SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 74269 / February 13, 2015

Admin. Proc. File No. 3-15701

In the Matter of the Application of

ROBERT MARCUS LANE
and
JEFFREY GRIFFIN LANE

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDINGS

Violations of Securities Laws and Conduct Rules

Unfair and Fraudulent Markups

Interpositioning

Failure to Supervise and Deficient Supervisory Procedures

Failure to Provide Requested Information

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered representative of former member firm of registered securities association interpositioned controlled accounts between member firm and its customers, resulting in excessive and, in some instances, fraudulent markups to the customers. Registered representative's supervisor failed reasonably to supervise representative and prepared deficient written supervisory procedures. Both registered representative and his supervisor failed to provide information requested by registered securities association. *Held*, registered securities association's findings of violations and sanctions are *sustained*.

APPEARANCES:

Robert Marcus Lane and *Jeffrey Griffin Lane*, *pro se*.

Alan Lawhead and *Michael Garawski*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: January 28, 2014
Last brief received: May 12, 2014

Robert Marcus Lane and Jeffrey Griffin Lane (together, "Applicants") appeal from FINRA disciplinary action.[1] FINRA found that Marcus Lane, on eleven occasions over a six-month period, interpositioned two accounts he owned and controlled between the Firm and two of its retail customers, charging the customers excessive and, in some cases, fraudulent markups, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder,[2] and NASD Conduct Rules 2110, 2120, 2320(b), 2440, and IM-2440.[3] For these violations,

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[1] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and the member-regulation, enforcement, and arbitration functions of the New York Stock Exchange. *See* Securities Exchange Act Release No. 56146, 2007 WL 5185331 (July 26, 2007). Because much of the conduct at issue here occurred before this date, NASD Conduct Rules that were in effect at the time apply, except as noted herein.

[2] 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. FINRA also found that Marcus Lane's "willful violation of Exchange Act Section 10(b) gives rise to a statutory disqualification." The Securities Acts Amendments of 1975 introduced the concept of a "statutory disqualification." *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *10 & n.49 (Nov. 9, 2012) (citation omitted). Under Article III, § 3 of FINRA's By-Laws, a person subject to a statutory disqualification cannot become or remain associated with a FINRA member unless the disqualified person's member firm applies for and is granted, in FINRA's discretion, relief from the statutory disqualification. *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at *1 n.4 (Apr. 18, 2013). A person is subject to a statutory disqualification under Exchange Act Section 3(a)(39)(F) if, among other things, he "has willfully violated any provision of the Exchange Act." 15 U.S.C. § 78c(a)(39)(F) (stating that a person is subject to a statutory disqualification if, among other things, he has committed any act enumerated in Exchange Act Section 15(b)(4)(D), 15 U.S.C. § 78o(b)(4)(D), which refers, among other things, to willful violations of the Exchange Act).

[3] NASD Conduct Rule 2110 required members to observe "high standards of commercial honor and just and equitable principles of trade," and we have repeatedly held that a violation of the Exchange Act and any FINRA rule constitutes a violation of Rule 2110. *E. Magnus Oppenheim & Co.*, Exchange Act Release No. 51479, 2005 WL 770880, at *2 (Apr. 6, 2005). NASD Conduct Rule 2120 prohibited members from effecting transactions, or inducing the

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FINRA barred Marcus Lane from associating with any FINRA member firm in all capacities and directed him to pay disgorgement of $218,582, plus prejudgment interest, to the affected customers.

FINRA also found that Jeffrey Lane violated NASD Conduct Rule 3010 by failing to establish and maintain reasonable written supervisory procedures and failing reasonably to supervise Marcus Lane.[4] For these violations, FINRA barred Jeffrey Lane from associating with any member firm in a principal capacity.[5]

FINRA further found that Applicants failed to respond in a timely manner to FINRA's requests for information under Rule 8210.[6] FINRA did not impose a sanction on Marcus Lane for this violation in light of the bar it imposed for his other violations, but it imposed on Jeffrey Lane a two-year suspension in all capacities and a $25,000 fine.

On appeal, Applicants contend that the markups Marcus Lane charged were fair and reasonable in light of the type of securities involved, that Jeffrey Lane prepared adequate supervisory procedures and that his supervision of Marcus Lane was reasonable, and that Applicants provided the information that FINRA requested in connection with its investigation.

(…continued)
purchase or sale of a security, by means of any manipulative, deceptive, or fraudulent device. Conduct Rule 2320 generally prohibited members from interpositioning a third party between the member and the best available market. Conduct Rule 2440 required members to buy securities from and sell securities to customers at prices that are fair, taking into consideration all relevant circumstances. IM-2440 deemed it a violation of NASD Conduct Rules 2110 and 2440 "for a member to enter into any transaction with a customer in any security at any price not reasonably related to the current market price of the security."

[4] NASD Conduct Rule 3010(b) required, among other things, member firms' written supervisory procedures to "set forth the supervisory system," including "the responsibilities of each supervisory person" and to maintain records relating to these procedures. Conduct Rule 3010(d) required member firms to establish written procedures designed reasonably to supervise each registered representative by reviewing all transactions and to maintain evidence that such review has occurred.

[5] FINRA found that Jeffrey Lane "failed reasonably to supervise [Marcus Lane], with a view to preventing violations of Section 10(b) of the Exchange Act and the rules thereunder" and, as a result, that he, too, was subject to a statutory disqualification. *See* 15 U.S.C. § 78c(a)(39)(F) (stating that a person is subject to a statutory disqualification if, among other things, he has committed any act enumerated in Exchange Act Section 15(b)(4)(E), 15 U.S.C. § 78o(b)(4)(E), which refers, among other things, to the failure "reasonably to supervise, with a view to preventing violations . . . ").

[6] NASD Conduct Rule 8210 required associated persons to provide information or documents in an investigation.

For the reasons set forth below, we sustain FINRA's findings of violations and imposition of sanctions.

I. Background

A. Applicants

During the relevant period, brothers Marcus Lane and Jeffrey Lane were general securities representatives associated with Greenwich High Yield, LLC ("Greenwich" or the "Firm").[7] Marcus Lane owned eighty percent of the Firm and Jeffrey Lane owned twenty percent. Marcus Lane was the Firm's chief executive officer and sole trader, and he was the sole owner of High Yield Partners, LLC and High Yield Partners Income, LLC, which Marcus Lane described as "separate trading account[s]" or "inventory account[s]" for the Firm (together, the "Controlled Accounts"). Jeffrey Lane was the principal responsible for supervision, the Firm's Chief Compliance Officer, and the Firm's registered Financial and Operations Principal ("FINOP"). He also was responsible for drafting all aspects of the Firm's Written Supervisory Procedures ("WSPs").

B. Marcus Lane charged two customers undisclosed markups ranging from 6.45 percent to 40.93 percent on eleven trade sets.

Between October 20, 2006, and May 2, 2007, Marcus Lane, trading for the Firm, executed eleven separate sets of transactions in corporate bonds issued by three companies in the automotive supply industry, as set forth in the attached Appendix (the "Trade Sets").[8] The Trade Sets followed a similar, multi-step pattern, which occurred over a short period of time: (1) the Firm purchased the bonds from a broker-dealer; (2) the Firm immediately sold the bonds with a markup to one of the Controlled Accounts owned by Marcus Lane and used by the Firm for inventory; (3) the Firm purchased the bonds back from the Controlled Account with a second markup; and (4) the Firm sold the bonds to one of its retail customers with a third markup. Ten out of the eleven Trade Sets were completed in their entirety within one hour, and the other was

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[7] Greenwich became a FINRA member on November 23, 1994 and terminated its FINRA membership on June 23, 2009. Both Marcus Lane and Jeffrey Lane became registered with FINRA in 1995 and terminated their registrations in April 2009.

[8] The bonds were issued by Collins & Aikman Corporation, Werner Enterprises, Inc., and RJ Tower Corporation. FINRA's opinion states that the record does not include the full corporate names of the issuers of the bonds at issue, but the parties do not dispute the identity of the issuers. The clearing firm's trade confirmations included in the record support the Lanes' characterization of the bonds as "distressed securities." According to those trade confirmations, both the Werner and Collins & Aikman bonds were rated "D" by Standard & Poor's, which indicates "payments default on financial commitments." The Tower bonds, which were denominated in Euros, were not rated by Standard & Poor's, but the trade confirmations state that the bonds were "in default."

completed in 138 minutes; all were completed on the same trading day.[9] The aggregate markup (*i.e.*, the percentage difference between the Firm's initial purchase price for the bonds from a broker-dealer and the final sale price to the customer) ranged from a low of 6.45 percent to a high of 40.93 percent , and the total profits for all eleven Trade Sets (for the Firm and the Controlled Accounts) amounted to $317,030.70.[10] All but three of the markups exceeded 10 percent. The Firm's profits in the Trade Sets represented a significant percentage of its total revenues during the applicable period.[11]

Trade Set 8 illustrates the pattern that ran through all eleven Trade Sets. The Firm initially purchased 2,000,000 Tower bonds from a broker-dealer at 11:35 a.m. on March 29, 2007, at a price of 7.33.[12] Within one minute, the Firm sold the bonds to a Controlled Account at

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[9] Trade Set 3, on October 31, 2006, was divided into two separate sales to the same retail customer, which occurred simultaneously, but at different prices. This resulted in two separate markups. The record does not indicate why this Trade Set was divided in this way; all the other Trade Sets involved a single sale to the applicable retail customer. A markup was charged at every leg of each of the Trade Sets, except for two of the Trade Sets, in which one of the four legs was executed at a price equal to the previous leg. None of the Trade Sets included any markdowns in price.

[10] Trade Set 1 occurred at a 15.11 percent markup for an aggregate profit (for the Firm and Controlled Accounts) of $13,387.50. Trade Set 2 occurred at an 11.76 percent markup for an aggregate profit of $15,000.00. Trade Set 3 involved two separate multi-step transactions, the first of which occurred at a 7.46 percent markup for an aggregate profit of $12,500.00 and the second of which occurred at a 13.43 percent markup for an aggregate profit of $11,250.00. Trade Set 4 occurred at a 7.41 percent markup for an aggregate profit of $2,825.00. Trade Set 5 occurred at a 6.45 percent markup for an aggregate profit of $5,000.00. Trade Set 6 occurred at a 10.34 percent markup for an aggregate profit of $14,250.00. Trade Set 7 occurred at a 20.02 percent markup for an aggregate profit of $42,600.00. Trade Set 8 occurred at a 40.93 percent markup for an aggregate profit of $60,000.00. Trade Set 9 occurred at a 39.92 percent markup for an aggregate profit of $76,950.00. Trade Set 10 occurred at a 20 percent markup for an aggregate profit of $52,068.20. Trade Set 11 occurred at a 14.53 percent markup for an aggregate profit of $11,200.00.

[11] During the first quarter of 2007, Trade Sets 5 through 10 (the only Trade Sets that occurred during that quarter) generated aggregate profits (for the Firm and Controlled Accounts) totaling $250,868.20, of which the Firm itself (as opposed to the Controlled Accounts) retained approximately $92,000. This amount represented over 20 percent of the Firm's total revenues during that quarter.

We further note, because it relates to contentions discussed below, that, although the Firm was subject to a net capital requirement of $100,000, it maintained excess net capital of over $2,000,000 during the first two quarters of 2007.

[12] Bond prices are stated in "points," with each point representing ten percent ($10) of the bond's par value. Thus, a stated price of 7.33 for a $1,000 par value bond is $73.33.

a price of 7.65. Less than thirty minutes later, at 12:01 p.m., the Firm bought the bonds back from the Controlled Account at a price of 9.91. The Firm then immediately re-sold the bonds to a retail customer at a price of 10.33. The aggregate markup for this twenty-six-minute Trade Set was 40.93 percent for a total markup amount of $60,000.

The markups were not disclosed to customers. Order tickets did not reflect the markups, nor did any other communication to customers, such as account statements.[13] Further, customers could not have discovered or determined the markups. Although FINRA was able to generate "audit trails" for the periods immediately before and after certain Trade Sets,[14] these audit trails were based on information provided by broker-dealers to FINRA's Trade Reporting and Compliance Engine ("TRACE").[15] There is no evidence that this information or similar audit trails are available to the public.

Even if a retail customer could have accessed TRACE audit trails, those audit trails lacked important information about the nature of the transactions at issue. For example, although the four legs of the transactions appeared on the audit trail with price information from which markup percentages could be calculated, the two legs involving the Controlled Accounts were identified by Applicants with a "C" for customer. Therefore, the transactions with the Controlled Accounts were represented on the audit trail as customer transactions, as opposed to transactions

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[13] FINRA senior regulatory analyst Derrick Leak reviewed a number of the Trade Sets, describing the timing and pricing of the component transactions. Among other things, Leak noted in his testimony during the hearing that the order tickets the customers received included no disclosure of the markups, and he pointed out that, for several of the Trade Sets, there were no intervening transactions in the market for those securities between the time of the Firm's initial purchase and the time of the final sale to retail customers, which meant that "other broker-dealers were not participating in the [applicable] market, thus the price was not affected."

