SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 75981 / September 24, 2015

Admin. Proc. File No. 3-16022

In the Matter of the Applications of

BLAIR C. MIELKE
and
FREDERICK W. SHULTZ

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDINGS

Failure to Provide Written Notice to and Obtain Written Approval from Firm Regarding Private Securities Transactions

Failure to Provide Written Notice to Firm of Outside Business Activities

Failure to Provide Requested Information

Failure to Appear for On-The-Record Interview

Conduct Inconsistent with Just and Equitable Principles of Trade

Misuse of Customer Funds

Causing Firm's Books and Records to Be Inaccurate

Registered representatives engaged in private securities transactions without giving written notice to or obtaining written approval from employer member firm of registered securities association; engaged in outside business activities without providing prompt written notice to firm; failed to provide requested information in connection with FINRA investigation; failed to appear timely for on-the-record interview; made misstatements on firm compliance schedules; misused customer funds; and caused firm to maintain inaccurate books and records. *Held*, association's findings of violations and sanctions imposed are *sustained*.

APPEARANCES:

James E. Stoltz, of Stoltz Law Office, Evansville, IN, for Blair C. Mielke and Frederick W. Shultz.

Alan Lawhead, *Michael Garawski*, and *Jante C. Turner*, for FINRA.

Appeal filed: August 25, 2014
Last brief received: December 8, 2014

Blair C. Mielke and Frederick W. Shultz, both formerly registered representatives associated with Brookstone Securities, Inc. ("Brookstone"), a FINRA member firm, appeal from FINRA disciplinary action. FINRA found that Mielke and Shultz violated NASD Rules 3040 and 2110 and FINRA Rule 2010 by engaging in private securities transactions without giving written notice to and obtaining written approval from Brookstone, and that they violated NASD Rules 3030 and 2110 and FINRA Rule 2010 by engaging in outside business activities without providing prompt written notice to Brookstone.[1] As a unitary sanction for these violations, FINRA barred each Applicant from associating with a FINRA member firm in any capacity.

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[1] On July 26, 2007, the Commission approved a proposed rule change that NASD filed seeking to amend its Certificate of Incorporation to reflect its name change to the Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of its member firm regulatory functions with NYSE Regulation, Inc. *See* Securities Exchange Act Release No. 56148, 2007 WL 2159604, at *2 (July 26, 2007). Following the consolidation, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* Exchange Act Release No. 58643, 2008 WL 4468749 (Sept. 25, 2008), 73 Fed. Reg. 57,174 (Oct. 1, 2008).

NASD Rule 3040 provides that "[n]o person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of [Rule 3040]," which include the requirement that the representative provide the member with written notice and, if receiving compensation for the private securities transaction, receive written approval from the member. NASD Rule 3040 has not yet been replaced by a new FINRA Rule in the Consolidated Rulebook, and it remains in effect. NASD Rule 3030 provided that "[n]o person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member." In December 2010, after the conduct at issue here, the Commission approved new FINRA Rule 3270, which replaced NASD Rule 3030. The new rule, among other things, clarified the types of positions an associated person could not hold with an outside business, and it specifically required that the associated person provide written notice to the member *before*

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FINRA also found that Applicants engaged in conduct inconsistent with just and equitable principles of trade, in violation of NASD Rule 2110 and FINRA Rule 2010, by making misstatements regarding outside business activities on Brookstone's annual Outside Business Interests Schedules submitted by Mielke in April 2008 and by both Applicants in April 2009. For these violations, FINRA also barred both Applicants in all capacities.

FINRA further found that Mielke and Shultz violated FINRA Rules 8210 and 2010. FINRA found that, in connection with its investigation of Applicants, Mielke failed to respond completely and timely to FINRA's requests for information and Shultz failed to appear timely for on-the-record testimony.[2] FINRA barred both Applicants in all capacities for these violations as well.

Finally, FINRA found that Shultz violated FINRA Rules 2150 and 2010 by misusing customer funds and violated NASD Rule 3110 and FINRA Rule 2010 by causing Brookstone to maintain inaccurate books and records.[3] For each of these violations, FINRA found that a $10,000 fine and a one-year suspension would be appropriate, but FINRA declined to impose those sanctions in light of the three bars it was imposing on Shultz as sanctions for the violations discussed above.

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engaging in outside business activities. *See FINRA Regulatory Notice 10-49* (Dec. 2010).

NASD Rule 2110 provided that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." According to "our long-standing and judicially-recognized policy . . . a violation of another Commission or NASD rule or regulation . . . constitutes a violation of [NASD] Rule 2110." *Stephen J. Gluckman*, Exchange Act Release No. 41628, 54 SEC 175, 1999 WL 507864, at *6, (July 20, 1999). In September 2008, the Commission approved new FINRA Rule 2010, which replaced NASD Rule 2110. The new rule, which became effective December 15, 2008, is not different in any material respect from the prior rule. *See FINRA Regulatory Notice 08-57* (Oct. 2008). NASD Rule 2110 applied to the portion of Mielke's conduct that occurred before December 15, 2008, and new FINRA Rule 2010 applies to Mielke's and Shultz's conduct after that date.

[2] FINRA Rule 8210 requires associated persons to provide "information or testimony" in connection with a FINRA investigation.

[3] NASD Rule 3110 requires member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with [FINRA Rules] and as prescribed by SEC Rule 17a-3. The record keeping format, medium, and retention period shall comply with Rule 17a-4 under the [Exchange Act]." NASD Rule 3110 has not yet been replaced by a new FINRA Rule in the Consolidated Rulebook, and it remains in effect.

FINRA Rule 2150 states that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds."

On appeal, Applicants claim that they had provided oral notice to Brookstone officers before commencing their outside business activities and private securities transactions; that their failures to comply with FINRA information requests were partial and can be excused because of personal and family health problems; that any misstatements on their Outside Business Interests Schedules were unintentional and should be viewed in light of their purported oral disclosures of their activities to Brookstone officers; that the misuse of customer funds and books and records violations were the result of sloppy bookkeeping and were unintentional; and that the sanctions FINRA imposed should be reduced. Based on our independent review of the record, we sustain FINRA's findings of violations and its imposition of sanctions.[4]

I. Background

A. January 2008—November 2008: Applicants formed Midwest and began to promote and sell interests in it, but did not tell Brookstone.

Mielke entered the securities industry in September 1988, and he remained continuously registered with various FINRA member firms from that time until November 2009. Mielke joined Brookstone in June 2007 and remained employed there until November 2009, when Brookstone terminated his employment. Mielke is not currently associated with a FINRA member firm.

Shultz, a retired mathematician and family friend of Mielke, entered the securities industry (at Mielke's recommendation) as a registered representative in 2006 and joined Brookstone along with Mielke in June 2007. Brookstone terminated Shultz's employment in November 2009. Shultz is not currently associated with a FINRA member firm.

In January 2008, shortly after becoming associated with Brookstone, Mielke and another individual who is not relevant to this proceeding formed Midwest Investment Partners, LLC ("Midwest"), a limited liability company that sought to attract investments by accredited investors who wanted to "pursue medium to long-term capital appreciation" by investing their pooled money in certain hedge funds. Mielke immediately began promoting and selling Midwest nonvoting membership interests. Mielke hired Shultz in September 2008 to handle Midwest's financial and accounting matters.

In its private placement memorandum, Midwest described an investment in its membership interests as speculative and involving a high degree of risk. Midwest offered up to $100 million of the company's restricted nonvoting membership interests to accredited investors and sought a minimum investment of $250,000. Investors were to receive 50 percent of Midwest's profits on an annual basis, with the other 50 percent going to Midwest's Manager, as discussed below.[5] Midwest invested the proceeds of its offering in two hedge funds, Vestium

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[4] In addition to the three bars FINRA imposed, it also ordered Applicants to pay, jointly and severally, appeal costs of $2,468.85.

[5] The record contains two different versions of Midwest's private placement memorandum,

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Equity Fund, LLC and Arcanum Equity Fund, LLC, which Mielke testified were "basically the same company" and invested in "medium term notes."

Applicants ran virtually every aspect of Midwest's business. From Midwest's inception, Mielke was its President and Chief Executive Officer. Beginning in January 2008, he hired an attorney to prepare Midwest's offering documents; conducted due diligence on Midwest's investment in certain hedge funds and handled the relationships with the hedge funds' managers; hired other registered representative to sell Midwest;[6] and marketed Midwest to prospective investors.

Shultz was Midwest's Chief Financial Officer and earned a salary of $1,000 per month. Shultz decided who qualified as an accredited investor and filed certain documents with the Commission, including a Form D Notice of Exempt Offering of Securities. He also mailed offering documents to prospective investors, obtained investors' money, answered investors' questions about Midwest, processed redemption requests, and handled a variety of formal correspondence and agreements. In general, Shultz "handled the money" and performed general accounting and office management duties for Midwest.

