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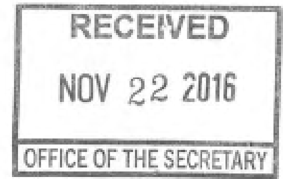

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

Keith D. Geary

For Review of

FINRA Disciplinary Action

File No. 3-17406

BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN OPPOSITION TO APPLICATION FOR REVIEW

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BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

Keith D. Geary failed on two separate occasions to cease conducting a securities business at his firm, Geary Securities, Inc. ("GSI" or the "Firm"), while it lacked the required net capital. Geary, the president and CEO of GSI, was directly responsible for the events that triggered both of the Firm's net capital deficiencies. In May 2009, as a result of Geary's reckless proprietary trading, GSI's net capital fell $11.5 million below its required minimum while the Firm continued to conduct a securities business. Eight months later, Geary knew that GSI was net capital deficient, as a result of his failure to infuse GSI with more capital, yet he permitted the Firm to continue to operate. FINRA's National Adjudicatory Council ("NAC") found Geary liable under FINRA Rule 2010 for his misconduct and fined him $20,000, imposed a 30-business-day suspension in all capacities, and barred him from acting in any principal or supervisory capacity with any FINRA member firm.

The record amply supports the NAC's liability findings. It is undisputed that GSI continued to conduct a securities business throughout the relevant period. It is also undisputed that Geary knew that GSI was net capital deficient for at least 13 days in February 2010 but nonetheless allowed GSI to continue to conduct a securities business. On appeal, Geary challenges only the NAC's conclusion that a net capital violation occurred in May 2009, alleging that GSI's repapering of the transactions that caused this violation six months after the fact demonstrates that GSI did not violate the net capital rule. Geary's argument is without merit. The May 2009 net capital violation is well supported by the record, expert testimony, and relevant precedent. Moreover, contrary to Geary's claims, his lack of intent or awareness about the consequences of his reckless trading does not excuse his liability under FINRA Rule 2010.

The record also amply supports the NAC's sanctions for Geary's egregious misconduct. The NAC weighed all relevant factors (both aggravating and mitigating) and imposed remedial sanctions which are neither punitive nor excessive. In barring Geary in all principal and supervisory capacities, the NAC found that Geary abdicated his responsibilities as a principal and lacked appreciation for the industry's regulatory requirements with respect to financial reporting. The NAC also suspended Geary in all capacities for 30 business days and fined him $20,000 to remediate his misconduct. These sanctions are consistent with FINRA's Sanction Guidelines (the "Guidelines") and fully warranted by the facts and circumstances of this case. Geary's arguments to the contrary should be rejected by the Commission, and the Commission should dismiss Geary's application for review.

II. FACTUAL BACKGROUND

A. Geary and GSI

Geary has extensive experience in financial services, having worked in the industry since 1979. RP 2368-69.[1] Among other things, he worked as a consultant for financial institutions dealing with interest rate risk management. RP 2364. In 1997, Geary first associated with a FINRA member firm. RP 2659.

In August 2007, Geary acquired Capital West Securities, which later became GSI. RP 2365-66. When Geary acquired the Firm, he became its chairman, CEO, and president. RP 2367. He registered as a general securities representative, general securities principal, municipal securities principal, operations professional, and investment banking limited representative. RP 2658-59. At GSI, Geary intended to continue serving the banks that had been his long-standing consulting clients, while earning additional revenue from GSI's securities business. RP 2366, 2368. Throughout the relevant period, GSI was subject to a $250,000 minimum net capital requirement. RP 2130-34, 2140, 3129-3378.

When Geary acquired GSI, the Firm had approximately 50 employees. RP 2488. Geary kept the existing staff, including Norman Frager, the Firm's primary financial and operations principal ("FINOP"), Denise Hintze, the Firm's on-site accountant and bookkeeper, and Althea Roberts, the Firm's chief compliance officer ("CCO") and on-site FINOP. RP 2367-69. Frager was on-site at GSI at least two days per month to finalize and submit GSI's FOCUS reports. RP 2369, 2559-60. Hintze acted as GSI's bookkeeper and prepared a rough draft of the FOCUS reports for Frager. RP 2277-78. Roberts was responsible for the operations part of the FINOP

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[1] "RP" refers to the record page numbers in the certified record of this case. "Decision at __" refers to the NAC's July 20, 2016 decision. RP 4727-45.

duties at GSI. RP 2601-02. GSI's written supervisory procedures provided that, should its net capital fall below the minimum required amount, the FINOP "will alert Senior Management that we must cease doing business." RP 2717.

In or about 2009, Geary came up with the idea to buy downgraded collateralized mortgage obligations ("CMOs") from banks, improve their credit rating by repackaging them with treasury bonds, and then sell them back to banks as high-rated securities. RP 2378-80. He called the plan "Credit Enhanced Mortgage Pool" or "CEMP." RP 2378-80. In May 2009, Geary discussed the CEMP plan with Frager, who had prior experience relating to the resecuritization of fixed income instruments. RP 2381, 2435, 2561. Frager prepared a bullet point presentation for Geary explaining what he should do to implement the CEMP plan. RP 2561-62. Frager explained to Geary that Geary would need to create a special purpose entity because GSI lacked the capital to repackage the CMOs. RP 2435-36, 2560-64, 2577-78. Frager also told Geary that GSI should only serve as a placement agent and should not acquire the CMOs. RP 2436-37, 2562-64, 2598. Frager testified that he was "convinced" Geary knew that GSI could not itself buy the CMOs.[2] RP 2598.

B. GSI's First Net Capital Deficiency – May 2009

1. Geary's Proprietary Trading

Geary's proprietary trading in GSI's account caused the Firm's first net capital deficiency in May 2009. Geary had a long-standing and wealthy customer named Joseph McKean, who owned Frontier State Bank ("Frontier"). RP 2386-87, 4003-36. Geary previously had sold

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[2] Based on Frager's advice, Geary eventually created a special purpose entity, and that entity closed its first CEMP transaction in September 2009 (well after GSI's first net capital violation). RP 2577-78.

private label CMOs to Frontier and other banks. RP 2379. On May 1, 2009, Frontier received a letter from the FDIC advising the bank of an upcoming examination and informing it that it would have to adjust its positions in private label securities. RP 2378-79, 2384. In late May 2009, Frontier solicited bids for its private label CMOs. RP 2442-43.

Contrary to Frager's advice earlier in May, Geary on behalf of GSI submitted the high bid for 13 private label CMOs from Frontier and caused GSI to buy them for GSI's own account for $76.7 million on Thursday, May 28, 2009. RP 2317-18, 2377-78, 2594-95, 2697-98. Geary did not talk to anyone at GSI, including Frager, prior to the purchase. RP 2440-41, 2594-95. The CMOs were taken into GSI's account at GSI's clearing firm, Pershing LLC ("Pershing"), and Pershing transferred funds to Frontier to pay for the purchase. RP 2318, 2368, 2437-39, 2443-44, 2697-98. At the time Geary purchased the CMOs, he admittedly did not have a specific customer in mind to purchase the CMOs, had no commitment from McKean or McKean's foundation to buy the CMOs from GSI, and he expected Pershing to hold the securities for GSI's account and to charge GSI interest for doing so. RP 2377-78, 2437-39.

On May 29, 2009, Pershing discovered it had paid Frontier, but it had not received any payment from GSI for the transaction. RP 2228-30. Therefore, Pershing issued a "maintenance call" and contacted GSI to find out if the Firm was going to meet it.[3] RP 2228, 2231-32. Geary asked Pershing to extend credit to GSI for the securities. RP 2265-66. Pershing declined because Pershing had a policy against extending credit for CMO purchases. RP 2266.