[14] Leak testified that an audit trail "shows all the activity in a certain [bond] and a certain designated time frame" and that FINRA staff selected the time frame "so we could get an accurate picture of what was happening in the market over an extended time frame." In addition to the audit trails, FINRA's Department of Market Regulation introduced the order tickets and confirmations for all of the Firm's transactions at issue.

[15] FINRA "introduced TRACE in July 2002 in an effort to increase price transparency in the U.S. corporate debt market. The system captures and disseminates consolidated information on secondary market transactions in publicly traded TRACE-eligible securities (investment grade, high yield and convertible corporate debt)—representing all over-the-counter market activity in these bonds." http://www.finra.org/Industry/Compliance/MarketTransparency/TRACE/CorporateBondData/. The Tower bonds, which were denominated in Euros, were not entered into the TRACE system.

with inventory accounts wholly owned by Marcus Lane. There was no other information that disclosed their identity.[16]

C. The Firm's Written Supervisory Procedures, drafted by Jeffrey Lane, did not address interpositioning and indicated that NASD's 5% Policy did not apply to transactions involving distressed bonds.

The Firm's Written Supervisory Procedures ("WSPs"), for which Jeffrey Lane was responsible, did not address interpositioning—the channeling of a customer's transaction through another broker-dealer or person in a similar position—which is a violation of NASD Rule 2320(b), "unless [a FINRA member or registered representative] can show that by so doing he reduced the costs of the transactions to the customer." Further, the WSPs and the Firm's Markup Policy did not specify who was responsible for reviewing the Firm's markups to ensure compliance with FINRA Rules, how such a review would be conducted (although the WSPs included a list of six factors to be considered), how often they would occur, and how the reviews

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[16] The audit trails show that market activity in the bonds at issue varied considerably during the relevant period; at times, several days passed without any trades in the bonds. Even during periods when there was trading activity on a daily basis, fewer than ten trades typically occurred on any given day. The audit trails for the dates surrounding the Trade Sets show that there was some price volatility in the bonds at issue, but much of this price volatility correlates closely with the volume of the transactions at issue: transactions involving a smaller quantity of bonds tended to occur at higher prices, whereas larger-quantity, so-called "Round Lot" transactions (such as all of the transactions in the Trade Sets), tended to occur at lower prices.

The audit trails for Trade Sets 3, 4, and 5 included no other same-day transactions at prices higher than the Firm's initial purchase price. Trade Sets 1, 2, and 6 had same-day transactions at a higher price than the Firm's initial purchase price. But in Trade Set 1, the only other same-day transaction occurred over four hours *after* the Firm's initial purchase, in a much lower volume transaction than the Firm's purchase. In Trade Set 2, although the higher-priced transactions occurred before the Firm's initial purchase of the bonds, the higher-priced transactions involved much lower volumes than the Firm's transactions, and other large-volume transactions closer to the time of the Firm's transactions occurred at lower prices than the Firm's transactions. In Trade Set 6, which took place on a day in which there was more trading activity than usual in the Werner bonds, there was only one transaction at a higher price than the Firm's initial purchase price, and that transaction involved a much smaller volume than the Firm's initial purchase; further, the trades closest in time to the Firm's purchase all occurred at lower prices than the Firm's purchase price. In addition, there is no evidence in the record to indicate whether these transactions were inter-dealer or involved retail customers of the firms involved. Some of the Trade Sets had no intervening inter-dealer trades between the time of the Firm's initial purchase of the bonds and the eventual sale to a Firm retail customer (giving the Firm no outside basis for its pricing determinations), and those that did have such intervening transactions all occurred at lower prices than the Firm's purchase price.

would be documented. Jeffrey Lane testified that he "didn't feel that [supervisory] steps actually had to be written out."

Despite the lack of procedures or guidance regarding how the Firm would review markups, the WSPs incorporated some of the general considerations included in FINRA's Markup Policy in effect at the time, IM-2440-1. But the WSPs omitted two key considerations under IM-2440-1(a): (1) "In the absence of other bona fide evidence of the prevailing market, a member's own contemporaneous cost is the best indication of the prevailing market price of a security"; and (2) "a mark-up pattern of 5% or even less may be considered unfair or unreasonable under the '5% Policy.'" Further, the WSPs included the assertions, without supporting authority, that "[i]t is difficult to post a profitable transaction in distressed bond securities costing less than $10 without exceeding the '5% Policy'" and "a higher percentage of mark-up customarily applies to a distressed bond transaction than for an investment grade bond transaction" because "[t]he high yield marketplace is known for illiquid markets in low priced securities for which customers are inclined to trade by appointment with member firms that provide useful research advice." The 2006-07 version of the WSPs stated that the Firm had "addressed to NASD in prior exit interviews" its belief that the 5% Policy did not apply to trades of distressed bonds. That version further stated that "NASD has consistently neglected to render any additional opinion or adopt any stricter standard that could be reasonably applied across the board as a rule (example: no mark-up may exceed four points)."[17]

D. Jeffrey Lane processed all of the transactions at issue without modification.

Jeffrey Lane prepared the order tickets for all of the transactions at issue without modification and reported the transactions to TRACE. He was aware that Marcus Lane owned the Controlled Accounts and set the markup prices for all legs of the Trade Sets, and he knew the timing of the various legs of each Trade Set. Jeffrey Lane discussed the markup amounts with Marcus Lane, and he acknowledged in his hearing testimony that he had encouraged Marcus Lane to charge a markup on the second leg of the Trade Set because "[i]t would not be fair to [the Firm] not to make a profit on those trades." But Jeffrey Lane never questioned Marcus Lane's use of the Controlled Accounts in the Trade Sets, stating, "When [Marcus Lane] bought bonds he said, now I own them, I have to go sell them, and no, I did not question." In addition, Jeffrey Lane acknowledged that none of the Firm's other customer accounts (*i.e.*, those owned by customers other than Marcus Lane) received the benefit of a markup when they sold securities to the Firm.

In reviewing the markup amounts, Jeffrey Lane looked only to the markup charged at each leg of the Trade Sets, and not to the amount of the aggregate markup over the initial purchase price the Firm paid when it first bought the bond from a broker-dealer. Although he claimed not to know what interpositioning was, he acknowledged that Marcus Lane regularly

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[17] As discussed above, bond prices are listed in "points," rather than dollar amounts, with one point equal to $10 of the bond's par value. *See supra* note 12.

had been conducting transactions for years in which the Controlled Accounts purchased bonds from the Firm and then sold them back before the Firm re-sold them to a retail customer. Jeffrey Lane testified that he was aware that his obligation in reviewing transactions for markup violations was to ensure that customers received fair prices, not that the Firm could make a profit on transactions.

E. FINRA investigated the Firm's markups and requested information pursuant to Rule 8210.

FINRA initiated an investigation in 2007 after detecting, through its electronic surveillance system, that certain of the Firm's trades made during the fourth quarter of 2006 appeared to include excessive markups. In 2007 and 2008, FINRA requested information from the Firm pursuant to Rule 8210, and Applicants responded fully to those requests. Based on that information, FINRA narrowed its focus to the Trade Sets because it appeared that, with respect to those transactions, the Firm had interpositioned the Controlled Accounts between the market and the Firm's customers, resulting in excessive markups. At that time, FINRA knew that one of the Controlled Accounts shared the same address as the Firm. But FINRA believed that the Controlled Accounts were customer accounts and did not know who owned or had investment authority over them.

From March 6, 2009, to July 6, 2009, FINRA made a series of Rule 8210 requests asking for information about the ownership of those accounts, their account opening documents, Firm communications regarding the transactions at issue, and electronic communications sent and received by Marcus Lane. As described in more detail below, Applicants failed to respond in a timely manner and did not provide certain information until October 2009, after FINRA had issued a Notice of Suspension and assigned a Hearing Officer.

F. FINRA charged Marcus Lane and Jeffrey Lane, alleging markup, supervisory, and failure-to-respond violations.

On April 6, 2011, FINRA filed a complaint alleging markup, supervisory, and failure-to-respond violations. FINRA held a hearing on February 28 and 29, 2012, before a three-person Hearing Panel. On July 12, 2012, the Hearing Panel found that Applicants committed the violations alleged and imposed sanctions. On July 25, 2012, Applicants timely appealed the Hearing Panel decision to the National Adjudicatory Council ("NAC"). On December 26, 2013, the NAC issued a decision affirming the findings of violations and imposing the sanctions listed above. This appeal followed.

II. Analysis

A. Standard of Review

We base our findings on an independent review of the record and apply the preponderance of the evidence standard for self-regulatory organization disciplinary actions.[18] Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary action, we determine whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violates the SRO's rules, and whether such SRO rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[19]

B. Marcus Lane's Violations

1. Marcus Lane's execution of the Trade Sets violated NASD Rule 2320(b)'s prohibition on interpositioning.

We sustain FINRA's findings that Marcus Lane violated NASD Rule 2320(b), which was in effect at the time of the transactions at issue.[20] Under NASD Rule 2320(b), "[a] member's obligations to his customer are generally not fulfilled when he channels transactions through another broker/dealer or some person in a similar position, unless he can show that by doing so he reduced the costs of the transactions to the customer."[21] We find that Marcus Lane engaged

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[18] *See David M. Levine*, Exchange Act Release No. 48760, 2003 WL 22570694, at *9 n.42 (Nov. 7, 2003).

[19] 15 U.S.C. § 78s(e)(1).

[20] These violations also constitute violations of Rule 2110, which required members to observe "high standards of commercial honor and just and equitable principles of trade." *See supra* note 3. Rule 2110 reflects the mandate of Exchange Act Section 15A(b)(6), which requires, among other things, that FINRA design its rules to "promote just and equitable principles of trade." 15 U.S.C. § 78o-3(b)(6). As we have stated, "[t]his general ethical standard . . . is broader and provides more flexibility than prescriptive regulations and legal requirements. NASD Rule 2110 protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation. NASD Rule 2110 has proven effective through nearly 70 years of regulatory experience." *Notice of Filing of a Proposed Rule Change*, Exchange Act Release No. 58095, 2008 WL 2971979, at *2 (July 3, 2008), *Rule Change Approved Without Modification*, 2008 WL 4468749 (Sept. 25, 2008). We therefore find that Rule 2110 is, and that FINRA applied the rule in a manner, consistent with the purposes of the Exchange Act.

[21] In 2009, after the dates of the Trade Sets, NASD Rule 2320(b) was amended and incorporated into NASD Rule 2320(a). *See FINRA Regulatory Notice 09-58*, 2009 FINRA LEXIS 161 (Oct. 2009).

in this practice of interpositioning in each of the eleven Trade Sets when he channeled transactions through the Controlled Accounts.

An applicant who channels transactions through another broker-dealer or person in a similar position has prima facie failed to meet his obligation to obtain the most favorable price for his customers.[22] An applicant may rebut this presumption by "showing that the customer's total cost or proceeds of the transaction is the most favorable obtainable under the circumstances."[23] As we have observed, "[p]ersons engaged in the securities business cannot be unaware of their obligation to serve the best interests of their customers, and that interpositioning is bound to result in increased prices or costs."[24] Marcus Lane failed to show that the Firm's customers received the most favorable prices obtainable under the circumstances. Instead, as discussed below, Marcus Lane charged customers excessive markups in each of the eleven Trade Sets.

2. Marcus Lane's markups on the Trade Sets were excessive and violated NASD Rule 2440.

We sustain FINRA's findings that Marcus Lane charged the retail customers excessive markups, in violation of its rules.[25] NASD Conduct Rule 2440 stated, "if a member . . . sells for his own account to his customer, he shall . . . sell at a price which is fair, taking into consideration all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense involved, and the fact that he is entitled to a profit."

To clarify what constitutes an excessive markup, FINRA published IM-2440, its Markup Policy, in which it adopted what is commonly referred to as the "5% Policy." Among other things, the 5% Policy stated that a markup is excessive and violates Rules 2110 and 2440 if the price of a security is not reasonably related to its current market price and that "a mark-up pattern

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22 *Thomson & McKinnon*, Exchange Act Release No. 8310, 43 SEC 785, 1968 WL 87637, at *3 (May 8, 1968).

23 *Andrew P. Gonchar*, Exchange Act Release No. 60506, 2009 WL 2488067, at *7 n.23 (Aug. 14, 2009) (citing *Thomson & McKinnon*, 1968 WL 87637, at *3 (concluding broker-dealers' interpositioning "constituted a fraud upon their customers" in violation of the antifraud provisions of the Exchange Act); *Milton M. Star*, Exchange Act Release No. 15577, 47 SEC 58, 1979 WL 173680, at *2 (Feb. 22, 1979) ("[W]here interpositioning has occurred, the burden is on the member to demonstrate that his action resulted in the customer being charged a lower price than that prevailing in the inter-dealer market.")).

24 *Gonchar*, 2009 WL 2488067, at *9.

