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July 30, 2020

VIA ELECTRONIC MAIL

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090
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RE: In the Matter of the Application of Louis Ottimo
Administrative Proceeding No. 3-17930r

Dear Ms. Countryman:

Enclosed please find 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
Lisa Jones Toms

Enclosure

cc: Robert Knuts, Esq.

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Louis Ottimo

For Review of Disciplinary Action Taken by

FINRA

Administrative Proceeding File No. 3-17930r

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Decisions

Federal Rules and Codes

SEC Decisions and Releases

FINRA Sanction Guidelines

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

I. INTRODUCTION

The sole issue before the Commission is whether Louis Ottimo should be barred for fraudulently omitting material facts in connection with an offering for a private fund. The record unequivocally demonstrates that Ottimo's bar is appropriate. FINRA's National Adjudicatory Council (the "NAC") relied upon its Sanction Guidelines—which suggest that adjudicators "strongly consider" barring an individual for intentional or reckless fraudulent misconduct unless mitigating factors predominate—to conclude that a bar was the fitting sanction for Ottimo's reckless misconduct. It did so based upon numerous aggravating factors and the absence of any mitigating factors. The NAC's bar for Ottimo's fraudulent misconduct is appropriately remedial and is neither excessive nor oppressive. The Commission should therefore dismiss Ottimo's appeal.

Indeed, in connection with an earlier appeal by Ottimo involving this matter, the Commission affirmed FINRA's findings that he engaged in fraud. The Commission found that Ottimo, a key fund principal with broad discretion over the fund and its proceeds, defrauded

investors by omitting material information from his biography in the fund's private placement memorandum ("PPM"). Ottimo deprived 20 unsuspecting fund investors of their fundamental rights to receive full material disclosure about his previous experience at Jet One Jets, Inc. ("Jet One Jets")—a business he and his brother co-founded that never made a profit and eventually went bankrupt. Finding these adverse facts material, the Commission held that Ottimo acted at least recklessly by failing to disclose them in his PPM biography that provided only favorable information about this venture. The Commission, however, took exception to FINRA's additional finding that Ottimo fraudulently omitted negative information in his PPM biography related to another entity, Wheatley Capital Corporation ("Wheatley"). It therefore remanded the case to FINRA to consider appropriate sanctions for Ottimo's fraudulent misconduct related solely to Jet One Jets.

On remand, the NAC reexamined the record, giving full effect to the Commission's decision, and barred Ottimo. The NAC found that, notwithstanding the Commission's partial dismissal, Ottimo engaged in egregious fraudulent misconduct that impacted $3.76 million of funds invested over the course of the fund's entire offering period. Ottimo acted with scienter, profited handsomely, yet blamed others for his misconduct. The NAC also considered—and rejected—several factors that Ottimo claimed to mitigate his misconduct. For example, the NAC was unconvinced that Ottimo purportedly relied on the advice of the fund's law firm when he omitted necessary facts about Jet One Jets to make his PPM biography—which he drafted—not misleading.

The bar the NAC imposed for Ottimo's fraudulent misconduct is consistent with the FINRA Sanction Guidelines ("Guidelines"), fully supported by the record, and is neither

excessive nor oppressive. We respectfully ask that the Commission affirm the bar and dismiss Ottimo's application for review.

II. PROCEDURAL BACKGROUND

A. The Fund

In early 2012, Ottimo, a former registered representative at EKN Financial Services, Inc. ("EKN"), created a special purpose vehicle, First Secondary Market Fund LLC ("Fund"), to purchase shares of Facebook Inc. in the secondary market before its initial public offering ("IPO"). RP 6014-15, 6364, 6602, 6690, 6692.[1] From March 6 through April 10, 2012, EKN sold ownership interests in the Fund, which the Fund called member interests, raising $3.76 million from 20 investors. RP 24, 160, 1727, 4640, 6016, 6365, 6692. Ottimo personally sold $500,000 of member interests to two EKN customers, for which he earned $30,000 in commissions. RP 1727, 6016, 6692. Ottimo managed the Fund through First Secondary Managers LLC ("FSM"), of which he owned 85 percent and served as its chief executive officer.[2] RP 23-24, 1820, 2351, 2732, 4650, 6014-15, 6365, 6692.

Ottimo assisted in drafting the Fund's PPM that was used to solicit investors. RP 6602. The PPM explicitly stated that Ottimo, through FSM, had exclusive discretion over the proceeds and Fund investments. Thus, a Fund investor had to relinquish all of their rights and rely "solely on the investment acumen of the officers of [FSM]" (i.e., Ottimo). RP 4647, 4660-61. Because investors had to base their decision to invest on their own assessment of the Fund and its

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[1] "RP __" refers to the page numbers in the certified record filed by FINRA. "Br." refers to the brief that Ottimo filed with the Commission on July 1, 2020.