Applicants managed Midwest's day-to-day business through Harvest Midwest Group, LLC ("Harvest"), an Indiana limited liability company that owned all of Midwest's voting membership interests. Mielke formed Harvest in early 2008 and was its President, Chief Executive Officer, and a Director. Beginning in September 2008, Shultz was Harvest's Chief Financial Officer and a Director and administered Harvest's financial operations, such as tracking distributions from investments, accounting for expenses, making distributions to the company and investors, and issuing account statements to investors. As Midwest's Manager, Harvest paid for Midwest's expenses and received 50 percent of Midwest's profits on an annual basis.

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one of which Brookstone never approved and another that Brookstone approved in June and August 2009. The versions of the private placement memorandum do not appear to differ in any material respect germane to the violations at issue in this proceeding.

[6] The registered representatives Mielke hired to sell Midwest interests, Thomas J. Gorter and Michael L. Trier, were charged in FINRA's complaint in this proceeding. After a four-day hearing, the FINRA Hearing Panel imposed three separate bars against Gorter after finding that he had participated in undisclosed private securities transactions, caused Brookstone to maintain inaccurate books and records, failed to respond timely to FINRA's information and document requests, and failed to appear timely for on-the-record testimony. Gorter appealed the Hearing Panel's decision to FINRA's National Adjudicatory Council, but Gorter and FINRA Enforcement then submitted a proposed settlement to the NAC, which the NAC accepted.

FINRA's complaint charged Trier only with participation in undisclosed private securities transactions. The Hearing Panel found that Trier had committed the violations as charged and suspended Trier in all capacities for thirty business days and fined him $2,500. Neither Trier nor FINRA Enforcement appealed the Hearing Panel's decision to the NAC.

Applicants indirectly owned Midwest. Harvest, Midwest's manager, was a wholly owned subsidiary of a limited liability company, Harvest Holding Company LLC ("Harvest Holding"), that Mielke created in 1995. Mielke owned 75 percent and Shultz owned five percent of Harvest Holding's stock, respectively.[7] Mielke was Harvest Holding's President, Chief Executive Officer, and a Director, and, starting in September 2008, Shultz was its Chief Financial Officer and a Director. Harvest Holding paid for Midwest's and Harvest's expenses (essentially reimbursing Harvest for having covered Harvest's and Midwest's expenses).

Mielke and Shultz do not dispute that they were entitled to receive some of Midwest's profits because they owned 80 percent of the stock of Harvest Holding, which wholly owned Harvest, which was entitled to 50 percent of Midwest's profits. Mielke testified that he was entitled to receive a pro rata percentage of Midwest's profits based on his proportional ownership in Harvest Holding. Shultz testified at the hearing in this matter that "everything, income, expenses, everything would flow up to Harvest Holding."

During the time that Mielke and Shultz were associated with Brookstone and owned and managed Midwest, thirty-one investors purchased approximately $4.62 million worth of Midwest membership interests.[8] Mielke directly sold $1.1 million of Midwest's membership interests to five investors, two of whom were Brookstone customers.[9] Mielke made his first direct sale of Midwest interests, for $500,000, in January 2008. He then made an additional three direct sales of Midwest interests, totaling another $500,000, before December 2008.

One of the Brookstone customers to whom Mielke sold Midwest made a $100,000 investment in Midwest in November 2008. That investor testified that she spoke about her Midwest investment only to Mielke, who had told her "to trust him." The investor testified that Mielke described Midwest as a "guaranteed" investment and did not tell her that she risked losing money by investing in Midwest.

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7 Four other shareholders who are not at issue in this proceeding owned the remaining 20%.

8 During this same time period, in a separate disciplinary action, FINRA fined Mielke $5,000 and suspended him in all capacities for six months (running from May 19, 2008 through November 18, 2008) for participating in undisclosed private securities transactions unrelated to his involvement in Midwest. Mielke agreed to the suspension pursuant to a settlement agreement in which he consented to findings that he had failed to provide prior written notice of his involvement in private securities transactions to his prior employer, failed to obtain the firm's written approval, and failed to disclose that he had referred customers to a third-party entity.

9 Gorter and Trier sold the remaining amount to twenty-six other investors. Shultz made no direct sales of Midwest membership interests.

B. December 2008—June 2009: Unbeknownst to Brookstone, Applicants continued to run Midwest while they were negotiating the sale of Midwest's membership interests through the firm.

Mielke testified that he began to discuss Midwest with Brookstone officials as early as January 2008. Mielke testified that David Locy, Brookstone's President and compliance officer, orally approved sales of Midwest through Brookstone in January 2008. Mielke also stated that he told Antony Turbeville, Brookstone's majority owner and President,[10] about Midwest when he joined Brookstone in June 2007, and that he discussed Midwest in several conference calls with Brookstone officers. Mielke further testified that he knew about "emails going back between [Midwest's securities attorney] and Locy." But Mielke did not testify as to the content of any such emails, nor did Applicants call the securities attorney as a witness to testify about the content of such emails or about any of Applicants' other claims that they had disclosed the sales transactions to Brookstone before they began selling Midwest membership interests to investors.

Locy's and Turbeville's testimony contradicted Applicants' description of the purported disclosures about Midwest to Brookstone. Turbeville testified that he first heard about Midwest at a December 2008 meeting with Mielke and Shultz at the Orlando airport. Turbeville stated that, at that meeting, Applicants described Midwest as an extremely safe private placement offering that could produce high investor returns and high sales commissions. But Turbeville told Applicants that he could not "just take somebody's word for something and approve something like that." Turbeville instructed Applicants to submit a written proposal to Locy, who was responsible for reviewing and approving the sale of private placements by Brookstone's sales representatives. Turbeville testified that Applicants did not tell him at the December 2008 meeting that they already had been selling Midwest membership interests for nearly a year. When asked to respond to Mielke's claim that he had approved the sale of membership interests in December 2008 in Orlando, Turbeville said, "Absolutely not." Turbeville explained that "it just doesn't make much business sense" that Brookstone would have approved the transactions without the firm supervising them because "[a]nything sold puts the firm at risk . . . so we have risk, [but] we have no revenue from the product being sold."

Locy's testimony was consistent with Turbeville's characterization of Brookstone's discussions with Applicants about Midwest. Locy testified that he had not heard anything about Midwest until after Turbeville's initial meeting in December 2008 and that he had "no reason to suspect that [Mielke and Shultz] would be selling an unapproved . . . offering."[11] In January 2009, Brookstone began reviewing drafts of Midwest's offering documents. On January 8, 2009, Turbeville received Midwest's drafts from a law firm and forwarded them to Locy. Within a few days, Locy told Mielke that he could not approve the drafts because they were incomplete and

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10 Turbeville owned 80% of Brookstone. The record does not indicate who owned the remainder.

11 Also, on December 14, 2009, Brookstone's Director of Legal and Regulatory Affairs responded to a FINRA inquiry by stating that "Brookstone had no knowledge [before November 2009] that Midwest was being sold at any Brookstone branch."

contained insufficient disclosures regarding risks and other information related to a restricted offering. Locy suggested that Mielke find counsel who could do a better job of drafting the required documents.

Several months passed before Locy received another draft of Midwest's offering documents. In June 2009, Mielke gave Locy revised documents that had been drafted by a different attorney. Locy decided that the documents provided sufficient disclosures and had remedied the deficiencies he had found in the earlier draft, and on June 26, 2009, Turbeville signed a selling agreement that authorized Brookstone representatives to sell Midwest membership interests. Locy approved the last of Midwest's offering documents, a private placement memorandum, on August 13, 2009.[12]

Sales of Midwest continued through approximately October 2009. But Turbeville and Locy testified that the firm did not know that any Brookstone registered representatives had been selling Midwest membership interests until November 2009, when FINRA began an investigation and inquired of Brookstone about the sales. Brookstone was unaware of Midwest's sales because Applicants did not tell Brookstone orally or in writing that they or any other person associated with Brookstone were selling Midwest; did not accurately complete or update Brookstone's annual Outside Business Interests Schedules; and did not provide Brookstone with any documentation about Midwest's sales so that the firm could record the information in its books and records. Denise Zumbrun, a Brookstone compliance officer, testified that Turbeville and Locy were "surprised" when they learned from FINRA in November 2009 that Applicants had already sold Midwest membership interests to firm customers. Brookstone fired Applicants in November 2009, based on FINRA staff's explanation about Applicants' sales of Midwest.

C. Applicants made misstatements on their 2008 and 2009 annual Outside Business Interests Schedules.

Brookstone's written supervisory procedures ("WSPs") required the firm's registered representatives to disclose all outside business activities and certify annually that they were not engaged in any outside business activity without formal written approval from Brookstone. Applicants testified that they had received Brookstone's compliance manual which described the procedures related to private securities transactions and outside business activities. Both Applicants also signed a document saying they had read the manual.

In April 2008, after he had already begun to make direct sales of Midwest membership interests, Mielke completed Brookstone's annual Outside Business Interests Schedule, in which

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[12] Locy was the Brookstone employee responsible for approving the sale of Midwest interests through Brookstone, but Turbeville signed the selling agreement on behalf of Brookstone. Locy initialed and dated his approval for the final Midwest private placement memorandum "8/13/08." Locy testified that his approval was actually given on August 13, 2009, and that his handwritten date, in 2008, was a typographical error. This testimony is consistent with Locy's handwritten notes from his meetings with Mielke, which occurred in July 2009.

he certified that he was not engaged in any undisclosed outside business activities. He did not include any information about Midwest or its private securities offering.[13] Mielke testified that Midwest provided the "bulk" of his income during the time period covered by this Outside Business Interests Schedule. And he had already made direct sales of Midwest membership interests and conducted numerous other activities on Midwest's behalf.

