

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 71589A / February 20, 2014

Admin. Proc. File No. 3-14175r

In the Matter of the Application of

KENT M. HOUSTON
Carlsbad, California 92009

For Review of Disciplinary Action Taken by

FINRA

CORRECTED OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Sanctions Imposed by Registered Securities Association on Remand

On remand, registered securities association modified the sanctions imposed on a former general securities representative of a member firm for violating association rules for (i) engaging in outside business activities without providing his member firm with written notice; (ii) failing to appear for an on-the-record interview with association staff; and (iii) engaging in conduct inconsistent with just and equitable principals of trade. *Held*, association's modification of sanctions *sustained*.

APPEARANCES:

Kent M. Houston, pro se.

Alan Lawhead, Carla Carloni, and Megan Rauch for FINRA.

Appeal filed: March 22, 2013
Last brief received: June 26, 2013

I.

Kent M. Houston, formerly a general securities representative with First Wall Street Corp. ("First Wall Street" or "the Firm"), a former NASD member firm, has appealed a decision by FINRA's National Adjudicatory Council ("NAC") reconsidering and modifying sanctions.¹ On December 20, 2011,² we sustained the NAC's findings of fact and findings that Houston violated (i) NASD Rules 3030 and 2110 by engaging in outside business activity without providing written notice to his member firm, and (ii) NASD Rules 8210 and 2110 by failing to appear for an on-the-record interview ("OTR") with NASD staff.³ But we also vacated the sanction imposed and remanded the proceeding to the NAC for a sanctions redetermination.⁴

We found that the sanction imposed—a bar for violating Rules 8210 and 2110⁵—was based on an NAC determination that Houston's failure to appear for the OTR constituted a complete failure to respond to NASD's Rule 8210 request. This determination, we found, did not take into account that Houston had responded, apparently to NASD's satisfaction, to two other Rule 8210 requests, and at least partially to a third Rule 8210 request.⁶ We stated that "because Houston did respond in some manner to NASD's request, any sanction imposed, whether a bar or

¹ On July 26, 2007, the Commission approved a proposed rule change filed by the National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA") in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *Order Granting Proposed Rule Change Relating to Restated Certificate of Incorporation of NASD*, Exchange Act Release No. 56146, 2007 SEC LEXIS 1641 (July 26, 2007). Because this disciplinary proceeding was instituted before that date, we continue to use the designation NASD.

² *Kent M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491 (Dec. 20, 2011) (the "December 20, 2011 Opinion").

³ Following the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. See FINRA Regulatory Notice 08-57 (Oct. 2008). Because the complaint in this case was filed before the consolidated rules took effect, NASD rules apply. See *John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *2 n.2 (Nov. 12, 2010), *petition denied*, 449 F. App'x 886 (11th Cir. 2011).

⁴ *Houston*, 2011 SEC LEXIS 4491, at *27.

⁵ In light of the bar imposed for violating Rules 8210 and 2110, the NAC assessed but initially declined to impose sanctions for Houston's failure to disclose his outside business activity in violation of Rules 3030 and 2110.

⁶ *Houston*, 2011 SEC LEXIS 4491, at *24-25. All of the Rule 8210 requests at issue "were part of the same investigation by NASD." *Id.* at *25.

otherwise, should analyze factors other than the presumptive unfitness indicated by a failure to respond in any manner."⁷

On remand, the NAC suspended Houston for two years and fined him \$25,000 for his failure to provide OTR testimony in violation of Rules 8210 and 2110. The NAC also imposed a consecutive one-year suspension and an additional \$50,000 fine for Houston's failure to provide notice to the Firm of his outside business activity in violation of Rules 3030 and 2110. We base our findings on an independent review of the record, and sustain the sanctions imposed.

II.

A. Findings of fact and violations of NASD Rules.

We presume familiarity with our prior findings.⁸ As noted, we sustained the NAC's findings of fact and findings that Houston violated (i) Rules 3030 and 2110 by engaging in outside business activity without providing the required notice to First Wall Street,⁹ and (ii) Rules 8210 and 2110 by refusing to attend the OTR.¹⁰

To summarize those findings, Houston failed to give First Wall Street prompt written notice that he was appointed on April 24, 2001, to serve with his great aunt, Veta M. Boyd, as co-trustee of a trust established in 1971 for the benefit of Mrs. Boyd and her late husband.¹¹ Houston also failed to give First Wall Street prompt written notice when he was appointed as the trust's sole trustee in June 2005. These failures were in contravention not only of Rule 3030 but also First Wall Street's periodic requests from 2002 through 2005 that Houston disclose any outside business activities.