On Saturday, May 30, 2009, Geary emailed Frager, stating that, "I may need to visit with

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[3] Pershing personnel testified that the transactions were large and resulted in a "fairly large" margin call. RP 2228. Pershing's Director of Operations in Los Angeles also noted that the price that GSI paid for the CMOs was higher than the price at which Pershing carried the CMOs on its books, resulting in "deficit equity in the account." RP 2226, 2229.

you on Monday morning as to how [GSI], with Pershing's help, can carry a group of [private label CMOs] for the ten, fifteen days it would take" to repackage the CMOs and sell them. RP 2446-47. Frager responded to Geary on Monday, June 1, 2009, and Geary told him that he had purchased the CMOs with the intention of holding them for weeks for the CEMP project. RP 2385, 2445, 2449-50. Frager told Geary that the securities could not be in GSI's account, and Geary said he would move them. RP 2385, 2447, 2450.

Geary thereafter contacted McKean, who agreed to buy the CMOs and instructed Geary to divide them between the GSI accounts of McKean's foundation and McKean's personal account. RP 2385. McKean did not have sufficient funds to cover the entire purchase. RP 2385. He purchased some of the CMOs on June 1, 2009, and he asked Geary to find out whether Pershing would let him buy the remaining CMOs on margin. RP 2385. Pershing personnel declined. RP 2385-86. On June 3, 2009, McKean deposited funds sufficient to purchase the remainder of the CMOs. RP 2385-86, 2698.

Although the CMOs were in GSI's inventory and in its account at Pershing on May 28 and May 29, 2009, GSI did not report them as an inventory position on its May 2009 FOCUS report. RP 2051, 3676-80. Instead, GSI's May 2009 FOCUS report, which was prepared by Frager without consulting with Geary, reflected that GSI had net capital of $1,026,261 at the end of May 2009. RP 2585-87, 3676. As described below, GSI's calculation was erroneous, and it actually had a substantial net capital deficiency at the end of May 2009.

2. FINRA's Discovers GSI's Net Capital Deficiency

In November 2009, the Oklahoma Department of Securities advised FINRA of GSI's CMO purchases and a potential net capital violation.[4] RP 2037. FINRA staff thereafter conducted an on-site examination to review GSI's net capital position at the end of May 2009. RP 2037. FINRA staff determined that GSI had a net capital deficiency of roughly $11.5 million on May 28 and 29, 2009, as a result of holding the CMOs in the Firm's proprietary account (which was not reflected in its May 2009 FOCUS report). RP 2037-44, 4059-86.

During the on-site visit, FINRA staff spoke to Frager by telephone. RP 2581-83. FINRA staff explained that GSI had been in violation of its net capital requirement on May 28 and 29, 2009, as a result of the CMO purchase and requested that GSI file a net capital deficiency notice. RP 2092-93. Frager asserted that GSI did not have a net capital deficiency because the CMOs had been purchased for a customer (i.e., McKean) and not for the Firm, even though when Geary purchased the CMOs he did so without having a specific purchaser in mind. RP 2093-94, 2112, 2583. Frager declined to file the net capital deficiency notice. RP 2093-94. The FINRA examiner testified that Frager told him that he was going to contact Pershing to have the CMO trades "corrected." RP 2094, 2216. The evidence reflects that, in November 2009, Frager requested that Pershing change both the trade dates and the settlement dates for the CMO sales to McKean and McKean's foundation from June 1 and 3, 2009, to May 28, 2009 (which was also the trade date and settlement date of GSI's purchase of the CMOs from Frontier). RP 2095,

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[4] On September 22, 2010, the Oklahoma Department of Securities initiated its own action against Geary, Frager, GSI, and the special purpose entity Geary created for CEMP transactions, alleging that they failed to maintain net capital, made false statements and omissions of material facts, and made unsuitable recommendations. RP 2666-67. Geary entered into a settlement agreement with the Oklahoma Department of Securities on April 23, 2012. RP 944-47. Without admitting or denying a violation, Geary agreed to not act as a principal, officer, or director of any broker-dealer in the state of Oklahoma for 25 months. RP 945, 2668.

2200-01. Pershing changed the trade date to May 28, 2009, but it did not change the settlement date, which remained June 1 and 3, 2009. RP 2210-18, 3873.

Frager did not consult with Geary prior to declining FINRA's request to file the net capital deficiency notice. RP 2586-87. FINRA staff never discussed or followed up with Geary about the issue prior to the underlying litigation. RP 2096.

C. GSI's Second Net Capital Deficiency – February 2010

1. Frager's Warnings to Geary Concerning GSI's Net Capital

In January 2010, Frager was on-site at GSI to complete GSI's December 2009 FOCUS report and other year-end reports. RP 2565. In the months prior, Frager had explicitly warned Geary that GSI's net capital was in continuous decline. RP 2475, 2565-66. Frager told Geary that GSI needed at least $500,000 in additional capital and that Geary needed to infuse the Firm with capital, either with the profits GSI anticipated from an ongoing CEMP transaction or from another source. RP 2566-68. Frager also told Geary that GSI should consider amending its membership agreement with FINRA to drop its net capital requirement from $250,000 to $100,000. RP 2567. Geary did not heed Frager's advice. Instead, Geary allowed GSI to fall below its required minimum net capital and permitted the Firm to conduct a securities business for 15 days while it was net capital deficient. RP 2122-27, 2891-96.

Geary testified that Frager had "generally spoke about . . . a net capital violation" and told him that GSI must stop writing tickets if it went below its net capital requirement. RP 2409, 2477-79. Similarly, Frager testified that he told Geary and Roberts (GSI's CCO and on-site FINOP) the implications of GSI violating the net capital rule. RP 2569-2572.

Meanwhile, in January 2010, Geary continued to work on a CEMP transaction that had failed to close in December 2009, which was having an impact on GSI's net capital position. RP 2489. On January 20, 2010, Frager sent an email to the FINRA regulatory coordinator for GSI, which read:

> On Friday the 22nd, [GSI] currently plans on the closing of CEMP 2010-1 resecuritization trust, which in and of itself will restore significant capital to the broker-dealer entity. If for some reason the closing is delayed, I have received assurances that the parent company [owned by Geary and his wife] will arrange to infuse additional capital into the [Firm] next week.

RP 2119-20, 3379. The CEMP transaction did not close at the end of January. RP 2474-75.

2. Hintze Informs Geary and Frager that GSI Falls Below its Required Minimum Net Capital

On or about February 4, 2010, Hintze (GSI's on-site accountant and bookkeeper) told Geary that, based on her calculations, she believed that GSI had gone approximately $20,000 below its required minimum net capital of $250,000. RP 2396, 2476. Geary testified that he told Hintze to contact Frager. RP 2476. Geary also called his bank that same day and inquired whether GSI's parent company could borrow $750,000 that would be repaid in mid-April after the CEMP transaction and other transactions closed. RP 2397, 2480-81. While waiting for the loan to be approved, Geary transferred $75,000 from his personal account to GSI on February 5, 2010. RP 2481. Geary's cash infusion, however, did not cure the net deficiency because Hintze's net capital calculation was incorrect. RP 2891. And, despite the bank's assurances to Geary, the $750,000 loan was not immediately forthcoming, and GSI's net capital deficiencies continued. RP 2401-02.

On or about February 10, 2010, Frager learned from Hintze that GSI had fallen below its required minimum net capital. RP 2572. Frager testified he was not surprised that GSI fell below, but he was surprised that it happened so quickly and that Hintze did not previously tell

him. RP 2572-73. He explained that he knew Hintze was having daily conversations with Geary, so Frager thought Hintze would have told him that GSI was approaching its net capital threshold. RP 2573. On February 10, 2010, Roberts informed Frager that she had left a message for FINRA staff and suggested that GSI did not need to send an email to GSI's brokers to stop writing tickets "until we have had discussions with FINRA." RP 4395. Frager responded that same day, writing, "I left you a voice mail instructing you **not** to send out any notice to our brokers. I spoke to [Hintze], Keith [Geary], ... I will file the [net capital deficiency] notice today . . . . [The bank] has a Board of Directors meeting on Tuesday to provide the Geary Cos. with additional funds." RP 4395.