[2] For managing the Fund, Ottimo received $82,276 in management fees. RP 1727.

management, RP 4647, Ottimo's biography in the Fund's PPM discussing his professional background and management experience was integral to such a decision.

At or around February 2012, Ottimo hired legal counsel to assist with the Fund's organization and offering documents, including drafting the Fund's PPM. RP 24, 159, 383-84, 398, 783-893, 2734, 5867, 6366-67, 6604. The law firm's retainer agreement defined the scope of its representation and explicitly stated that the law firm's drafting of the Fund's PPM was based upon any information or representation that Ottimo provided. RP 5867-70. Upon the law firm's request, Ottimo drafted his biography for the inclusion in the Fund's PPM, which stated in relevant part:

> Previously, Mr. Ottimo co-founded Jet One Jets in April 2006 and successfully negotiated an exclusive reseller Agreement with American Express to handle the Jet One Jets pre-paid card. Jet One Jets grew to $18 million in revenues inside approximately 18 months.

RP 4650.

Ottimo testified at the hearing that his PPM biography was intended to disclose "the growth of companies and my management experience." RP 2382-83. With regard to Jet One Jets, Ottimo's biography disclosed only favorable information related to his previous business experience at the company. Ottimo, however, failed to disclose that:

(1) during its entire existence, Jet One Jets suffered tremendous financial losses and never made a profit;

(2) the Department of Transportation ("DOT") issued a consent order against Jet One Jets for engaging in unfair and deceptive practices in violation of its statutory licensing requirements;

(3) Jet One Jets ceased operations in July 2008 and all of the investors lost their principal investments; and

(4) in August 2010, Jet One Jets filed for bankruptcy, reporting company assets of less than $50,000 and liabilities between $100,000 and $500,000.

RP 25, 2372-75, 2384, 5019-30, 5059, 6366, 6603, 6692-93.

The Fund's law firm provided no legal advice or guidance about the contents of the biography. RP 2736. When Ottimo drafted his biography and provided it to the Fund's law firm, he did not provide any additional information regarding the Jet One Jets business other than what was stated in his biography. RP 398-400, 2376-77. The law firm neither knew nor had any reason to believe that Ottimo withheld negative information about Jet One Jets' financial losses, bankruptcy, or the DOT's regulatory action against it and thus did not advise Ottimo to exclude this information from his PPM biography. RP 2376-77, 6030. Moreover, Ottimo admitted that he never *sought* legal advice from the law firm on what background information should be disclosed in his biography. RP 2376-77.

B. The Complaint

In August 2013, FINRA's Department of Enforcement filed a three-cause complaint. RP 1-34. The first cause of action alleged that Ottimo willfully failed to report timely or accurately, material financial information on his Uniform Application for Securities Industry Registration or Transfer ("Form U4") in violation of FINRA Rules. RP 29-30. The second cause of action alleged that Ottimo willfully omitted material information concerning his prior business experience in the Fund's PPM with respect to Jet One Jets and Wheatley, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. RP 29-30. The third cause of action alternatively alleged that Ottimo's fraudulent omissions violated Section 17(a)(2) and (3) of the Securities Act of 1933 and FINRA Rule 2010. RP 30-31.

C. A FINRA Hearing Panel Finds that Ottimo Engaged In Fraud

In July 2015, a FINRA Extended Hearing Panel ("Hearing Panel") found that Ottimo engaged in the misconduct as alleged in the first two causes of action and dismissed the third alterative cause. RP 6013-36. For his fraud violation, Ottimo was barred from associating with any FINRA member in all capacities. RP 6034. For his Form U4 violations, the Hearing Panel assessed a two-year suspension and $25,000 fine but declined to impose these additional sanctions in light of the bar. RP 6034-35. Ottimo thereafter appealed the Hearing Panel's decision to the NAC.

D. The NAC Affirms the Hearing Panel's Findings

In March 2017, the NAC affirmed the Hearing Panel's decision in its entirety. RP 6363-80. The NAC adopted the Hearing Panel's uncontested findings that Ottimo violated FINRA rules when he willfully disregarded his obligation to amend his Form U4 to report material information related to multiple unsatisfied tax liens and civil judgments, and a bankruptcy filing. RP 6375. The NAC also found that Ottimo violated the antifraud provisions of the Exchange Act and FINRA rules by omitting material facts in his PPM biography in connection with the sale of the Fund's offering related to both Jet One Jets and Wheatley. RP 6371. The NAC barred Ottimo for his fraudulent misconduct and assessed, but did not impose in light of the bar, a two-year suspension and $25,000 fine for his Form U4 violations. RP 6379. Ottimo's application for review before the Commission followed. RP 6385-6406.

E. The Commission Finds that Ottimo Engaged in Fraud

The Commission conducted a de novo review of the record and issued a decision on June 28, 2018. The Commission determined by a preponderance of the evidence that Ottimo

committed fraud when describing his experience with Jet One Jets, but not when he described his experience with Wheatley. RP 6599-6619.