25 These violations also constitute violations of Rule 2110. *See supra* notes 3 and 20.

of 5% or even less may be considered unfair or unreasonable under the '5% Policy.'"[26] Absent countervailing evidence, the best indicator of the current market price is a member firm's contemporaneous cost of acquiring the security, and a firm's contemporaneous cost is the price upon which member firms should calculate their markup amounts.[27] Wholesale trades between dealers are a better indicator of prevailing market price than retail transactions between firms and their customers.[28] We have held consistently that markups greater than five percent (as every markup here was) are "acceptable in only the most exceptional cases."[29] Once evidence has been presented that markups are five percent or more above a firm's contemporaneous cost, the burden shifts to the firm, or its associated persons, to explain why contemporaneous cost is not an

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[26] *See also A.S. Goldmen & Co., Inc.*, Exchange Act Release No. 44328, 55 SEC 147, 2001 WL 588039, at *3 (May 21, 2001) ("The prices that a broker dealer charges retail customers for securities must be reasonably related to the prevailing market price of the security.").

[27] *See Gonchar*, 2009 WL 2488067, at *7 n.22 (citing *Daniel R. Lehl*, Exchange Act Release No. 34196, 1994 WL 268782, at *2 (June 10, 1994) (holding that a firm that is not a market maker must base its prices on its own contemporaneous cost), *aff'd*, 90 F.3d 1483 (10th Cir. 1996); *F.B. Horner & Assocs., Inc. v. SEC*, 994 F.2d 61, 63 (2d Cir. 1993) (affirming contemporaneous cost of acquiring bonds as an appropriate gauge of the market price for purposes of determining markups); *David Disner*, Exchange Act Release No. 38234, 52 SEC 1217, 1997 WL 47268, at *2 n.8 (Feb. 4, 1997) (citing *Alstead, Dempsey & Co.*, Exchange Act Release No. 20825, 47 SEC 1034, 1984 WL 50800, at *1 (Apr. 5, 1984)); *George Salloum*, Exchange Act Release No. 35563, 52 SEC 208, 1995 WL 215268, at *3 (Apr. 5, 1995) (using contemporaneous cost to conclude that applicant had charged customers fraudulently excessive markups)).

It is undisputed that the Firm was not a market maker in any of the bonds at issue. Section 3(a)(38) of the Exchange Act, 15 U.S.C. § 78c(a)(38), in relevant part, defines "market maker" as "any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy or sell such security for his own account on a regular or continuous basis."

[28] *See, e.g., Michael H. Novick*, Exchange Act Release No. 34640, 51 SEC 1258, 1994 WL 499291, at *3 (Sept. 2, 1994) (stating that "the prevailing market price (on the basis of which retail markups are computed) means the contemporaneous price at which dealers are trading with one another (*i.e.*, the current inter-dealer market)"); *First Honolulu Secs., Inc.*, Exchange Act Release No. 32933, 51 SEC 695, 1993 WL 380039, at *2 (Sept. 21, 1993) ("[t]he prices paid for a security by a dealer in actual transactions closely related in time to its sales are normally a highly reliable indication of the prevailing market").

[29] *Inv. Planning, Inc.*, Exchange Act Release No. 32687, 51 SEC 592, 1993 WL 289728, at *2 (July 28, 1993).

appropriate measure of the prevailing market price or to present facts otherwise justifying higher markups.[30]

In this matter, Marcus Lane does not dispute the markup percentages in the attached Appendix and concedes that he calculated those markups. Since all of the markups exceeded five percent, the burden shifts to Marcus Lane to justify the markups.

Marcus Lane has not satisfied this burden, despite his contentions that the markups were justified based on his allegations that: (1) the Firm was at risk while it held the bonds; (2) the Firm had conducted significant research identifying these specific securities for its customers; (3) the Firm had significant general research expenses and needed to be profitable; (4) the customers were sophisticated investors and would not have accepted the markup prices if they were not fair and that the pricing information "was on TRACE so they could figure it out"; (5) FINRA examiners were aware of the Controlled Accounts; and (6) the prices the Firm charged its customers were "within the constraints of the market."

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[30] *Gonchar*, 2009 WL 2488067, at *7 n.25 (citing *Mark David Anderson*, Exchange Act Release No. 48352, 56 SEC 840, 2003 WL 21953883, at 87 n.41 (Aug. 15, 2003) (noting that the applicant "had the burden of producing evidence to support his claim that his pricing was not excessive"); *First Honolulu*, 1993 WL 380039, at *4 n.23 ("Once the NASD presented evidence of the markups, the burden shifted to applicants to refute this evidence.")); *Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 WL 1697151, at *11 n.62 (Apr. 11, 2008) (citing *Steven P. Sanders*, Exchange Act Release No. 40600, 53 SEC 889, 1998 WL 741105, at *4 (Oct. 26, 1998)).

For example, in sustaining FINRA findings of excessive markups, we have held that applicants may provide "countervailing evidence that showed a change in the market between when Applicants acquired the bonds and when they later sold the bonds to their customers" to overcome the long-recognized presumption in favor of contemporaneous cost as the proper basis for calculating markup amounts. *Gonchar*, 2009 WL 2488067, at *8. And although we have recognized that other factors, such as extra efforts or expenses, may be considered in evaluating whether a markup is excessive, we have faulted applicants who failed to document extra efforts or expenses associated with trades. *Gordon*, 2008 WL 1697151, at *12. This follows from NASD's instruction to members that they must provide "adequate documentation" to justify markups greater than five percent. *Notice to Members 92-16*, 1992 WL 1319225, at *3 (Apr. 1992).

Among the factors to be considered in determining whether a markup is excessive are: "the expense associated with effectuating the transaction; the reasonable profit fairly earned by the broker or dealer; the expertise provided by the broker or dealer; the total dollar amount of the transaction; the availability of the financial product in the market; the price or yield of the instrument; the resulting yield after the subtraction of the markup compared to the yield on other securities of comparable quality, maturity, availability, and risk; and the role played by the broker or dealer." *Press v. Chem. Inv. Servs. Corp.*, 166 F.3d 529, 535 (2d Cir. 1999).

Marcus Lane claims that the markups were justified because the Controlled Accounts took risks by purchasing the bonds from the Firm and that, as a result, the Controlled Accounts were entitled to "compensation" for "committing risk capital." According to this argument, one purpose of the transactions was to create "inventory" for the Firm's retail customers, which put the Firm (and, presumably, the Controlled Accounts) at risk while they held the bonds. Marcus Lane further argues that, because of the risk levels involved, it would not be profitable for any broker to sell low-priced securities unless the broker could charge markups exceeding five percent.

But the existence of general market risk in the distressed bond market does not permit the Firm to charge its customers a price that is not in accordance with the prevailing market.[31] We have consistently found that "markups above 5% generally are not justified even in the sale of lower-priced securities."[32] Further, as set forth in the Appendix, the Firm did not struggle to make money on these transactions; in one instance it made over $75,000 on a Trade Set. We have acknowledged that a markup greater than five percent conceivably may be appropriate in transactions involving low-priced securities, but "only if the size of the total transaction is small and the total compensation charged is equal to or less than a reasonable minimum ticket charge."[33] Here, the dollar amounts of the transactions were large, and the compensation the Firm received was far greater than a reasonable minimum ticket charge.[34]

In any event, the evidence contradicts Marcus Lane's claims that the Firm was at risk in these transactions. Although Marcus Lane asserted in his hearing testimony that he and the Firm were "at risk" on these trades—which, in his view, helped to justify the markups—Marcus Lane acknowledged that he "assume[d] he probably did" receive indications that the customers at issue "would be interested in these bonds" and knew that the customers were knowledgeable about the

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31 *See, e.g.*, *Frank L. Palumbo*, Exchange Act Release No. 36427, 1995 WL 630926, at *6 & n.44 (Oct. 26, 1995) ("We have repeatedly stated that market risk does not justify excessive markups.") (citing *G.K. Scott*, Exchange Act Release No. 33485, 1994 WL 17114, at *4 n.25 (Jan. 14, 1994)).

32 *Sanders*, 1998 WL 741105, at *5.

33 *Century Capital Corp. of South Carolina*, Exchange Act Release No. 31206, 50 SEC 1208, 1992 WL 252170, at *3 & n.10 (Sept. 21, 1992). This precedent is consistent with the testimony of Patrick S. Geraghty, discussed *infra* in note 47.

34 Marcus Lane also argues that the "point" amounts of the markups were small, repeatedly stating that the range of markups ranged from "0.25 to 1.375 points," which he claims indicated that the markups were "fair and reasonable." But even if the "point" amount of the markup might appear to be small, the percentages of the markups ranged from 6.45 percent to 40.93 percent. Marcus Lane cites no authority to support using "points," rather than percentages, to evaluate markup amounts. As discussed, the 5% Policy and numerous courts and the Commission have analyzed markups on a percentage basis. We are aware of no authority that would suggest that markups should be evaluated based on the "point" value of the markup.

bonds at issue.[35] And the very short time periods between the Firm's initial purchase and the eventual sale to the customers support FINRA's position that the risk, if any, was minimal.[36] Further, Marcus Lane was the sole owner of the Controlled Accounts; thus, Marcus Lane did not truly shift any of the economic risk of the transactions when he sold the bonds back and forth between entities he owned.[37]

Marcus Lane's claim that risk justified the markups also does not explain why he charged "layered" markups in a multi-step Trade Set—even if the initial markup compensated the Firm for purchasing the securities from a broker-dealer, this would not explain why the Firm charged the customers markups for the third and fourth legs of the Trade Sets. As discussed above, markups were added to the price of the bonds at issue at nearly every leg of each Trade Set, and no markdowns were charged. As FINRA argued in its pre-hearing brief below, "At most, the customers should have paid the price [the Controlled Accounts] paid to [the Firm]. . . . Instead, the customers incurred one or two additional markups above the initial markup charged."[38] Marcus Lane provides no explanation why, once the Controlled Accounts (which Applicants commonly refer to as Firm "trading accounts") charged a markup to the Firm, it was necessary to assess two additional markups before the sale of the bonds to the retail customer.[39]

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[35] Applicants conceded that these customers had purchased the bonds at issue from the Firm previously and that "there was a readily identifiable competitive market for [the bonds]."

[36] *See Lake Sec., Inc.*, Exchange Act Release No. 31823, 51 SEC 19, 1992 WL 296794, at *3 (describing any risk that member firm endured as "minimal" where markup transaction occurred within two hours of firm's initial purchase).

[37] Marcus Lane contends that it was important to "position" the Controlled Accounts because of unspecified "broker dealers that have . . . been liquidated because of trades blowing up." But he does not explain why the impact of a trade "blowing up" would be mitigated through his use of the Controlled Accounts, since he owned 100 percent of the Controlled Accounts and 80 percent of the Firm.

[38] Such an alternative approach would have resulted in much smaller markups to the customers, which may have compensated the Firm fairly without violating FINRA's Rules. As FINRA notes, if Marcus Lane considered the risk of the transactions to be too great without charging excessive markups, "he could have effected riskless principal trades, or declined to execute the trades altogether." In riskless principal transactions, the firm "buys only to fill orders already in hand, and immediately 'books' the shares it buys to its customers." In such a transaction, "the firm serves as an intermediary for others who have assumed the market risk." *Gonchar*, 2009 WL 2488067, at *2 & n.11 (citing *Kevin B. Waide*, Exchange Act Release No. 30561, 50 SEC 932, 1992 WL 90342, at *3 (Apr. 7, 1992)).

[39] As discussed above, on appeal, FINRA correctly notes that Jeffrey Lane "argues that [the Firm] properly charged [the Controlled Accounts] a mark-up 'as it would . . . another customer,' but he does not address why the firm did not also charge a mark-down when purchasing the bonds back." A markup at this stage, where a customer is selling rather than buying a security, is not typical. Instead, a firm ordinarily would mark down the security—that is, reduce the price it

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In addition, Applicants claim that it was necessary to interposition the Controlled Accounts in order to protect the Firm's net capital position, but the Firm maintained a net capital position of over twenty times its required net capital during the period at issue (*i.e.*, although the Firm was subject to a net capital requirement of $100,000, it maintained excess net capital of over $2,000,000 during the first two quarters of 2007), and none of these transactions would have put the Firm at risk of failing to maintain the required levels of net capital if the Firm itself had sold the bonds to the customers without interpositioning the Controlled Accounts.[40]

The purported costs incurred by the Firm also do not justify the markups here. Marcus Lane testified at the hearing that the Firm had conducted significant "analysis of the auto supply [distressed bond market] prior to [the dates of the Trade Sets]," which it provided to the retail customers at issue, enabling the customers to identify opportunities for advantageous purchases of the bonds. Marcus Lane further testified that distressed debt broker-dealers, like the Firm, "have a lot of analytical expenses" and needed to make a profit. Marcus Lane also claims that he "provided extensive credit analysis and valuable services that were indirectly paid for only through bond transactions . . . especially given the capital risk." Marcus Lane provides no support for this claim. But even if he had established that he provided such services, there is nothing in FINRA's Markup Policy that would allow a member firm to charge excessive markups on a specific bond transaction to compensate the member for expenses associated with general customer services it provided. Likewise, Applicants claim, without supporting evidence, that the Firm lost money on other distressed bond transactions during this time period, but a firm may not charge excessive markups to compensate for losses in other transactions.[41]

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pays to a selling customer for the security to cover the cost of the transaction and make a profit on it. *See generally*, *Gonchar*, 2009 WL 2488067, at *5; *Mark David Anderson*, Exchange Act Release No. 48352, 2003 WL 21953883, at *1-2 (Aug. 15, 2003); *The Law and Finance of Broker-Dealer Mark-ups*, Allen Ferrell (Apr. 6, 2011) (Discussion paper), available at: http://ssrn.com/abstract=1805131. By charging a markup instead of a markdown on the third leg of each Trade Set, Marcus Lane suffered no lost profit because that profit remained in the Controlled Account (*i.e.*, with him). Then, in the fourth leg, he achieved an even greater profit by charging the true customer a markup based on the third leg's marked up price, rather than what should have been a marked down price (*i.e.*, a lower price at the third leg).

