2429. Finding no grounds to mitigate the sanctions based on Tysk's reliance on advice of counsel claim, the NAC rightly rejected it.

3. The NAC's Sanctions Serve to Remediate Tysk's Conduct

Tysk argues that the sanctions are excessive and oppressive because they exceed "those recommended by the OHO." Br. 39. But a sanction is not presumptively excessive or oppressive simply because it was increased from the proceedings below. *Accord Tomlinson*, 2014 SEC LEXIS 4908, at *42 ("[T]he 'mere fact that the NAC increased the sanctions . . . does not render the [sanctions] invalid on fairness grounds.'"). Indeed, the NAC reviews the Hearing Panel's decision de novo and can independently "affirm, modify, reverse, increase, or reduce any sanction." *See* FINRA Rules 9348 and 9349; *see also Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *25-26 (May 13, 2011). The NAC found that stronger sanctions were necessary to remediate Tysk's serious misconduct while deterring misconduct of similar nature in the future and protecting the investing public. RP 6618. The Commission should affirm them.

In arguing for a lesser sanction, Tysk revisits *Dep't of Enforcement v. Decker*, a settled FINRA action in which FINRA suspended the respondent for 20 days and fined him $7,500 for placing his initials near a backdated notation. Br. 43-44. The comparison to this settled matter is inappropriate for several reasons. First, the sanctions imposed in any particular case depend upon the facts and circumstances and "cannot be precisely determined by comparison with action taken in other proceedings." *See Tomlinson*, 2014 SEC LEXIS 4908, at *40. Second, Tysk's reliance on a settled FINRA case in arguing for a lesser sanction has minimal to no probative value in comparing sanctions because settled cases tend to result in lower sanctions against the respondent. *Brian L. Gibbons*, 52 S.E.C. 791, 795 (1996); *see also* Guidelines, at 1 (acknowledging that settled cases generally result in lower sanctions than fully litigated cases for incentive purposes), *aff'd* 122 F.3d 516 (9th Cir. 1997) (table).

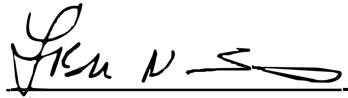
Third, the *Decker* case is dissimilar to this one. Tysk's backdating and alterations to his ACT! Notes were much more extensive than an initialed backdated notation on spreadsheets in the *Decker* case. Moreover, Tysk substantively altered numerous entries, 67 notes in total, for two-weeks. Tysk then concealed his misconduct for over a year—a much longer period than the two months the respondent took to confess his actions in *Decker*. For Tysk to argue that *Decker* is the yardstick by which to measure excessive or oppressive sanctions is fallacious and the Commission should reject it.

The sanctions the NAC imposed against Tysk, which are neither excessive nor oppressive, remedially address the gravity of his misconduct while deterring him and other securities professionals from similarly engaging in deceptive business practices going forward. For these reasons, the Commission should sustain the NAC's sanctions.

V. CONCLUSION

The NAC's findings of violation are well supported by the record and Tysk's sanctions are appropriate. FINRA respectfully asks that the Commission sustain the NAC's decision in all respects.

Respectfully submitted,



Lisa Jones Toms
Associate General Counsel
FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
(202) 728-8044 Telephone

July 23, 2019

<u>APPENDIX OF APPLICABLE FINRA SANCTION GUIDELINES</u>

This appendix sets forth the relevant text of FINRA's Sanction Guidelines on Forgery and/or Falsification of Records.

(Source: *See FINRA Sanction Guidelines* (2013 ed.))

FINRA

Financial Industry Regulatory Authority

Sanction Guidelines

Table of Contents

Overview 1

General Principles Applicable to All Sanction Determinations 2

Principal Considerations in Determining Sanctions 6

Applicability 8

Technical Matters 9

- I. Activity Away From Associated Person's Member Firm 12
- II. Arbitration 17
- III. Distributions of Securities 19
- IV. Financial and Operational Practices 25
- V. Impeding Regulatory Investigations 31
- VI. Improper Use of Funds/Forgery 35
- VII. Qualification and Membership 38
- VIII. Quality of Markets 46
- IX. Reporting/Provision of Information 67
- X. Sales Practices 76
- XI. Supervision 99

Schedule A to the FINRA Sanction Guidelines 106

Index 107

© 2013 FINRA. All rights reserved. July 2013 version of the *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.