Mielke and Shultz each completed Brookstone's annual Outside Business Interests Schedules in April 2009. Shultz testified that he filled out both his and Mielke's schedules after discussing them with Mielke, and that he wrote exactly what Mielke told him to on the forms. Mielke's and Shultz's April 2009 Outside Business Interests Schedules were identical and included no direct reference to Midwest, their employment with Midwest, or their receipt of compensation from Midwest. Rather the schedules referred only indirectly to Midwest, stating that Mielke and Shultz were "in the planning stages of . . . working with an investment group dealing in medium term notes."

In reality, by April 2009, Midwest had sold twenty-two membership interests and raised more than $3 million. As Mielke acknowledged, both Mielke and Shultz received a share of Midwest's profits as the owners of Harvest Holding, and Shultz received an additional monthly salary of $1,000 as Midwest's CFO. The record also includes copies of Midwest's general transactions ledger, which documents payments by Midwest to Harvest, Mielke, and Shultz during 2008 and 2009, including payments to Mielke for commissions and to Shultz as reimbursements for expenses related to Midwest meetings and other travel.

D. Shultz did not provide documentation supporting sales of Midwest after Brookstone approved sales of Midwest in June 2009, and, as a result, Brookstone did not maintain required documentation of Midwest transactions.

After Brookstone signed a selling agreement with Midwest in June 2009, Shultz (as Midwest's CFO) was responsible for providing Brookstone with documentation in support of any sales made pursuant to this approval. Brookstone's WSPs stated that all approved securities transactions should be recorded in the firm's books and records. Locy also testified that he informed Applicants that all sales transactions must be processed through Brookstone. Yet, although Midwest received nine new purchases of membership interests between August and October 2009 totaling $1.47 million—after Brookstone had signed the selling agreement—Shultz did not route sales documentation for any of these transactions through Brookstone.

E. Shultz improperly distributed certain customer funds to Harvest.

Shultz had responsibility for calculating Midwest's profits and dividing them between Harvest and Midwest's other investors. In September and October 2009, Midwest received $374,500 in investments from three investors, but Shultz did not invest these funds in Vestium

[13] Shultz was not yet employed with Midwest in April 2008.

and Arcanum (as he did with all of the other investments in Midwest), instead leaving those funds in Midwest's checking account. In a series of withdrawals between September and November 2009, Shultz allocated $147,000 of this amount to Harvest, describing the payments as "Part of Profits" or "Part of Harvest Profits." Shultz conceded that he allocated too much profit to Harvest, blaming the "mistake" on "bad accounting." Shultz's error was discovered by an accountant Midwest hired in June 2010, and that accountant replaced $45,000 of the amount (the $147,000 minus $102,000 in accrued profits Harvest was owed at the time) by making a transfer from Harvest to Midwest.

F. Mielke failed to respond completely and timely to information requests.

In late 2009, FINRA commenced an investigation of Applicants, in connection with which Mielke provided on-the-record testimony on January 14, 2010. During this testimony, Mielke claimed that certain evidence, including correspondence between Midwest's attorney and Brookstone, would indicate that Brookstone was aware of and had approved the Midwest sales transactions as early as January 2008, before any Midwest sales had occurred. On January 22, 2010, FINRA requested certain information related to Mielke's OTR testimony in an effort to substantiate his claims. Specifically, FINRA requested: (1) correspondence between Brookstone and Midwest's attorney; (2) Mielke's tax returns and bank account statements for the relevant period; (3) documentation of due diligence Mielke performed related to the Midwest offering; (4) spreadsheets showing funds, profit allocations, and payments to Midwest investors; and (5) a list of Midwest's investors. On February 19, 2010, Mielke provided FINRA with copies of his tax returns for 2007 and 2008, but he did not provide any other responsive documents. As a result, FINRA charged him with failure to provide requested information under Rule 8210.

In January 2012, shortly before the scheduled hearing date, Mielke provided certain additional documents in response to the Rule 8210 request from nearly two years earlier, including a spreadsheet that contained investor and profit information. Subsequently, before the hearing, Mielke additionally provided updated copies of his tax returns, investor logs, and disbursement of profits from Midwest. But this information was not complete and, in fact, inaccurately stated that Gorter did not sell Midwest securities. To date, Mielke has still failed to provide several of the categories of information included in FINRA's original request. Specifically, Mielke has not provided any correspondence between Brookstone and Midwest's attorney, any check registers or copies of payments made to Midwest investors, or a list of Midwest investors. At the hearing, Mielke explained that he failed to comply with FINRA's 8210 requests because he was unaware of them and had delegated compliance with them to another Midwest employee.

G. Shultz failed to appear timely to provide OTR testimony.

In December 2009, in connection with its investigation of Applicants, FINRA requested that Shultz provide OTR testimony. FINRA initially requested that Shultz appear on December 18, 2009 at its Chicago district office. In order to allow Applicants to travel together for their OTRs, however, FINRA rescheduled Shultz's testimony to occur on January 15, 2010, one day after Mielke's testimony, with both OTRs in Louisville, Kentucky. At the close of Mielke's testimony, the attorney who was then representing both Applicants stated that he would not be able to continue to represent both men because of a conflict of interest. Shultz requested an opportunity to obtain new counsel, and FINRA rescheduled his testimony for March 5, 2010, in Chicago.[14] But, when that time came, Shultz asserted that he was unable to attend the testimony because of illnesses of his daughter and wife that required his full attention. Shultz also stated that Harvest Holding was expecting shortly to receive the results of an accounting audit, which Shultz claimed would render his testimony "moot."

Shultz later requested that FINRA postpone his testimony indefinitely until FINRA received and reviewed the results of the accounting audit. When FINRA denied his request, Shultz, who had been warned that failure to appear for testimony could result in a bar being imposed against him, stated that he simply wanted to know "where to send his license" and voluntarily withdraw from registration with any FINRA member firm. Shultz did not appear for testimony for nearly two years after that, and he ultimately agreed to testify only when the hearing date drew near and it was clear that his continued failure to appear would likely result in a bar.

H. FINRA found that Mielke and Shultz violated FINRA Rules as charged and imposed sanctions.

After a four-day hearing in March 2012, a FINRA Hearing Panel found Mielke and Shultz liable on all counts charged in FINRA's complaint: that Mielke and Shultz participated in undisclosed private securities transactions involving the sales of Midwest membership interests, engaged in undisclosed outside business activities because of their involvement with Midwest, and made false statements by failing to disclose their involvement in Midwest on their Brookstone Outside Business Interests Schedule. The Hearing Panel also found that Mielke failed to respond completely and timely to FINRA's information requests. The Hearing Panel further found that Shultz misused customer funds, caused Brookstone to maintain inaccurate books and records, and failed to appear timely for OTR testimony. The Hearing Panel imposed three bars each against Mielke and Shultz: one for their undisclosed private securities transactions and outside business activities, a second for their false statements on the Outside Business Interest Schedules, and a third for their failures to comply with FINRA's information requests. In light of the three bars it imposed against Shultz, the Hearing Panel declined to impose any additional sanctions against him for misuse of customer funds and causing books and records violations.

In reaching its finding, the Hearing Panel expressly found not credible Mielke's and Shultz's "uncorroborated claims" that they gave written and oral notice of the Midwest transactions and their involvement with Midwest to Brookstone before they began selling Midwest membership interests, and that Turbeville and Locy gave oral approval to Mielke and Shultz to sell interests in Midwest. The Hearing Panel also credited and relied on the testimony

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[14] The FINRA examiner initially scheduled Shultz's OTR to occur in Chicago (where his original OTR had been scheduled in December 2009) on February 18, 2010, but Shultz requested an extension, which FINRA granted.

of Turbeville and Locy that they "neither knew nor approved [Midwest's] sales before Locy's final approval of the selling agreement in June 2009."

Mielke and Shultz appealed the Hearing Panel's decision to FINRA's National Adjudicatory Council. The NAC affirmed the Hearing Panel's decision and the sanctions it imposed. The NAC stated that it would have fined Shultz $10,000 and suspended him in all capacities for one year for his misuse of customer funds and his books and records violations, but it declined to impose those sanctions in light of the three bars it imposed for his other misconduct.

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.[15] 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.[16]

B. Applicants violated NASD Rule 3040.

NASD Rule 3040 prohibits an associated person from participating "in any manner" in a private securities transaction without prior written notification to the employer. When the associated person receives compensation in connection with a private securities transaction, he must also receive written approval from the member firm before engaging in the transaction. We address each Rule 3040 element below.

1. Midwest membership interests are securities.

Section 2(a)(1) of the Securities Act of 1933 and Exchange Act Section 3(a)(10) define the term "security" to include an "investment contract."[17] In *SEC v. W.J. Howey Co.*, the Supreme Court defined an "investment contract" as "a contract, transaction, or scheme whereby a person invests his or her money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."[18] The record establishes that investors bought Midwest membership interests, that the money Midwest received was pooled and invested in

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

16 15 U.S.C. § 78s(e)(1).