Frager filed GSI's first net capital deficiency notice that same day. RP 2876-77. In the notice, Frager noted that GSI expected to receive $500,000 from its parent company on February 16, 2010. RP 2877.

3. Geary Is in Constant Contact with GSI Staff Regarding GSI's Net Capital

From February 10, 2010, onward, Geary communicated regularly with GSI staff regarding the Firm's net capital position. Hintze communicated daily with Geary and prepared daily net capital computations for Frager. Hintze and Geary also reviewed the numbers from GSI's clearing firm and GSI's net capital calculation. RP 2287, 2289, 2484, 2574. Frager also spoke with Geary on multiple occasions during February 2010. Geary testified that Frager called him sometime between February 10 and 12, and told him that GSI had fallen below its net capital requirement, that he needed to put capital into GSI, and that having "net capital violations means you don't write tickets, you just quit doing business in the firm." RP 2477-79. Frager testified that Geary made "repeated assurances" during February 2010 that he was going to obtain additional funding for GSI. RP 2575.

Geary continued to follow up with the bank and ultimately went to a bank directors' meeting on February 16, 2010, to plead his case for approving the loan. RP 2401-02, 2413. Despite GSI's net capital deficiency, Geary permitted GSI to continue to conduct a securities business. RP 2897-3128.

On February 12, 2010, Frager filed a second notice of net capital deficiency on behalf of GSI. RP 2879-2880. Frager again noted that GSI expected to receive $500,000 from its parent company on February 16, 2010. RP 2880. Notwithstanding Frager's notation, GSI continued to be net capital deficient until February 26, 2010, when Geary infused GSI with an additional $500,000. RP 2483, 2891-96. That same day, GSI filed a third notice of net capital deficiency. RP 2885-86. In the notice, Frager noted, "[p]arent company reduced a non-allowable receivable on Feb. 26, 2010 by a cash payment and capital compliance regained." RP 2886.

It is undisputed that GSI continued its securities business during the entirety of its net capital deficiency. RP 2897-3128.

III. PROCEDURAL HISTORY

On September 17, 2012, FINRA Department of Enforcement ("Enforcement") filed a five-cause complaint against Geary and Frager. RP 13-25. Prior to the hearing, Frager settled the charges against him, so the hearing proceeded solely on the charges against Geary. RP 1493-1503. Only two causes of action were alleged against Geary. RP 13-25. In cause one, Enforcement alleged that Geary knew, should have known, or was reckless in not knowing that GSI conducted a securities business while failing to maintain its minimum net capital requirement on May 28 and 29, 2009, in violation of FINRA Rule 2010. RP 15-17. In cause four, Enforcement alleged that Geary knew, should have known, or was reckless in not knowing that GSI conducted a securities business while failing to maintain its minimum net capital

requirement for 15 days between February 2, 2010, and February 25, 2010, in violation of FINRA Rule 2010. RP 20-22.

After a three-day hearing, the Hearing Panel issued its decision on July 8, 2014. RP 4445-75. The Hearing Panel found that Geary engaged in the misconduct as alleged in the complaint. RP 4445-75. For the first violation, the Hearing Panel fined Geary $10,000, suspended him from association with any FINRA member firm in any capacity for 30 business days, and barred him from acting in a principal or supervisory capacity with any FINRA member firm. RP 4474. For the second violation, the Hearing Panel fined Geary $20,000, suspended him from association with any FINRA member firm in any capacity for 60 calendar days, and barred him from acting in a principal or supervisory capacity with any FINRA member firm. RP 4474.

Geary appealed the Hearing Panel's decision to the NAC. RP 4477-88. In a decision dated July 20, 2016, the NAC affirmed the Hearing Panel's liability findings in their entirety. Decision at 1-12. The NAC held that Geary twice permitted his firm to conduct a securities business while it lacked the required net capital, in violation of FINRA Rule 2010. *Id.* at 11-12. The NAC found that Geary knew or should have known that his proprietary trading would cause a net capital violation in May 2009, and that Geary knowingly permitted GSI to operate while net capital deficient in February 2010. *Id.* at 10-11. The NAC rejected Geary's argument that the repapering of GSI's May 28, 2009 purchases of the CMOs negated GSI's net capital violation. *Id.* at 7.

The NAC modified the Hearing Panel's sanctions. *Id.* at 12. It imposed a unitary sanction on Geary for his misconduct, fining him $20,000, imposing a 30-business-day suspension in all capacities, and barring him from acting in any principal or supervisory capacity

with any FINRA member firm. *Id.* In assessing sanctions, the NAC found that Geary's reckless disregard of the consequences of his proprietary trading in May 2009 and his intentional disregard of the net capital rules and his firm's written supervisory procedures in February 2010 warranted significant sanctions. *Id.* at 18. The NAC found that "Geary has demonstrated that he is incapable of acting as a principal" because of "his failure to discharge the significant responsibilities that fall on a firm principal to ensure the firm's compliance with applicable laws, rules, and regulations." *Id.*

Geary timely appealed the NAC's decision to the Commission. RP 4752-4755.

IV. ARGUMENT

The record amply supports the NAC's findings that Geary violated FINRA Rule 2010 by permitting GSI to conduct a securities business in May 2009 and February 2010 while it lacked the required minimum net capital. It is undisputed that GSI continued to conduct a securities business throughout the relevant period. It is likewise undisputed that GSI lacked the required minimum net capital in February 2010, but Geary nonetheless—and knowingly as of February 4, 2010—permitted GSI to conduct a securities business.

On appeal, Geary only challenges FINRA's liability finding that GSI had a net capital deficiency in May 2009. He argues that because GSI repapered Geary's $76.7 million CMO purchases six months after the fact, the CMOs were not in GSI's inventory on May 28 and 29, 2009, and thus the Firm did not have any liability for the CMOs and was net capital compliant at that time. Geary's argument is without merit. Indeed, this same argument was considered by the NAC, but was rejected based on the overwhelming evidence—including Geary's own testimony—and established case law. Moreover, Geary's lack of awareness about the consequences of his trading does not excuse his liability. The Commission therefore should affirm FINRA's liability findings.

The Commission also should affirm the sanctions imposed by the NAC. The $20,000 fine, 30-business-day suspension in all capacities, and bar from acting in any principal or supervisory capacity with any FINRA member firm are neither excessive nor oppressive. The NAC's sanctions are appropriately remedial, consistent with the Guidelines, and fully warranted by the facts and circumstances. Geary's arguments that FINRA disregarded mitigating factors and failed to tailor its sanctions to his violations are without support. The NAC appropriately considered both the principal and specific considerations associated with Geary's misconduct and the Guidelines, carefully balanced all relevant mitigating and aggravating factors, and concluded that Geary's misconduct was egregious. The NAC's imposed sanctions are appropriately remedial and correctly reflect the gravity of Geary's misconduct.[5]

A. Geary Twice Permitted GSI to Conduct a Securities Business While It Lacked the Required Net Capital

The record establishes that GSI conducted a securities business in May 2009 and February 2010 while it was net capital deficient.