Affirming FINRA, the Commission agreed that Ottimo contravened the federal antifraud provisions and FINRA's rules when he omitted material facts in his biography in the Fund's PPM concerning Jet One Jets. RP 6609-14, 6619. In particular, the Commission observed that, throughout the entire offering period, Ottimo solicited investors using a PPM touting that he "*successfully* negotiated an exclusive reseller Agreement with American Express" and that "Jet One Jets *grew to $18 million in revenues* inside approximately 18 months." RP 5897, 6610 (Emphasis added). The Commission found these statements misleading because Jet One Jets actually "had significant regulatory problems and, as Ottimo conceded, was a 'failure' that ultimately generated 'no profitability' and resulted in losses to investors of over $1 million." RP 6610. By omitting these adverse facts from Ottimo's background disclosure, the Commission found that Ottimo "painted a misleading picture of his management acumen given the company's undisclosed problems and eventual failure."[3] RP 6611.

The Commission additionally found that Ottimo's omitted disclosures were material because the undisclosed regulatory problems, significant losses, and the bankruptcy of Jet One

[3] Ottimo claims that the Commission erred in stating that he signed the Jet One Jets' bankruptcy petition that was filed in 2010. Br. 4 n.1. Ottimo's assertion, while correct (*see* RP 5021), has no bearing on the Commission's finding that he selectively made only favorable disclosures in an offering document that he must have known was materially misleading. RP 6613. In fact, Ottimo and his brother *both* testified at the hearing that they ended their affiliations with Jet One Jets when the company ceased operations in 2008. *See, e.g.*, RP 2313, 2922-2924. Therefore, the signatory of the Jet One Jets bankruptcy petition is irrelevant. Moreover, Ottimo never argued throughout these proceedings that he was unaware of the Jet One Jets bankruptcy. Indeed, Ottimo conceded in his opening brief to the NAC that there was *no dispute* that he was aware of the omitted information concerning Jet One Jets at the time the Fund's PPM was drafted. RP 6651. Thus, the Commission should reject Ottimo's point as immaterial to the matter at hand.

Jets were "clearly relevant to investors' assessment of Ottimo's management abilities," and thus there was a substantial likelihood that a reasonable investor would have wanted to consider such information before entrusting their money to him under his exclusive control.[4] RP 6611.

The Commission further determined that Ottimo possessed the requisite level of scienter, stating that Ottimo "had actual knowledge of the adverse information about Jet One Jets," and thus he was, at the very least, reckless in not knowing that "his biography presented a substantial risk of misleading investors since it gave the impression that Jet One Jets was a profitable business." RP 6613-14. The Commission rejected Ottimo's reliance on the advice of counsel claim as a defense to the liability findings. RP 6614-15. According to the Commission, the evidence demonstrated that, contrary to Ottimo's claims, he authored his own biography for inclusion in the Fund's PPM and he failed to disclose all relevant facts about Jet One Jets' financial condition to the Fund's law firm. RP 6614.

In sum, the Commission affirmed FINRA's findings that, with regard to Jet One Jets, Ottimo willfully omitted adverse facts that were material and necessary to make his PPM biography not misleading, in violation of Exchange Act Section 10(b) and Rule 10b-5 and FINRA Rules 2020 and 2010.[5]

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[4] Ottimo remarks that the Commission made its findings on materiality without expert testimony or testimony from the Fund investors. Br. 4. But expert testimony is not necessary for the Commission or the NAC to determine whether the omitted adverse facts regarding Jet One Jets were necessary to make his disclosed statements in his biography not misleading. *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *66 (May 27, 2011) ("In determining whether securities law violations have occurred, neither we nor [FINRA] is hindered by the lack of, or is bound by, expert testimony." (internal quotation marks omitted)).

[5] The Commission further sustained FINRA's unchallenged findings that Ottimo willfully failed to report timely and accurately material unsatisfied tax liens, outstanding civil judgments, and a bankruptcy, in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. RP 6601.

Although the Commission concluded that Ottimo committed fraud, it dismissed the NAC's findings that Ottimo's omissions regarding Wheatley, a back-office company he previously owned, constituted fraud. RP 6615-16. The Commission explained that the statements Ottimo made in his PPM biography with regard to Wheatley were neither positive nor negative and thus did not give the Fund investors a misimpression about its financial condition. RP 6615-16. The Commission therefore set aside a portion of the fraud findings and remanded the case to FINRA to reconsider whether Ottimo's bar was excessive or oppressive in light of its partial dismissal. RP 6617-18. In doing so, the Commission took no position on the appropriate sanction for Ottimo's fraudulent misconduct. RP 6618.