⁷ *Id.*

⁸ *Id.*

⁹ NASD Rule 3030 prohibits a person associated with a member from being employed by, or accepting compensation from, "any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member."

NASD Rule 2110 requires adherence to "high standards of commercial honor and just and equitable principles of trade." Rule 2110 is violated by any conduct that violates another NASD rule. *See, e.g., Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *19 n.28 (July 1, 2008).

¹⁰ NASD Rule 8210(a)(1) provides that NASD may require a person associated with a member "to provide information orally, in writing, or electronically . . . and to testify at a location specified by NASD staff."

¹¹ Boyd's husband, Walter L. Boyd, died in 1986. The trust was established in 1971 to pay the trust's net income to the Boyds on a monthly basis.

Indeed, Houston did not disclose his trustee activities when he signed First Wall Street's "Independent Contractor Agreement" in 2002 and 2003 despite the fact that the agreement (i) stated that Houston was to notify the Firm of such activities, and (ii) appended an "Outside Business Activity Notification Form."¹² Houston then misrepresented on another First Wall Street form in 2004 that he had not "conducted any outside business activities during the past year."¹³

Houston continued with his deception in 2005. He did not disclose his trustee activities after receiving a Firm memorandum on August 29, 2005, stating that registered representatives and staff should contact the compliance department "immediately in writing if you are currently listed as a trustee, . . . or if you perform any duties that involve compensation of any kind that does not come through the firm in the form of commissions and is not included on your form U4 as an approved outside business activity."¹⁴ Houston then again misrepresented on another First Wall Street form in October 2005 that he had not "accepted any appointment as trustee . . . over any client including my immediate family during the past year."¹⁵

An NASD examination in December 2005 led to the discovery of Houston's outside business activity. During that examination, First Wall Street's chief compliance officer learned that Houston had check-writing authority on an account that Houston had opened for the trust at the Firm in 2001 (the "Boyd Trust Account").¹⁶ The Firm subsequently learned that Houston had become sole trustee of the Boyd trust and that Houston had written numerous checks on the Boyd Trust Account, some of which were payable to Houston's home equity line of credit account at Countrywide Bank. The Firm opened a formal investigation into Houston's trustee activities, and terminated Houston after he failed to cooperate.¹⁷

¹² The agreement expressly mentioned acting as a trustee as an example of an outside business activity. Houston did not complete the appended form in 2002 or 2003.

¹³ This form was entitled "Outside Business Activities Statement," and was separate from the form appended to the Firm's "Independent Contractor Agreement."

¹⁴ Houston misrepresented on his Forms U4 (Uniform Application for Securities Industry Registration or Transfer) dated July 29, 2005, and October 20, 2005, that he was not engaged in an outside business activity.

¹⁵ This form was attached to a second Firm memorandum dated September 8, 2005 reminding registered representatives that they are required to request approval for acting as a trustee.

¹⁶ The account application listed Houston and Mrs. Boyd as co-successor trustees and Houston as the account representative. Houston was able to write checks on the account without Mrs. Boyd's signature.

¹⁷ As discussed in detail in the December 20, 2011 Opinion, Houston provided some but not all of the information and documents requested by the Firm before refusing to cooperate. And some of the information he provided was false.

It turned out that Houston had written checks on the Boyd Trust Account to pay himself over \$355,000 in compensation from 2003 through January 2006.¹⁸ Houston paid himself \$41,600 in 2003, \$167,000 in 2004, \$119,000 in 2005, and \$27,500 in January 2006.¹⁹

After his termination, NASD began investigating Houston's possible misconduct at First Wall Street. NASD sent two Rule 8210 requests to Houston in June and August 2006, which Houston appears to have complied with to NASD's satisfaction. NASD sent a third Rule 8210 request to Houston in September 2006, to which Houston only partially responded. To obtain a complete response, NASD sent follow-up letters to Houston in October and November 2006 repeating the request from September. Houston again failed to provide a complete response.