[40] *See supra* note 11.

[41] *Horner*, 994 F.2d at 63 ("The facts that [the respondent firm] sometimes lost money on other transactions for the same clients or that some of its markups paid the firm's costs in other transactions does not justify an excessive markup in any one transaction."); *Inv. Planning*, 1993 WL 289728, at *4 ("A lack of profit on some transactions for a customer cannot justify excessive markups on others.").

In his opening statement at the FINRA hearing, Marcus Lane expressed his belief that it could be fair to charge an excessive markup, stating: "Now, occasionally, let's say when a bond falls from 10 – 20 to 15 to 10 to 5 and you buy them at 6 and you can sell them at 9 or something

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Marcus Lane claims that the retail customers at issue were highly sophisticated and knowledgeable about market prices and that the customers would not have accepted the prices he charged unless those prices matched the customers' own analysis of the bonds at issue, but this does not justify charging excessive markups. He noted that the customers had made a great deal of money on the transactions at issue, in one instance describing a customer's returns as "excessive." Marcus Lane's claim that the customers made a large amount of money on these and other transactions using the Firm as a broker also does not justify the markups he charged. We have held that each individual transaction with a customer must be at a fair price under Rule 2440; fairness is not assessed based on the average markup charged per customer in all transactions over time.[42]

We reject Marcus Lane's further argument that there was no violation because the Firm's retail customers had "full transparency" with respect to five of the eleven Trade Sets via TRACE, but nevertheless did not complain about the markups because they "achieved extraordinary returns."[43] First, customers did not have access to the TRACE reports, and even if they did have

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like that and get, you know, more than you – you know, once every couple of years you can do that, once every year, you know, once a year maybe, and that's only facilitated by your risking capital. This is necessary to offset your losses from situations you buy which don't work out." Apparently based on this belief, Applicants argue that they should have been permitted to introduce evidence to show that the Controlled Accounts lost money on transactions involving other bonds (not those involved in the Trade Sets) during the relevant period. The Hearing Panel did not admit such evidence, but the NAC found that such evidence "may have shed additional light on whether any market risk was assumed." Ultimately, however, the NAC found that the error was "harmless" because "the presence of some market volatility is not a ground for charging excessive markups." Based on the authority discussed above, we agree with the NAC's finding. As discussed, in order to justify these markups, Marcus Lane could not simply point to losses on other transactions; he had to present adequate documentation explaining why it was necessary for the Firm to charge prices that deviated significantly from the prevailing market price at the time of these specific transactions.

[42] *Thomas F. White & Co., Inc.*, Exchange Act Release No. 33477, 51 SEC 932, 1994 WL 17044, at *2 & n.21 (Jan. 14, 1994) (citing *Inv. Planning*, 1993 WL 289728, at *4); *Horner*, 994 F.2d at 63 (stating that using the average markup per customer to evaluate fairness of pricing "is not consistent with well-established law").

[43] Marcus Lane claims that the six Trade Sets involving Tower bonds were "outside FINRA regulatory authority" because they were "foreign bonds." The record contains limited information about the Tower bonds, but the parties do not dispute that they were purchased and sold in the United States. Accordingly, FINRA has jurisdiction. *See Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869, 2884 (2010) (finding that the focus of the Exchange Act is "upon purchases and sales of securities in the United States" and holding that Exchange Act Section 10(b) applies to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities"). To the extent that Applicants argue that *Morrison* does not

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access, those reports contained misleading information. Second, it is irrelevant that the affected customers did not complain to FINRA about the markups. Customers make decisions about whether to file formal complaints for numerous reasons, but it is well established that FINRA maintains the authority to enforce its Rules regardless of whether customers have complained.[44]

Marcus Lane also claims that the Firm had discussed the Controlled Accounts with FINRA examiners on multiple occasions, which led him to conclude that FINRA had "approved" the transactions at issue.[45] But he also acknowledges that he had no documentation to substantiate this claim. Further, any awareness FINRA had of the Controlled Accounts would not have relieved Marcus Lane of the burden of providing documentary evidence supporting the fairness of his pricing. As FINRA argues on appeal, "Marcus Lane does not claim that FINRA staff ever informed him that he would not have to demonstrate *why* a markup exceeding 5% was fair." Applicants also claim that the Trade Sets were reviewed by FINRA district examiners in

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apply because it was decided after the conduct at issue, they are incorrect. *See Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *see also Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) ("Judicial decisions have had retrospective operation for near a thousand years.") (Holmes, J., dissenting).

[44] *See Maximo Justo Guevara*, Exchange Act Release No. 42793, 54 SEC 655, 2000 WL 679607, at *6 (May 18, 2000) (finding that "NASD's power to enforce its rules is independent of a customer's decision not to complain"); *Bernard D. Gorniak*, Exchange Act Release No. 35996, 52 SEC 371, 1995 WL 442063, at *2 n.5 (July 20, 1995) (same and noting that customer decisions about whether to complain "may be influenced by many factors"); *Raymond M. Ramos*, Exchange Act Release No. 26007, 49 SEC 868, 1988 WL 902244, at *4 (Aug. 18, 1988) (finding violations of NASD Rules against misappropriating customer funds despite the fact that affected customer had written to NASD requesting leniency for applicant).

[45] In support of the claim that FINRA was aware of the Controlled Accounts, Applicants introduced a January 1997 letter from the Firm to NASD, which stated that the Firm planned to fund its "inventory account" because "in conjunction with its regular trading activities, [the Firm] does occasionally buy and sell positions in the companies we are following." The letter does not disclose the Firm's use of the Controlled Accounts to interposition and charge markups to retail customers. Notably, the account opening documents for the Controlled Accounts, which were dated August 2003, indicate that those accounts did not exist at the time of the 1997 letter. Further, the letter says nothing about the Firm's trading accounts or how its use of such accounts would affect the Firm's markups.

annual reviews, but the record indicates that FINRA staff looked at only one leg of one Trade Set. And as we have held, FINRA's failure to identify a deficiency during an examination does not excuse a violation.[46] The responsibility for complying with regulatory requirements cannot be shifted to regulatory authorities.

Finally, Marcus Lane claims that the prices he charged the customers were "within the constraints of the market," but these claims lack merit.[47] Marcus Lane testified that trades published on TRACE are a "good definer of the constraints of the marketplace," but he does not cite any transactions reported on TRACE that would indicate a different prevailing market price than the Firm's initial purchase price in each of the Trade Sets.[48] As discussed above, to the extent there were any same-day transactions at a higher price than the Firm's initial purchase price, those transactions either occurred hours after the completion of the relevant Trade Set or involved significantly smaller volumes than the Round Lot transactions of the Firm here.[49] Thus,

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[46] *Sanders*, 1998 WL 741105, at *6.

[47] On appeal, Marcus Lane references testimony of Patrick S. Geraghty, a FINRA staff member in charge of fixed income products. Marcus Lane correctly notes that Geraghty acknowledged that it was possible that markups on distressed securities, under certain limited circumstances, could exceed five percent without being excessive. But the circumstances that Geraghty cited were "if the overall dollar profit associated with the transaction is going to be relatively small otherwise" and would not "cover the costs of the transaction." As discussed above, the record does not support the conclusion the Applicants had a basis for similar concerns when they included the multi-layer markups in the Trade Sets.

[48] Among other attempts to justify the markups the Firm charged, Jeffrey Lane claims that FINRA's expert witness, Charles Myers, testified that the prices in the Trade Sets were "in line with the market both before and after the cited trades." Jeffrey Lane mischaracterizes Myers's testimony. The only trades that Myers described in such a way were not part of the Trade Sets, but rather were cited by Myers in showing how he determined what the applicable contemporaneous market prices were on or around the relevant dates. It was in this portion of Myers's testimony, in fact, that he noted that prices in the surrounding days (such as the ones being discussed in the quoted passage referenced by Jeffrey Lane) were *not* an appropriate measure of the prevailing market price. In any event, the NAC did not rely upon his testimony, and neither do we.

Similarly, Jeffrey Lane claims on appeal that the prices the Firm charged to customers for the Euro-denominated Tower bonds were the "same or less" as the market price of unspecified "Tower corporate bonds." Jeffrey Lane, however, introduced no evidence to support this claim, nor did he cite any authority or evidence to support the theory that the contemporaneous market price of a security can be determined by looking to the prices of another security, even if issued by the same company. *Cf. Sanders*, 1998 WL 741105, at *5-6 (rejecting arguments that prices charged for warrants correlated with prices of common stock and units because evidence indicated that market for common stock and units was controlled by one firm).

[49] *See supra* note 16.

those trades do not provide a useful indication of the prevailing market price. Absent evidence to the contrary, the Firm's contemporaneous cost of obtaining the bonds in the initial purchase from a broker-dealer is the best indicator of prevailing market prices because the initial purchase transaction occurred "between informed market professionals."[50] Further, Marcus Lane cannot cite transactions between the Firm and the Controlled Accounts (at prices he set) as indicators of the prevailing market price. Applicants also claim that these trading practices are widespread in the industry, but they cite no evidence to support this assertion; nor would such a claim excuse violative conduct.

3. Marcus Lane's excessive markups on nine of the Trade Sets were fraudulent and violated Exchange Act Section 10(b) and Rule 10b-5 thereunder and NASD Rule 2120.

In addition to violating Rules 2110 and 2440, undisclosed excessive markups are fraudulent when they are done with scienter.[51] We sustain FINRA's findings that, with respect to the nine Trade Sets with aggregate markups of ten percent or higher, Marcus Lane violated Exchange Act Section 10(b), Rule 10b-5 thereunder, and NASD Rule 2120, which prohibit

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[50] *Salloum*, 1995 WL 215268, at *3.

Jeffrey Lane defends the markups, claiming that Marcus Lane "went in to buy bonds with below the market bids and that in assuming the risk he is free to mark up the bonds and offer them to customers still within the confines of the current bids and offers." But we have held that "[q]uotations only propose a transaction and do not reflect the actual result of a completed arm's-length sale" and "may have little value as evidence of the current market." *Adams Sec., Inc.*, Exchange Act Release No. 34028, 51 SEC 1092, 1994 WL 186827, at *2 (May 9, 1994).

[51] *See Gonchar*, 2009 WL 2488067, at *7 (finding that interpositioning resulted in fraud where it was done with scienter and resulted in the charging of excessive and undisclosed markups).

Based on the finding that Marcus Lane charged fraudulently excessive markups, FINRA also found that Marcus Lane is subject to a statutory disqualification. *See supra* note 2. We have sustained FINRA findings that an applicant is subject to statutory disqualification where, as here, the applicant acted willfully. *See, e.g.*, *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 WL 5001956, at *7-10 (Oct. 20, 2011); *Scott Mathis*, Exchange Act Release No. 61120, 2009 WL 4611423, at *12 & n.40 (Dec. 7, 2009), *aff'd, Mathis v. SEC*, 671 F.3d 210 (2d Cir. 2012). It is well established that a willful violation of the securities laws means "intentionally committing the act which constitutes the violation" and does not require that the actor "also be aware that he is violating one of the Rules or Acts." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal quotation marks and citation omitted). The record demonstrates that Marcus Lane intentionally applied the markups to the transactions at issue without disclosing the details of those markups. We therefore agree with FINRA that he acted willfully.

material misrepresentations or omissions or the use of any manipulative or fraudulent device in connection with the purchase or sale of a security.[52]

The Supreme Court has defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud."[53] Scienter includes recklessness, defined as conduct that is "an extreme departure from the standards of ordinary care … to the extent that the danger [of deceiving investors] was either known to the [applicant] or so obvious that the [applicant] must have been aware of it."[54]

We have held that, "[w]here a dealer knows the circumstances indicating the prevailing inter-dealer market price for the securities, knows the retail price that it is charging . . . and knows or recklessly disregards the fact that its markup is excessive . . . the scienter requirement is satisfied."[55] In order to further clarify which markups provide the basis for a finding of fraud, we have held generally that undisclosed markups of more than ten percent over the prevailing market price are so egregiously excessive that the markups themselves are evidence of scienter.[56]

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[52] FINRA determined that the Firm's markups of less than ten percent were not fraudulent because it found that "the fact that these transactions involved distressed securities provided a thin basis on which [Marcus Lane] could believe—albeit unreasonably—that these three markups were fair." We will not disturb FINRA's findings on this point. *But see infra* note 56.

[53] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

[54] *Sundstrand Corp. v. Sun Chem. Corp*., 553 F.2d 1033, 1045 (7th Cir. 1977); *Hollinger v. Titan Corp*., 914 F.2d 1564, 1569-70 (9th Cir. 1990).

[55] *Meyer Blinder*, Exchange Act Release No. 31095, 1992 WL 216702, at *9 (Aug. 26, 1992). If markups are excessive, then a broker-dealer has an implied duty to disclose them. *See Gonchar*, 2009 WL 2488067, at *7 & n.20 (citing *Starr ex rel. Estate of Sampson v. Georgeson S'holders, Inc.*, 412 F.3d 103, 111 (2d Cir. 2005) (quoting *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 192 (2d Cir. 1998)); *see also SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1469 (2d Cir. 1996) (holding that a failure to disclose excessive markups violated Rule 10b-5); *Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 835 F.2d 1031, 1033 (3d Cir. 1987) ("The SEC has established through its enforcement actions the principle that charging undisclosed excessive commissions constitutes fraud.").

[56] *A.S. Goldmen*, 2001 WL 588039, at *3 ("We further have held that markups of more than 10 percent over the prevailing market price are evidence of scienter and have held such markups to be fraudulent."); *D.W. Wine Invs., Inc.*, Exchange Act Release No. 43929, 2001 WL 98581, at *2 (Feb. 6, 2001) ("[M]arkups on equity securities of more than 10% generally are fraudulent.").

We note that we have found markups of less than ten percent to be fraudulent, under certain circumstances. *See, e.g.*, *Gonchar*, 2009 WL 2488067, at *9 (finding that undisclosed markups under ten percent on certain convertible bond transactions were fraudulent where applicants recklessly disregarded that the markups were not reasonably related to the prevailing market price); *David E. Lynch*, Exchange Act Release No. 46439, 2002 WL 1997953, at *2-3

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In nine of the Trade Sets, Marcus Lane charged markups exceeding ten percent. Marcus Lane charged the markups without disclosing them to the customers. There is no dispute that the written confirmations received by the retail customers failed to disclose the markups and that Marcus Lane did not inform the customers himself. Contrary to Marcus Lane's argument that the TRACE audit trails provided the requisite disclosure, the record supports a finding that they did not: even if the retail customers had access to the audit trails, they would have been misled into believing that the Controlled Accounts were other customers rather than proprietary accounts; and the five Tower bond Trade Sets did not appear on TRACE at all. Marcus Lane knew that there were no intervening inter-dealer trades regarding the bonds reported to TRACE; and the record does not demonstrate that he made an effort to ascertain the prevailing market price at the time he purchased the Tower bonds. Although Marcus Lane directed the pricing structure of the Trade Sets, he betrayed the customers' trust by concealing the fact that he was charging excessive markups.[57] His conduct was at least reckless and strongly supports a finding that he violated the antifraud provisions.

4. NASD Rules 2320, 2440, and 2120 are, and were applied in a manner, consistent with the Exchange Act.

Each of the NASD Rules regarding the markups at issue in this matter were consistent with the Exchange Act because, as required under Section 15A(b)(6) of the Exchange Act, the rules at issue were "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . , and, in general, to protect investors and the public interest."

Rule 2320 was consistent with the purposes of the Exchange Act because it prohibited member firms and associated persons from engaging in a type of conduct that generally harms investors—interpositioning a third party between the member and the best available market. This conduct denies the investor the best available price for the securities at issue and, therefore, reduces the investor's profits. When we approved a change to Rule 2320 in 2009, we noted that the rule would continue to prohibit interpositioning "that is unnecessary or violates a member's general best execution obligations—either because of unnecessary costs to the customer or

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(Aug. 30, 2002) (finding that undisclosed markups under ten percent on certain collateralized mortgage obligation transactions were fraudulent where trader knew that the markups were not reasonably related to the prevailing market price). Indeed, undisclosed, excessive markups constituting any percentage may be fraudulent if done with scienter.

[57] *See Gonchar*, 2009 WL 2488067, at *9 (finding that applicants acted with scienter where customers relied on applicants' pricing and applicants exacerbated the lack of transparency by not disclosing the interpositioning and markups).

improperly delayed executions."[58] Further, we find that FINRA applied Rule 2320 here in a manner consistent with the purposes of the Exchange Act. As described above, Marcus Lane's interpositioning harmed the Firm's customers and resulted in excessive prices.

Rule 2440 also was consistent with Section 15A(b)(6) of the Exchange Act. The rule protected investors by requiring member firms to charge customers a fair price, taking into account all relevant circumstances.[59] Charging a fair price promotes just and equitable principles of trade and is designed to prevent fraud or conduct that harms investors. Because we sustain FINRA's finding that Marcus Lane charged the Firm's customers unfair and excessive markups that were not correlated to the contemporaneous market price for the securities at issue, we find that FINRA applied Rule 2440 in a manner consistent with the purposes of the Exchange Act.

Finally, Rule 2120 was designed to prevent fraudulent and manipulative acts and practices because it prohibited members and their associated persons from effecting transactions in, or inducing the purchases or sale of, any security by means of any manipulative, deceptive, or other fraudulent device or contrivance. Therefore, it was consistent with the purposes of the Exchange Act.[60] This rule, which has remained unchanged for approximately seventy years, enabled NASD (now FINRA) to "continue to enforce these overarching provisions that express FINRA's core regulatory objectives and allow FINRA to effectively protect investors and the public interest."[61] FINRA properly found that Marcus Lane fraudulently charged excessive markups. We therefore find that FINRA applied Rule 2120 in a manner consistent with the purposes of the Exchange Act.

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58 *Order Approving Proposed Rule Change as Modified by Amendment No. 1 Thereto Amending Rule 2320 Regarding Best Execution and Interpositioning*, Exchange Act Release No. 60635, 2009 WL 2900773, at *2 & nn.15-16 (Sept. 8, 2009).

59 *See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change*, Exchange Act Release No. 72208, 2014 WL 2120449, at *4 (May 21, 2014); *Order Approving Proposed Rule Change and Amendment No. 1 Thereto to Expand the Scope of NASD Rule 2440 and Interpretive Material 2440-1 Relating to Fair Prices and Commissions to Apply to All Securities Transactions*, Exchange Act Release No. 57964, 2008 WL 2971906, at *2 (June 13, 2008) (stating that the excessive markup rule will "protect investors").

60 *Notice of Filing of a Proposed Rule Change*, Exchange Act Release No. 58095, 2008 WL 2971979, at *4 (July 3, 2008) (observing FINRA's belief that transferring NASD Rule 2120 into the Consolidated FINRA Rulebook as FINRA Rule 2020 with no changes was consistent with the provisions of Exchange Act Section 15A(b)(6), which requires that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest), *Rule Change Approved Without Modification*, 2008 WL 4468749 (Sept. 25, 2008).

61 *Id*.

C. Jeffrey Lane's Supervisory Violations

1. Jeffrey Lane violated NASD Conduct Rule 3010 when he prepared deficient WSPs.

We sustain FINRA's findings that Jeffrey Lane violated NASD Conduct Rule 3010 when he prepared deficient WSPs. Rule 3010 required member firms to "establish and maintain" a supervisory system "reasonably designed to achieve" regulatory compliance.

We have held that a member firm violated Rule 3010 where its supervisory procedures relating to the pricing of securities did not explain "the manner in which Firm personnel were to make" a determination about whether an independent market for the security existed and whether the price charged was consistent with the prevailing market price.[62] Likewise, we have emphasized the importance of members providing a "mechanism" to detect violations of the markup rules, as well as to detect interpositioning.[63] This is consistent with FINRA's articulation that WSPs "serve as a 'frontline' defense to protect investors from fraudulent trading practices and help to ensure that members are complying with rules designed to promote the transparency and integrity of the market."[64] The WSPs that Jeffrey Lane prepared did not identify the individual responsible for supervision at the Firm and also did not set forth how and when the designated supervisor should conduct supervisory reviews. As a result, as the NAC found, the WSPs did not help to protect investors.

As the NAC found, the WSPs were also deficient because they did not address interpositioning, even though the Firm regularly engaged in that practice. Such a failure is inconsistent with Rule 3010(b)(3)'s requirement that WSPs "shall include the . . . responsibilities of each supervisory person as these relate *to the types of business engaged in* . . . ." (Emphasis added). The failure of the WSPs to cover a topic that was regularly implicated by its trading practices contradicts Jeffrey Lane's argument on appeal that the supervisory system was appropriately tailored for a firm of its size and was "written to emphasize the nature of the firm's business."

Finally, as discussed above, the WSPs repeatedly characterized FINRA's 5% Policy as optional, but omitted crucial FINRA guidance on how to apply the 5% Policy, including FINRA statements that markup patterns of "5% or even less" could be considered unfair and that members needed to provide "bona fide evidence" to counter the presumption that its contemporaneous cost was the prevailing market price of a security.[65] As discussed, the Firm

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62 *Sanders*, 1998 WL 741105, at *7.

63 *Sheldon*, 1992 WL 353048, at *14.

64 *Notice to Members 98-96*, 1998 NASD LEXIS 121, at *2 (Dec. 1998).

65 Jeffrey Lane contends that his omission of these aspects of the 5% Policy was "meant to intend a heightened awareness of the 5% markup policy and in no way 'strongly suggest' that

(continued…)

repeatedly charged markups exceeding five percent and failed to provide evidence justifying those markups. Given the inclusion in the WSPs of statements suggesting that the 5% Policy was unreasonable for distressed bonds (which the Firm routinely traded), these omissions increased the likelihood of violative markups and provide an additional basis for finding the WSPs deficient. Accordingly, we find that Jeffrey Lane violated Rule 3010 by preparing deficient WSPs.

Jeffrey Lane argues that the Firm's WSPs "had been tested and approved by the NASD District Office in its Annual Examinations" and claims that examiners had only identified one deficiency in the WSPs, which was not related to markups. But we have rejected similar arguments, noting that associated persons cannot shift their compliance burden to FINRA.[66]

Jeffrey Lane contends that FINRA *Notice to Members 98-96*, which was referenced in the NAC's decision, is "simply an advisory" and does not provide "authority for establishing violations" because it has not been "incorporated into the Rule regarding supervisory procedures [since the Notice was issued in 1998]."[67] The NAC considered the notice as a "source of guidance," which the NAC is entitled to do. Although the notice contains specific recommendations about the kinds of information that FINRA believes should be included in WSPs, it does not "mandate[e] any particular type or method of supervision."[68] For example, the notice suggests that WSPs (1) identify the individual responsible for supervision; (2) describe the supervisory steps and reviews to be undertaken by that individual; (3) describe the frequency of such reviews; and (4) describe the manner in which the reviews are to be documented.[69] The NAC considered these four factors, finding that the WSPs addressed none of them. But, as discussed above, the NAC also considered other factors and other authority in reaching its determination that Jeffrey Lane violated Rule 3010(a). Given the nature of the Firm's business,

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(…continued)
trades 'would often' exceed the 5% guideline." But we fail to see how omitting elements of the 5% Policy from the Firm's WSPs indicates increased concern about its adherence to the policy.

[66] *Rita H. Malm*, Exchange Act Release No. 35000, 1994 WL 665963, at *8 n.40 (Nov. 23, 1994) (rejecting contention that "because the NASD noted no markup, pricing, or other 'exceptions' during its audit . . . NASD was subsequently precluded from bringing markup or supervisory charges").

[67] Jeffrey Lane also contends that he complied with the requirements of the Notice to Members regarding the identification of supervisory personnel, in that he was designated as the Firm's principal in charge of supervision, but he conceded in his hearing testimony that the WSPs he drafted did not contain the other specifications set forth in *Notice to Members 98-96*.

[68] *NASD Notice to Members 98-96*, 1998 NASD LEXIS 121, at *8.

[69] *Id*.

we find no impropriety in the NAC's use of the notice in supporting its findings, coupled with its analysis of additional authority and record evidence.[70]

2. Jeffrey Lane failed reasonably to supervise Marcus Lane when he approved the transactions without reviewing the aggregate markup for each Trade Set.

In addition to requiring WSPs that are reasonably designed to achieve compliance, we have held that "[t]he duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation."[71] The duty to supervise requires "reasonable" supervision, which is "determined based on the particular circumstances of each case."[72] We have held that supervisors violate supervisory requirements if a firm violates FINRA's markup rules, even where the WSPs did not set forth specific requirements for the review of markups.[73] Based on the circumstances discussed above, Jeffrey Lane's supervision of Marcus Lane was not reasonable.

Jeffrey Lane was the principal responsible for supervision, and he does not dispute the relevant facts regarding his supervisory role. Instead, he attempts to justify the fairness of the markups, rather than specifically address the quality of his supervision of Marcus Lane. He states that he approved the Trade Sets for a number of reasons we have rejected above in the discussion of Marcus Lane's markup violations.[74] With respect to his supervisory role, he claims that he acted reasonably by reviewing each transaction within the Trade Sets individually, evaluating whether a given stage complied with the 5% Policy rather than looking at the aggregate markup for an entire Trade Set.[75]

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70 *See Castle Sec. Corp.*, Exchange Act Release No. 52580, 2005 WL 2508169, at *2-3 & n.10 (Oct. 11, 1985) (discussing the specifications in *Notice to Members 98-96*, along with other record evidence, in support of finding that a firm's supervisory procedures lacked necessary provisions).

71 *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 WL 5328765, at *10 n.22 (Dec. 19, 2008) (setting forth the supervisory responsibilities of NASD members under Rule 3010).

72 *Id.* at *10 n.26.

73 *See Palumbo*, 1995 WL 630926, at *6 n.54 (Oct. 26, 1995).

74 These reasons include the need to protect the Firm's net capital position and that the Firm's approach to pricing was consistent with industry practice.

75 In addition to his attempts to justify the markups themselves, Jeffrey Lane contends that he had conducted his supervisory duties properly in other respects (by, for example, preparing annual supervisory reports). But such a claim is irrelevant to our consideration of his failure to supervise with respect to the transactions at issue here. *See Albert Vincent O'Neal*, Exchange Act Release No. 34116, 1994 WL 234316, at *5 (May 26, 1994) (finding that "the test is whether

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As discussed above, Jeffrey Lane conceded that he was aware of all elements of the Trade Sets, including the timing of each individual leg, the amounts of the markups at each step, and the fact that Marcus Lane set the prices for the relevant transactions by using the Controlled Accounts. Given this awareness, Jeffrey Lane was obligated to question the aggregate amounts of the markups from the point of the Firm's initial purchase price, not merely at each individual leg of the Trade Set. We find that Jeffrey Lane violated Rule 3010 by failing reasonably to supervise Marcus Lane after the Firm repeatedly charged its customers fraudulent and excessive markups.[76]

3. Rule 3010 is, and was applied in a manner, consistent with the Exchange Act.

Rule 3010 required that FINRA member firms implement and maintain supervisory systems designed to prevent violations of rules and statutory provisions such as the markup provisions at issue here. We have found that Rule 3010 was consistent with the purposes of the Exchange Act, under which the rules of a registered securities association must "prevent fraudulent and manipulative acts and practices, [and] promote just and equitable principles of trade," and reaffirm that finding here.[77] In finding Rule 3010 to be consistent with the purposes of the Exchange Act, we noted that the Commission "has long emphasized that the responsibility of broker-dealers to supervise their employees is a critical component of the federal regulatory scheme."[78] Based on our determination to sustain FINRA's finding that Jeffrey Lane's supervisory failures did not provide the Firm's customers protections against fraudulent or unfair trading practices, we find that FINRA applied Rule 3010 here in a manner consistent with the purposes of the Exchange Act.

(…continued)
[respondent's] supervision was reasonably designed to prevent the violations at issue, not . . . whether, if all the many other supervisory functions he performed were taken into account, his overall supervisory performance somehow earned him a hypothetical passing grade"). He further claims that the customers "have realized tremendous returns on the vast majority of the securities that [the Firm] sold to them," without explanation how such a claim relates to the quality of his supervision.

[76] As discussed, Jeffrey Lane's violation of Rule 3010 also resulted in his violation of Rule 2110. *See supra* note 3. And, as FINRA found, because Jeffrey Lane failed reasonably to supervise Marcus Lane with a view to preventing his violations of the antifraud provisions of the federal securities laws, he is subject to a statutory disqualification. *See supra* note 5.

[77] *See Order Granting Approval of a Proposed Rule Change to Adopt Rules Regarding Supervision in the Consolidated FINRA Rulebook, as Modified by Amendment No. 1*, Exchange Act Release No. 71179, 2013 WL 6794111, at *31-32 & n.230 (Dec. 23, 2013).

[78] *Id.*

D. Applicants' Rule 8210 Violations

1. FINRA investigated the Firm's markups and requested information pursuant to Rule 8210.

On March 6, 2009, FINRA requested that the Firm provide, by March 27, 2009, nine categories of information regarding the trades at issue. On May 27, 2009, FINRA received responsive documents for only five of the nine categories. FINRA did not receive documents or information that responded to four categories: (1) "the ownership breakdown and the identity of the individuals with investment authority for" the Controlled Accounts; (2) a "list identifying any and all [Firm] accounts involved in each transaction, as well as copies of the respective New Account Form and subsequent updates, if any"; (3) copies of all communications regarding the trades at issue, including, among other things, Bloomberg messages; and (4) all electronic communications sent and received by Marcus Lane from January 1, 2006 through December 31, 2007.

Instead of providing information responsive to those four categories, Jeffrey Lane sent FINRA a letter on March 23, 2009, stating that he had "already provided significantly all the information that is currently being requested," that he "could send all of [the Firm's] boxes containing all of [the Firm's] historical records" because the Firm was out of business, and that he could "provide assent to Bloomberg for them to provide . . . the messages" because the Firm had terminated its Bloomberg services. According to an Assistant Director in FINRA Market Regulation's Fixed Income Group, who filed a declaration in the proceeding below, FINRA needed information about the outstanding four categories "to determine what information, if any, Marcus Lane relied on when he priced the [Trade Sets], whether he communicated with the customers or Jeffrey Lane about the transactions, and who the beneficial owners were of the [Controlled Accounts]."

In late June 2009, FINRA requested that Applicants provide information regarding the remaining four categories by July 3, 2009. The letter clarified that the only manner in which FINRA could obtain the Bloomberg messages was for one of the Applicants to sign and return an enclosed form. The letter advised Applicants that "Bloomberg has agreed to waive charges for processing the messages" and instructed them to "not make any changes to the form's standard language." Marcus Lane e-mailed FINRA on July 1, but did not provide the requested information. Instead, the e-mail stated that he had "provided all records requested," that "FINRA's Bloomberg representative" told him that FINRA should subpoena the Bloomberg messages, and that he already "offered to send all records for the 15 years [the Firm] acted as a broker dealer."

FINRA staff, in a July 6 e-mail to Marcus Lane, explained that it could not obtain the Bloomberg messages in the manner he suggested because it does not have subpoena power and reiterated the need for one of the Applicants to sign the authorization form previously provided. On that same date, FINRA again requested that Applicants provide information about the same four outstanding categories by July 17, 2009. FINRA's request reminded Applicants of the process for obtaining the Bloomberg messages and asked Applicants to submit the authorization

form by July 13, 2009. The request also asked Applicants to contact FINRA by July 17, 2009, so that it could copy and return a hard drive containing Firm communications that FINRA understood to be in Marcus Lane's possession.

On July 15, 2009, Marcus Lane e-mailed FINRA but did not provide the requested information. Instead, he stated that FINRA already had access to all the requested information during fifteen previous annual audits, that he would not sign the Bloomberg authorization form because he would be obligated to pay $2,000 in fees, and that "the nature of [the Controlled Accounts] . . . has been provided on several occasions in the annual audit." In response, on July 16, 2009, FINRA explained that information obtained during previous audits did not excuse Applicants' obligation to provide information requested pursuant to Rule 8210, that FINRA still needed the outstanding information, that a signed Bloomberg authorization form was still required, and that Bloomberg would not charge fees for accessing the messages.

Applicants did not respond. Consequently, on July 31, 2009, FINRA issued a Notice of Suspension to each Applicant, to become effective on August 24, 2009, if they did not provide information about the remaining four categories. In August 2009, Applicants requested a hearing and insisted that they already had provided all requested information, except for the Bloomberg authorization form, which they continued to refuse to sign.

On September 26, 2009, Marcus Lane e-mailed FINRA, stating that he would sign the Bloomberg authorization form, provide FINRA with access to the Firm's hard drive, and ask Jeffrey Lane to "look for the new account forms."[79] Marcus Lane also disclosed the ownership details of the Controlled Accounts, stating: "During 2006 and 2007 I was responsible for risk management and investments in [the Firm and the Controlled Accounts] and ownership was 80% myself and 20% for Jeff."[80] In October 2009, after FINRA received the Firm's Bloomberg messages and copied the Firm's hard drives, a FINRA Hearing Officer granted FINRA's motion to dismiss the suspension proceeding without prejudice.

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[79] The record contains a new account form for only one of the Controlled Accounts, although FINRA found that "the Lanes satisfied [the] request [for the other Controlled Account's new account form] in some other fashion."

[80] Applicants, in delivering this information, did not explain the inconsistency with their earlier position that they already had provided all information.

2. Applicants violated FINRA Rules 8210 and 2010 by failing to respond to FINRA's requests in a timely manner.

Rule 8210(a)(1) requires a person subject to FINRA's jurisdiction to provide information upon FINRA's request.[81] From March to August 2009, FINRA sent multiple Rule 8210 requests to Applicants seeking information about the Trade Sets.[82] The record supports FINRA's findings that Applicants failed to provide the requested information by the various deadlines set in the successive Rule 8210 requests and failed to provide all information until almost seven months after the initial request. We therefore sustain FINRA's finding that Applicants failed to respond in a timely manner in violation of Rules 8210 and 2010.[83]

Applicants argue that they responded fully and timely. But the record contradicts their assertion, and they offer no evidence otherwise. Applicants state that they responded to all Rule 8210 requests made in 2007 and 2008. While that may be true, the conduct at issue in this proceeding relates to Applicants' failure to respond in a timely manner to Rule 8210 requests that were made in 2009.[84] Applicants argue that they had provided authorization to retrieve Bloomberg messages in connection with FINRA's Rule 8210 request made in 2007. But the 2007 authorization covered a shorter period of time (October 1, 2006 through December 31, 2006) than the authorization sought by FINRA in 2009, which covered January 1, 2006 through

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81 *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 WL 3306103, at *4 (Nov. 8, 2007).

82 Applicants terminated their respective registrations on April 24, 2009 and therefore were under FINRA's jurisdiction when the requests were made, because FINRA's jurisdiction continues for two years after such termination. *See* NASD Bylaws, Article V, Section 4 (providing that, within two years after the effective date of termination of registration, a "person whose association with a member has been terminated . . . shall continue to be subject to the filing of a complaint . . . based upon conduct that commenced prior to the termination . . . or upon such person's failure . . . to provide information requested"); *Lee Gura*, Exchange Act Release No. 11414, 2004 WL 2363871, at *2 n.7 (Oct. 20, 2004) (finding that applicant was subject to NASD's jurisdiction where Rule 8210 request was made within two years after applicant terminated his registration).

83 *See Erenstein*, 2007 WL 3306103, at *6-7 (finding that applicant's production of tax returns after deadline set forth in Rule 8210 request was failure to provide timely response in violation of Rule 8210). Jeffrey Lane's Rule 8210 violation also constitutes conduct inconsistent with just and equitable principles of trade. *Supra* note 3.

84 Jeffrey Lane seeks to admit into the record FINRA's 2007 and 2008 Rule 8210 requests along with his responses to those requests. But as we have made clear, Applicants' compliance during 2007 and 2008 is not in dispute or the basis for the Rule 8210 violation. We therefore reject his request.

December 31, 2007 and specifically focused on the Trade Sets.[85] Likewise, Marcus Lane argues that FINRA already had ownership information about the Controlled Accounts after having conducted annual audits of the Firm. But he does not point to any record evidence in support of that claim.

Jeffrey Lane argues that he provided all information that was within his control and that the only outstanding items included the Bloomberg authorization form and the Firm's hard drive, both of which were under Marcus Lane's control. But FINRA's Rule 8210 requests, which were sent to both Applicants, instructed that either of the Lanes could sign the Bloomberg authorization form, and it is undisputed that neither signed the form until approximately three months later. Moreover, FINRA did not receive timely ownership information about the Controlled Accounts, which either of the Applicants could have provided.

Rule 8210 is the principal means by which FINRA obtains information from FINRA member firms and associated persons in order to detect and address industry misconduct.[86] The rule therefore is consistent with the purposes of the Exchange Act.[87] Here, FINRA found that

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[85] The NAC did not include Applicants' failure to produce the Bloomberg authorization form in its findings regarding the Rule 8210 violation. The NAC found that "Market Regulation agreed to modify its request based on cost considerations, and the Lanes provided the Bloomberg authorization form once Market Regulation addressed those cost concerns in a clear manner." But we find the record demonstrates otherwise. Beginning with the June 26, 2009 Rule 8210 request, FINRA staff made it clear that either of the Applicants needed only to sign a Bloomberg authorization form in order for FINRA to gain access to the Firm's Bloomberg messages and that any charges Bloomberg ordinarily would assess would be waived. Over the next three months, FINRA staff repeatedly explained the circumstances to Applicants, but Applicants refused to cooperate. As with the other outstanding categories of information, the record demonstrates that Applicants could have responded much sooner than they did, and this provides additional support for the NAC's finding of a Rule 8210 violation.

[86] *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *6 (Nov. 8, 2007) (stating that SROs lack subpoena power and instead must rely on Rule 8210 as a "vitally important" tool to acquire information and satisfy an obligation to police the activities of its members and associated persons).

[87] *See* Exchange Act Section 15A(b)(6) (requiring that registered securities association's rules be designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating securities, and, in general, to protect investors and the public interest); *Order Approving Proposed Rule Change*, Exchange Act Release No. 42036, 1999 WL 961340, at *2 (Oct. 19, 1999) (finding that amending the definition of "person associated with a member" in the By-Laws of the NASD would expand Rule 8210's applicability and thereby "promote the objectives of Section 15A(b)(6) of the Act by helping the NASD obtain necessary information to conduct its regulatory investigations and proceedings").

Marcus Lane violated Rule 8210 by hampering FINRA's ability to investigate possible improprieties with respect to the Trade Sets. We therefore find that FINRA applied Rule 8210 in a manner consistent with the purposes of the Exchange Act.

E. Procedural Arguments

Applicants make various challenges to the fairness of these proceedings, including that the panel members who considered the case were incompetent and biased against them; that FINRA's procedures were (and the statutory scheme that provides for Commission review is) weighted in favor of Market Regulation staff; and that resolution of the matter was, according to Jeffrey Lane, "unreasonably delay[ed]" due to FINRA staff's "negligence in pursuing an extended fishing expedition . . . ." As discussed below, we find no merit to Applicants' various arguments.

Jeffrey Lane claims that the chief hearing officer "displayed an unusual bias and hostility towards the Petitioners at the same time exhibiting a favored bias toward" FINRA staff who, he further claims, were "determined to manufacture a case against Petitioner[s] to validate its authority." According to Jeffrey Lane, FINRA "has pursued the case as a vendetta for challenging the conduct of its review . . . ." He also asserts that Market Regulation "dominated over 80% of the time allowed for the Hearing" and "had at least four witnesses, PowerPoint presentations and four attorneys burning the time." As discussed above, we believe there was a strong basis for the allegations against Applicants. We also find that the proceedings were conducted in a fair manner and that Applicants were given a full opportunity to develop a defense to FINRA's allegations.[88]

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[88] Jeffrey Lane claims that Applicants were prevented from "drawing out the glaring dissimilarities between the present case and the cases upon which FINRA provided for authority and upon which they based their case." But, as FINRA pointed out in its opposition brief, the transcript page count demonstrates that Applicants' cross-examination was more than fifty percent longer than Market Regulation's direct examination. Moreover, Applicants were able to cross-examine witnesses on both days of the hearing and were afforded latitude in their manner of cross-examination. As the NAC noted, "when [Marcus Lane's] questioning of a FINRA analyst drew objections, the Hearing Officer explained at length why his questioning was inappropriate and guided him on what proper questioning would consist of." Applicants also had the opportunity to distinguish authority cited by Market Regulation by including such arguments in their briefs. Rule 9235 grants the hearing panelists broad discretion to "do all things necessary and appropriate to discharge his or her duties," including "regulating the course of the hearing" and "resolving any and all procedural and evidentiary matters." It is also well established that "[a]dverse rulings, by themselves, generally do not establish improper bias." *Mitchell M. Maynard*, Advisers Act Release No. 2875, 2009 WL 1362796, at *9 (May 15, 2009) (citing *Scott Epstein*, Exchange Act Release No. 59238, 2009 WL 223611, at *18 (Jan. 30, 2009), *aff'd*, No. 09-1550 (3rd Cir. 2010)).

Nor is there support for Marcus Lane's contention that the panel members were not qualified to decide the case because of their lack of expertise regarding the kind of distressed debt securities at issue in the case. Indeed, there is nothing in the record regarding the panel members' background or experience. The panel's decision, moreover, was well-reasoned, suggesting that the panel was qualified. Further, only the NAC's decision is before us.[89] And in any event, Applicants had a full opportunity to introduce evidence regarding the particular circumstances surrounding the trades at issue and the market for such securities—but largely declined to do so. Moreover, we have carefully reviewed the record and, as discussed, find ample support for FINRA's findings of violation.[90]

Applicants also complain generally about the regulatory structure governing FINRA disciplinary actions. Marcus Lane stated that "the plaintiff's organization hire[d] the judge and jury to support monetary awards for itself," and Jeffrey Lane asserted that, because the Commission is "supportive" of FINRA, Applicants cannot get a fair hearing. But courts repeatedly have rejected such challenges to the FINRA disciplinary structure, and Applicants have offered no supportable basis for a contrary conclusion.[91]

Finally, although there was an extended period between when FINRA's investigation began and when the final FINRA decision was issued, as discussed above, at least some of the fault for that delay rests with Applicants, who failed to cooperate with FINRA staff. Marcus

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89 "'[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of [FINRA] which is subject to Commission review.'" *Erenstein*, 2007 WL 3306103, at *8 n.26 (citing *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 4958612 (Nov. 8, 2006)). Marcus Lane supports his claim of FINRA's incompetence by observing that FINRA's "convoluted multi-leg trading analysis also illustrates [its] lack of understanding in trading." As indicated above, we consider FINRA's approach in analyzing the pricing at issue entirely appropriate.

90 The NAC conducted a *de novo* review of the record and made its own independent findings, including a determination to reduce the sanctions imposed on Applicants. As we have noted, the Hearing Panel decision is largely irrelevant in an appeal before the Commission. Moreover, our *de novo* review mitigates any harm that may have resulted. *Erenstein*, 2007 WL 3306103, at *8 (rejecting applicant's challenges to Hearing Panel decision and noting that the NAC conducted its own *de novo* review, which coupled with the Commission's review, mitigates any harm that may have resulted).

91 *See Siegel v. SEC*, 592 F.3d 147, 152-53 (D.C. Cir. 2010) (discussing statutory provisions authorizing NASD to conduct disciplinary proceedings against its members, subject to the requirement that it provide fair process, and noting the Commission's oversight of such proceedings); *see also Saad v. SEC*, 718 F.3d 904, 907 (D.C. Cir. 2013) (acknowledging FINRA's power to "adopt rules governing the conduct of its members and of persons associated with its members," and to "bring[ ] disciplinary proceedings to adjudicate violations, which are subject to review by the Commission").

Lane also delayed the proceedings when he requested that the hearing be rescheduled.[92] We also note that, while Jeffrey Lane asserts generally that "the more time that passes the harder it becomes to represent any defense," he identifies no specific instances in which Applicants were prejudiced, and we are unaware of any.[93]

III. Sanctions

Exchange Act Section 19(e)(2) directs us to sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[94] As discussed below, we find the sanctions imposed on both Applicants to be consistent with the statutory requirements and sustain them.

A. FINRA's bar of Marcus Lane in all capacities and its order that he pay disgorgement of $218,582, plus prejudgment interest, is neither excessive nor oppressive.

We agree with FINRA's characterization of Marcus Lane's markup violations as egregious and, based on our assessment of all factors bearing on the remedial nature of the sanctions FINRA imposed, we find them to be neither excessive nor oppressive. As we have stated, "[t]he charging of excessive markups [i]s a serious breach of [an applicant's] obligation to deal fairly with its customers."[95] Marcus Lane's interpositioning of the Controlled Accounts between the market and the Firm's retail customers, which resulted in excessive and fraudulent

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92 In order to accommodate Marcus Lane's request, FINRA continued a pre-hearing conference and rescheduled the hearing, resulting in a delay of approximately five months.

93 *See Pellegrino*, 2008 WL 5328765, at *16 & n.58 (finding no prejudice resulted from length of proceeding and rejecting applicant's claim that passage of time was unfair) (citing *Mark H. Love*, Exchange Act Release No. 49248, 2004 WL 283437, at *4 (Feb. 13, 2004) (evaluating whether length of delay in filing NASD complaint prejudiced applicant and finding no prejudice where applicant's ability to present a defense was not harmed by the passage of time since the alleged misconduct)); *Larry Ira Klein*, Exchange Act Release No. 37835, 1996 WL 597776, at *6 (Oct. 17, 1996) (finding no prejudice resulted from NASD's three-year investigation). We note that FINRA proceedings are not subject to any statute of limitations. *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *22 (July 2, 2013) (finding that "the disciplinary authority of private self-regulatory organizations ('SROs') such as [FINRA] is not subject to any statute of limitation") (citation omitted), *petition denied*, 751 F.3d 472 (7th Cir. 2014).

94 15 U.S.C. § 78s(e)(2). Applicants do not allege, and the record does not show, that FINRA's sanctions imposed an undue burden on competition.

95 *Nicholas A. Codispoti*, Exchange Act Release No. 24946, 48 SEC 842, 1987 WL 755546, at *4 (Sept. 29, 1987).

markups, showed a complete disregard for this obligation.[96] Marcus Lane acted with scienter, committed repeated violations over the course of several months, and benefitted financially from the violations, as the owner of the Controlled Accounts and eighty percent owner of the Firm.

There are no mitigating circumstances that warrant reducing the sanctions FINRA imposed. Marcus Lane contends that we should treat as mitigating that the customers "generated extraordinary returns" on these transactions, but the customers would have made even more money if he had not charged fraudulent, excessive markups. FINRA treated the sophistication of the customers as somewhat mitigating,[97] but such a finding does not justify the violations Marcus Lane committed and does not cause us to question FINRA's decision to bar him.[98] Under the circumstances, Marcus Lane's actions pose too great a risk to the markets and investors to allow him to remain in the securities industry.

Marcus Lane also challenges FINRA's disgorgement order, which was based on the amount of money that Marcus Lane personally gained from the markups,[99] by claiming that "taxes were paid on the compensation [disgorgement amount] [FINRA] is seeking to extort."[100]

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96 *See, e.g.*, *Sheldon*, 1992 WL 353048, at *13 (finding that "interpositioning of favored accounts between the dealer market and non-favored accounts [that] resulted in fraudulent, effective markups of as much as ten percent" was "particularly egregious"); *Palumbo*, 1995 WL 630926, at *9 (stating that recklessly overcharging customers without justification demonstrates "a marked insensitivity to [the] obligation to deal fairly with customers").

97 *See FINRA Sanction Guidelines*, at 7 (listing as one of the principal considerations in determining sanctions, as a potentially mitigating factor, "the level of sophistication of the injured or affected customer").

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). *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013). We also acknowledge that the Sanction Guidelines "do not prescribe fixed sanctions for particular violations" and "are not intended to be absolute." *Guidelines*, at 1.

98 *See Lester Kuznets*, Exchange Act Release No. 23525, 48 SEC 551, 1986 SEC LEXIS 1001, at *7 (Aug. 12, 1986) (holding that the fact that customers were "experienced investors" does not give a registered representative "license to make fraudulent representations"), *aff'd*, 28 F.2d 844 (D.C. Cir. 1987).

99 FINRA calculated the disgorgement amount by adjusting all profits that exceeded a five percent markup (which FINRA found "might still be excessive"), to reflect Marcus Lane's ownership of eighty percent of the Firm and 100 percent of the Controlled Accounts, resulting in a "reasonable approximation of [Marcus Lane's] ill-gotten gains" at $218,582, to which it added prejudgment interest.

100 In cases where, as here, the record demonstrates that the respondent obtained a financial benefit from his misconduct, the Sanction Guidelines state that adjudicators may properly "order

(continued…)

But we have held that a registered representative is entitled to no modification "based upon taxes . . . paid."[101] He also contends that the disgorgement order "disregards the need to fund operations," but as discussed above, the Firm cannot use excessive markups to make up for losses on other transactions.

In assessing the appropriate sanction to impose on Marcus Lane, FINRA looked to its Sanction Guidelines, which it promulgated to achieve greater consistency, uniformity, and fairness in its sanctions.[102] The Guidelines do not address interpositioning violations directly, but they discuss violations involving excessive markups and fraudulent or reckless omissions. FINRA appropriately looked to the Guidelines for excessive markups and fraud in fashioning its sanction for Marcus Lane's violations for the markups the Firm charged in the Trade Sets. For excessive markups, the Guidelines recommend a 30-day suspension or, in egregious cases, up to two years or a bar, plus a fine of $5,000 to 10,000, plus the gross amount of the excessive markups. For fraudulent or reckless omissions, such as Marcus Lane's failure to disclose the markups at issue here, the Guidelines recommend a fine of $10,000 to 100,000 and, in egregious cases, a bar. For all of the violations at issue here (including interpositioning), FINRA also looked to the principal considerations applicable to all sanction determinations under the Guidelines. We agree that the sanctions FINRA imposed on Marcus Lane are consistent with the Guidelines. We further find that the sanctions will "have the salutary effect of deterring others from engaging in the same serious misconduct."[103]

(…continued)
that the respondent's ill-gotten gain be disgorged and that the financial benefit . . . derived by the respondent be used to redress harms suffered by customers." *Guidelines*, at 5. The Guidelines also recommend disgorgement in cases, such as this one, where "the case involves widespread, significant, and identifiable customer harm and the respondent has retained substantial ill-gotten gains." *Guidelines*, at 10.

On appeal, Marcus Lane further contends that disgorgement is inappropriate because none of the customers is requesting "reimbursement" and that the customers "would have difficulty claiming any damages" in a court of law. The assertion that the customers would not be able to establish damages from Marcus Lane's misconduct is disputable. But, in any event, the purpose of a disgorgement order is to deny the respondent the benefit of ill-gotten gains. *See, e.g.*, *Rodney R. Schoemann*, Securities Act Release No. 9076, 2009 WL 3413043, at *13 n.51 (Oct. 23, 2009) (citing *SEC v. Bilzerian*, 29 F.3d 689, 697 (D.C. Cir. 1994) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978)), *aff'd*, 398 F. App'x 603 (D.C. Cir. 2010).

101 *Laurie Jones Canady*, Exchange Act Release No. 41250, 54 SEC 65, 1999 WL 183600, at *10 (Apr. 5, 1999), *aff'd*, 230 F.3d 362 (D.C. Cir. 2000).

102 *Neaton*, 2011 WL 5001956, at *12 & n.38.

103 *Gordon*, 2008 WL 1697151, at *13 & n.75 ("[W]e are mindful that although 'general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.'" (quoting *PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007))).

B. Jeffrey Lane's bar from associating with member firms in a principal capacity is neither excessive nor oppressive.

We also find barring Jeffrey Lane in a principal capacity for his supervisory failures to be neither excessive nor oppressive. As discussed above, the Firm's WSPs contained no provision for interpositioning, nor did they include specific procedures for the review of markups, including the specific steps and reviews to be undertaken by supervisory personnel and the frequency of such reviews. FINRA correctly found that these omissions "may have played some part in allowing Marcus Lane's violative conduct to escape detection." As discussed above, the lack of such provisions in the WSPs denied investors of crucial "frontline" defenses to help prevent the types of violations that occurred here.[104] Jeffrey Lane also failed reasonably to supervise Marcus Lane by ignoring numerous red flags. Jeffrey Lane reviewed all of the Trade Sets and was aware of the markup amounts Marcus Lane was charging to customers by interpositioning the Controlled Accounts he wholly owned between the Firm and its customers. The underlying violations were repeated, involved a significant amount of money, and occurred over a span of several months, involving eleven separate Trade Sets.

FINRA's Sanction Guidelines set out sanction recommendations for violations of Rule 3010 for both deficient WSPs and failure to supervise, the two types of violations we have found that Jeffrey Lane committed here.[105] The Guidelines recognize the following principal considerations in determining sanctions for deficient WSPs: (1) whether deficiencies allowed violative conduct to occur or to escape detection; and (2) whether the deficiencies made it difficult to determine the individual or individuals responsible for specific areas of supervision or compliance.[106] The Guidelines recognize the following principal considerations in determining sanctions for a failure to supervise: (1) whether the respondent ignored "red flag" warnings that should have resulted in additional supervisory scrutiny and whether individuals responsible for

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104 *See supra* note 64 and accompanying text.

105 For deficient WSPs, the Guidelines recommend a fine of $1,000 to $25,000 and, in egregious cases, recommend suspending the individual responsible in any or all capacities for up to one year. For failure to supervise, the Guidelines recommend a fine of $5,000 to $50,000 and, in egregious cases, recommend suspending the responsible individual in any or all capacities for up to two years or barring the responsible individual. *Guidelines*, at 104.

106 *Id.* As discussed above, we agree with FINRA that the deficient WSPs allowed Marcus Lane's violations to occur, in that they did not address interpositioning and included language (without supporting authority) indicating that the 5% Policy did not apply in sales of distressed bonds.

Although the WSPs did not specifically identify Jeffrey Lane as the person responsible for supervision at the Firm, because Jeffrey Lane was designated as the Firm's FINOP and Chief Compliance Officer—coupled with the fact that Jeffrey Lane was one of only two principals at the Firm—we do not find that the deficient WSPs made it difficult to determine that he was in charge of supervision. Jeffrey Lane does not dispute his supervisory role.

underlying misconduct attempted to conceal misconduct from the respondent; (2) the nature, extent, size, and character of the underlying misconduct; and (3) the quality and degree of the supervisor's implementation of the firm's supervisory procedures and controls.[107]

As discussed above, this case presented numerous red flags that should have resulted in additional supervisory scrutiny of Marcus Lane's trading practices. Jeffrey Lane was aware of all elements of the Trade Sets, including the timing of each leg, the amounts of the markups at each step, and the fact that Marcus Lane alone set the prices for the relevant transactions by using the Controlled Accounts. Further, Jeffrey Lane owned twenty percent of the Firm, so his supervisory failures resulted in personal financial gain, which is an aggravating factor.[108]

There are no mitigating factors. Jeffrey Lane's claim of appropriate supervision with respect to other elements of the Firm's business—which we cannot assess based on the record before us—would not excuse his failures here. Likewise, his claim that he was not aware of what interpositioning was, even if true, does not provide any mitigation because participants in the securities industry "cannot be excused for lack of knowledge, understanding, or appreciation of [compliance] requirements."[109] Jeffrey Lane himself acknowledges that he "had over twenty years of experience in working with the NASD and FINRA as a FINOP and Compliance Officer." He also acknowledged that the Firm regularly engaged in transactions in which the Controlled Accounts purchased distressed bonds from the Firm and sold them back to the Firm before the bonds were sold to retail customers. This experience further undermines any argument that he was unaware of the rules regarding interpositioning.

C. The suspension and fine imposed for Jeffrey Lane's violations of Rule 8210 are neither excessive nor oppressive.

Rule 8210 "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations."[110] This rule is at the "heart of the self-regulatory system for the securities industry"[111] and is an "essential cornerstone of [FINRA's] ability to police the securities markets and should be rigorously enforced."[112] "Failures to comply are serious violations because they subvert [FINRA's] ability to carry out its

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107 *Id.* at 103.

108 *Id.* at 7 (Principal Considerations in Determining Sanctions No. 17).

109 *Epstein*, 2009 WL 223611, at *21.

110 *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *4 (Nov. 14, 2008), *petition for review denied*, 347 F. App'x 692 (2d Cir. 2009).

111 *Id.*

112 *Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 WL 2482466, at *5 (Aug. 25, 2006).

regulatory responsibilities," threatening investors and the markets.[113] Rather than respond to FINRA's Rule 8210 requests, Applicants repeatedly asked FINRA to explain why it was requesting the information and offered up the entirety of the Firm's records without reviewing those records themselves. It is well established that an individual may not "second guess [ ]" a Rule 8210 request or "set conditions on their compliance."[114] The suspension and fine imposed on Jeffrey Lane is remedial because those sanctions will protect the investing public by encouraging timely cooperation essential to the prompt discovery and remediation of industry misconduct.[115] The sanctions also will deter others from ignoring FINRA's information requests.

The sanctions imposed on Jeffrey Lane are consistent with the Sanction Guidelines. If the violation is one in which "mitigation exists, or the person did not respond in a timely manner" to a request made pursuant to Rule 8210, the Guidelines recommend suspending an individual "in any or all capacities for up to two years" and imposing a fine of $2,500 to $25,000.[116] The Guidelines identify three principal considerations for determining sanctions: the "[i]mportance of the information requested as viewed from FINRA's perspective"; the "[n]umber of requests made and the degree of regulatory pressure required to obtain a response"; and the "[l]ength of time to respond."[117]

We agree with FINRA that, "[f]rom FINRA's perspective, obtaining the requested ownership and investment authority information was critical to its investigation of the interpositioning scheme."[118] We acknowledge that Jeffrey Lane responded fully to FINRA's 2007 and 2008 Rule 8210 requests and belatedly provided some information a couple of months after FINRA's March 2009 Rule 8210 request, but he failed to provide timely information in response to four outstanding categories of information requested. The information covered by those categories was necessary to aid FINRA's investigation of the Controlled Accounts and how trades in the accounts affected the customers involved. Indeed, it was only after Applicants finally provided the outstanding information that FINRA was able to discern that the Controlled Accounts were proprietary and used in a manner that resulted in the violations at issue.

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113 *Plunkett*, 2013 WL 2898033, at *9 (citations omitted).

114 *CMG Inst'l Trading, LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *8 (Jan. 30, 2009) (citations omitted).

115 The NAC determined not to sanction Marcus Lane in light of the bar that it imposed on him for the interpositioning and excessive and fraudulent markups.

116 *Guidelines*, at 33.

117 *Id*.

118 NAC Decision at 36.

We also agree with FINRA that the degree of regulatory pressure required to obtain a response "was substantial and is a highly aggravating factor."[119] FINRA made five Rule 8210 requests between March and July 2009 in an attempt to get responses to four of the categories of information requested. It took the institution of a disciplinary proceeding, the threat of an imminent suspension, and another Rule 8210 request before Applicants provided the responsive information several months later, in October 2009. That responsive information consisted of two sentences explaining ownership details about the Controlled Accounts, a signature on a Bloomberg authorization form, access to the Firm's hard drives, and production of a new account form for one of the Controlled Accounts.[120] Jeffrey Lane fails to offer any persuasive reason why he could not have provided this information in March 2009.

Jeffrey Lane argues on appeal that the $25,000 fine is a "misguided attempt to force [him] to pay FINRA's costs for manufacturing these false charges . . . ." But nothing in the record supports his argument. As discussed above, the record amply supports the imposition of a fine. Moreover, FINRA is entitled to, and did, assess costs separate and apart from the fine. The complaint informed Jeffrey Lane that he might be ordered to "bear such costs of [the] proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330." We find that FINRA acted well within its discretion in assessing the costs following the decision.[121]

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119 NAC Decision at 36-37.

120 As discussed above, these are the only documents included in the record, but FINRA found that Marcus Lane and Jeffrey Lane provided the new account form for the second Controlled Account "in some other fashion." *See supra* note 79.

121 *See* FINRA Rule 8330 (stating that disciplined member shall bear such costs of the proceeding as the Adjudicator deems fair and appropriate under the circumstances); *Oppenheim*, 2005 WL 770880, at *5 & n.26 (citing *John M. W. Crute*, Exchange Act Release No. 40474, 53 SEC 1112, 1998 WL 652110, at *5 (Sept. 24, 1998), *aff'd*, 208 F.3d 1006 (5th Cir. 2000) recognizing NASD's broad discretion to impose costs and upholding imposition of costs)).

We find the sanctions imposed on Jeffrey Lane to be neither excessive nor oppressive.

An appropriate order will issue.[122]

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

Brent J. Fields
Secretary

[122] 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.

APPENDIX

Trade Set	Date	Bond	Firm Purchases From	Firm Sells To	Quantity	Buy Trade Price	Sell Trade Price	Aggregate Markup Percentage	Aggregate Profit
1	10/20/2006 (12:02 – 12:41 PM)	Werner	B-D Controlled Account	Controlled Account Customer	1020 1020	8.6875 9.75	9.25 10.00	15.11%	$13,387.50
2	10/24/2006 (2:31 – 3:31 PM)	Werner	B-D Controlled Account	Controlled Account Customer	1500 1500	8.50 9.25	8.75 9.50	11.76%	$15,000.00
3	10/31/2006 (11:35 AM –12:10 PM) (As noted in opinion, Trade Set 3 was divided into two separate sales transactions to the same customer).	Werner	B-D Controlled Account Controlled Account	Controlled Account Customer Customer	3000 2000 1000	8.375 8.875 9.250	8.75 9.00 9.50	7.46% 13.43%	$12,500.00 $11,250,00
4	12/20/2006 (12:46 – 12:55 PM)	Collins & Aikman	B-D Controlled Account	Controlled Account Customer	1130 1130	3.375 3.5	3.375 3.625	7.41%	$2,625.00
5	1/10/2007 (3:47 – 3:59 PM)	Collins & Aikman	B-D Controlled Account	Controlled Account Customer	2000 2000	3.875 4.125	4.00 4.125	6.45%	$5,000.00
6	2/23/2007 (12:00 – 12:15 PM)	Werner	B-D Controlled Account	Controlled Account Customer	1900 1900	7.25 7.75	7.50 8.00	10.34%	$14,250.00
7	3/20/2007 (12:35 – 2:53 PM)	Tower	B-D Controlled Account	Controlled Account Customer	2000 2000	10.64 12.30	11.30 12.77	20.02%	$42,600.00
8	3/29/2007 (11:35 AM – 12:01 PM)	Tower	B-D Controlled Account	Controlled Account Customer	2000 2000	7.33 9.91	7.65 10.33	40.93%	$60,000.00
9	3/29/2007 (12:36 – 1:10 PM)	Tower	B-D Controlled Account	Controlled Account Customer	3000 3000	6.425 8.65	6.70 8.99	39.92%	$76,950.00

Trade Set	Date	Bond	Firm Purchases From	Firm Sells To	Quantity	Buy Trade Price	Sell Trade Price	Aggregate Markup Percentage	Aggregate Profit
10	3/29/2007 (2:38 – 3:00 PM)	Tower	B-D Controlled Account	Controlled Account Customer	4052	6.425 7.38	6.70 7.71	20.00%	$52,068.20
11	5/2/2007 (10:17 - 11:00 AM)	Tower	B-D Controlled Account	Controlled Account Customer	1000	7.71 8.50	8.00 8.83	14.53%	$11,200.00

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74269 / February 13, 2015

Admin. Proc. File No. 3-15701

In the Matter of the Application of

ROBERT MARCUS LANE
and
JEFFREY GRIFFIN LANE

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by FINRA against Robert Marcus Lane and Jeffrey Griffin Lane is hereby sustained.

By the Commission.

Brent J. Fields
Secretary