F. The NAC Reassesses Ottimo's Misconduct

The NAC carefully considered the record anew, including the Commission's remand, the Guidelines, and additional briefing by the parties, and it issued a decision on March 27, 2020. The NAC barred Ottimo in all capacities for his material, misleading omissions related to Jet One Jets (while maintaining the previously assessed sanctions for his Form U4 violations). RP 6698-6699. The NAC looked to the Guidelines and confirmed that a bar is strongly recommended for intentional or reckless fraud unless mitigating factors predominate. Consistent with the framework contained within the Guidelines, the NAC concluded that "Ottimo's conduct was egregious, several factors aggravated his misconduct, and his claims for mitigation did not warrant a lesser sanction." RP 6697.

The NAC particularly found it aggravating that Ottimo's fraudulent omissions—from which he profited—significantly impacted every investor in the Fund throughout the entire offering, but Ottimo had not taken responsibility for his misconduct. RP 6695. The NAC rejected Ottimo's alleged mitigating circumstances. For example, it was evident to the NAC that

Ottimo could not have reasonably relied on the Fund's law firm to advise him on the materiality of the statements in his biography because he never informed the law firm of the omitted adverse information. RP 6696. The NAC also rejected Ottimo's unfounded claim that the duration of the Fund's offering, its offering size, and number of investors were "extremely small" and found that his other attempts to downplay the severity of his misconduct all lacked merit.[6] RP 6696-97. This timely appeal followed.

III. ARGUMENT

The Commission should dismiss Ottimo's application for review and affirm the bar the NAC imposed on remand. The Commission already determined that Ottimo committed one of the most serious violations of federal securities laws. He evaded basic statutory disclosure requirements and FINRA rules in his sale of securities by fraudulently omitting material disclosures in the Fund's offering memorandum. After reviewing the sanctions recommended in the Guidelines for intentional or reckless fraud, and finding only the presence of aggravating and no mitigating factors, the NAC correctly determined that Ottimo's violation was egregious and that he should be barred. The bar is neither excessive nor oppressive, is appropriate to promote the full disclosure of information necessary for investors to make informed decisions, and to deter the reoccurrence of future misconduct. The Commission should therefore affirm the bar.

[6] For his Form U4 violations, the NAC on remand upheld its previously assessed sanctions of a two-year suspension and $25,000 fine, which is consistent with the ranges recommended in the Guidelines. RP 6698. Ottimo does not challenge these assessed sanctions on appeal.

A. Barring Ottimo for His Fraudulent Misconduct Is Neither Excessive nor Oppressive

Exchange Act Section 19(e)(2) requires the Commission to dismiss Ottimo's application for review if it finds that FINRA's imposed sanction is neither excessive nor oppressive and does not impose an unnecessary or inappropriate burden on competition.[7] *See* 15 U.S.C. § 78s(e)(2). As part of its sanctions review, the Commission determines whether the sanctions imposed are remedial in nature and not punitive.[8] *Paz Sec., Inc.*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) ("The purpose of the [Commission's] order is remedial, not penal."). The Commission also considers the principles articulated in the Guidelines and gives weight as to whether the sanctions are within the allowable guideline range. *See, e.g.*, *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *80 (Sept 28, 2017) (using the Guidelines as a benchmark when reviewing FINRA's sanctions on appeal). The bar is not penal but serves to protect the public interest by impressing upon Ottimo and others the importance of providing full material disclosure in connection with the sale of securities. The Commission should sustain the bar.

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[7] Ottimo previously has not claimed, nor does he claim in this appeal, that FINRA's sanction imposes an undue burden on competition.

[8] Ottimo argues that, if a lesser sanction may be sufficient to deter future violations, then "the imposition of a permanent bar is necessarily punitive and, therefore, improper." Br. 6. His argument, however, is misplaced. *See Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *32 n.48 (Sept. 3, 2015) (rejecting argument that the NAC could have imposed a sanction other than a bar to prevent future misconduct and holding that "Exchange Act Section 19(e)(2) requires that we determine whether the bar imposed is excessive or oppressive, not whether a lesser sanction could have been imposed"); *see also PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009)).

1. The FINRA Sanction Guidelines Recommend to "Strongly Consider" a Bar for Intentional or Reckless Material Omissions of Fact

The NAC correctly consulted the Guidelines, including the general principles applicable to all sanction determinations and the principal considerations for fraudulent misrepresentations or material omissions of fact. The Guidelines strongly recommend that adjudicators bar individuals, like Ottimo, who engage in intentional or reckless fraudulent misconduct, unless mitigating factors predominate. *FINRA Sanction Guidelines* 87 (2016), https://www.finra.org/sites/default/files/2016_Sanction_Guidelines.pdf.[9]

The Guidelines reflect the Commission's well-established position that "violations involving fraud are particularly serious and should be subject to the most severe sanctions" under the securities laws. *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *44 (Mar. 27, 2017); *see also Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *36 (Sept. 30, 2016) (same); *Moshe Marc Cohen*, Exchange Act Release No. 78797, 2016 SEC LEXIS 3413, at *52 (Sept. 9, 2016) (same). Consistent with this guidance, the NAC carefully weighed the degree of risk that Ottimo posed to the investing public based on this Jet One Jets omissions. It concluded that Ottimo committed a willful violation under the antifraud provisions of the Exchange Act and FINRA rules by depriving investors of their essential rights to complete disclosure, to which an industry bar is a fitting remedial sanction. RP 6693.