On September 7, 2007, NASD sent Houston a letter requesting that he appear for an OTR. After obtaining NASD's agreement to twice reschedule the OTR, Houston sent NASD a letter stating that he had "nothing further to add and [would] not be attending the (OTR)." The FINRA disciplinary action followed.

III.

Pursuant to Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find, "having due regard for the public interest and the protection of investors," that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.²⁰ As part of this review, we must consider any aggravating or mitigating factors²¹ and whether the sanctions imposed by FINRA are remedial in nature and not punitive.²²

Although the Commission is not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).²³ We acknowledge

¹⁸ The trust agreement authorized compensation for the trustee. Some of the checks were made payable to Houston and others to Houston's Countrywide account.

¹⁹ Mrs. Boyd also wrote approximately \$99,000 worth of checks to Houston from the Boyd Trust Account in 2001 and 2002. Houston also received commissions for transactions in the Boyd Trust Account.

²⁰ 15 U.S.C. § 78s(e)(2). Houston does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

²¹ See *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007).

²² See *Paz Sec.*, 494 F.3d at 1065 ("The purpose of the order [must be] remedial, not penal.") (quoting *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940)).

²³ *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *42 (June 14, 2013). FINRA revised its Sanction Guidelines in 2011, but the NAC on remand applied the prior version of the Sanction Guidelines (cited hereinafter as the "2007 Sanction Guidelines"). The NAC noted that, in the usual proceeding, it applies the revised version of the Sanction Guidelines, which "are effective as of the date of publication, and apply to all

that the Sanction Guidelines "do not prescribe fixed sanctions for particular violations" and "are not intended to be absolute."²⁴

A. The sanctions imposed for violating Rules 8210 and 2110 were neither excessive nor oppressive.

The Sanction Guidelines state that a bar is standard "[i]f the individual did not respond [to Rule 8210 requests] in any manner."²⁵ But where mitigation exists, the Sanction Guidelines provide that an adjudicator should "consider suspending the individual in any or all capacities for up to two years."²⁶ The Sanction Guidelines also recommend a fine of \$10,000 to \$25,000 for "[f]ailure to [r]espond [c]ompletely."²⁷

The Sanction Guidelines also identify two "principal considerations" for determining sanctions where an individual has failed to respond to Rule 8210 requests. They are (i) the "[n]ature of the information requested"; and (ii) "[w]hether the requested information has been provided and, if so, . . . the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response."²⁸ The NAC's decision to suspend Houston for two years and fine him \$25,000 for his failure to provide OTR testimony in violation of Rules 8210 and 2110 is supported by application of these considerations.

First, the OTR that Houston refused to attend was important. It concerned the nature and scope of Houston's outside business activity. As we previously have stated, prompt notice to firms of an associated person's outside business activity permits the firm to object to the outside activity at a meaningful time and exercise any appropriate supervision.²⁹

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disciplinary matters, including pending matters." FINRA Sanction Guidelines at 8 (2011). But the NAC applied the 2007 Sanction Guidelines on remand because it was "in effect at the time [it] issued its initial decision in December 2010 (and during Houston's appeal to the Commission)."

²⁴ 2007 Sanction Guidelines at 1.

²⁵ *Id.* at 35. The 2011 revisions to the Sanction Guidelines provide that a bar is standard where an individual has provided a partial but incomplete response to a Rule 8210 request "unless the person can demonstrate that the information provided substantially complied with all aspects of the request." FINRA Sanction Guidelines at 33 (2011).

²⁶ 2007 Sanction Guidelines at 35. The Sanction Guidelines include a list of non-exhaustive aggravating and mitigating factors. *See id.* at 6-7.

²⁷ *See id.* at 35. A higher range of \$25,000 to \$50,000 is recommended for "[f]ailure to [r]espond" in any manner. *Id.* And a lower range of \$2,500 to \$25,000 is recommended for "[f]ailure to [r]espond [i]n a [t]imely [m]anner." *Id.*

²⁸ *Id.*

²⁹ *Sears*, 2008 SEC LEXIS 1521, at *26-27; *see also* Order Approving Proposed Rule Change Relating to Outside Business Activities of Associated Persons of Member Firms, Exchange Act

(continued...)