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.e The respondent's relevant disciplinary history (see Generale Principle No. 2).e

2.e Whether an individual or member firm respondent acceptede responsibility for and acknowledged the misconduct to his ore her employer (in the case of an individual) or a regulator prior toe detection and intervention by the firm (in the case of an individual)e or a regulator.e

3.e Whether an individual or member firm respondent voluntarilye employed subsequent corrective measures, prior to detectione or intervention by the firm (in the case of an individual) or by ae regulator, to revise general and/or specific procedures to avoide recurrence of misconduct.e

4.e Whether the respondent voluntarily and reasonably attempted,e prior to detection and intervention, to pay restitution or otherwisee remedy the misconduct.e

5.e Whether, at the time of the violation, the respondent member firme had developed reasonable supervisory, operational and/or technicale procedures or controls that were properly implementede

6.e Whether, at the time of the violation, the respondent member firme had developed adequate training and educational initiatives.e

7.e Whether the respondent demonstrated reasonable reliance one competent legal or accounting advice.e

8.e Whether the respondent engaged in numerous acts and/or ae pattern of misconduct.e

9. Whether the respondent engaged in the misconduct over an extended period of time.

10.eWhether the respondent attempted to conceal his or here misconduct or to lull into inactivity, mislead, deceive or intimidatee a customer, regulatory authorities or, in the case of an individuale respondent, the member firm with which he or she is/wase associated.e

11.eWith respect to other parties, including the investing public, the member firm with which an individual respondent is associated,e and/or other market participants, (a) whether the respondent'se misconduct resulted directly or indirectly in injury to such othere parties, and (b) the nature and extent of the injury.e

---

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 absenceis 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.

Forgery and/or Falsification of Records

FINRA Rule 2010

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

CERTIFICATE OF COMPLIANCE

I, Lisa Jones Toms, certify that the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17294r) complies with the length limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,012 words.

Lisa Jones Toms
Associate General Counsel
FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
(202) 728-8044 Telephone

July 23, 2019

CERTIFICATE OF SERVICE

I, Lisa Jones Toms, certify that on this 23rd day of July 2019, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17294r) to be sent via messenger and fax to:

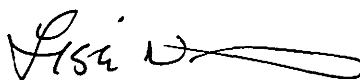
Vanessa A. Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915 – Mailstop 1090
Washington, DC 20549-1090

and via overnight delivery and electronic mail to:

Brian L. Rubin, Esq.
Eversheds Sutherland (US) LLP
700 Sixth Street, NW, Suite 700
Washington, D.C. 20001
brianrubin@eversheds-sutherland.com

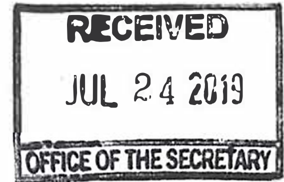
Lee A. Peifer, Esq.
Eversheds Sutherland (US) LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309
lee.peifer@eversheds-sutherland.com

Service was made on the Securities and Exchange Commission by messenger and on the Applicant's counsel by overnight delivery service and electronic mail between the offices of FINRA and the counsel for the Applicant.



Lisa Jones Toms
Associate General Counsel
FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
(202) 728-8044 Telephone

Financial Industry Regulatory Authority



Lisa Jones Toms
Associate General Counsel

Direct: (202) 728-8044
Fax: (202) 728-8264

July 23, 2019

VIA MESSENGER AND FACSIMILE

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Fax: (202) 772-9324

RE: In the Matter of the Application for Review David B. Tysk
Administrative Proceeding No. 3-17294r

Dear Ms. Countryman:

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

Please contact me at (202) 728-8044 if you have any questions.

Sincerely,

Lisa Jones Toms

Enclosures

cc: Brian L. Rubin, Esq. (via FedEx and Email)
Lee A. Peifer, Esq. (via FedEx and Email)