1. The Net Capital Rule

The Securities Exchange Act of 1934 ("Exchange Act") Rule 15c3-1, known as the net capital rule, prohibits broker-dealers from engaging in a securities business if their net capital falls below certain amounts.[6] The purpose of the rule is to ensure that broker-dealers have

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5 Throughout his opening brief, Geary references the findings of the FINRA Hearing Panel. It is the opinion of the NAC, not the Hearing Panel, that is the final FINRA action subject to Commission review. *See, e.g., David Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *51 (July 27, 2015). Therefore, FINRA's brief focuses on those arguments that refer to the NAC's findings.

6 Pursuant to the requirements set forth in Exchange Act Rule 15c3-1(a)(2)(i), GSI was required to maintain a minimum net capital of $250,000 throughout the relevant period. RP

[Footnote continued on next page]

sufficient liquid assets on hand at all times to cover their indebtedness. *See Lowell H. Listrom*, 50 S.E.C. 883, 886 (1992), *aff'd*, 975 F.2d 866 (8th Cir. 1992). Broker-dealers calculate their required net capital based on their ratio requirement and the activities performed at the firm and then calculate their net capital position by making adjustments to net worth to account for illiquidity. *See* 17 C.F.R. § 240.15c3-1(a), (c)(2). The rule requires broker-dealers to maintain their required net capital continuously, demonstrating "moment-to-moment" compliance. *See NASD Notice to Members 07-16*, 2007 NASD LEXIS 36, at *1 (Apr. 2007). Broker-dealers are prohibited from continuing to engage in a securities business if their net capital falls below the requirement. *See id.* A violation of the net capital rule also is a violation of FINRA Rule 2010. *See Fox & Co. Invs., Inc.*, 58 S.E.C. 873, 883 (2005). Even minimal or inadvertent violations of the Commission's net capital rule cannot be excused. *See, e.g., Hutchinson Fin. Corp.*, 51 S.E.C. 398, 403 (1993) (affirming net capital violation even where violation was "inadvertent" and capital was only deficient by approximately $1,000); *Mark James Hankoff*, 48 S.E.C. 705, 707 (1987) (affirming violation of net capital rule where firm only effected two impermissible transactions).

2. GSI Conducted a Securities Business While It Was Net Capital Deficient in May 2009

The evidence establishes that GSI failed to maintain its required minimum net capital on May 28 and 29, 2009, when it effected securities transactions and had a net capital deficiency of approximately $11.5 million. When Geary caused GSI to purchase the CMOs on May 28, 2009, for $76.7 million, its account at Pershing reflected a long securities position until June 3, 2009,

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[cont'd]

2140, 2699, 3129-3377. Geary did not contest this finding before the NAC, and Geary does not contest this finding before the Commission.

when all of the securities had been sold to McKean and McKean's foundation. Because GSI had not paid for the CMOs, it had, and should have recorded, a corresponding liability to Pershing in the interim. As a result of this liability, GSI was required to deduct a 15 percent haircut on the CMOs for its net capital computation, equating to approximately $11.5 million.[7] RP 2317-25, 2697-98, 4059-86.

On appeal, Geary argues that GSI had no position in the CMOs on May 28 and May 29, 2009, because GSI—six months after the transactions—had changed the trade dates of the CMO sales to McKean and McKean's foundation, with Pershing's acquiescence, to May 28, 2009. Applicant's Br. at 6-8. The argument is unpersuasive. As the Commission has stated, "[i]t is essential that a firm monitor its net capital compliance on an ongoing basis on the basis of records that are reliable and up-to-date." *Hutchinson Fin. Corp.*, 51 S.E.C. at 403. Thus, the fact that Frager sought to repaper the transactions six months after the fact to create the false appearance that they did not cause a net capital violation does not change the actual timing or substance of the transactions.[8] *See id.* ("[W]e generally have been unreceptive to attempts to adjust net capital computations with documentation obtained after the date as of which the computations were made.").

Geary's argument also ignores the overwhelming evidence that the CMOs were in GSI's inventory on May 28 and 29, 2009, and that they remained there until GSI sold them to McKean

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[7] A broker-dealer's net capital is determined by deducting the total haircut, along with other adjustments, from the broker's net worth. *See* 17 C.F.R. § 240.15c3-1(c)(2). Pursuant to Exchange Act Rule 15c3-1, the CMOs were subject to a 15 percent haircut on the market value of the CMOs. *See* 17 C.F.R. § 240.15c3-1(c)(2)(vi)(J).

[8] Geary himself testified: " [Frager] ultimately backdated the tickets to make the [net] capital violation go away." RP 2460. Similarly, Geary's assistant testified that the CMO trades needed to be "rebilled" six months later "because of the net capital issues from the months earlier." RP 2200-01.

and McKean's foundation on June 1 and 3, 2009. *See Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285, at *17 (Apr. 1, 2016) (finding that the firm effected proprietary trading because "it held all of the transactions for multiple business days without allocating them to customer accounts and liquidated some of those transactions at a profit or loss to the [f]irm."). Geary's own testimony supports this finding. Among other things, Geary testified at the hearing that he purchased the CMOs on behalf of GSI for the CEMP program and that, at the time of the purchase, he did not have a customer in mind to receive the CMOs from GSI, he had no commitment from McKean or McKean's foundation to buy the CMOs from GSI, and he expected Pershing to hold the securities for GSI's account and to charge GSI interest for doing so. RP 2377-78, 2437-39. Testimony by other GSI employees and Pershing representatives also support the finding that the CMO trades were not a riskless principal transaction. RP 2200-01, 2228-32, 2256-61, 2265-70, 2279-83.

Geary fails to address, or even note, these facts on appeal. Rather, Geary points to the testimony of Enforcement's net capital expert that a firm's liability arises on the trade date when the firm buys, and the liability disappears on the trade date when the firm sells. Applicant's Br. at 7-8. Geary's argument conveniently ignores that the same expert later testified that GSI's repapering of the trade date did not reflect the reality of the transaction at issue—i.e., that GSI did not contract to sell the CMOs until June 1 and 3, 2009. RP 2323-24, 2344.

Geary also asserts that the FINRA examiner mistakenly testified at the hearing that Pershing had rejected GSI's efforts to change the trade dates for the sale of the CMOs from GSI to McKean and McKean's foundation to May 28, 2009.[9] Applicant's Br. at 7. Geary, however,

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[9] As noted by the NAC, Frager was able to change the trade dates to May 28, 2009, while Pershing rejected GSI's efforts to change the settlement dates for those transactions to May 28,

[Footnote continued on next page]

fails to explain the significance of the examiner's mistaken testimony, or even note that the same examiner later explained why Pershing's action did not affect the substance or timing of the transactions at issue. RP 2221. As the NAC found, the examiner's mistaken testimony is insignificant because the record is "replete with evidence that GSI did not contract to sell the CMOs until June 1 and 3, 2009." Decision at 7 n.8; RP 2228-32, 2256-61, 2265-70, 2279-83, 2324, 2344, 2377-79, 2437-38.

In sum, Geary's argument lacks legal and evidentiary support and does not obviate the fact that GSI violated the net capital rule by conducting a securities business with less than the $250,000 required net capital on May 28 and 29, 2009.

3. GSI Conducted a Securities Business While It Was Net Capital Deficient in February 2010

As conceded by Geary, GSI failed to maintain its required minimum net capital for 15 days in February 2010 and had a net capital deficiency ranging from $3,903 to $131,273.74. RP 2122-27, 2891-96. And there is no dispute that GSI conducted a securities business while it was net capital deficient during this period. RP 2897-3128.

4. Geary Is Liable for Permitting GSI to Conduct a Securities Business in May 2009 and February 2010 While It Was Net Capital Deficient

The evidence and well-established case law also support the NAC's finding that Geary violated FINRA Rule 2010 by permitting GSI to conduct a securities business in May 2009 and February 2010 while it lacked the required minimum net capital.