Houston argues that information concerning his outside business activity was unimportant by the time of the OTR because he had admitted to NASD that he had violated Rule 3030. But an associated person may not "second guess" NASD's requests for information, or "take it upon [himself] to determine whether information is material to an NASD investigation of [his] conduct."³⁰ And "Rule 8210(a) has no requirement that NASD explain its reasons for making the information request or justify its relevance."³¹

Moreover, Houston misunderstands the purpose of the OTR. Information concerning Houston's outside business activity was important not only because it concerned Houston's Rule 3030 violation but also because it concerned whether Houston defrauded and misappropriated funds from the Boyd trust. Houston's refusal to attend the OTR, therefore, impeded NASD's investigation into potentially serious misconduct against a customer of his firm.

Second, despite NASD's repeated requests and granting of accommodations to Houston, NASD was still unable to obtain Houston's attendance at the OTR. Houston responded to NASD's initial letter scheduling the OTR by stating that he would attend only if NASD provided him with (i) the "[w]ording of the 2110 violation in question"; (ii) "[s]entencing guidelines on violation 2110 & 3030"; and (iii) "[r]ecent broker history of sentences handed down and accepted by" respondents for violating Rules 3030 and 2110. NASD repeated its request in a subsequent letter, warning Houston that he could not impose conditions on his testimony and that failure to appear and testify at the OTR would be "grounds for formal disciplinary action."³² But NASD also accommodated Houston by directing him to the location on NASD's website for the text of Rule 2110, the Sanction Guidelines, synopses of settled disciplinary actions, and hearing panel and NAC decisions. NASD then twice postponed the OTR to accommodate Houston

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Release No. 26178, 1988 SEC LEXIS 2032, at *1 (Oct. 13, 1988) (approving NASD's enactment of Rule 3030 to address the securities industry's growing concern about preventing harm to the investing public or a firm's entanglement in legal difficulties based on an associated person's unmonitored outside business activities); Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons, Exchange Act Release No. 26063, 1988 SEC LEXIS 1841, at *2-3 (Sept. 6, 1988).

³⁰ *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21, *26 (Jan. 30, 2009) (citation omitted); *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18-19 (Nov. 8, 2007) ("As we have often noted, recipients of requests under Rule 8210 must promptly respond to the requests or explain why they cannot. They may not refuse such requests on the grounds of relevance or otherwise set conditions on their compliance, and NASD is not required to justify its information requests in order to obtain compliance from members and their associated persons.").

³¹ *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *26; *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

³² *See* note 30.

before finally receiving a letter from him stating that he had "nothing further to add and [would] not be attending the (OTR)."

Moreover, while Houston responded to NASD's initial three Rule 8210 requests for information and documents, his responses to those requests were untimely and his response to the third request was incomplete.³³ In fact, NASD sent Houston two follow-up letters demanding that he fully comply with its third Rule 8210 request, but he still failed to produce all the documents requested. These included copies of checks written from Houston's Countrywide account,³⁴ documents substantiating payments Houston claimed were for Mrs. Boyd's care, and Houston's tax returns for 2003 through 2005.³⁵

Houston contends that the severity of his Rule 8210 violation is mitigated by the fact that he misunderstood the purpose of the OTR. Houston claims that he thought the OTR "was provided to [him] if [he] wanted to fight the [outside business activity] issue," and that he did not attend because he "admitted [his] guilt" and "asked to move on to an equitable settlement." Houston blames NASD for his purported misunderstanding because it did not explain that the OTR "was for further questioning" despite knowing that Houston "did not have legal counsel."³⁶

Houston's contention has no merit. NASD's letter to Houston scheduling the OTR stated clearly that the OTR was an "on-the-record interview" pursuant to Rule 8210, and that Houston was "obligated to appear."³⁷ NASD's letter neither stated nor implied that the OTR was a hearing or that a determination had been made to charge Houston with Rule violations. Moreover, Houston was responsible for understanding his obligations as a securities professional, including those under Rule 8210.³⁸

³³ The record belies Houston's contention that he provided all information and documents requested in a timely manner. Houston's responses to NASD's initial three Rule 8210 requests were each approximately two weeks late, and he never fully responded to the third request.