2. Only Aggravating Factors Surround Ottimo's Misconduct

The NAC's bar for Ottimo's fraudulent misconduct is supported by several aggravating factors. The NAC found—and Ottimo now concedes—that at least the first two aggravating

[9] The NAC applied the 2016 version of the Guidelines on remand, a copy of which is provided herein as Attachment A.

factors applied here. *See* Br. 6-7. First, Ottimo's misconduct was the result of an intentional or reckless act. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13); *see also William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *37 (Mar. 31, 2006) (finding intentional, or at least reckless, fraudulent omissions of material fact aggravating for purposes of determining sanctions). The NAC was particularly troubled that, although Ottimo was well aware of the adverse information regarding Jet One Jets and maintained broad discretion over the Fund, he nevertheless consciously chose to only advertise his positive experience at Jet One Jets to highlight his business acumen.[10] RP 6695.

Second, Ottimo undoubtedly benefited financially from his fraudulent conduct. *See Guidelines*, at 7 (Principal Consideration in Determining Sanctions, No. 17). He earned $82,276 in management fees and $30,000 in sales commissions for the investments that he personally sold. RP 6695.

Third, the NAC properly deemed that the "number, size and character" of the transactions at issue was aggravating. RP 6695; *see also Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 18). Ottimo's deficient PPM reached more than a dozen investors who in total invested $3.76 million in a fund that he exclusively managed and controlled. Moreover, his fraud did not involve an isolated transaction or single investor, but extensively

[10] Ottimo downplays the significance of his omission by claiming that his fraud is based on two positive sentences in his PPM biography and that Jet One Jets had nothing to do with the business of the Fund. Br. 2. His assertion, however, ignores the purpose of including a management background section in the Fund's PPM. As Ottimo himself explained, his biography was intended to disclose "the growth of companies and my management experience." RP 2382-83. Because Ottimo, through FSM, had very broad discretion over the use of the Fund's proceeds, full disclosure of his past business ventures, especially ones that deteriorated like Jet One Jets, was critical in giving investors an accurate picture of his business and investing expertise.

impacted the Fund's entire offering period, lasting several weeks. *See id.*, at 6 (Principal Considerations in Determining Sanctions, No. 9).

Lastly, the NAC found it aggravating that Ottimo continually refused to accept responsibility for his misconduct and thereby provided it no assurances against future violations. RP 6695; *see also Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2); *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *63 (Nov. 9, 2012) (finding respondent's "persistent attempts to deflect blame onto others . . . suggests that he is likely to engage in similar misconduct in the future"). The record fully supports that Ottimo authored his PPM biography. RP 2360, 2376, 2381. Ottimo also admitted at the evidentiary hearing that he neither sought nor received legal advice from the Fund's law firm about Jet One Jets or the other disclosures he made in his biography. RP 2377, 2408-2409. Yet, at every turn, Ottimo shifted responsibility for his violation to others, when in truth, he alone is culpable for his fraud.[11] *See Cohen*, 2016 SEC LEXIS 3413, at *51 (barring respondent whose attempt to blame others with an advice of counsel defense lacked evidentiary support and "undermine[d] the sincerity of his assurances against future violations").

3. None of Ottimo's Arguments for Mitigation Merit A Lesser Sanction

The NAC properly concluded that the arguments Ottimo raised for mitigation, which he largely repeats to the Commission on appeal lacked merit, including that: (1) he reasonably

[11] Ottimo argues that asserting an advice of counsel defense is a far cry from the NAC's finding that he blamed others for his wrongdoing. Br. 9-10. But instead of taking responsibility for his independent choice to omit negative information from his PPM biography, Ottimo continues to shift blame to others. As the NAC rightly stated: "Although Ottimo is entitled to present a vigorous defense and we have considered his defense, his refusal to accept accountability for his conduct demonstrates a misunderstanding of, or lack of regard for his responsibilities as a securities professional, which strongly indicates a propensity for future wrongdoing." RP 6695.

relied on the Fund's law firm to advise him on the contents of his biography; (2) there was no finding of a pattern of misconduct; (3) the offering and investor sizes were minimal; (4) the Fund's investors suffered no loss or harm; (5) all of the investors were sophisticated and accredited; (6) the Commission's affirmance would authorize FINRA to impose all bars for every fraud claim; and (7) the Commission purportedly agrees that the materiality of disclosure question under the Exchange Act is too complex for securities professionals. Br. 7-10. For the reasons discussed below, the Commission should find that these arguments are unsound and do not support a reduction of the bar.