17 15 U.S.C. §§ 77b(a)(1), 78c(a)(10).

18 328 U.S. 293, 298-99 (1946).

hedge funds, and that investors understood they were to receive profits solely from the efforts of Harvest, Midwest's manager.[19] Moreover, Midwest's offering documents describe in great detail the various ways in which the membership interests are securities, and Applicants do not dispute that a Midwest membership interest is, and that they understood it to be, a security.[20] We conclude that Midwest membership interests are securities.

2. The sales of Midwest membership interests were private securities transactions.

Rule 3040 defines a "private securities transaction" as "any securities transaction outside the regular course or scope of an associated person's employment with a member." Before June 2009, when Brookstone and Midwest executed the selling agreement, twenty-two investors purchased Midwest membership interests totaling $3.14 million from Applicants and others associated with Brookstone.[21] Mielke sold $1.1 million of Midwest membership interests directly to five investors, including two Brookstone customers, before June 2009. Because Brookstone had not approved these sales, the transactions were outside the regular course or scope of Applicants' jobs with Brookstone. We find that the sales of Midwest membership interests were private securities transactions.

3. Applicants participated in Midwest's private securities transactions.

Applicants were the heart of Midwest and facilitated sales of Midwest membership interests in many ways. Mielke created Midwest and its related companies; served as an officer and/or director for each of those companies; conducted due diligence on Midwest's investment in certain hedge funds and maintained a relationship with the hedge funds' managers; hired all the necessary personnel to market, sell, and administer Midwest; and promoted and directly sold

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19 We have held that pooled interests clearly support the existence of a common enterprise. *See, e.g.*, *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *8 & n.55 (July 12, 2013) (citing *Howey*, 328 U.S. at 298-99; *Anthony H. Barkate*, Exchange Act Release No. 49542, 57 SEC 488, 2004 WL 762434, at *3 n.13 (Apr. 8, 2004), *aff'd*, 125 F. App'x 892 (9th Cir. 2005); *Joseph Abbondante*, Exchange Act Release No. 53066, 58 SEC 1082, 2006 WL 42393, at *6 n.40 (Jan. 6, 2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006)).

20 For example, the Midwest private placement memorandum states that Midwest's membership interests are "'restricted securities' under the Securities Act and are subject to substantial transfer limitations." And, in September 2009, when Shultz ultimately filed a Form D Notice of Exempt Offering of Securities with the Commission, under the box for "type of securities offered," Shultz referred to Midwest's membership interests as "pooled investment fund interests."

21 Although Brookstone officials testified that they were unaware of any Brookstone sales until approximately November 2009, FINRA based its findings regarding Mielke's and Shultz's private securities transactions violations solely on those transactions that occurred before June 2009, when Turbeville signed the selling agreement.

some of Midwest's membership interests. Mielke hired a securities attorney to draft the Midwest offering documents and hired registered representatives, including Shultz, to help him promote and sell Midwest interests.

Shultz does not dispute that he was also heavily involved in Midwest's transactions. He was an officer or director for the various Midwest entities and had primary responsibility for Midwest's financial and accounting matters, including deciding who qualified as an accredited investor and filing Commission documents. Shultz processed investor transactions virtually from beginning to end. He answered investors' questions about Midwest, mailed them offering documents, received their funds, ensured that the funds were invested in the hedge funds, made distributions, and handled redemption requests. Customer testimony further indicates that Shultz advised some investors about the advantages of maintaining, rather than liquidating, their Midwest investments.

Rule 3040's reach is "very broad" and "encompass[es] the activities of 'an associated person who not only makes a sale but who participates 'in any manner' in the transaction.'"[22] We have held that administrative and sales activities like those of Mielke and Shultz here support a finding that an associated person violated Rule 3040.[23] Indeed, Applicants controlled virtually every aspect of Midwest's business during the relevant period. Accordingly, we find that Applicants participated in Midwest's private securities transactions.

4. Applicants received selling compensation for the securities transactions.

Under Rule 3040(e)(2), "selling compensation" means "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions . . . rights of participation in profits . . . as a general partner or otherwise . . . or expense reimbursements." Mielke and Shultz owned 80 percent of Harvest Holding, which wholly owned Harvest. As manager of Midwest, Harvest was entitled to 50 percent of Midwest's profits. Thus, Applicants had rights of participation in Midwest's profits. Mielke also received "commissions" for his direct sale of Midwest membership interests to five investors. And, in addition to his rights to participate in Midwest's profits, Shultz received a monthly salary from Midwest and reimbursement of expenses for his

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22 *Gluckman*, 1999 WL 507864, at *5 & n.24.

23 *See Mark H. Love*, Exchange Act Release No. 49248, 57 SEC 315, 2004 WL 283437, at *2-3 (Feb. 13, 2004) (finding that applicant participated in a private securities transaction where he recommended an investment to customers and facilitated mechanics of the transaction by, among other things, assisting customers with transferring funds and liquidating their firm accounts to purchase the recommended investments); *John P. Goldsworthy*, Exchange Act Release No. 45926, 2002 WL 987627, at *8 (May 15, 2002) (finding that applicant participated in a private securities transaction by signing the investment instruments, making arrangements to sell them, receiving investor checks made payable to him, and accepting funds from the proceeds of sales of the instruments).

Midwest-related travel and other activities. We find that Mielke and Shultz received selling compensation here.

5. Applicants did not provide written notice to or receive written approval from Brookstone.

Written notice under Rule 3040 is defined as "describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction." Under Rule 3040, registered representatives must provide member firms with such written notice before engaging in the transactions.[24] Because Mielke and Shultz received selling compensation, they also were required to obtain written approval from Brookstone before engaging in the Midwest transaction. There is no evidence of any written notice or approval in the record.

Applicants do not claim that they provided Brookstone specific written notice before selling Midwest securities. Instead, Applicants contend that they orally disclosed the transactions to Brookstone officers before January 2008, and, alternatively, that they satisfied the written notice requirement by various other documents they provided to Brookstone after the offering was in progress. They also contend that Brookstone orally approved of the Midwest sales before June 2009. We reject each of their arguments.

Mielke argues that, upon his arrival at Brookstone in June 2007, he began a discussion with Turbeville and Locy about his plan to sell Midwest and that Turbeville and Locy orally approved Mielke's plan before any representatives began to sell Midwest securities. But Rule 3040 requires written notice and approval. Oral notice and approval are insufficient.[25] In any event, FINRA did not credit Mielke's uncorroborated testimony. FINRA did credit the testimony of Locy and Turbeville, who testified that they had no idea before November 2009, when FINRA began its investigation, that anyone associated with Brookstone was selling Midwest securities. They also testified that they did not tell Applicants they could sell Midwest before a written selling agreement with Brookstone was in place. Turbeville's and Locy's testimony is corroborated by documentary evidence. We will not disturb FINRA's credibility findings here.[26]

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[24] *Harry Friedman*, Exchange Act Release No. 64486, 2011 WL 1825025, at *7 (finding violations of Rule 3040 where applicant failed to provide written notice to member firm before engaging in the transactions at issue).

[25] *See id.* at *5 (citing *Joseph J. Vastano*, Exchange Act Release No. 50219, 2004 WL 1857139, at *4 (Aug. 19, 2004) (finding that "any such oral exchange could not substitute for the written notice (and approval when compensation is to be received) required by the rule" and that "oral notice is not sufficient to satisfy the requirements of NASD Conduct Rule 3040")).

[26] Such determinations, based on hearing the witness's testimony and observing demeanor, are entitled to considerable deference. *See Wanda P. Sears*, Exchange Act Release No. 58075, 2008 WL 2597567, at *2 (July 1, 2008) (quoting *Jon R. Butzen*, Exchange Act Release No. 36512, 52 SEC 512, 1995 WL 699189, at *2 & n.7 (Nov. 27, 1995) ("[T]he credibility determination of the initial decision maker [in a FINRA disciplinary proceeding] is entitled to

(continued…)

The record and Applicants' own admissions in their briefs on appeal further undermine Applicants' claims that Brookstone had provided oral approval of Midwest sales before June 2009. For example, Mielke and Shultz acknowledge on appeal that, in late 2008 and early 2009, "Turbeville said Brookstone would need to review and approve the offering materials for Midwest before Brookstone would sell Midwest." They also note that Locy "rejected the first private placement memorandum he received from Midwest" in early 2009. Such admissions are inconsistent with Applicants' claim that Brookstone had provided Mielke with oral permission to sell Midwest as early as the beginning of 2008.

On appeal, Applicants further assert that Turbeville "approved the sale of the Midwest offering in 2008 but wanted to refrain from discussions about having Brookstone sell Midwest until Mielke's suspension ended." But this characterization does not make sense. Mielke was employed at Brookstone throughout 2008, including while he was suspended for six months. Turbeville testified that he would not have approved of his employee engaging in private securities transactions without the ability to supervise and monitor them. We find Turbeville's and Locy's testimony on this point to be consistent and credible.