³⁴ Houston claimed that Countrywide does "not send checks."

³⁵ Houston questioned NASD's "legal authority" for requesting his tax returns.

³⁶ Houston claims that NASD neglected to explain the purpose of the OTR so that it could charge him with violating Rule 8210, and that NASD told him he "didn't need legal counsel as . . . [he] was pleading guilty to the outside business activity charge." Neither claim is supported by the record.

³⁷ In a subsequent letter, NASD reiterated that the OTR was an "on-the-record interview" and that NASD was authorized pursuant to Rule 8210 to require Houston "to provide information and to testify at a location specified by the Staff." The letter reminded Houston that he was "obligated to appear" and that "failure to appear and testify truthfully, alone, is grounds for formal disciplinary action."

³⁸ See *Hans N. Beerbaum*, Exchange Act Release No. 55731, 2007 SEC LEXIS 971, at *19 & n.22 (May 9, 2007) ("We have repeatedly held that members and their associated persons cannot shift their burden of compliance to the NASD.") (internal quotation omitted); *Kirk A. Knapp*, Exchange Act Release No. 30391, 1992 SEC LEXIS 430, at *11 n.15 (Feb. 21, 1992)

Finally, the sanctions are remedial and not punitive. We have stressed the importance of Rule 8210 in connection with NASD's "obligation to police the activities of its members and associated persons."³⁹ "Without subpoena power, NASD must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate."⁴⁰ Failure to respond to Rule 8210 requests "impedes NASD's ability to detect misconduct that threatens investors and markets."⁴¹ It is therefore "critically important to the self-regulatory system that members and associated persons cooperate with NASD investigations."⁴² Houston's misconduct was therefore serious, and the sanctions imposed will protect the public by encouraging Houston (upon the lifting of his suspension) as well as others to respond to Rule 8210 requests completely and in a timely manner.⁴³

B. The sanctions imposed for violating Rules 3030 and 2110 were neither excessive nor oppressive.

The Sanction Guidelines state that a suspension of up to one year for violating Rule 3030 should be considered "[w]hen the outside business activities involve aggravating conduct."⁴⁴ The Sanction Guidelines also recommend a fine of \$2,500 to \$50,000.⁴⁵

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(Respondent "cannot shift his responsibility for compliance with regulatory requirements to . . . NASD.").

³⁹ *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *15 (quoting *Paz Sec. Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12 (Apr. 11, 2008), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009)).

⁴⁰ *Id.* at 15.

⁴¹ *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13-14 (Nov. 14, 2008), *petition denied*, 347 F. App'x 692 (2d Cir. 2009); *see also Joseph Patrick Hannan*, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998) ("We have repeatedly stressed the importance of cooperation in NASD investigations Failures to comply [with Rule 8210 requests] are serious violations because they subvert the NASD's ability to carry out its regulatory responsibilities.").

⁴² *Erenstein*, 316 F. App'x at 871.

⁴³ *See Siegel v. SEC*, 592 F.3d 147, 158 (D.C. Cir. 2010) (noting that deterrence may be considered as part of the overall remedial inquiry in determining sanctions).

⁴⁴ 2007 Sanction Guidelines at 14. The Sanction Guidelines recommend a 30-day suspension "[w]hen the outside business activities do not involve aggravating conduct." *Id.* And the Sanction Guidelines recommend a bar or suspension longer than one year "[i]n egregious cases, including those involving a substantial volume of activity or significant injury to customers of the firm." *Id.*

⁴⁵ *Id.*

The Sanction Guidelines further identify five "principal considerations" for determining sanctions for violating Rule 3030. They are (i) "[w]hether the outside activity involved customers of the firm"; (ii) "[w]hether outside activity resulted directly or indirectly in injury to customers of the firm and, if so, the nature and extent of the injury"; (iii) the "duration of the outside activity, the number of customers, and the dollar volume of sales"; (iv) "[w]hether the respondent's marketing and sale of the product or service could have created the impression that the employer (member firm) had approved the product or service";⁴⁶ and (v) "[w]hether the respondent misled his or her employer member firm about the existence of the outside activity or otherwise concealed the activity from the firm."⁴⁷