First, Ottimo essentially admits that his advice of counsel defense cannot stand. In his own words, Ottimo agrees that he "failed to meet the standard of proof required for a formal 'advice of counsel' defense to the fraud charge." Br. 8, 10. Ottimo nonetheless argues that he hired the Fund's law firm in good faith to ensure compliance with the securities laws and suggests that the Fund's law firm should have advised him that the disclosures concerning Jet One Jets were insufficient. Br. 8. But the law firm's obligation to draft a compliant PPM is not implicated here because Ottimo never told counsel about the adverse Jet One Jets information he withheld.

As the NAC explained in its decision, the relevant inquiry for Ottimo's reliance of counsel claim to be mitigating is whether he could demonstrate with sufficient evidence that he provided the Fund's law firm with full details about his intention to omit the adverse information about Jet One Jets and reasonably relied on legal advice to do so. RP 6695-96; *see also Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 7); *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *38 (Nov. 14, 2008) (requiring the respondent to have sought advice on the legality of the *intended* conduct), *aff'd*

347 F. App'x 692 (2d Cir. 2009). The NAC properly concluded that Ottimo could not establish these elements. RP 6696. To the contrary, Ottimo admitted at the hearing that he had ultimate authority over the contents in his PPM biography and he did not provide the Fund's counsel with any information regarding Jet One Jets other than the statements that appeared in the biography section. RP 2377. Therefore, Ottimo's purported reliance on counsel's advice properly received no mitigation.

Second, the NAC properly rejected Ottimo's newfound claim that he should receive mitigation because he did not engage in a pattern of misconduct. Br. 7. That Ottimo did not commit multiple acts of fraud or engaged in a pattern of misconduct did not make his fraud any less egregious. RP 6696; *see, e.g.*, *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *30 (Feb. 24, 2012) (finding the absence of a particular aggravating factor under the Guidelines is not necessarily mitigating). The absence of a pattern of misconduct here does not mitigate Ottimo's sanction.

Third, in his attempt to downplay the severity of his misconduct, Ottimo argues that the number of transactions, investor size, and duration of his misconduct were "extremely small." Br. 7. Ottimo further assumes that, because the Fund raised under $4 million from less than 25 investors, his offense was inconsequential. Br. 9. He is mistaken. And, not surprisingly, Ottimo offers no legal basis for his arbitrary claim. The NAC instead concluded that Ottimo distributed a materially misleading PPM that significantly impacted every investor and investment transaction in a multi-million-dollar private placement. These factors weighed in favor of, rather than mitigated against, a higher sanction. RP 6696; *see also Cohen*, 2016 SEC LEXIS 3413, at *51 (barring respondent for fraudulent misstatements impacting over a dozen point-of-sale forms over a two-month period).

Fourth, Ottimo reargues that none of the Fund investors suffered any injury or financial loss as a result of his misconduct. Br. 7. But "the fact that a customer may have suffered no loss or made money does not excuse the serious fraud shown." *Mark O'Leary*, 43 S.E.C. 842, 850 (1968). Not only was the NAC correct in finding that the lack of customer harm does not mitigate his sanction, Ottimo's claim ignores the fact that he unnecessarily exposed the Fund's investors to potential harm when he omitted negative history from his business resume that was a crucial part of their decision to invest in the Fund. *See* RP 6696; *see also Scholander*, 2016 SEC LEXIS 1209, at *40 n.63. This is particularly true where, as here, Ottimo had very broad discretion over the Fund and its proceeds.

Fifth, although Ottimo persists in arguing that all of the Fund's investors were sophisticated and accredited, he provides no evidence in support of his claim. Br. 7. Regardless, as the Commission has held, "the sophistication of investors does not justify misleading them." *David Henry Disreali*, Exchange Act Release No. 57027, 2007 SEC LEXIS 3015, at *27 (Dec. 21, 2007). As a securities professional, Ottimo had a fundamental duty to provide each Fund investor all material facts necessary to make the PPM disclosures about his management credentials not misleading. The NAC correctly found that the Fund investors' levels of sophistication were not mitigating in this case. RP 6696; *see also Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *46 & n.60 (Jan. 9, 2015) (rejecting respondent's claim for a reduction of sanctions because his customer was sophisticated and holding that all investors, sophisticated or otherwise, are entitled to protections against abuse under the securities laws).

Sixth, Ottimo claims on appeal that by affirming the bar, the Commission in substance would be authorizing FINRA to bar associated persons for *any* fraud charge, regardless of the

character and severity of the misconduct. Br. 1, 5. This argument, however, over-generalizes, ignores the Guidelines' directive that FINRA consider a sanction less than a bar only where mitigating factors predominate, and plainly misses the mark. It is well established that the sanctions rendered in a FINRA disciplinary proceeding are based upon individual facts and circumstances. *See, e.g., Arthur Joseph Lewis*, 50 S.E.C. 747, 751 n.15 (1991); *see also Guidelines*, at 3 (directing adjudicators to impose sanctions tailored "to address the misconduct involved in each particular case"). Here, the specific sanction is Ottimo's bar for committing egregious fraud based upon the presence of several aggravating factors and no mitigating ones, and not generally all bars that FINRA has imposed in every disciplinary proceeding. There is no basis to assume that the Commission will not continue to review FINRA's cases based upon the relevant facts and circumstances of each case.[12]

Finally, the Commission should reject Ottimo's strained argument that his fraud was not egregious because the materiality of disclosure question is a complex one even for attorneys. Br. 8. To support his claim, Ottimo quotes Keith Higgins, the Commission's former Director of the Division of Corporate Finance, whose speech, for a number of reasons, was taken out of context. As a preliminary matter, Higgins' speech reflected his own views and not the views of the Commission, and thus is not law. Moreover, Higgins' speech addressed the effectiveness of the disclosure and registration regime under Regulation S-K for public companies, rather than the

[12] Ottimo contends that it is erroneous to lump together his material, misleading omissions with that of "raw Ponzi schemes." Br. 5. Comparatively speaking, however, while the character of each offense may be different, one aspect of the violation is essentially the same. In both cases, the violator deceptively induces investors to invest money in an enterprise under false or misleading pretenses, which is prohibited under the antifraud statutes and FINRA rules. In short, Ottimo cannot escape the seriousness of his fraud violation for which a bar is warranted. *See McGee*, 2017 SEC LEXIS 987, at *43 (finding respondent's fraudulent omissions egregious that justified a bar).

antifraud provisions under the Exchange Act that prohibit Ottimo from communicating with the public through disclosed statements that omit material facts or qualifications that render such statements misleading. In any event, Higgin's speech actually supports FINRA's view that securities professionals are encouraged to seek legal advice from competent counsel about their disclosure obligations to the extent they do not understand them. Here, the appropriate time for Ottimo to have obtained such legal advice on the materiality of his omissions—which he did not—was *before* he finalized the Fund's PPM. The Commission should uphold the bar.

B. FINRA's Assessed Sanctions for Ottimo's Form U4 Violations Remain Appropriate

Ottimo does not challenge the NAC's assessed two-year suspension and $25,000 fine, which are fully supported by the record and consistent with the ranges recommended in the Guidelines.[13] We therefore ask the Commission to sustain them.

The timely entry and accuracy of reportable financial disclosure on the Form U4 is vital to FINRA's regulatory oversight of its securities professionals. The NAC observed that, for an extended period of time, Ottimo repeatedly failed to report timely (or accurately) material events on his Form U4 related to seven outstanding tax liens, six civil judgments, and a bankruptcy. RP 6698; *see also Tucker*, 2012 SEC LEXIS 3496, at *47 (finding judgments, bankruptcies, and liens are significant because they cast doubt on an associated person's ability to manage his personal financial affairs and provide investors with appropriate financial advice).

The NAC assessed meaningful sanctions, including a mid-level fine and a suspension at the higher end of the sanction guideline range, to remediate Ottimo's severe misconduct. RP

[13] For failures to amend the Form U4, the Guidelines recommend a fine ranging between $2,500 and $73,000, a suspension in any or all capacities of five to 30 business days, and in egregious cases, a longer suspension of up to two years or a bar. *See Guidelines*, at 69-70.

6698. The Commission should affirm the NAC's assessed sanctions as neither excessive nor oppressive.

V. CONCLUSION

The bar imposed by the NAC against Ottimo for his fraudulent omissions regarding Jet One Jets is fully supported by the record and entirely appropriate under the facts and circumstances of this case. The Commission therefore should dismiss the application for review and affirm the NAC's decision in its entirety.

Respectfully submitted,

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Dated: July 30, 2020

CERTIFICATE OF COMPLIANCE

I, Lisa Jones Toms, certify that the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17930r) 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 5,897 words.

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July 30, 2020

CERTIFICATE OF SERVICE

I, Lisa Jones Toms, certify that on this 30th day of July 2020, I caused a copy of FINRA's Brief in Opposition to the Application for Review in the matter of Application for Review of Louis Ottimo, Administrative Proceeding No. 3-17930r, to be served via electronic mail on:

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Respectfully submitted,

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ATTACHMENT A

Attachment A is a .pdf of the relevant text of FINRA's Sanction Guidelines available at https://www.finra.org/sites/default/files/2016_Sanction_Guidelines.pdf.

(Source: *FINRA Sanction Guidelines* (2016 ed.))

FINRA

Financial Industry Regulatory Authority

2016

Sanction Guidelines

Table of Contents

Overview

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

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

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

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

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

General Principles Applicable to All Sanction Determinations

1. **Disciplinary sanctions 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 provide. Proof of inability to pay need not result in a reduction or waiver of a fine, restitution or disgorgement order, but could instead result in the imposition of an installment payment plan or another alternate payment option. In cases in which Adjudicators modify a monetary sanction based on a *bona fide* inability to pay, the written decision should so indicate. Although Adjudicators must consider a respondent's *bona fide* inability to pay when the issue is raised by a respondent, monetary sanctions imposed on member firms need not be related to or limited by the firm's required minimum net capital.

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

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

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

Principal Considerations in Determining Sanctions

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

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

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

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

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

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

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

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

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

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

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

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

Applicability

These guidelines supersede prior editions of the *FINRA Sanction Guidelines*, whether published in a booklet or discussed in *FINRA Regulatory Notices* (formerly *NASD Notices to Members*). These guidelines are effective as of the date of publication, and apply to all disciplinary matters, including pending matters. FINRA may, from time to time, amend these guidelines and announce the amendments in a *Regulatory Notice* or post the changes on FINRA's website *(www.finra.org)*. Additionally, the NAC may, on occasion, specifically amend a particular guideline through issuance of a disciplinary decision. Amendments accomplished through the NAC decision-making process or announced via *Regulatory Notices* or on the FINRA website should be treated like other amendments to these guidelines, even before publication of a revised edition of the *FINRA Sanction Guidelines*. Interested parties are advised to check FINRA's website carefully to ensure that they are employing the most current version of these guidelines.

Forms U4/U5—Late Filing of Forms or Amendments; Failing to File Forms or Amendments; Filing of False, Misleading or Inaccurate Forms or Amendments *(continued)*

Article V of FINRA By-Laws and FINRA Rule 2010[1]

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature and significance of information at issue. 2. Whether failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm. 3. Whether respondent member firm's misconduct resulted in harm to a registered person, another member firm or any other person or entity.	**Late Filing of Forms or Amendments** *Individual* Fine of $2,500 to $37,000. **Firm and/or Responsible** *Principal* Fine of $5,000 to $73,000. **Failure to File or Filing False, Misleading or Inaccurate Forms or Amendments**[2] *Individual* Fine of $2,500 to $73,000.	**Failure to File or Filing False, Misleading or Inaccurate Forms or Amendments** *Individual* Consider suspending individual in any or all capacities for five to 30 business days.

1. This guideline also is appropriate for violations of MSRB Rule G-7 and for failures to report changes in ownership or control of member firms.
2. As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Forms U4/U5—Late Filing of Forms or Amendments; Failing to File Forms or Amendments; Filing of False, Misleading, or Inaccurate Forms or Amendments

Article V of FINRA By-Laws and FINRA Rule 2010

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	***Responsible Principal and/or Firm*** Fine of $5,000 to $146,000.	***Responsible Principal at the Firm*** Consider suspending responsible principal in all supervisory capacities for 10 to 30 business days. **In Egregious Cases (such as: those involving repeated failures to file, untimely filings or false, inaccurate, or misleading filings; those involving the failure to disclose or timely to disclose a statutory disqualification event or customer complaint; or where the failure to disclose or timely to disclose delayed regulatory investigation of terminations for cause):** ***Individual***–Consider a longer suspension in any or all capacities (of up to two years) or a bar. ***Responsible Principal at the Firm***–Consider a suspension in any or all capacities (of up to two years) of responsible principal or bar of responsible principal in all supervisory capacities. ***Firm***–Suspend firm with respect to any or all activities or functions until the firm corrects the deficiency.

Fraud, Misrepresentations or Material Omissions of Fact

FINRA Rules 2010 and 2020[1]

Principal Considerations in Determining Sanctions	Monetary Sanction[2]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	***Negligent Misconduct*** Fine of $2,500 to $73,000. ***Intentional or Reckless Misconduct*** Fine of $10,000 to $146,000.	***Negligent Misconduct***[3] Suspend individual in any or all capacities for 31 calendar days to two years. Consider suspending a firm with respect to a limited set of activities for up to 90 days. ***Intentional or Reckless Misconduct*** Strongly consider barring an individual. Where mitigating factors predominate, however, consider suspending an individual in any or all capacities for a period of six months to two years. Consider applicable Principal Considerations in determining the duration of a suspension or whether to impose a bar. Consider suspending a firm with respect to any or all activities for up to two years. Where aggravating factors predominate, strongly consider expelling the firm.

1. This guideline also is appropriate for violations of Sections 10(b) and 15(c)(1) of the Securities Exchange Act of 1934, the applicable rules and regulations thereunder, and MSRB Rules G-17 and G-47.
2. In cases involving misrepresentations and/or omissions as to two or more customers, the Adjudicator may impose a set fine amount per investor rather than in the aggregate. As set forth in General Principle No. 6, Adjudicators may also order disgorgement.
3. This guideline should be applied in cases alleging only a violation of FINRA Rule 2010 or MSRB Rule G-17 if the cause of action in the complaint is based on negligent misrepresentations or negligent material omissions of fact.