Applicants alternatively argue that their 2008 and 2009 Outside Business Interests Schedules provided sufficient written notice to Brookstone. But in Mielke's schedule dated April 30, 2008, he did not mention Midwest. And Applicants' April 2009 schedules, both completed by Shultz, obliquely state, "In the planning stages of . . . working with an investment group dealing in medium term notes." That is insufficient detail to provide Brookstone notice of Midwest's sales or Applicants' roles in such sales.

Applicants cite a December 2008 internal Brookstone audit report as providing notice to Brookstone of the Midwest transactions. This report was not prepared by either Mielke or Shultz, but rather by an internal examiner at Brookstone. And December 2008 was over eleven months after Mielke formed Midwest and began to sell membership interests. The report did not notify Brookstone of Midwest's sales of membership interests, but merely flagged Mielke's and Shultz's involvement and advised Brookstone to "[l]ook into Vestium."

Applicants next assert that the Midwest offering documents they provided to Brookstone in the course of seeking Locy's approval adequately notified Brookstone because, according to Applicants, the documents indicated that Midwest already was being sold to investors.[27] But

(…continued)
considerable weight and deference, since it is based on hearing the witnesses' testimony and observing their demeanor.")).

[27] Applicants point to the use of the present tense in the offering documents. For example, the private placement memorandum received by Locy in January 2009 states that Midwest "currently markets and sells its investments through licensed agents throughout the United States." But these statements were in draft offering documents and there was no reason for Brookstone to think that Applicants were currently selling Midwest membership interests when Brookstone had not yet approved those sales.

Rule 3040 requires written notice of proposed transactions before (not after) those transactions are completed. Sales began in January 2008, one year before Brookstone first saw drafts of the offering documents.

Even for transactions that occurred after Brookstone received the draft offering documents, Applicants' argument fails. Applicants described the documents as "proposed offering materials" and acknowledged that they were given to Brookstone as part of the approval process to offer Midwest through the firm. Locy rejected the initial drafts Applicants submitted and told them to hire new counsel and to try again. Locy and Turbeville understood these documents to be drafts because they were not signed or dated. Consistent with that understanding, Locy and Turbeville testified that they had no reason to think that Applicants would be selling an unapproved offering. Thus, the drafts standing alone did not provide adequate notice.

Further, because Applicants received compensation from sales, Rule 3040 required them to obtain written approval of the transactions from Brookstone. There is no evidence that Brookstone provided Applicants with written approval to sell Midwest until Brookstone approved a final version of an offering document, the Midwest selling agreement, in June 2009.

6. Rules 3040 and 2110 are, and were applied, in a manner consistent with the purposes of the Exchange Act.

We have stated repeatedly that the prohibition on private securities transactions is fundamental to an associated person's duties to his customers and his firm.[28] Such misconduct deprives investors of a brokerage firm's oversight, due diligence, and supervision—protections investors have a right to expect.[29] Consequently, Rule 3040 is, and FINRA applied the rule in a manner, consistent with the purposes of the Exchange Act.

* * *

We find that Mielke and Shultz engaged in private securities transactions without providing written notice to their member firm employer. Further, they received selling compensation without obtaining written approval of the transactions by their member firm employer. There is no documentary evidence showing the required written notice and written approval by Brookstone (before the June 2009 selling agreement), and the testimony of Locy and Turbeville, which FINRA credited, supports a finding that Applicants had not provided oral notice that they were selling Midwest membership interests before Brookstone learned about such sales in November 2009. We therefore sustain FINRA's finding that Applicants violated FINRA Rule 3040.

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28 *See Friedman*, 2011 WL 1825025, at *10 & n.34.

29 *Id.* at n.35 (citing *Barkate*, 2004 WL 762434, at *5 & n.27).

C. Applicants violated NASD Rule 3030 by failing to provide prompt written notice to Brookstone of their outside business activities.

NASD Rule 3030 states that "[n]o person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member."

Mielke and Shultz owned and managed Midwest. Mielke received selling commissions and Shultz received a monthly salary in addition to their pro rata shares of any Midwest profits that were distributed to them through Harvest, Midwest's Manager. Yet Applicants failed to provide Brookstone with prompt written notice of their involvement in Midwest. For example, their Outside Business Interest Schedules included no information specifically referring to Midwest or to Applicants' Midwest-related compensation.

On appeal, Applicants concede that there was a "problem" with the Outside Business Interests Schedules that they submitted to Brookstone in 2008 and 2009, but they claim that they did not believe a full disclosure of their involvement with Midwest was necessary in those documents, based on their "good faith belief" that "Brookstone was already aware of the facts." As discussed above, we find that the record, including the credible testimony of Locy and Turbeville, does not support Applicants' claim that Brookstone knew about their sales at the time Applicants submitted their Outside Business Interests Schedules. And even if we accepted Applicants' argument that Brookstone was aware of their involvement in Midwest because of ongoing discussions with Midwest's securities attorney, such notice does not satisfy Rule 3030's requirement of written notice.[30]

Rule 3030 is consistent with the purposes of the Exchange Act because prompt written disclosure of outside business activities allows member firms to raise any objections to the outside activities in a timely manner and to exercise appropriate supervision of the activities of registered persons.[31] We therefore sustain FINRA's finding that Applicants violated Rule 3030 and 2110 by engaging in undisclosed outside business activities and that Rule 3030 is, and FINRA applied the rule in a manner, consistent with the purposes of the Exchange Act.[32]

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[30] We have held that constructive notice does not satisfy the requirements of Rule 3030. *See Sears*, 2008 WL 2597567, at *4 & n.24.

[31] *See Order Approving Proposed Rule Change Relating to Outside Business Activities of Associated Persons of Member Firms*, Exchange Act Release No. 26178, 1988 WL 902783, at *1 (Oct. 13, 1988) (approving NASD's enactment of Rule 3030 to address the securities industry's growing concern about preventing harm to the investing public or a firm's entanglement in legal difficulties based on an associated person's unmonitored outside business activities).

[32] These violations also constitute violations of NASD Rule 2110 and FINRA Rule 2010, which require members to observe "high standards of commercial honor and just and equitable principles of trade." *See supra* note 1.

D. Applicants engaged in conduct inconsistent with just and equitable principles of trade by making misstatements on their 2008 and 2009 Outside Business Interests Schedules.

As discussed above, FINRA Rule 2010, and its predecessor NASD Rule 2110, prohibit conduct by associated persons of member firms that is inconsistent with just and equitable principles of trade. It is well established that FINRA's "disciplinary authority [under Rule 2110] is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade even if that activity does not involve a security."[33] We have stated that Rule 2110 applies where the conduct at issue "reflects on the associated person's ability to comply with the regulatory requirements of the securities business."[34]

Here, Mielke submitted an Outside Business Interests Schedule to Brookstone in April 2008 that included no mention of his involvement with Midwest, even though he had formed Midwest in January 2008 and had already begun, before April 2008, to sell membership interests both personally and through other registered representatives, raising approximately $500,000. In April 2009, both Mielke and Shultz submitted identical Outside Business Interests Schedules, which made no specific reference to Midwest and included only vague allusions to being "in the planning stages of . . . working with an investment group dealing in medium term notes," even though Midwest had already sold several million dollars of membership interests at that time. Applicants claim that these disclosures adequately informed Brookstone about their involvement in Midwest, but as discussed above, we find the disclosures to be wholly inadequate. Applicants were in charge of all aspects of Midwest's operations, with Mielke receiving the "bulk" of his income from Midwest and Shultz receiving a monthly salary and serving as Midwest's primary money manager.

The false statements Applicants made on their Outside Business Interests Schedules were inconsistent with just and equitable principles of trade and reflect poorly on their ability to comply with regulatory requirements. We therefore sustain FINRA's findings that Mielke violated NASD Rule 2110 and FINRA Rule 2010 and Shultz violated FINRA Rule 2010 and that these rules are, and FINRA applied them in a manner, consistent with the purposes of the Exchange Act.

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[33] *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996); *see also Ialeggio v. SEC*, 185 F.3d 867, 1999 WL 362896, at *2 (9th Cir. 1999) (Table) (same); *Daniel D. Manoff*, Exchange Act Release No. 46708, 2002 WL 31769236, at *4 (Oct. 23, 2002) (noting that application of Rule 2110 to business-related conduct not involving a security "is well established"); *Thomas E. Jackson*, Exchange Act Release No. 11476, 1975 WL 162936, at *2 (June 16, 1975) (stating that, although "[applicant's] wrongdoing in this instance did not involve securities, [FINRA] could justifiably conclude that on another occasion it might").

[34] *Manoff*, 2002 WL 31769236, at *4.

E Shultz violated NASD Rule 3110 by causing Brookstone to maintain inaccur ate books and records.

NASD Rule 3110 requires member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of [FINRA] and as prescribed by SEC Rule 17a-3."[35] Under Exchange Act Rules 17a-3 and 17a-4, FINRA member firms must make and keep books and records documenting their business activities, including documentation of the securities transactions executed by their associated persons.[36] Under these provisions, Brookstone was required to record in its books and records all sales of securities by its associated persons.