The NAC's decision to impose an additional and consecutive one-year suspension and \$50,000 fine for Houston's failure to provide prompt written notice of his outside business activity to the Firm in violation of Rules 3030 and 2110 is supported by application of the above considerations.⁴⁸ Indeed, Houston's misconduct involved four significant principal considerations: firm customer, duration, substantial monetary gain, and concealment.⁴⁹ Houston's outside business activity not only involved a First Wall Street customer, the Boyd trust, but also extended over a long period of time (2001 through 2005). Houston's outside business activity resulted in substantial gain of over \$450,000 for Houston, including approximately \$355,000 in checks that Houston wrote to himself or his home equity line of credit from the Boyd Trust Account. And Houston repeatedly misled First Wall Street about his trustee activities. As discussed above, Houston misrepresented on one form that he sent the Firm in 2004 that he had not "conducted any outside business activities during the past year," and he misrepresented on another form that he sent the Firm in 2005 that he had not "accepted any appointment as trustee . . . over any client including my immediate family during the past year."⁵⁰

⁴⁶ This proceeding does not involve the marketing and sale of First Wall Street products or services, and therefore the fourth principal consideration is not applicable here.

⁴⁷ 2007 Sanction Guidelines at 14. The Sanction Guidelines also list as principal considerations in determining sanctions for all violations, among other factors, "[w]hether the respondent engaged in the misconduct over an extended period of time," "[w]hether the respondent's misconduct resulted in the potential for respondent's monetary or other gain," and "[w]hether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, [or] deceive . . . the member firm with which he or she is/was associated". *Id.* at 6-7.

⁴⁸ It should be noted with respect to the second principal consideration that, while NASD was investigating whether Houston's trustee activities resulted in injury to the Boyd trust through the misappropriation of its funds, Houston's refusal to attend the OTR impeded NASD's investigation into this issue. We therefore make no finding with respect to whether there was or was not customer harm. For similar reasons discussed below, we also reject Houston's contention that a lack of investor injury warrants lesser sanctions.

⁴⁹ *See* 2007 Sanction Guidelines at 6-7, 14.

⁵⁰ This pattern of deception, and Houston's additional failure to report his trustee activities in response to repeated requests from the Firm, disprove Houston's contention that there was no aggravating conduct here and that he merely failed to "correctly sign[]" certain documents.

We find no mitigating factors here. Houston contends that, before the commencement of this proceeding, he admitted culpability to NASD for violating Rules 3030 and 2110. Houston further contends that he accepts responsibility for his actions and will not commit future violations. But acceptance of responsibility is mitigating only when it occurs "prior to detection and intervention by the firm . . . or a regulator."⁵¹ Moreover, Houston's assurances are unconvincing because of his attempts to shift blame for his misconduct. For instance, Houston asserts that he never would have violated Rule 3030 if the Firm's "compliance officer had caught [his] mistake [in signing an incorrect business activity form] and sent it back to [him] for correction."

Houston further claims that the Firm "knew of [his] trustee activities" because the file he set up for the Boyd Trust Account in 2001 included a "legal document of [his] appointment as [c]o-[t]rustee," and because his name was on the Boyd Trust Account checks which were "shown on [the Boyd trust's] monthly statement for [the] compliance examination."⁵² Regardless of whether the Boyd Trust Account file or the Boyd trust's monthly statement indicated that Houston was serving as a trustee, Houston remained responsible as an associated person to provide prompt notice of his outside business activity "in the form required by" the Firm.⁵³ Houston cannot shift his responsibility for compliance with Rule 3030 to a supervisor, compliance officer, or anyone else at the Firm.⁵⁴ Houston's attempt to do so demonstrates a fundamental misunderstanding of his responsibilities as a securities professional.

C. Houston's remaining contentions lack merit.

We reject Houston's remaining contentions. Houston contends that his lack of disciplinary history should be considered mitigating. FINRA has repeatedly held that a lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional. We

⁵¹ 2007 Sanction Guidelines at 6.