FINRA Rule 2010 requires members and associated persons in the conduct of their business to observe high standards of commercial honor and just and equitable principles of

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[cont'd]

2009. Decision at 6. Geary does not address the settlement dates in its opening brief.

trade. The Commission has found that an officer or executive at a firm may be liable under FINRA Rule 2010 for a firm's net capital violations. *See Jarkas*, 2016 SEC LEXIS 1285, at *24 (finding firm's CEO violated NASD 2110 and FINRA Rule 2010 because he permitted his firm to conduct a securities business without sufficient net capital); *Fox & Co.*, 58 S.E.C. 873, 883 (2005) (finding the firm's president violated NASD Rule 2110 because he permitted his firm to conduct a securities business without sufficient net capital); *Hutchinson Fin. Corp.*, 51 S.E.C. at 403 (finding firm president and FINOP responsible for firm's net capital violation); *Kirk A. Knapp*, 51 S.E.C. 115, 126 (1992) (finding the chief shareholder and executive liable for the firm's net capital and recordkeeping violations because he had proposed many of the violative transactions, controlled the FINOP, and dictated the operations of the firm).

On appeal, Geary contends that his mental state or intention somehow negate his liability. Applicant's Br. at 5, 8, 10. He is mistaken. The NAC need not find that Geary acted with scienter to find him liable. *See, e.g.*, *Jarkas*, 2016 SEC LEXIS 1285, at*18 (finding the firm's president's intent to violate net capital rule was irrelevant to finding that he violated NASD Rule 2110 and FINRA Rule 2010); *Hutchinson Fin. Corp.*, 51 S.E.C. at 403 (finding firm's president liable even though there was no evidence that he or others at the firm intended to mislead regulators or intended to keep the firm open when it was undercapitalized); *First Heritage Inv. Co.*, 51 S.E.C. 953, 957 n.15 (1994) (rejecting claim that Exchange Act Rule 15c3-1 has an implicit scienter requirement). Thus, it is irrelevant whether Geary intended to trigger a net capital deficiency when he caused GSI to purchase the CMOs in May 2009. Geary's mental

state likewise is irrelevant with respect to the February 2010 net capital violation for liability purposes.[10]

As president and CEO of GSI, Geary was responsible for ensuring that GSI complied with all regulatory requirements. *See Fox & Co.*, 58 S.E.C. at 889 ("Officers of securities firms bear a heavy responsibility in ensuring that the firm compl[ies] with all applicable rules and regulations[,] including the duty of ensuring that the firm comply with the net capital requirements.") (internal quotations and citations omitted). Geary's own actions caused GSI's net capital violation in May 2009 because the CMO trades were placed at his request on behalf of the Firm. RP 2377. He did so even though Frager specifically had told him that GSI could not purchase the CMOs, and Geary did not even consult with Frager prior to the purchase. RP 2440-41, 2435-37, 2594-95, 2560-64, 2577-78. Geary knew or should have known that his trading would cause a net capital violation. *See Jarkas*, 2016 SEC LEXIS 1285, at *22 (finding that firm's president should have recognized the regulatory implications of his proprietary trading and, at the very least, alerted the FINOP).

Moreover, in February 2010, Geary knowingly permitted GSI to continue to operate a securities business while the Firm lacked the required net capital. As of February 4, 2010, Geary had actual notice from Hintze that GSI had fallen below its net capital requirement. RP 2396, 2476. But Geary should have been monitoring the Firm's net capital compliance even before February 4, 2010, because Frager had warned Geary in the months prior that GSI's net capital was in continuous decline and that GSI would need additional capital. RP 2475, 2565-66; *see Hutchinson Fin. Corp.*, 51 S.E.C. at 404 (find that firm president, who ignored warning signs and

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[10] Although Geary's intent is not relevant for purposes of liability, it is relevant in assessing his sanctions. *See* Part IV.B.1 *infra*.

was only "remotely involved" in monitoring the firm's net capital, "displayed a level of inattention to the problem that was clearly inappropriate"). Under the circumstances, Geary's suggestion that he relied upon, or deferred to, Frager or Roberts cannot preclude a finding of liability against Geary.[11] *See Knapp*, 51 S.E.C. at 134 (finding that participants in the industry must take responsibility for their compliance obligations which "cannot be excused by pointing the finger of blame at employees who do not have the authority to prevent the alleged violations"); *Dep't of Enforcement v. Jarkas*, Complaint No. 2009017899801, 2015 FINRA Discip. LEXIS 50 at *28 (FINRA NAC Oct. 5, 2015) ("[T]he FINOP's role is to ensure that the firm complies with applicable net capital, recordkeeping and other financial and operational rules. The FINOP, however, does not act independently of those who control the operations of the firm."), *aff'd*, 2016 SEC LEXIS 1285.

By permitting GSI to conduct a securities business when it did not meet its net capital requirement under Exchange Act Rule 15c3-1, Geary violated FINRA Rule 2010.

B. The Sanctions Imposed By the NAC Are Consistent With FINRA's Sanction Guidelines and Are Neither Excessive Nor Oppressive

The Commission should affirm the NAC's sanctions imposed upon Geary, consisting of a $20,000 fine, suspension in all capacities for 30 business days, and bar from acting in any principal or supervisory capacity with any FINRA member firm.[12] The sanctions are supported

11 Even Geary agrees that it was ultimately "[his] decision to act" on information provided to him by Frager. RP 2480.

12 Unlike the Hearing Panel, the NAC imposed a unitary sanction for Geary's misconduct. RP 4474; Decision at 12. The NAC appropriately reasoned that, although Geary twice permitted GSI to operate while it lacked the required net capital (as reflected by the two separate causes of action), Geary's sanction is designed and tailored to deter the same underlying misconduct. Decision at 12.

by the facts in this case, are consistent with the Guidelines, are neither excessive nor oppressive, and serve the public interest.

Section 19(e)(2) of the Exchange Act guides the Commission's review of FINRA's sanctions, and provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). The Commission considers the principles articulated in the Guidelines and has regularly affirmed sanctions that are within the recommended ranges contained in the relevant Guidelines.[13] *See Robert Tretiak*, 56 S.E.C. 209, 233 (2003); *Daniel D. Manoff*, 55 S.E.C. 1155, 1166 (2002).

As the Commission has stated, "[n]et capital violations are serious offenses. The uniform net capital rule is designed to ensure that a broker-dealer will have sufficient liquid assets to satisfy its indebtedness, particularly the claims of customers." *Edward B. Daroza, Jr.*, 50 S.E.C. 1086 (1992). For net capital violations, the Guidelines recommend a fine of between $1,000 and $73,000 and a suspension of the "responsible party" in any or all capacities for up to 30 business days. *See FINRA Sanction Guidelines* 28 (2015) (hereinafter "*Guidelines*").[14] In egregious cases, the Guidelines advise adjudicators to consider a lengthier suspension of up to two years or a bar. *Id.* The Guidelines instruct adjudicators to consider two violation-specific principal considerations: whether the firm continued to operate while knowing of deficiencies and whether the respondent attempted to conceal deficiencies. *Id.* Adjudicators also are instructed to

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13 Geary does not contend, and the record does not show, that the sanctions are an undue burden on competition.

14 The cited sections of the Guidelines are attached as Appendix A.

consider the principal considerations and general principles applicable to all violations. *Id.* at 2-7.

1. The NAC Considered All Relevant and Aggravating Factors

The NAC appropriately considered a number of factors in assessing the appropriate sanctions for Geary's misconduct. Decision at 12-18. The NAC first considered the specific factors under the Guidelines for net capital violations, and found that "Geary was directly responsible for the events that triggered both of the Firm's net capital deficiencies." *Id.* at 12. With respect to the May 2009 net capital violation, and the NAC found that "Geary knew or should have known that GSI did not have sufficient capital to hold the CMOs in the Firm's account" because Frager told Geary that GSI could not purchase the CMOs for the Firm's inventory, and Geary should have known that GSI's acquisition of the CMOs would cause GSI to have a net capital deficiency. *Id.* at 12-13. The NAC found that Geary's misconduct with respect to the May 2009 net capital violation was at a minimum reckless in light of the magnitude of the trade, the explicit advice he previously had received from Frager, and the fact that he did not consult Frager prior to the purchase. *Id.*; *see Jarkas*, 2016 SEC LEXIS 1285, at *22 (finding that firm's president should have recognized the regulatory implications of his proprietary trading and, at the very least, alerted the FINOP).

With respect to the February 2010 net capital violation, the NAC similarly found that Geary knew that GSI was net capital deficient for at least 13 days, yet he permitted GSI to continue to conduct a securities business. Decision at 13. The NAC noted that although Geary took steps to inject GSI with more capital, his actions did not obviate the fact that Geary knowingly permitted GSI to operate below its required net capital minimum. *Id.* The NAC correctly dismissed Geary's attempt to blame others—including Frager—for GSI's net capital violation, finding that notwithstanding their conduct, Geary, as president of GSI, ultimately was

responsible for the Firm's net capital compliance. *Id.* The NAC noted that "Geary's contention that Frager needed to direct him to have the Firm stop doing business is unreasonable because it ignores Geary's responsibility as president of GSI and Geary's ultimate control over the Firm and its financial affairs." *Id.* at 14. The NAC correctly observed that this argument also ignores the fact that Frager previously had told Geary that GSI must stop writing tickets if the Firm went below its net capital requirement, and that GSI's written supervisory procedures explicitly provided that GSI must stop doing business if it fell below the minimum net capital threshold. *Id.* at 13-14. The NAC thus found it aggravating that Geary knowingly permitted GSI to continue to operate while net capital deficient. *Id.*; *cf. Paul Joseph Benz*, 58 S.E.C. 34, at 40-41 (2005) (affirming the NAC's finding that the firm president acted in good faith to cease the firm's securities business).

The NAC also considered whether Geary tried to conceal GSI's net capital deficiencies. Decision at 14. It concluded he did not, noting that Geary was "forthcoming" and GSI "alerted FINRA to the net capital issues at the Firm" prior to February 2010.[15] *Id.* To wit, the NAC attributed GSI's failure to timely file its first net capital deficiency notice to "sloppiness as opposed to an effort to conceal." *Id.*

[15] Geary incorrectly asserts that the NAC gave "zero consideration" and ignored the testimony that Geary provided substantial assistance to FINRA and fully cooperated with the investigation. Applicant's Br. at 22-23. To the contrary, the NAC explicitly found that Geary did not attempt to delay FINRA's investigation, conceal information, or engage in misleading testimony or documentary evidence, noting that "FINRA staff testified that they found that Geary was cooperative and responsive and provided 'substantial assistance' during the course of its investigation, including at the November 2009 exam and at his on-the-record interview in November 2010." Decision at 15. Although "compliance with his obligation to cooperate with an investigation is not a mitigating factor," *see Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *28 (Nov. 4, 2009), the NAC awarded Geary some mitigation for his "substantial assistance." Decision at 15.

Next, the NAC appropriately considered the relevant principal considerations and general principles applicable to all violations. *Id.* at 14-18; *Guidelines*, at 6-7. The NAC found that, although the collective time period during which GSI continued to operate was less than three weeks, it was aggravating that Geary's firm violated the net capital rule twice in less than eight months. *Id.* at 16. It also found the large size of the May 2009 net capital deficiency (i.e., $11.5 million) aggravating. *Id.; see Dep't of Enforcement vs. CMG Institutional Trading, LLC*, Complaint No. 2006006890801, 2010 FINRA Discip. LEXIS 7, at *43-44 (FINRA NAC May 3, 2010) (finding respondents' misconduct egregious where it subjected the firm to a net capital deficiency of roughly $2.2 million). The NAC correctly observed that "Geary exposed the Firm's customers to potential harm and undue risks" by permitting his firm to operate while net capital deficient, and "[his] actions enabled him and the Firm to continue to generate income, resulting in monetary gain." Decision at 15; *see Fox & Co.*, 58 S.E.C. at 897 ("By conducting business when the Firm was not in compliance with net capital requirements, [respondents] subjected the Firm's customers to undue risks.").

The NAC also considered whether Geary reasonably attempted to remedy the misconduct and whether he took corrective measures. Decision at 15. The NAC noted that Geary "was trying in earnest in February 2010 to bring the Firm into net capital compliance" by securing a loan for GSI's parent company, and Geary transferred $75,000 from his personal account to GSI the day after the Firm's bookkeeper told him that she believed that GSI had gone approximately $20,000 below its net capital requirement. *Id.* Geary's cash infusion, however, did not bring GSI back into net capital compliance. RP 2122-27, 2396, 2476, 2891-96. The NAC thus found it aggravating that Geary, despite being on notice of GSI's financial troubles, did not investigate

the amount of the deficiency and permitted GSI to continue to effect securities transactions.[16] *Id.* at 15. It also found it aggravating that GSI did not file its first net capital deficiency notice until six days later. *Id.* at 15-16. The NAC properly concluded that Geary's collective actions were insufficient and not mitigative under the circumstances.[17] *See Hutchinson Fin. Corp.*, 51 S.E.C. at 406 (finding sanctions neither excessive or oppressive where firm president was aware of net capital problems but failed to discharge his responsibilities as firm president to ensure the firm's compliance with applicable laws, rules, and regulations).

After considering all of these factors, the NAC concluded that Geary's misconduct was egregious, and explained that, although Geary's actions were not motivated by fraud, his "reckless disregard of the consequences of his proprietary trading in May 2009 and his intentional disregard in February 2010 of the net capital rules and his own Firm's written supervisory procedures . . . warrant significant sanctions."[18] Decision at 18. The NAC's conclusion is well supported by the record.

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[16] On appeal, Geary falsely asserts that the "NAC ignored . . . that the Firm voluntarily started performing daily net capital contributions in February, 2010 and did so until the Firm's closing in April 2012." Applicant's Br. at 20. The NAC addressed this evidence in its decision and explicitly did not find any mitigation because Geary, at that point, was aware that GSI was net capital deficient but nonetheless permitted the Firm to continue to conduct a securities business. Decision at 16 n.28. In its sanctions analysis, the NAC's decision incorrectly states that Hintze began performing daily net capital contributions from February 4, 2010, onward when in fact the evidence reflects she did not begin doing so until February 10, 2010, as recited earlier in the NAC's decision. RP 2574; Decision at 9, 16 n.28. The scrivener's error, which favors Geary, is not problematic.

[17] Geary contends that the NAC ignored that he testified, with the benefit of hindsight, that he wished he would have not left net capital issues up to Frager. Applicant's Br. at 20. The NAC, to the contrary, addressed this very point in its sanctions analysis, but noted that Geary, as president of GSI, ultimately was responsible for GSI's net capital compliance. Decision at 13.

[18] Before the Commission, as he did before the NAC, Geary attempts to make the Hearing Panel's failure to make an explicit finding that Geary's conduct was "egregious" fatal.

[Footnote continued on next page]

Geary argues that he must have acted fraudulently or exhibited a high level of scienter in order for his actions to rise to the level of egregiousness. Applicant's Br. at 10. Geary is incorrect and ignores directly on point precedent. *See Jarkas*, 2016 SEC LEXIS 1285, at *48 (finding that applicant's misconduct was egregious because he "knew or should have known that his proprietary trading had resulted in an increase of the Firm's net capital requirements, and he knew or should have known that the Firm was substantially delinquent in paying its payroll taxes. Therefore, Jarkas knew or should have known that his actions had exposed the Firm and its customers to net capital risk."). Further, the cases cited by Geary are inapposite. Applicant's Br. at 10-11. Four of the cases he cites (*First Pac Bancorp., Becker, Dawson,* and *DiBella*) were brought for violations of antifraud provisions of the federal securities laws, which require proof of scienter. A fifth—*Rainner*—was a follow-on administrative proceeding based on the respondent's criminal conviction for wire fraud. Unlike *Jarkas,* none of these cases applied the Guidelines or considered the meaning of egregiousness for a net capital violation under the Guidelines.

Geary also argues that the NAC failed to appropriately consider that he had been sufficiently sanctioned by another regulator. Applicant's Br. at 24. While the Oklahoma Department of Securities sanctioned Geary for the same May 2009 and February 2010 net capital violations and additional allegations, the Exchange Act "provides several parallel and compatible procedures for the achievement of its objectives," and FINRA "has an independent statutory mandate to enforce the provisions of the Exchange Act, as well as its own rules." *Knapp*, 51

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Applicant's Br. at 26. It is not. Further, the NAC, in its de novo review, explicitly found that Geary's conduct was egregious, and it is the NAC's decision that is on review before the Commission. Decision at 18; *see Evansen*, 2015 SEC LEXIS 3080, at *51.

S.E.C. at 130-31 (rejecting argument that NASD was precluded from pursuing action against respondent that arose from the same misconduct that was already the subject of a Commission administrative action); RP 945, 2668. The Commission should also reject Geary's assertion that the NAC "diminished" the sanctions imposed by the Oklahoma Department of Securities because they occurred in the context of settlement. Applicant's Br. at 25. Pragmatic considerations justify imposing lower sanctions in negotiating a settlement. *See Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *33 (Feb. 20, 2014). Moreover, "[l]itigated cases typically present a fuller, more developed record of facts and circumstances for purposes of assessing appropriate sanctions than do settled matters." *Id.* The NAC considered the import of the Oklahoma action in its entirety—the allegations, the sanction, and the fact it was a settlement—against the fully developed matter before FINRA and correctly found that the limited statewide ban imposed by the Oklahoma Department of Securities "is not sufficient to remedy Geary's violation of FINRA's rules." RP 945-947, 2668; Decision at 16. The NAC therefore imposed its sanctions, including sanctioning Geary "in his capacity as a general securities representative as well because of the serious consequences of his trading activity." Decision at 17.

There is no merit to Geary's remaining myriad claims of mitigation, all of which were considered and rejected by the NAC. Decision at 14-15. "Not every consideration listed in the guidelines has the potential to be mitigating." *Siegel v. SEC*, 592 F.3d 147, 157 (D.C. Cir. 2010). For instance, Geary asserts that the NAC failed to consider Geary's lack of relevant disciplinary history. Applicant's Br. at 18. But "the Commission has repeatedly held that the lack of a

disciplinary history is not a mitigating factor."[19] *See John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *64 n.77 (Nov. 12, 2010), *aff'd*, 449 F. App'x. 886 (11th Cir. 2011). Likewise, a lack of customer of complaints is not mitigating. *See Kevin M. Glodek*, 2009 SEC LEXIS 3936, at *27 ("The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate [respondent's] misconduct"). Geary's claims that he should be given credit because no customers were harmed also lack merit. *See Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 & n.25 (Feb. 24, 2012) (internal quotations omitted) ("The absence of monetary gain or customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally.").[20]

Geary also argues that it is problematic that the NAC's sanctions exceeded the sanctions that Enforcement requested. Applicant's Br. at 9. The NAC, however, is not constrained by Enforcement's requested sanctions. *See Wedbush Sec. Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *40 (Aug. 12, 2016) (upholding NAC-imposed sanctions that exceeded Enforcement's requested sanctions); *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *10-11 (Nov. 8, 2007) (same), *aff'd*, 316 F. App'x 865

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[19] On appeal, Geary similarly asserts that the NAC failed to consider whether the conduct was aberrant and not otherwise reflective of GSI's historical compliance record. Applicant's Br. at 26. Geary apparently is relying on Principal Consideration No. 16 of the Guidelines, which applies to FINRA member firms, not associated persons. Geary's misconduct thus is not aberrant within the meaning of the Guidelines. *See Alexander Blair West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *40 n. 46 (Jan. 9, 2015).

[20] As noted by the NAC, Geary did expose GSI's customers to potential harm and undue risks by permitting GSI to effect securities transactions while below its minimum net capital requirement. Decision at 15; *see Fox & Co.*, 58 S.E.C. at 897 ("By conducting business when the Firm was not in compliance with net capital requirements, [respondents] subjected the Firm's customers to undue risks.").

(11th Cir. 2008). As the Guidelines make clear, adjudicators have broad discretion when assessing sanctions, and the Hearing Panel is free to impose any sanction it sees fit. The NAC also has broad discretion, and "may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction" in its de novo review. *See* FINRA Rules 9348 and 9349(a).

Finally, Geary seeks to compare his sanctions to those imposed in other net capital cases. Applicant's Br. at 12-15, 28-29. Geary ignores the well-settled maxim that "the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases." *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011). Geary's reliance on the lesser sanctions imposed in settled proceedings is also misplaced. Applicant's Br. at 29; *see Houston*, 2014 SEC LEXIS 614, at *33. Accordingly, comparison—whether to a litigated or settled matter—is an invalid means of determining the appropriateness of the sanctions that the NAC imposed on Geary.

2. The NAC's Sanctions Are Not Punitive

Geary does not directly contest on appeal his bar in all principal and supervisory capacities. Nor should he. As explained by the NAC, Geary "[failed] to discharge the significant responsibilities that fall on a firm principal to ensure the firm's compliance with applicable laws, rules, and regulations" and "demonstrated that he is incapable of acting as a principal." Decision at 18. Geary does, however, contest his 30-business-day suspension in all capacities, arguing that it is "punitive, rather than deterrent." Applicant's Br. at 3, 29-30. Geary is incorrect. In determining that a sanction is remedial, and not excessive or oppressive, the Commission need not be convinced that a lesser sanction would be sufficient or that FINRA has imposed the least onerous sanction available. *See PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009). Indeed, the Guidelines direct that the NAC design sanctions "that are significant enough to

ensure effective deterrence" and that adjudicators must "exercise judgment and discretion" and tailor sanctions to "achieve deterrence and remediate misconduct." *Guidelines*, at 2-3 (General Principles Applicable to All Sanction Determinations, Nos. 1, 3).

A principal and supervisory bar alone is not sufficient to remediate Geary's misconduct. *Cf. Jarkas*, 2016 SEC LEXIS 1285, at *43-45 (affirming the NAC's assessment of a $50,000 fine and two-year suspension in all capacities for firm president's egregious net capital violation). Besides the principal and supervisory bar, the NAC found "it necessary to impose sanctions against Geary in his capacity as a general securities representative as well because of the serious consequences of his trading activity [in May 2009]," whereby he plunged his firm into an $11.5 million deficiency and put GSI's customers at risk. Decision at 17. Geary's collective sanction serves the public interest because it impresses upon him and others in the industry the importance of complying with the net capital rule. *See Robert E. Strong*, Exchange Act Release No. 57426, 2008 SEC LEXIS 467, at *48 (Mar. 4, 2008) ("[W]e believe that the sanctions imposed by NASD serve the public interest by encouraging future compliance with the rules at issue here, by Strong and by others in the industry who have been given similar responsibilities.").

The NAC tailored its sanctions based on the presence of relevant factors with respect to Geary's specific misconduct. These sanctions are remedial, serve the public interest, and encourage future compliance with the net capital rule. *See William K. Cantrell*, 52 S.E.C. 1322, 1327 (1997) (finding sanctions neither excessive nor oppressive when respondent permitted the firm to operate with substantial net capital deficiencies thereby depriving its customers protections afforded to them by the net capital requirements and exposing them to undue risk).

3. Geary Did Not Demonstrate an Inability to Pay

Contrary to his assertions on appeal, Geary did not demonstrate an inability to pay. A respondent who claims an inability to pay bears the burden of establishing that he does not have the ability to pay a fine, and FINRA is entitled to make a searching inquiry into the respondent's assertions. *See ACAP Fin. Inc.*, Exchange Act Release No. 70046, 2013 SEC LEXIS 2156 (July 26, 2013); *Guang Lu*, Exchange Act Release No. 51047, 2005 SEC LEXIS 117, at *33 (Jan. 14, 2005), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006); *Tretiak*, 56 S.E.C. at 220. Geary did not meet his burden.

As noted by the NAC, Geary testified that he currently does not have financial resources to satisfy his unpaid financial obligations or meet all of his obligations if he is suspended, but he submitted no additional evidence or any documentation showing financial hardship. Decision at 19-20. Geary's bald assertion is insufficient. *See Tretiak*, 56 S.E.C. at 220 n.16 (requiring respondents asserting an inability to pay to come forward with full documentation of financial situation); *cf.* SEC Rule of Practice 630(e), 17 C.F.R. § 201.630(e) (stating that respondent in Commission administrative action who fails to file required financial information will be deemed to have waived the claim of inability to pay); *see also Dep't of Enforcement v. Levitov*, Complaint No. CAF970011, 2000 NASD Discip. LEXIS 12, at *33-34 (NASD NAC June 28, 2000) ("We require all respondents who wish to make a claim of inability to pay to verify the accuracy of their financial condition through the submission of signed and notarized documents evidencing financial hardship.").

V. CONCLUSION

Geary was directly responsible for the events and insufficient capital that triggered both of his firm's net capital deficiencies. The evidence of Geary's misconduct is abundant and clear. His reckless disregard of the consequences of his proprietary trading in May 2009 and his

intentional disregard in February 2010 of the net capital rules and his firm's written supervisory procedures warrant significant sanctions. The sanctions imposed by FINRA are supported fully by the record and serve to remediate Geary's misconduct in accordance with the Guidelines. The Commission therefore should dismiss the application for review, sustain FINRA's disciplinary action, and affirm the sanctions it imposed.

Respectfully submitted,

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Dated: November 21, 2016

EXHIBIT A

General Principles Applicable to All Sanction Determinations

1. **Disciplinary sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct.**

   The purpose of FINRA's disciplinary process is to protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent. Toward this end, Adjudicators should design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct.

   Sanctions should be more than a cost of doing business. Sanctions should be a meaningful deterrent and reflect the seriousness of the misconduct at issue. To meet this standard, certain cases may necessitate the imposition of sanctions in excess of the upper sanction guideline. For example, when the violations at issue in a particular case have widespread impact, result in significant ill-gotten gains, or result from reckless or intentional actions, Adjudicators should assess sanctions that exceed the recommended range of the guidelines.[1]

   Finally, as Adjudicators apply these principles and tailor sanctions, Adjudicators should consider a firm's size with a view toward ensuring that the sanctions imposed are remedial and designed to deter future misconduct, but are not punitive. Factors to consider in connection with assessing a firm's size are: the financial resources of the firm; the nature of the firm's business; the number of individuals associated with the firm; and the level of trading activity at the firm. This list is included for illustrative purposes and is not exhaustive. Other factors also may be considered in connection with assessing firm size.[2]

2. **Disciplinary sanctions should be more severe for recidivists.** An important objective of the disciplinary process is to deter and prevent future misconduct by imposing progressively escalating sanctions on recidivists beyond those outlined in these guidelines, up to and including barring associated persons and expelling firms. Sanctions imposed on recidivists should be more severe because a recidivist, by definition, already has demonstrated a failure to comply with FINRA's rules or the securities laws. The imposition of more severe sanctions emphasizes the need for corrective action after a violation has occurred, discourages future misconduct by the same respondent, and deters others from engaging in similar misconduct.

   Adjudicators should always consider a respondent's relevant disciplinary history in determining sanctions and should ordinarily impose progressively escalating sanctions on recidivists. In certain cases, the guidelines recommend responding to second and subsequent disciplinary actions with increasingly severe suspensions, monetary sanctions, and in certain cases, prohibitions or limitations on a respondent's lines of business. This escalation is consistent with the concept that repeated misconduct calls for increasingly severe sanctions.

   Adjudicators also should consider imposing more severe sanctions when a respondent's disciplinary history includes significant past misconduct that: (a) is similar to that at issue; or (b) evidences a reckless disregard for regulatory requirements, investor protection,

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1. See, e.g., Dep't of Enforcement v. Murray, Complaint No. 2008016437801, 2012 FINRA Discip. LEXIS 64, at *31 (FINRA OHO Oct. 25, 2012) (finding that respondent's disregard of his supervisory duties supported sanctions above the range recommended by the Sanction Guidelines), aff'd, 2013 FINRA Discip. LEXIS 33, at *5 (FINRA NAC Dec. 17, 2013).

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

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

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

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

   The recommended ranges in these guidelines are not absolute. The guidelines suggest, but do not mandate, the range and types of sanctions to be applied. Depending on the facts and circumstances of a case, Adjudicators may determine that no remedial purpose is served by imposing a sanction within the range recommended in the applicable guideline; *i.e.*, that a sanction below the recommended range, or no sanction at all, is appropriate. Conversely, Adjudicators may determine that egregious misconduct requires the imposition of sanctions above or otherwise outside

of a recommended range. For instance, in an egregious case, Adjudicators may consider barring an individual respondent and/or expelling a respondent member firm, regardless of whether the individual guidelines applicable to the case recommend a bar and/or expulsion or other less severe sanctions. Adjudicators must always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case. In addition, whether the sanctions are within or outside of the recommended range, Adjudicators must identify the basis for the sanctions imposed.

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

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

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

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

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

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

6. **To remediate misconduct, Adjudicators should consider a respondent's ill-gotten gain when determining an appropriate remedy.** In cases in which the record demonstrates that the respondent obtained a financial benefit[4] from his or her misconduct, where appropriate to remediate misconduct, Adjudicators may

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

require the disgorgement of such ill-gotten gain by ordering disgorgement of some or all of the financial benefit derived, directly or indirectly.[5] In appropriate cases, Adjudicators may order that the respondent's ill-gotten gain be disgorged and that the financial benefit, directly and indirectly, derived by the respondent be used to redress harms suffered by customers. In cases in which the respondent's ill-gotten gain is ordered to be disgorged to FINRA, and FINRA collects the full amount of the disgorgement order, FINRA's routine practice is to contribute the amount collected to the FINRA Investor Education Foundation.

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

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

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

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

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

Principal Considerations in Determining Sanctions

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

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

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

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

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

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

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

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

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

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

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

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

Net Capital Violations

FINRA Rule 2010 and SEC Rule 15c3-1

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Whether the firm continued in business while knowing of deficiencies/inaccuracies or voluntarily ceased conducting business because of the deficiencies/inaccuracies. 2. Whether respondent attempted to conceal deficiencies or inaccuracies by any means, including "parking" of inventory and inflating "mark-to-market" calculations.	Fine of $1,000 to $73,000.	*Firm* Consider suspending the firm with respect to any or all activities or functions for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or expulsion of the firm. ***Individual*** Consider suspending the Financial Principal or responsible party in any or all capacities for up to 30 business days. In egregious cases, consider a lengthier suspension (of up to two years) or a bar.