After Brookstone approved Midwest's sales of membership interests through the June 2009 selling agreement, new investors purchased an additional $1.47 million in Midwest membership interests. Shultz acknowledges that he failed to route sales documentation for the post-June 2009 Midwest transactions through Brookstone. Without such information, Brookstone did not include in its books and records crucial information related to those transactions, including the dates and amounts of the transactions at issue and the registered representatives who made the sales. Associated persons responsible for a member firm's failure to maintain accurate and complete books and records are responsible for causing the firm's violations of Rule 3110.[37]

Shultz primarily claims that he was not aware of his obligations to provide Brookstone with such documentation. But, as discussed above, Brookstone's WSPs clearly stated that the appropriate personnel were required to route sales transactions through the member firm in order to comply with recordkeeping obligations, and Locy testified that, upon approving the sale of Midwest through Brookstone, he had informed Shultz of his obligations. And, in any event, Shultz's claims of ignorance of his obligations do not excuse the violations.[38]

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35 The Rule further states that the format of such records "shall comply with Rule 17a-4 under the [Exchange Act]."

36 17 C.F.R. § 240.17a-3(a)(6)(i), 17 C.F.R. § 240.17a-4(b)(1).

37 *See North Woodward Fin. Corp. and Douglas A. Troszak*, Exchange Act Release No. 60505, 2009 WL 2488066, at *5 (Aug. 14, 2009) (finding that associated person's failure to prepare and maintain a current general ledger and trial balance, as required by Rule 17a-3, caused violations of Rule 3110).

38 *See, e.g.*, *Friedman*, 2011 WL 1825025, at *6 & n.16 (citing *Phillipe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 & n.18 (Nov. 8, 2006) (noting that registered representative's "claimed ignorance of his obligations is only aggravated in light of his fifteen years of experience in the securities industry"); *see also Ryan R. Henry*, Exchange Act Release No. 53957, 2006 WL 1565128, at *3 & n.13(Jun. 8, 2006) ("A registered representative is assumed as a matter of law to have read and have knowledge of [SRO] rules and requirements.") (citing *Carter v. SEC*, 726 F.2d 472, 473-74 (9th Cir. 1983); *Walter T. Black*, Exchange Act

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Rule 3110 protects investors because it requires that member firms "conduct their business operations with regularity and that their records accurately reflect those operations."[39] Shultz's failures here made it impossible for Brookstone to keep track of the securities being sold by its registered representatives for purposes of meeting Brookstone's obligations under NASD Rule 3040. Therefore, FINRA's application of Rule 3110 here was, and the rule is, consistent with the purposes of the Exchange Act.[40]

F. Shultz violated FINRA Rule 2150 by misusing customer funds.

FINRA Rule 2150 states that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." As Midwest's CFO, Shultz was responsible for calculating Midwest's profits and dividing them between Harvest and the investors, with each receiving 50 percent. In September and October 2009, Midwest received $374,500 in new investor funds, but Shultz did not invest those funds in Vestium, as he was supposed to do. Rather, Shultz left those funds in Midwest's checking account and misallocated $147,000 of that amount to Harvest, describing it as "[p]art of profits." Shultz described his misallocation as a mistake caused by "bad accounting," an explanation that FINRA accepted.[41] The error was discovered by an outside accountant Midwest hired to assist with Midwest's books and records. The outside accountant ultimately determined that, of the $147,000 Shultz improperly misallocated to Harvest, Harvest was entitled to $102,000 in accrued, but previously unpaid, profits. Therefore, he determined that Shultz had misused approximately $45,000 of customer funds.[42]

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Release No. 28630, 50 SEC 424, 1990 WL 322246, at *2 (Nov. 20, 1990) ("[L]ack of familiarity with the NASD's rules cannot excuse [registered representative's] conduct."))).

39 *See John F. Lebens*, Exchange Act Release No. 36691, 1996 WL 20836, at *2 (Jan. 5, 1996).

40 These violations also constitute violations of FINRA Rule 2010, which requires members to observe "high standards of commercial honor and just and equitable principles of trade." *See supra* note 1.

41 We have held that violations involving the misuse of customer funds do not require a showing of scienter. *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *8 (Jan. 9, 2015) (finding no need to establish scienter to support a violation relating to misuse of customer funds, but finding the facts of the case at issue supported such a finding). Further, to the extent Shultz's arguments are intended to mitigate the severity of his violations for sanctions purposes, as discussed elsewhere in this opinion, FINRA imposed no sanctions for Shultz's violations of Rule 2150, in light of the bars it imposed for his other violations.

42 As discussed above, through a transfer from Harvest to Midwest, this $45,000 was returned to the affected investors. But those investors were denied any benefit they may have accrued if their money had been properly invested at the time they purchased their membership interests.

"[M]isuse of customer funds is 'patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote.'"[43] Based on Shultz's admitted improper diversion of significant funds invested with Midwest, we sustain FINRA's finding that Shultz violated FINRA Rules 2150 and 2110, and that Rule 2150 is, and find that FINRA applied the rule in a manner, consistent with the purposes of the Exchange Act.[44]

G. 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.[45] As we have emphasized, Rule 8210 is essential to FINRA's ability to investigate possible misconduct by its members and associated persons.[46] We have long recognized that the language of Rule 8210 is "unequivocal" regarding an associated person's responsibility to cooperate with FINRA information requests and that vigorous enforcement of Rule 8210 "helps ensure the continued strength of the self-regulatory system—and thereby enhances the integrity of the securities markets and protects investors. . . ."[47]

Applicants admit that they failed to comply fully with FINRA's information requests. FINRA made multiple requests for information from Mielke. But Mielke responded only partially to FINRA's information requests and waited over two years, until just before his scheduled hearing date, to provide most of the limited information that he eventually submitted. We have held that associated persons may not decide which specific FINRA information requests they will fulfill.[48] In the end, Mielke never provided responsive answers to most of the

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43 *Henry E. Vail*, Exchange Act Release No. 35872, 1995 WL 380152, at *2 n.12 (June 20, 1995) (quoting *Wheaton D. Blanchard*, Exchange Act Release No. 12484, 1976 WL 160367, at *1 (May 27, 1976)), *aff'd*, 101 F.3d 37 (5th Cir. 1996); *see also Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 WL 358737, at *16 & n.21 (Feb. 1, 2010) (same), *petition denied*, 647 F.3d 1156 (D.C. Cir. 2011).

44 These violations also constitute violations of FINRA Rule 2010, which requires members to observe "high standards of commercial honor and just and equitable principles of trade." *See supra* note 1.

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

46 Rule 8210 is the principal means by which FINRA obtains information from member firms and associated persons in order to detect and address industry misconduct. *See, e.g., Charles C. Fawcett, IV*, Securities Exchange Act Release No. 56770, 2007 WL 3306105, at *6 (Nov. 8, 2007) (stating that, because of a lack of subpoena power, Rule 8210 is a "vitally important" tool to acquire information).

47 *See Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *4 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009).

48 *See CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *6

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key requests that FINRA made in 2009 and 2010, including documents showing emails and other communications between Midwest's attorney and Brookstone, which Mielke claimed would prove that he had disclosed the Midwest transactions.

Shultz repeatedly refused to appear for OTR testimony before FINRA, despite numerous efforts by FINRA to accommodate his scheduling requests. At one point, after refusing to appear on several separate occasions, Shultz told FINRA, through his counsel, that he simply wished to turn in his license. Shultz finally provided testimony to FINRA two years after his originally scheduled OTR date, and only a few months before the scheduled hearing date.

On the basis of these findings, we sustain FINRA's finding that both Applicants violated Rule 8210 and that the rule is, and that FINRA applied the rule in a manner, consistent with the purposes of the Exchange Act.[49]

III. Sanctions

A. Standard of Review

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.[50] As part of this review, we must consider any aggravating or mitigating factors[51] and whether the sanctions imposed by FINRA are remedial in nature and not punitive.[52] Although the Commission is not bound by FINRA's Sanction Guidelines, we use them as a benchmark in

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& n.23 (stating that "associated persons 'may not ignore NASD inquiries; nor take it upon themselves to determine whether information is material to an NASD investigation of their conduct'") (quoting *Gen. Bond & Share Co. v. SEC*, 39 F.3d 1451, 1461 (10th Cir. 1994) (affirming Commission's finding that member violated predecessor to NASD Rule 8210)).

49 These violations also constitute violations of FINRA Rule 2010, which requires members to observe "high standards of commercial honor and just and equitable principles of trade." *See supra* note 1.

50 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.

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

52 *Paz Sec.*, 494 F.3d at 1065 ("The purpose of the order [must be] remedial, not penal.") (quoting *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940); *see also* FINRA Sanction Guidelines at 2 ("Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry.").

conducting our review under Section 19(e)(2).[53] As discussed below, we find the sanctions imposed on Applicants to be consistent with the statutory requirements and sustain them.

B. FINRA's bars of Mielke and Shultz for their violations of Rules 3040 and 3030 are neither excessive nor oppressive.

The Sanction Guidelines authorize the aggregation or "batching" of violations for purposes of determining sanctions if, among other things, the violations result from a single systemic problem or cause.[54] FINRA found that, although the Guidelines permitted it to assess separate sanctions for each of Applicants' violations, the Rule 3040 and 3030 violations at issue here were related and a unitary sanction was appropriate. We agree with FINRA that Applicants' violations of Rules 3040 and 3030 both derive from their significant involvement and control of Midwest, and we sustain FINRA's determination to impose a unitary sanction for those violations.