⁵² Houston also claims that First Wall Street knew of his trustee activities because (i) it was the Firm's idea that he receive compensation for his services as a trustee because he "could not receive trading commissions"; (ii) he sent First Wall Street a document appointing him as sole trustee in late 2005; and (iii) the Firm's compliance department had him under special supervision "[a]s a trustee on [the Boyd Trust] account, as broker of record and with [First Wall Street] as dealer of record," and that he "had monthly meetings with compliance concerning any and all activities of Boyd's account." These claims are not supported by the record.

⁵³ NASD Rule 3030. Moreover, as discussed above, Houston not only failed to provide notice of his trustee activities on the forms provided by First Wall Street, he also falsely claimed on certain of those forms that he had no such activities.

⁵⁴ See *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *73 (Jan. 30, 2009) ("We have held repeatedly that a respondent cannot shift his or her responsibility for compliance with an applicable requirement to a supervisor.") (citation and internal quotation omitted), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

find FINRA's application of its Sanctions Guidelines reasonable and have consistently affirmed FINRA's choice in so holding.⁵⁵

Houston contends that he "provided seven years of substantial assistance in this investigation" by meeting his "obligation to provide [h]onest and [t]ruthful information requested of [him] in a timely manner without regulatory pressure." In addition to the fact that this contention is contradicted by the record as set forth above, associated persons do not provide substantial assistance by fulfilling their obligations to cooperate with NASD investigations.⁵⁶ There is also no indication in the record that Houston otherwise provided substantial assistance to NASD.

Houston contends that he should receive credit because he wanted to settle this proceeding and that NASD "never negotiated in good faith." But NASD had no obligation to settle this proceeding on Houston's terms, and settlement negotiations are irrelevant to the sanctions determination.⁵⁷ Moreover, the record does not contain any evidence that NASD acted in bad faith.

Houston contends that the sanctions imposed by the NAC should have been in line with lesser sanctions that have been imposed in proceedings settled by NASD.⁵⁸ But "[w]e have repeatedly observed that comparisons to sanctions in settled cases are inappropriate" because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement "such as the avoidance of time-and-manpower-consuming adversary proceedings."⁵⁹ Moreover,

⁵⁵ *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at*23 (Nov. 8, 2006). *But cf. Matthew J. Collins v. SEC*, 736 F.3d 521, 526 (D.C. Cir. 2013) (noting, in the context of an appeal from an administrative proceeding, that disciplinary history is properly considered a mitigating factor); *Robert L. Burns*, Advisers Act Release No. 3260, 2011 WL 3407859, at *11 (Aug. 5, 2011) (considering petitioner's clean disciplinary history as a mitigating factor in an appeal from an administrative law judge's initial decision).

⁵⁶ *Keyes*, 2006 SEC LEXIS 2631, at*24 (Respondent's "cooperation in the [NASD] investigation was consistent with the responsibilities he agreed to when he became an associated person and does not constitute substantial assistance.").

⁵⁷ *See Richard A Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *36 (Oct. 20, 2011) ("We have previously held that [settlement] negotiations are not relevant to our determination of sanctions in a contested proceeding."); *Clyde J. Bruff*, Exchange Act Release No. 40583, 1998 SEC LEXIS 2266, at *14 (Oct. 21, 1998) ("The NASD is not obligated to accept [a settlement] offer once made."), *petition denied*, 198 F.3d 253 (9th Cir. 1999).

⁵⁸ Houston specifically refers to the sanction imposed upon settlement by Letter of Acceptance, Waiver and Consent in FINRA Case Nos. 2012033265101, 201024740901, 2011029832701, and 2012031636001.

⁵⁹ *Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 SEC LEXIS 2973, at *47 (Sept. 20, 2012); *Castle Sec. Corp.*, Exchange Act Release No. 52580, 2005 SEC LEXIS 2628, at *18 n.24 (Oct. 11, 2005) (same).

the appropriate sanction in any case "depends on the particular facts and circumstances presented."⁶⁰ "Litigated cases typically present a fuller, more developed record of facts and circumstances for purposes of assessing appropriate sanctions than do settled matters."⁶¹

Houston contends that lesser sanctions are warranted because his conduct did not result in injury to investors. But the OTR that NASD requested pursuant to Rule 8210 concerned whether the Boyd trust, an investor and First Wall Street customer, was harmed by Houston's trustee activities. It was Houston's refusal to attend the OTR that impeded NASD's ability to determine whether there was any harm to the Boyd trust.⁶²