For engaging in private securities transactions without providing prior written notice and obtaining the required approval, the Sanction Guidelines recommend a fine between $5,000 and $50,000, a suspension of at least one year, or a bar.[55] For engaging in outside business activities, the Guidelines suggest a suspension of up to one year or, in egregious cases, a bar.[56] The Guidelines for both Rule 3040 and Rule 3030 enumerate a number of specific aggravating and mitigating circumstances, each of which FINRA considered and found to weigh in favor of a bar.

FINRA found a number of aggravating factors. Mielke and Shultz owned a significant percentage of Midwest through their ownership of Harvest and Harvest Holding. They derived a financial benefit from the sales of Midwest membership interests.[57] They did not provide Brookstone with oral notice of the transactions.[58] And the managers of the Vestium and Arcanum funds, into which Midwest invested member's proceeds, were enjoined against violations of the antifraud provisions of the federal securities laws; if Applicants had properly disclosed their sales of Midwest, Brookstone could have supervised the investments and protected its customers from exposure to such fraudsters.[59]

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53 *See, e.g., John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

54 *See* FINRA Sanction Guidelines, at 4 (General Principles Applicable to All Sanctions Determinations, No. 4).

55 *Id.* at 14.

56 *Id.* at 13.

57 *Id.*

58 *Id.* at 15 (Principal Considerations in Determining Sanctions, No. 9).

59 *Id.* at 14.

Individual aggravating factors also apply to each Applicant. For example, Mielke had the primary responsibility for setting up Midwest, including arranging for the preparation of offering documents, hiring registered representatives to sell membership interests, and conducting due diligence on Vestium and Arcanum. And, as discussed above, Mielke has a disciplinary history of violations of Rule 3040 and was serving a six-month suspension for violating Rule 3040 at the time of some of the conduct at issue here. We sustain FINRA's finding that such a disciplinary history is a significant aggravating factor.[60] FINRA also found it aggravating that Mielke's conduct had extended over a 17-month period from January 2008 through June 2009. During this period, investors (including some Brookstone customers) purchased millions of dollars of Midwest membership interests.[61] FINRA found that the accumulation of these aggravating factors warranted a bar against Mielke.

Although Mielke may have initiated the Midwest offering, FINRA also found that Shultz's role in Midwest was quite significant. Shultz managed the daily operations of Midwest and was identified as the "Manager" of the Midwest offering. Shultz calculated the profits of the enterprise and made determinations regarding the amounts of distributions owed to investors. He also consulted with investors regarding redemption requests. As with Mielke, FINRA found that the extent and length of Shultz's involvement in the conduct at issue (from approximately September 2008 through June 2009) were aggravating factors. FINRA also noted as aggravating factors the number of transactions that occurred while Shultz managed Midwest's operations and the dollar amounts involved in those transactions. On these bases, FINRA found that Shultz's misconduct was egregious and warranted a bar.

FINRA found no mitigating factors. On appeal, Applicants suggest that it is mitigating that there is no specific evidence of customer harm resulting from their violations. But even assuming Applicants are correct in arguing that they did not harm customers financially by their Rule 3040 and 3030 violations, such a finding would not be mitigating.[62] As described above, the violations at issue harmed the customers by depriving them of Brookstone's supervision of their investments, regardless of whether the investors suffered financial harm.

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[60] *See id.* at 2 (General Principles Applicable to All Sanctions Determinations, No. 2), 6 (Principal Considerations in Determining Sanctions, No. 1).

[61] *Id.* at 15 (Principal Considerations determining Sanctions, No. 11).

[62] *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *18 & n.137 (Nov. 15, 2013) ("[T]he absence of . . . customer harm is not mitigating, as our public analysis focus[es] . . . on the welfare of investors generally.") (citing *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at *7 & n.25 (Feb. 24, 2012) (internal quotations omitted); *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at *5 (Apr. 11, 2008) (holding that applicants' failure to comply with NASD rule "are not mitigated because those failures did not, in themselves, produce a monetary benefit to Applicants or result in injury to the investing public"), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Coastline Fin., Inc.*, Exchange Act Release No. 41989, 54 SEC 388, 1999 WL 798874, at *5 (Oct. 7, 1999) (rejecting absence of customer harm as a mitigating factor for sanctions)).

Applicants also argue that their violations of Rules 3040 and 3030 are mitigated because Mielke retained securities counsel "to insure compliance with FINRA rules and to negotiate a selling agreement with Brookstone." To establish a valid advice-of-counsel claim, Applicants must show: (1) that they made complete disclosure to counsel; (2) that they sought advice on the legality of the intended conduct; (3) that they received advice that the intended conduct was legal; and (4) that they relied in good faith on counsel's advice.[63] But Mielke admitted in his testimony that he did not recall what he discussed with the securities counsel "in the aspect of what was to be disclosed and what wasn't to be disclosed." And Shultz's testimony also did not establish that the securities attorney had notified Brookstone of the ongoing Midwest sales transactions but merely that Shultz understood that the attorney "had been discussing Midwest with Brookstone all along and that [Brookstone] knew that we were operating Midwest."

Because we agree with FINRA's findings that Applicants' Rule 3040 and Rule 3030 violations were egregious and presented numerous aggravating factors and no mitigating factors, we sustain FINRA's imposition of bars in all capacities against both Applicants for these violations.

C. FINRA's bars of Mielke and Shultz for their misstatements on the April 2008 and 2009 Outside Business Interests Schedules are neither excessive nor oppressive.

Although the Guidelines contain no specific recommendation for misstatements on member firm compliance forms, FINRA concluded that the most closely analogous guideline was for forgery or falsification of records.[64] We have sustained FINRA disciplinary sanctions where FINRA applied those Guidelines in a case involving misstatements on firm compliance documents.[65] Those Guidelines recommend a bar in egregious cases.[66] As discussed below,

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[63] *Zacharias v. SEC*, 569 F.3d 458, 467 (D.C. Cir. 2009); *Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994); *C.E. Carlson v. SEC*, 859 F.2d 1429, 1436 (10th Cir. 1988); *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 467 (9th Cir. 1985); *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981). *See also Vastano*, 2004 WL 1857139, at *5 & n.22; *Barkate*, 2004 WL 762434, at *4 & nn.19-20; *Toni Valentino*, Exchange Act Release No. 49255, 57 SEC 330, 2004 WL 3000098, at *5 & n.11 (Feb. 13, 2004).

[64] The Guidelines make clear that they "are not intended to be absolute," and "[f]or violations that are not addressed specifically, [a]djudicators are encouraged to look to the guidelines for analogous violations." *See* Guidelines, Overview. *See also Robert Conway Kakit Ng*, Exchange Act Release No. 70833, 2013 WL 5960703, at *10 & n.48 (Nov. 7, 2013).

[65] *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at *8 (Feb. 24, 2012) (finding that "FINRA reasonably determined that the falsification of records was the most analogous guideline" where applicant had failed to provide written notice of his outside brokerage accounts on compliance forms submitted to member firm employer).

[66] *See Guidelines*, at 37.

FINRA considered each Applicant's violation individually and determined that they were egregious and warranted a bar.

At the time Mielke completed his 2008 Outside Business Interests Schedule, he had already raised $500,000 for Midwest. At the time of his 2009 schedule, Mielke himself had directly sold membership interests to five investors, including two Brookstone customers, totaling over $1 million. And, at that time, Midwest had received twenty-two investments totaling over $3 million. Given the significant number and dollar amount of these transactions, Mielke was obviously aware of his involvement in Midwest at the time he submitted these schedules. FINRA correctly found that the record demonstrated that Mielke's misstatements were intentional and misled Brookstone about the extent of Mielke's involvement in Midwest while Mielke negotiated the terms of a selling agreement with Brookstone. This is an aggravating factor under the Guidelines for falsification.[67]

On appeal, Mielke argues that his violations of Rule 2110 and 2010 should be viewed "in light of the ongoing communications between Midwest and Brookstone." But, by Mielke's own admission, neither Turbeville nor Locy had approved the sale of Midwest securities in writing until June 2009. Therefore, Mielke knew that he was repeatedly selling Midwest securities to investors while using an offering memorandum that had not been approved by his member firm employer.

We concur with FINRA's finding that Mielke's misstatements on the Outside Business Interests Schedules were egregious. Mielke's failure to disclose his significant role at Midwest undermined Brookstone's "ability to detect actual or potential conflicts of interest, or other violative conduct."[68] Such a violation is serious because it impedes detection of other potentially violative conduct.[69] We sustain FINRA's imposition of a bar against Mielke for his misstatements on the 2008 and 2009 Outside Business Interests Schedules.

Shultz's misstatements on his 2009 Outside Business Interests Schedule were similarly egregious. As with Mielke, Shultz was aware of his significant involvement in Midwest at the time he submitted his schedule, and the schedule neither mentioned Midwest by name nor explained that millions of dollars in membership interests had already been sold at the time he submitted the schedule. Further, FINRA correctly noted that, if Shultz had not made the misstatements, his other violations for misuse of customer funds and causing Brookstone's books and records violations may have been avoided, because Brookstone would have exercised supervisory authority over the transactions.

FINRA noted that Shultz had less securities industry experience and made misstatements only on one Schedule (as opposed to Mielke's two Schedules), but it found that those factors did

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67 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

68 *See Braff*, 2012 WL 601003, at *7.

69 *Id.*

not outweigh the significant aggravating factors. Regardless of the length of Shultz's experience in the industry, Shultz was a retired mathematician and FINRA correctly pointed to his "life experience" as supporting a finding that he should have had awareness of the importance of providing true statements regarding his involvement with Midwest to his member firm employer. Shultz also claimed that he merely followed Mielke's instructions in filling out the schedule, but FINRA correctly rejected this argument, noting that associated persons are responsible for their own compliance with FINRA Rules and cannot shift that responsibility to another individual.[70]

D. FINRA's bars of Mielke and Shultz for their Rule 8210 violations 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."[71] This rule is at the "heart of the self-regulatory system for the securities industry"[72] and is an "essential cornerstone of [FINRA's] ability to police the securities markets and should be rigorously enforced."[73] "Failures to comply are serious violations because they subvert [FINRA's] ability to carry out its regulatory responsibilities," threatening investors and the markets.[74] Rather than respond to FINRA's Rule 8210 requests, Mielke repeatedly refused to provide responsive documents and, when he did provide some documents, his responses only partially fulfilled FINRA's requests and included certain patently false information. And Shultz continuously refused to provide OTR testimony for over two years, at one point expressing a desire to "send in his license" and voluntarily withdraw. It is well established that an individual may not "second guess" a Rule 8210 request or "set conditions on their compliance."[75] The bars FINRA imposed on Mielke and Shultz are remedial because they will protect the investing public by encouraging timely cooperation essential to the prompt discovery and remediation of industry misconduct. The bars also will deter others from ignoring FINRA's information requests.

The sanctions imposed on Mielke and Shultz are consistent with the Sanction Guidelines. FINRA determined that Mielke provided a partial response because he timely appeared for an OTR and provided some documents. The Guidelines identify three principal considerations for determining sanctions for a partial response: the "[i]mportance of the information requested as

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70 *Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *21 (Jan. 30, 2009) ("We have held repeatedly that a 'respondent cannot shift his or her responsibility for compliance with an applicable requirement to a supervisor or to the NASD.'") (citation omitted), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

71 *See supra* note 46.

72 *Id.*

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

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

75 *CMG Inst'l Trading*, 2009 WL 223617, at *8 (Jan. 30, 2009) (citations omitted).

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."[76] The Guidelines also provide that a bar is standard for a partial but incomplete response unless the person can demonstrate substantial compliance with all respects of the request.

We acknowledge, as FINRA did, that Mielke appeared for his scheduled OTR testimony and provided some of the information that FINRA requested, including providing copies of his tax returns and (two years later) additional information including some Midwest-related documentation. But we agree with FINRA that "[i]n most respects, however, the [8210] request for information and documents remained unfulfilled." Specifically, we agree with FINRA that some of the information Mielke failed to provide were "documents necessary to assist in FINRA's investigation of [Midwest] and the offering."

We also agree with FINRA that Mielke's failure to provide the requested documentation substantiating Mielke's claims that he had proof of Brookstone's awareness of the Midwest sales "curtailed FINRA's ability to verify his claims." Such inhibition of FINRA's regulatory functions is a "serious violation justifying stringent sanctions."[77]

Mielke claims that his personal health issues explain his Rule 8210 violations. While we do not doubt the existence of Mielke's significant health issues, it was his obligation to contact FINRA, explain the reasons why his response would be delayed, and propose alternate arrangements, none of which Mielke did here.[78]

We also note that Mielke failed to provide any responsive information to FINRA for nearly two years, and provided much of the additional information only on the cusp of his hearing. Much of the information he ultimately provided, such as his narrative description of his involvement with Midwest, was readily available to him throughout this two-year period. But it took the institution of a disciplinary proceeding and the threat of imminent sanctions before Mielke provided even a partial response. Mielke fails to offer any persuasive reason why he could not have provided this information when FINRA initially requested it.

Shultz's Rule 8210 failure was treated as a complete failure because he did not appear for his requested OTR testimony until after FINRA instituted disciplinary proceedings against him. Under such circumstances, the Guidelines recommend a bar.[79] We have emphasized that a bar is

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[76] *Guidelines*, at 33.

[77] *Elliot M. Hershberg*, Exchange Act Release No. 53145, 2006 WL 140646, at *3 (Jan. 19, 2006) (stating that "[f]ailure to comply is a serious violation justifying stringent sanctions because it subverts NASD's ability to execute its regulatory functions"), *pet. denied*, 210 F. App'x 125 (2d Cir. 2006).

[78] *See Fawcett*, 2007 WL 3306105, at *5.

[79] *See* Guidelines, at 33.

an appropriate sanction in such circumstances because FINRA "should not have to initiate a disciplinary action to elicit a response to its information requests."[80]

Shultz cites his daughter's and wife's health concerns as reasons for his failure to appear for testimony. But, as with Mielke's claims regarding his own health issues, Shultz made no effort to explain his needs or propose alternate arrangements.[81] Shultz also now claims that his failure to appear resulted from his inability to obtain new counsel after his former counsel had withdrawn from representing him at the time of Mielke's OTR testimony. But the record indicates that Shultz obtained new counsel promptly after his former counsel withdrew. Further, "[a]lthough FINRA's rules permit the participation of counsel, it is well established that 'there is no right to counsel in [its] disciplinary proceedings.'"[82] Given Shultz's complete failure to respond to FINRA's request for testimony until he was about to be barred or suspended, and the lack of mitigating factors, we sustain FINRA's bar of Shultz for his Rule 8210 violations.

We find the sanctions imposed on Mielke and Shultz to be neither excessive nor oppressive.[83]

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80 *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 WL 3523186, at *4 (Sept. 10, 2010), *aff'd*, 436 F. App'x 31 (2d Cir. 2011).

81 *See supra* note 78.

82 *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *12 (Nov. 9, 2012) (quoting *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at *6 (Dec. 22, 2008).

83 FINRA also ordered Mielke and Shultz to pay, jointly and severally, appeal costs of $2,468.85. Because we find that the sanctions FINRA imposed were appropriately tailored to the violations at issue, we likewise sustain its imposition of costs.

As discussed above, FINRA stated that it would have fined Shultz $10,000 and suspended him in all capacities for one year for his violations of Rules 2150 and 2010 involving the misuse of customer funds and his violations of Rules 3110 and 2010 for causing Brookstone to maintain inaccurate books and records, but FINRA did not impose these sanctions in light of the bars it imposed for Shultz's other violations. Since FINRA imposed no sanctions for these violations, Shultz's argument on appeal that these violations merited only "minimal" sanctions is not relevant in this appeal.

We note, however, the presence of aggravating factors for both violations. Shultz's misuse of customer funds lasted for nine months, from September 2009 until its discovery in June 2010, and was only discovered by an outside accountant. *See* Guidelines, at 6 (Principal Considerations in Determining Sanctions, No. 9). This discovery was undoubtedly delayed by Applicants' failure to disclose the Midwest sales to Brookstone more promptly. Shultz also misused approximately $45,000 in investor funds, a significant amount of money, which is aggravating. *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 18). In light of these aggravating factors, while we sustain FINRA's determination not to impose additional sanctions for Shultz's misuse of customer funds, we agree with FINRA that a $10,000 fine and a

(continued…)

An appropriate order will issue.[84]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN, and PIWOWAR).

Brent J. Fields
Secretary

(…continued)
one-year suspension would have been appropriate.

With respect to Shultz's books and records violations, Shultz claims that his attorney never instructed him about his obligation to route sales documentation through Brookstone. A reasonable reliance on competent legal or accounting advice can be a mitigating factor in determining sanctions. *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 7). But, as discussed above, Shultz has not shown that he met the requirements for a valid advice of counsel defense. *See supra* note 63. Shultz also claims that the selling agreement between Brookstone and Midwest did not specifically alert him to his responsibility to route sales documentation through Brookstone. But, as discussed above, both Locy and Brookstone's WSPs made clear that Shultz, as the manager of Midwest, had the responsibility to assist Brookstone in maintaining accurate books and records by providing documentation in support of sales transactions. In light of the absence of mitigating factors, while we sustain FINRA's determination not to impose additional sanctions for Shultz's causing Brookstone to violate Rule 3110 and 2010, we agree with FINRA that a $10,000 fine and a one-year suspension would have been appropriate.

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75981 / September 24, 2015

Admin. Proc. File No. 3-16022

In the Matter of the Applications of

BLAIR C. MIELKE
and
FREDERICK W. SHULTZ

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

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

ORDERED that the disciplinary action taken by FINRA against Blaire C. Mielke and Frederick W. Shultz, and the assessment of costs imposed, is sustained.

By the Commission.

Brent J. Fields
Secretary