Houston contends that the suspensions imposed should be vacated because he has suffered enough as a result of this proceeding. Houston asserts that the two plus years in which he has not been "able to practice [his] trade is enough to prevent the recurrence of misconduct." But any collateral consequence that Houston may have suffered as a result of his misconduct or from the disciplinary proceeding that followed, such as the impact on his reputation, career, or finances, is not a mitigating factor.⁶³

Houston further contends that the consequences to his career from this proceeding have been exacerbated because NASD, despite knowing that Houston did not have legal counsel, did not inform him that our prior decision vacating the sanctions imposed and remanding the proceeding for a sanctions redetermination meant that he was no longer prohibited from associating with a member firm. As a result, Houston contends, he "sat out another full year

⁶⁰ *Pattison*, 2012 SEC LEXIS 2973, at *49; *see also* *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011) ("[W]e consistently have held 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."); *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 187 (1973) (holding that "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases"); *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (holding that, because the "Commission is not obligated to make its sanctions uniform," court would not compare sanction imposed in case to those imposed in previous cases).

⁶¹ *Pattison*, 2012 SEC LEXIS 2973, at *49.

⁶² *Paz Sec.*, 2008 SEC LEXIS 820, at *17-20 (finding lack of evidence of customer harm not to be mitigating where "NASD was prevented from determining whether Applicants engaged in . . . potentially harmful conduct . . . because Applicants did not answer its information requests").

⁶³ *See, e.g., Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008) ("We also do not consider mitigating the economic disadvantages [respondent] alleges he suffered because they are a result of his misconduct."); *Ramiro Jose Sugranes*, Exchange Act Release No. 35311, 1995 SEC LEXIS 234, at *4 (Feb. 1, 1995) ("[A]ny difficulty [Respondent] has encountered in securing employment is a direct consequence of his own misconduct, rather than a reason for reducing his suspension.").

believing [he] was still suspended."⁶⁴ But Houston's misunderstanding is not reasonable considering that the order accompanying our prior decision stated clearly "that the sanction imposed by [NASD] on Kent M. Houston in this proceeding . . . is, vacated."⁶⁵ Moreover, NASD had no obligation to explain our prior decision to Houston or otherwise provide him with legal advice.

Finally, for the first time in this proceeding, Houston contends that he is unable to pay the fines imposed. But Houston has failed to carry his burden of proving inability to pay because he did not provide any supporting evidence for this contention.⁶⁶ Moreover, Houston did not show below that his financial hardship has resulted from a subsequent change in circumstances.⁶⁷

Accordingly, for the foregoing reasons, we find that the sanctions imposed on Houston are neither excessive nor oppressive within the meaning of Exchange Act Section 19(e).

An appropriate order will issue.⁶⁸

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER and STEIN); Commissioner PIWOWAR not participating.

Jill M. Peterson
Assistant Secretary

⁶⁴ Houston claims that NASD's inaction was "[d]eliberate[] and [i]ntentional[]," and that it knew he believed he was still suspended. This claim is not supported by the record.

⁶⁵ *Houston*, 2011 SEC LEXIS 4491, at *30.

⁶⁶ *See Castle Sec.*, 2005 SEC LEXIS 2628, at *19 (finding that respondent did not meet its "burden of demonstrating an inability to pay" because respondent did not introduce documentation concerning the deterioration in its financial situation); *Michael H. Novick*, Exchange Act Release No. 37503, 1996 SEC LEXIS 1994, at *6 (July 31, 1996) (noting that respondent "bears the burden of demonstrating an inability to pay the fine" in an NASD proceeding); 2007 Sanction Guidelines at 5 ("The burden is on the respondent to raise the issue of inability to pay and to provide evidence thereof.").

⁶⁷ 2007 Sanction Guidelines at 5 ("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).").

⁶⁸ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 71589 / February 20, 2014

Admin. Proc. File No. 3-14175r

In the Matter of the Application of

KENT M. HOUSTON
Carlsbad, California 92009

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the sanctions imposed by FINRA on Kent M. Houston be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary