SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59328 / January 30, 2009

Admin. Proc. File No. 3-12933

In the Matter of the Application of

SCOTT EPSTEIN

c/o George L. Mahr, II
Mahr and Mahr, LLC
80 Main Street
P.O. Box 534
Madison, NJ 07940

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDING

Unsuitable Recommendations

Former registered representative of member firm of registered securities association made unsuitable recommendations to customers. Held, association's findings of violation and the sanction it imposed are sustained.

APPEARANCES:

George L. Mahr II and George L. Mahr III, of Mahr and Mahr, LLC, for Scott Epstein.

Marc Menchel, Alan Lawhead, and Gary J. Dernelle, for FINRA.

Appeal filed: January 17, 2008
Last brief received: July 7, 2008 1/

I.

Scott Epstein, a former registered representative with Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch" or the "Firm"), a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"), appeals from FINRA disciplinary action. 2/ FINRA found that Epstein made unsuitable mutual fund switch 3/ recommendations to customers in violation of NASD Rules 2310, 2110, and IM-2310-2. 4/ For these violations, FINRA barred Epstein from

---

1/ On July 15, 2008, FINRA moved for leave to file a sur-reply to Epstein's reply brief. Commission Rule of Practice 450 states that "No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Commission." 17 C.F.R. § 201.450. The briefing schedule order does not contemplate the filing of a sur-reply and we have determined that the filing of FINRA's additional brief is unnecessary to our review of Epstein's appeal. Accordingly, we deny FINRA's motion.

2/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the final disciplinary action on appeal here was taken after the consolidation, references to FINRA herein shall include references to NASD.

3/ A mutual fund switch involves one or more mutual fund redemption transactions coupled with one or more related mutual fund purchase transactions. See Laurie Jones Canady, 34 S.E.C. 65, 68 n.5 (1999) (citing Russell L. Irish, 42 S.E.C. 735, 737 n.5 (1965) (defining mutual fund switch), aff'd, 367 F.2d 637 (9th Cir. 1966)), petition denied, 230 F.3d 362 (D.C. Cir. 2000).

4/ NASD Rule 2310, sometimes referred to as the "suitability rule," requires that, in recommending the purchase, sale, or exchange of any security to a customer, a member must have reasonable grounds for believing that the recommendation is suitable for that customer based on the facts, if any, disclosed by the customer as to his other securities holdings and the customer's financial situation and needs. NASD Rule IM-2310-2 imposes on members and registered representatives the obligation of "fair dealing" in relationships with customers, and states that sales efforts must be undertaken within NASD's ethical standards. NASD Rule 2110 requires the observance of "high standards of commercial honor and just and equitable principles of trade." A violation of the

(continued...)

acting in any capacity with any member firm. 5/ We base our findings on an independent review of the record.

II.

A. Background

Epstein joined Merrill Lynch in August 2000 after graduating from college and was assigned to a Merrill Lynch "call center" in Hopewell, New Jersey, the Financial Advisory Center (the "FAC"). 6/ Epstein was a registered general securities representative whose official title was Investment Services Advisor ("ISA").

The FAC handled Merrill Lynch accounts with assets of $100,000 or less. Merrill Lynch transferred such accounts from its branch offices to the FAC. Whenever a customer called Merrill Lynch, the call would be routed to a randomly-selected and available ISA. ISAs also would make unsolicited telephone calls to customers whose accounts had been transferred to the FAC. Customer conversations routinely were recorded by the FAC.

ISAs were permitted to make securities recommendations regarding mutual funds but not individual stocks and bonds except when a customer requested such advice. In his investigative testimony to NASD, Epstein stated that, when speaking with a customer, whether on an inbound call or on an unsolicited basis, the ISAs had access to information via their desktop computers and other proprietary databases regarding when a customer had opened an account, the customer's age, marital status, income, total net assets, and the type of investments they held. However, Epstein's counsel stated in an affidavit filed with the Commission in this proceeding that the ISAs frequently experienced difficulties with "the FAC computer system," which "crashed constantly."

4/ (...continued)
NASD suitability rule is also a violation of NASD Rule 2110. See, e.g., Wendell D. Belden, 56 S.E.C. 496 (2003).

5/ FINRA also assessed costs. It declined to reach findings by its Hearing Panel that Epstein's recommendations also were accompanied by misrepresentations and omissions of material fact. These allegations, therefore, are not before us.

6/ On March 15, 2006, Merrill Lynch settled NASD allegations relating to sales practice abuses at the FAC, without admitting or denying those allegations, by agreeing to a censure and a $5 million fine, in addition to several undertakings. See NASD Fines Merrill Lynch $5 Million for Call Center Supervisory Failures, Sales Contest Violations, http://www.finra.org/Industry/Issues/Advertising/NewsReleases/2006/p115786 (last visited Dec. 3, 2008).

ISAs were divided into teams and were required to achieve certain levels of production. The FAC occasionally held sales contests with prizes for individual ISAs and teams based on their overall production. Although the ISAs were salaried employees, the Firm offered them substantial bonuses for increased production, which included mutual fund sales. For example, Epstein was paid a base salary of $35,000 plus variable compensation consisting, in part, of bonuses called "production credits" for certain transactions. 7/ Epstein's variable compensation for the period from October 1, 2001 through March 2, 2002, approximately the period at issue, totaled $26,443.

Epstein, as a Merrill Lynch employee, agreed to comply with Merrill Lynch's Compliance Outline Handbook (the "Handbook"). The Handbook required the representative to "discuss the investment objective, investment strategy and risks associated with investment in any recommended mutual fund" and "the advantages and disadvantages of the various available share classes," including "front-end [and] back-end" loads, the Contingent Deferred Sales Charge ("CDSC") peculiar to Class B and Class C shares, "the existence and effect of any on-going distribution and maintenance fees," and the "availability of no-cost or low cost shares." 8/ The

7/ The variable compensation consisted of three components: production; client contact/new money; and "focus scores" based on communication and customer service skills. Epstein was paid a percentage of the production credit amounts that he earned, depending on the nature of the transactions that he effected. As part of his variable compensation, Epstein also earned specific dollar amounts for achieving certain production credit "hurdles."

8/ Generally, each mutual fund comprises several classes of shares that have different kinds of sales charges and operating expenses associated with them. See Rule 18f-3 under the Investment Company Act of 1940, 17 C.F.R. § 270.18f-3; Exemption for Open-End Management Investment Companies issuing Multiple Classes of Shares, 60 Fed. Reg. 11875, 11876 (Mar. 2, 1995). For example, the major cost associated with purchasing Class A shares is a sales charge known as a "front-end load." See, e.g., Raghavan Sathianathan, Securities Exchange Act Rel. No. 54722 (Nov. 8, 2006), 89 SEC Docket 774, 775 (barring respondent for making unsuitable mutual fund recommendations and for unauthorized trading), petition denied, No. 07-1002, slip op. (D.C. Cir. Dec. 2, 2008); Mutual Fund Regulation § 18:4.1 (Clifford E. Kirsch ed., 2d ed. 2005). This sales charge is paid when the shares are bought and it is deducted from the amount invested (effectively reducing the quantity of mutual fund shares purchased). By contrast, Class B shares have a back-end sales charge – the CDSC – but no front-end load. Sathianathan, 89 SEC Docket at 776; see generally Investment Company Act Rule 6c-10, 17 C.F.R. § 270.6c-10; Exemption for Certain Open-End Management Investment Companies to Impose Contingent Deferred Sales Loads, 60 Fed. Reg. 11887 (Mar. 2, 1995). The CDSC is collected from the investor when the mutual fund shares are sold rather than at the time of purchase. Sathianathan, 89 SEC Docket at 776. Typically, the CDSC is reduced for

(continued...)

Handbook cautioned that a switch should not be recommended "unless it will result in a net investment advantage for the client, considering all financial and other factors, including sales charges and tax consequences."

Merrill Lynch also provided ISAs with a summary sheet or "script" describing mutual fund share classes and the fees and expenses associated with each, that were to be discussed with customers. The script contained additional information regarding which share class would make the "most sense" for different types of customers, depending on their investment time horizon, the amount they wished to invest, and their sensitivity to fees and expenses. ISAs were expected to inform customers that "[t]he share class that is right for you depends in large part on the period of time you intend to hold the shares and the amount of money you intend to invest."

B. Epstein's Mutual Fund Switch Recommendations

FINRA's findings of violation relate to Epstein's recommendations between October 2001 and February 2002 of various transactions for the accounts of twelve FAC customers, many of whom were elderly, retired, and/or unsophisticated. Several of them had limited understanding of the applicable fee structures and other attributes of the funds referenced in Epstein's recommendations. Except as discussed below, Epstein did not inquire about the customer's financial situation or investment objectives. Sidney D. Krasner, of S.D. Krasner and Associates, who was qualified as an expert for NASD by the Hearing Panel, testified that Epstein "failed to secure sufficient information from these clients in order to make the kind of recommendations he made." According to Krasner, Epstein had an obligation "to refresh the record as to the risk tolerances and the investment objectives of these people," and "in most cases, [Epstein] failed to do that."

1. Thomas Reed

In October 2001, Epstein made an unsolicited telephone call to the seventy-eight year old Reed to discuss his IRA account, which consisted primarily of mutual funds. During their four-and-a-half minute conversation, Epstein recommended that Reed switch mutual funds into

---

8/ (...continued)
each year that an investor holds Class B shares, phasing out entirely after a certain number of years. Id. Class C shares also impose a CDSC, see Mutual Fund Regulation at § 18:4.1, but that charge is usually eliminated after those shares have been held for more than one year.

something "a little bit more stable for you . . . ." Epstein informed Reed that "it's not going to cost you . . . at all . . . to make the change." Reed acceded to the switch. 9/

On October 15, 2001, Epstein executed the following transactions in Reed's IRA account:

Sold $89,524 Merrill Lynch High Income Bond Fund Class B shares.
Bought $88,000 Alliance US Government Bond Fund Class B shares.

This switch resulted in a production credit to Epstein of $3,520.

Reed had owned the Merrill Lynch High Income Bond Fund Class B shares since 1993. They had an expense ratio of 1.29%, while the Alliance US Government Bond Fund Class B shares had an expense ratio of 2.80%.

Because the IRA had held the Merrill Lynch High Income Bond Fund Class B shares for more than four years, and the holding period for the back-end sales charge – the CDSC – for that investment had expired, Reed incurred no CDSC upon the sale of those shares. However, Epstein did not inform Reed that the Merrill Lynch High Income Bond Fund Class B shares would convert automatically into less expensive Class D shares of that fund with an expense ratio of 0.77% within two years (i.e., ten years after the original date of purchase). 10/ By switching the Merrill Lynch Class B shares out of that mutual fund less than two years before they were due to convert into less costly Class D shares, Epstein interrupted the holding period and eliminated the availability of a lower expense ratio for Reed's investment. Epstein also did not inform Reed that switching to the Alliance US Government Bond Fund Class B shares would trigger a new three-year CDSC holding period and higher operating expenses than the Merrill

9/ Reed's side of the recorded conversation can be heard clearly, while portions of Epstein's remarks are inaudible. Nonetheless, it is clear from both the transcript and the recording of the conversation that Epstein recommended that Reed switch mutual funds.

10/ The expense ratio for Class B (or Class C) shares typically is larger than for Class A shares. See generally Mutual Fund Regulation at § 18:4.1. According to NASD expert witness Krasner, Class B shares typically convert to either Class A shares with lower operating costs or to another share class with lower operating costs, usually after six to ten years. See also Investment Company Act Rule 18f-3(f), 17 C.F.R. § 270.18f-3(f); Exemption for Open-End Management Investment Companies issuing Multiple Classes of Shares, 60 Fed. Reg. at 11878. For example, according to Krasner, many Merrill Lynch Class B shares convert to Class D shares that have lower operating expenses than Class B shares but higher operating expenses than Class A shares. In other fund families, Class B shares eventually convert to Class A shares. See Sathianathan, 89 SEC Docket at 776.

Lynch High Income Bond Fund Class B shares. 11/ Epstein further did not tell Reed he could switch from the Merrill Lynch High Income Bond Fund Class B shares to the Merrill Lynch U.S. Government Fund Class B shares, with an expense ratio of 1.52%, without triggering a new CDSC holding period. Moreover, the Merrill Lynch U.S. Government Fund Class B shares would have matured into Class D shares, with an expense ratio of 1.00%, in less than two years because the investment would have maintained its original 1993 Merrill Lynch purchase date.

NASD expert Krasner observed that "[n]one of the inherent costs (or lost benefits) were discussed with Mr. Reed." Krasner testified that, although this switch was out of a "junk-bond fund" into a "more conservative" investment, Epstein failed to alert Reed that "the alternative for this switch was to buy the Merrill Lynch United States Government fund" which "would have been cost free, because the switch would have been within the same family of funds."

An NASD compliance specialist testified at the hearing that Epstein would not have received any production credit for recommending an exchange within the same mutual fund family. She also testified that, based on her review of Epstein's conversations with the customers, there were "no instances" where Epstein offered or discussed with customers the possibility of a free exchange of a mutual fund they already owned to another fund within the same fund family.

2. Doris Baumann

In October 2001, Epstein made an unsolicited telephone call to the residence of Doris Baumann, then an eighty-one year old homemaker, to discuss her Merrill Lynch trust account, of which she was the trustee. Baumann held a combination of mutual funds and individual stocks in that account. Epstein did not reach Baumann, but instead spoke to an individual who identified himself as Baumann's husband ("R. Baumann").

During their seven-and-a-half minute conversation, Epstein recommended to R. Baumann that Baumann switch from the Putnam New York Tax Exempt Fund, whose yield had fallen, to an Alliance fund that, Epstein stated, would provide Baumann with a better tax-free yield. Epstein assured R. Baumann that the switch to the Alliance fund "wouldn't incur any sort of

---

11/ Generally, according to Krasner, investors who switch funds within the same fund family can "tack" their holding period from the old fund to the new fund within that fund family. For example, if an investor who holds a class of shares with a CDSC that phases out after five years switched to another fund within the same fund family after two years, those two years would be credited toward the total five year period to which the CDSC would apply. Thus, the investor's original purchase date would be deemed the starting point for the calculation of any CDSC holding period for any fund within the same fund family. By contrast, according to Krasner, there usually is no tacking for switches between funds in different fund families. Switching between funds from different fund families would restart the holding period.

upfront sales charge" and that "there would just be a one-year hold on the investment." Epstein also informed him that "if you sold it in the first year, there'd be a 1 percent charge," but if "you hold onto it longer than that, no charge at all." At one point during the conversation, R. Baumann seemed confused, stating "[L]et me make – make sure. Let me – let me clear that up in my own mind." Eventually, R. Baumann acceded to Epstein's recommendation.

On October 18, 2001, Epstein executed the following transactions in Baumann's trust account:

Sold $93,892 Putnam New York Tax Exempt Income Class A shares.
Bought $93,000 Alliance Municipal Income Fund NY Class C shares.

This switch resulted in a production credit to Epstein of $3,720.

The Putnam New York Tax Exempt Income Class A shares had an expense ratio of 0.82%, while the Alliance Municipal Income Fund NY Class C shares had an expense ratio of 1.47%. R. Baumann stated in his declaration to NASD that he "did not understand the difference in expenses between the different classes of shares and Scott Epstein never explained it to [him]." 12/

In analyzing these transactions, Krasner questioned the suitability of Epstein's recommendation. Krasner noted that, although the performance of the two funds was "almost identical" over a five year period, the "total return for year 2000 was more than 200 basis points better for the Putnam Fund than for the Alliance Fund." According to Krasner, Epstein recommended a switch "from a Class A mutual fund, which already had reduced operating costs, into a Class C mutual fund that had substantially higher operating costs," and "those operating costs were never going to go away." Krasner also noted that "Epstein never explained . . . that there would be ongoing and continuing operating costs."

Epstein did not inquire as to Baumann's financial or tax status or other circumstances. As a result of the switch, Baumann realized a capital gain of $8,000 and incurred a corresponding tax liability of approximately $1,200. In his declaration to NASD, R. Baumann stated that "[a]t

---

12/ Class B and Class C shares typically carry higher distribution-and-service fees ("12b-1 fees") than Class A shares. See generally Mutual Fund Regulation at § 18:4.1. Accordingly, the total annual fund operating expense ratios for Class B and Class C shares generally are higher than those for Class A shares. See, e.g., Sathianathan, 89 SEC Docket at 776. The 12b-1 fees on Class B and Class C shares function as an ongoing sales charge for those shares and are deducted from the fund's assets. Class B shares typically convert to Class A shares (or to another class with lower 12b-1 fees) some time after the Class B shares' CDSC holding period has phased out. However, according to Krasner, Class C shares typically do not convert to another class of shares and thus continue to shoulder higher 12b-1 fees.

the time that [he] agreed to sell the Putnam, [he] never considered the tax consequences that [he] would be hit with." According to R. Baumann, "Epstein never discussed this with [him]" and if he had known, he would not have agreed to the switch.

3. Rose Roberts

In October 2001, Roberts, then a seventy-five year old widow, telephoned the FAC to inquire about the available balance in her money market account and to withdraw $300 from that account. As Roberts later stated in her declaration to NASD, she "had no intentions at the time to buy or sell anything."

Roberts's call was routed to Epstein. During the approximately twenty minute conversation, Epstein, after determining that Roberts was "looking to generate mainly income," and despite her apparent reluctance, recommended that Roberts liquidate her existing Eaton Vance Virginia Municipal fund and switch to another mutual fund that would provide her with a "higher tax free yield." Epstein also recommended "moving the money" from her IRA money market account "into some government bonds in something that is going to provide you with a higher yield." Although Roberts told Epstein "You're going too fast for me" and "I think I'm lost here (laughing)," she eventually acceded to Epstein's recommendations. Epstein never mentioned the name of the fund into which he planned to switch Roberts and did not discuss fees and expenses.

On October 31, 2001, Epstein executed the following transactions in Roberts's trust account:

Sold $21,615 Eaton Vance Virginia Municipal Fund Class B shares.
Bought $21,000 Alliance Muni Income Fund II, Virginia Portfolio, Class B shares.
Redeemed $9,385 from the money market account.
Bought $10,000 Merrill Lynch Municipal Bond National Fund Class B shares.

Epstein received production credits of $840 and $400, respectively, for these transactions.

The Eaton Vance Virginia shares had a slightly higher expense ratio than the Alliance Muni Income Fund shares. However, Roberts was beyond the CDSC holding period in her Eaton Vance fund. Had Roberts remained invested in the Eaton Vance Virginia Municipal Fund Class B shares, they would have matured into Class A shares with an expense ratio of 0.87%. 13/ Instead, when Epstein switched Roberts from that fund into Alliance Class B shares, which was in a different fund family, it triggered a new six-year CDSC holding period with a higher expense

13/ The record does not indicate when the Eaton Vance Virginia Municipal Fund Class B shares would mature into Class A shares.

ratio than Roberts would have incurred had she maintained her Eaton Vance investment and the Class B shares matured into Class A shares. 14/

Epstein also executed the following transactions in Roberts's IRA account:

Redeemed $12,000 from the money market account within the IRA.
Bought $12,000 Merrill Lynch Core Bond Fund Class B shares.

Epstein received a production credit of $480 for this transaction.

Krasner noted that Epstein recommended that Roberts redeem some of her money market funds to buy government bonds. However, Epstein bought Merrill Lynch Core Bond Fund Class B shares instead. Krasner stated that Epstein never discussed the costs associated with that purchase nor provided Roberts with relevant information regarding the mutual fund. When Roberts received confirmation of these transactions, she became upset and, as she stated in a complaint letter to Merrill Lynch, contacted the FAC "many times during November-December 2001" attempting to reach Epstein, who "never returned any of [her] calls."

4. Vernan Brisson

In October 2001, Epstein made an unsolicited telephone call to the Brisson residence to discuss a joint Merrill Lynch account held by Vernan Brisson, his wife, and a third individual who was in her nineties. During their ten minute conversation, Epstein, without gathering any information from Vernan Brisson, almost immediately prodded Brisson into considering a mutual fund switch, stating that he would like to see some of Brisson's holdings "reinvested elsewhere" for "stability" of principal. Among other things, Epstein recommended switching to a "PIMCO bond fund," which he acknowledged was in "a different fund family," but emphasized its stability. Epstein recommended taking half of each of Brisson's mutual funds – a Franklin, a Lord Abbett, and two Merrill Lynch funds – and allocating them to "government issue bonds." Epstein stated that "there wouldn't be any sort of a front-end sales charge" for switching into the PIMCO Real Return Bond fund. Without discussing the different share classes, Epstein stated that "you pay the upfront sales charge to . . . get the best return" and that the "other two options" involved one-year and six-year holding periods, respectively. Brisson subsequently agreed to Epstein's recommendations.

14/ Class B shareholders pay their sales charge by either redeeming their shares during the CDSC holding period, thus incurring the back-end load, or by paying 12b-1 fees for the duration of the CDSC holding period until the Class B shares mature into Class A (or Class D) shares with a lower expense ratio. See Sathianathan, 89 SEC Docket at 776. According to Krasner, a long-term Class B shareholder who switches to Class B shares of another fund in a different fund family does not receive the benefit of tacking and must restart the entire process of paying the CDSC over a new holding period.

On October 25, 2001, Epstein executed the following transactions in the Brisson joint account:

Sold $18,000 Franklin Income Fund Class A shares.
Sold $11,724 Lord Abbett Bond Debenture Fund Class B shares.
Bought $5,000 Merrill Lynch Core Bond Fund Class B shares.
Bought $25,000 PIMCO Real Return Fund Class C shares.

Epstein received a production credit of $1,000 for the switch to the PIMCO Real Return Fund and $200 for the switch to the Merrill Lynch Core Bond Fund.

The Franklin Income Fund Class A shares had an expense ratio of 0.76%, while the Merrill Lynch Core Bond Fund Class B shares had an expense ratio of 1.34%. The switch to Class B shares in a different fund family triggered a new CDSC holding period. Epstein failed to explain that the $5,000 added to the Brisson joint account's existing Merrill Lynch Core Bond Fund Class B position had its own new CDSC holding period, even though one of the account holders was in her nineties. 15/

The Lord Abbett Bond Debenture Fund Class B shares had an expense ratio of 1.62%, while the PIMCO Real Return Fund Class C shares had an expense ratio of 1.44%. Despite the slightly lower expense ratio of the latter fund, Epstein did not explain that the PIMCO Funds Class C shares did not convert into other share classes, while the liquidated Lord Abbett Class B shares, which Brisson purchased originally in 1996, would have converted automatically to lower cost Class A shares within three years. Thus, following this conversion, Brisson would pay higher fees for as long as the account held the PIMCO fund.

5. Gloria Ann Johannsen-Johnson

In late October 2001, Johannsen-Johnson, then a fifty-eight year old widow, contacted the FAC to withdraw $30,000. Johannsen-Johnson held two separate accounts at Merrill Lynch – a regular investment account and a retirement account consisting of her IRA. Her call was routed to Epstein.

During their ten minute conversation, Epstein determined that, because Johannsen-Johnson's regular investment account had a balance of only $2,000 (which she did not want to liquidate) the $30,000 would have to come from her IRA account. Johannsen-Johnson stated that

---

15/ Because Class A shareholders pay their sales charge upfront, in the form of a front-end load, switching from Class A shares to Class B or Class C shares results in new sales charges for the investor. According to Krasner, switching a Class A shareholder or long-term Class B shareholder to Class C shares of a fund in a different fund family triggers a new CDSC holding period without the possibility of conversion to a less expensive class of shares over time.

she was willing to incur the ten percent early withdrawal penalty for deducting funds from her IRA.

Observing that her IRA consisted of individual stocks and a couple of mutual funds, Epstein told Johannsen-Johnson, "the two funds you have in there really haven't been very good over the last couple of years." When Johannsen-Johnson concurred, Epstein stated, "You know, we definitely recommend reallocating there." Epstein then recommended selling some of her holdings and "then take whatever's left . . . and get that reallocated into a couple – a couple of different funds for you, maybe a growth fund and a value fund." Epstein did not identify those funds, nor did he discuss the costs associated with switching to those funds.

In late October and early November 2001, Epstein executed the following transactions in Johannsen-Johnson's IRA account:

Sold \$35,693 Elan Corp. PLC stock.
Sold \$8,619 Alliance Technology Fund Class B shares.
Sold \$20,750 Merrill Lynch Balanced Capital Fund Class B shares.
Bought \$10,000 Oppenheimer Quest Balanced Fund Class B shares.
Bought \$9,999 PIMCO Renaissance Fund Class B shares. 16/

Epstein received a production credit of \$400 for the switch to the Oppenheimer fund and a production credit of \$400 for the switch to the PIMCO fund.

The switch from the Merrill Lynch Balanced Capital Fund Class B shares, which had an expense ratio of 1.61%, to the Oppenheimer Quest Balanced Fund Class B shares, which had an expense ratio of 2.06%, was a switch between two funds with similar investment goals from different fund families. Epstein never informed Johannsen-Johnson that her Merrill Lynch Class B shares, which she purchased in 1996, would have matured into Class D shares, with an expense ratio of 0.84%, in another two-and-a-half years (i.e., eight years after the original purchase date). Epstein also did not inform Johannsen-Johnson that the switch from the Merrill Lynch to the Oppenheimer fund would trigger a new CDSC holding period and increased operating expenses. In her declaration to NASD, Johannsen-Johnson stated that "Epstein never mentioned anything about any charges or fees that would have been associated with buying new mutual funds." Moreover, Epstein "never told [her] about different classes of mutual funds, expenses, or contingent deferred sales charges."

Krasner observed that a "more cost effective switch" would have been into another Merrill Lynch mutual fund (which would have enabled tacking of the holding period of the Merrill Lynch Balanced Capital Fund Class B shares), several of which were comparable to the Oppenheimer or PIMCO funds. Beyond discussing the penalty for early withdrawal from her

---

16/ The remainder of the funds from the sales apparently were withdrawn or used to pay the early withdrawal penalty.

IRA account, Epstein did not inquire as to Johannsen-Johnson's financial or tax status or other circumstances, or otherwise seek to obtain information from her that would have helped Epstein determine whether his recommendation was suitable.

6. Helen Martindale

In November 2001, Epstein made an unsolicited telephone call to Martindale, who held a combination of mutual funds and individual stocks in her Merrill Lynch account. The record does not include Martindale's age or other personal information about her.

During their nine minute conversation, Epstein recommended switching mutual funds at the outset, suggesting that Martindale sell her existing Franklin Federal Tax Exempt Fund shares and "move it over and add that" to her existing Nuveen Colorado Municipal Bond Fund holdings. Epstein then had an abbreviated discussion of share classes and sales charges without identifying either the share classes or the sales charges associated with the mutual funds that he was recommending. Epstein informed Martindale that she would have to hold the Nuveen fund for one year and that there would not be "any costs associated with it" but there would be a "higher yield." Martindale acceded to Epstein's recommendation.

On November 1, 2001, Epstein executed the following transactions in Martindale's account:

Sold \$47,296 Franklin Federal Tax Free Fund Class A shares.
Bought \$47,000 Nuveen Colorado Municipal Bond Fund Class C shares.

Epstein received a production credit of \$1,880 for this switch.

Although Epstein told Martindale that there would be no cost associated with the purchase of Nuveen Colorado Muni Bond Fund Class C, in fact those Class C shares had a higher expense ratio than the Franklin Federal Tax Free Fund Class A shares. The Franklin Federal Tax Free Fund Class A shares had an expense ratio of 0.60%, while the Nuveen Colorado Municipal Bond Fund Class C shares had an expense ratio of 1.55%. Moreover, the Nuveen Class C shares do not convert to Class A, which caused Martindale to incur higher operating expenses for the duration of her ownership of those shares over expenses charged on Franklin Federal Tax Free Fund Class A shares. Epstein also did not inform Martindale about the possibility of switching to the Franklin Colorado Tax Free Income Fund, which would have avoided the Nuveen Class C shares' one-year, one percent CDSC. Martindale was eligible for a "free exchange" from the Franklin Federal Tax Free Fund to the Franklin Colorado Tax Free Income Fund Class A shares, which had an expense ratio of 0.71%.

7. <u>Stuart Angevine</u>

In November 2001, Epstein made an unsolicited telephone call to Angevine, then a seventy-five year old retired FBI agent. During their thirteen minute conversation, Epstein recommended that Angevine switch from his Merrill Lynch Balanced Capital Fund to "a different balance fund" that would be "a little bit better. It's got a better track record and should hopefully continue to perform a little better." Epstein did not disclose the name of the fund that he recommended to Angevine.

On November 6, 2001 Epstein executed the following transactions in Angevine's account:

> Sold $39,738 Merrill Lynch Balanced Capital Fund Class D shares. 17/
> Bought $38,000 Oppenheimer Quest Balance Fund Class C shares.

Epstein received a production credit of $1,520 for the switch.

The Merrill Lynch Balanced Capital Fund Class D shares had an expense ratio of 0.84%, while the Oppenheimer Quest Balance Fund Class C shares had an expense ratio of 2.06%. These were two very similar mutual funds, but the switch resulted in substantially higher operating expenses to Angevine. Epstein also did not explain that the Oppenheimer Class C shares would not convert into shares with a lesser expense ratio.

8. <u>Wayne Ford</u>

In January 2002, Epstein made an unsolicited telephone call to Wayne Ford to discuss one of the mutual funds in Ford's account. During their two-and-a-half minute conversation, Ford explained to Epstein that, even though he was named on the Merrill Lynch account, it was "really [his] mom's account." Epstein recommended switching out of that fund into some "higher yielding bonds" that would continue "to provide her with monthly checks."

On January 8, 2002, Epstein executed the following transactions in Ford's account:

> Sold $44,863 Alliance Americas Government Income Fund Class A shares.
> Bought $22,000 Merrill Lynch High Income Fund Class B shares.
> Bought $22,000 Merrill Lynch U.S. Government Mortgage Fund Class B shares.

Epstein received a production credit of $880 for the switch to the Merrill Lynch High Income Fund Class B shares, which had an expense ratio of 1.29% and a CDSC holding period, and a

---

17/ The spreadsheet that NASD introduced into evidence at the hearing misidentified these shares as Class A shares.

production credit of $880 for the switch to the Merrill Lynch U.S. Government Mortgage Fund Class B shares, which had an expense ratio of 1.52% and a CDSC holding period.

The Alliance Americas Government Income Fund Class A shares had a higher expense ratio of 2.26%. However, Epstein failed to recommend another Alliance Class A mutual fund. For example, Epstein could have switched to the Alliance High Yield Class A shares, with an expense ratio of 1.34%, or the Alliance U.S. Government Class A shares, with an expense ratio of 2.11%, within the same fund family as Ford's Alliance Americas Government Income Fund, but with lower expenses. Despite their higher expense ratio, had Ford remained invested in the Alliance Americas Government Income Fund Class A shares, he would have avoided CDSC holding periods.

9. Robert Gorman

In January 2002, Epstein made an unsolicited telephone call to Gorman, then a seventy-one year old retiree. During their five-and-a-half minute conversation, Epstein recommended switching from Gorman's existing balanced fund into a government bond fund and the Oppenheimer "quest for balance" fund, which had a "nice track record" and "would do a little bit better . . . ." Epstein did not discuss the operating costs and share classes of the funds to which he intended to switch Gorman or their impact on potential investment returns. Gorman acceded to Epstein's recommendation. 18/

On January 10, 2002, Epstein executed the following transactions in Gorman's account:

Sold $43,336 Merrill Lynch Balanced Capital Fund Class B shares.
Bought $25,000 Franklin U.S. Government Securities Fund Class B shares.
Bought $28,000 Oppenheimer Quest Balanced Value Fund Class B shares.

Epstein received a production credit of $1,000 for the switch to the Franklin U.S. Government Securities Fund and a production credit of $1,120 for the switch to the Oppenheimer Quest Balanced Value Fund. The Franklin fund had an expense ratio of 1.25%, and the Oppenheimer fund had an expense ratio of 2.06%. The Merrill Lynch Balanced Capital Fund Class B shares had an expense ratio of 1.61%, but were to mature into Class D shares with an expense ratio of 0.84% within three weeks of the switch transaction. Instead of leaving that mutual fund undisturbed, Epstein switched the Merrill Lynch Balanced Capital Fund into other Class B shares of two different fund families, triggering new CDSC holding periods and higher expense ratios than the Class D shares.

18/ Although Epstein's side of the conversation is occasionally inaudible, it is clear from both the transcript and the recording of the conversation that Epstein recommended that Gorman switch mutual funds.

10. Victoria Wilson

In February 2002, Wilson, a retired widow, contacted the FAC to transfer her holdings from another brokerage firm into her existing Merrill Lynch account. Her call was routed to Epstein. During their six-and-a-half minute conversation, Epstein observed that she had held her Merrill Lynch Balanced Capital Fund "for a while" and recommended that she switch "into a different balance fund" that had "a little bit better track record and a little bit better management in place." In recommending an Oppenheimer fund, Epstein said that "we can do it at no cost to you and, you know, move it into a Class C share class where you don't pay anything upfront" and indicated that "there's only a one-year hold on the investment[.]" Wilson acceded to Epstein's recommendation.

On February 20, 2002, Epstein executed the following transactions in Wilson's Merrill Lynch account:

Sold $27,167 Merrill Lynch Balanced Capital Fund Class B shares.
Bought $26,499 Oppenheimer Quest Balance Fund Class C shares.

Epstein received a production credit of $1,059 for the switch.

The Merrill Lynch Balanced Capital Fund Class B shares had an expense ratio of 1.61%, while the Oppenheimer Quest Balance Fund Class C shares had an expense ratio of 2.06%. These two mutual funds had similar portfolios and investment objectives.

Moreover, the Merrill Lynch Balanced Capital Fund Class B shares, which Wilson had purchased in 1996, would have converted to Class D shares, which had an expense ratio of 0.84%, in approximately two years. Epstein failed to explain these expense differences, which he was obligated to do, or take into account that the CDSC holding period for Wilson's investment in the Merrill Lynch Balanced Capital Fund Class B shares had already expired.

11. Dorothy Paige

In February 2002, Paige, then a seventy-six year old widow, contacted the FAC to request that a service charge be removed from three accounts held for the benefit of her great grandchildren. Her call was routed to Epstein. During their ten minute conversation, Epstein expressed dissatisfaction with the performance of her investments and recommended that she switch to different mutual funds. Epstein stated, "What I'd like to do is move it into a different fund going with an – with an Oppenheimer Balance Fund, but a fund that's – that's done a little bit better" Epstein informed Paige that "it's not going to cost us anything to make the changes." Paige acceded to his recommendation.

On February 6, 2002, Epstein executed the following transactions in each of the three accounts that Paige held for the benefit of her great grandchildren:

Sold $10,593, $10,720, and $10,720 Merrill Lynch Balanced Capital Fund Class B shares.
Bought $10,593, $10,720, and $10,720 Oppenheimer Quest Balanced Value Capital Fund Class B shares.

Epstein received production credits totaling nearly $1,300 for the three switches.

The Merrill Lynch Balanced Capital Fund Class B shares had an expense ratio of 1.61%. The Merrill Lynch shares, which Paige purchased in 1997, would have matured into D shares, with an expense ratio of 0.84%, in another three years. Paige's Merrill Lynch Balanced Capital Fund Class B CDSC period was nearly at an end. In contrast, the Oppenheimer Quest Balanced Value Capital Fund Class B shares had an expense ratio of 2.06%, and the switch triggered a new six-year CDSC holding period.

Epstein failed to explain that the existing fund had a lower expense ratio than the one he recommended, or that, in three years, the operating expenses of Paige's existing fund would be reduced further. Epstein also failed to suggest a cost-free exchange into another Merrill Lynch fund.

12. Kenneth Wilson 19/

In January 2002, Epstein made an unsolicited telephone call to Wilson, who was seventy-four years old. During their nine minute conversation, Epstein expressed concerns about Argentina's political and economic situation in connection with Wilson's existing holdings in the Alliance Americas Government Income Fund. Epstein then recommended that Wilson switch to a "high yield fund" and a "government mortgage fund."

On January 8, 2002, Epstein executed the following transactions in Wilson's account:

Sold $21,842 Alliance Americas Government Income Fund Class A shares.
Bought $20,000 Merrill Lynch NJ Muni Bond Fund Class C shares.

Epstein received a production credit of $800 for this switch.

The Alliance Americas Government Income Fund Class A shares had an expense ratio of 2.26%, while the Merrill Lynch NJ Muni Bond Fund Class C shares had an expense ratio of 1.40%. However, as an alternative, Wilson could have switched from the Alliance Americas Government Income Fund Class A shares to the Alliance NJ Muni Fund Class A shares, with an expense ratio of just 0.85%.

19/ The record contains a recording of Wilson's conversation with Epstein but no transcript of that conversation.

C. Proceedings Below

Around August 30, 2002, Rose Roberts wrote to NASD to complain about Epstein's handling of her account. 20/ Following receipt of the Roberts letter, NASD began an investigation of Epstein and questioned him about his recommendations. 21/

On July 11 and 12, 2005, FINRA held a disciplinary hearing in this matter. Epstein was listed as a potential witness on the witness list submitted by FINRA's Department of Enforcement (the "DOE"). However, Epstein did not testify or appear at the disciplinary hearing, 22/ and Epstein's counsel left the hearing before introducing any evidence or presenting a defense. FINRA based its findings on recordings of the telephone conversations that Epstein had with the customers involved, transcripts of those recordings, customer declarations, complaint letters, and testimony from FINRA staff and Krasner.

III.

Epstein does not challenge directly FINRA's findings that he made unsuitable mutual fund switch recommendations in violation of NASD Rules 2310, 2110, and IM-2310-2, and we find that the evidence amply supports those findings. Epstein does, however, complain about the evidence introduced at the hearing.

A. NASD Conduct Rule 2310(a) requires that, in recommending a transaction to a customer, a registered representative "shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by

---

20/ In that letter, Roberts stated that, during her telephone conversation with Epstein, he "started to talk about this and that" and she "let it go" even though she "had no intention of buying or selling anything" at the time. The letter also detailed her unsuccessful attempts to contact Epstein at the FAC after she had received written confirmation of the transactions that he had effected in her accounts. In particular, Roberts asserted in her letter that she "had owned the Eaton Vance Fund for over 18 years and had no intentions of selling it, especially for something [she] had never heard of like Alliance."

21/ Epstein has not worked in the securities industry since Merrill Lynch terminated his employment on November 15, 2002 as part of a "reduction in staff."

22/ Epstein's counsel explained Epstein's absence by stating that "he is not here today because he is working."

such customer as to his other security holdings and as to his financial situation and needs." 23/ NASD Rule IM-2310-2(a)(1) imposes on members and registered representatives the "fundamental responsibility for fair dealing," which is "[i]mplicit in all [their] relationships" with customers. As relevant here, NASD Rule IM-2310-2(a)(2) provides that "sales efforts must be judged on the basis of whether they can be reasonably said to represent fair treatment for the persons to whom the sales efforts are directed . . . ." In applying the suitability rule to mutual fund transactions, we have held that a "recommendation is not suitable merely because the customer acquiesces in the recommendation. Rather, the recommendation must be consistent with the customer's financial situation and needs." 24/

NASD Notice 95-80 states further that a registered representative "must not recommend that a customer switch from one mutual fund to another based on the compensation" that the registered representative "will receive for effecting the switch." 25/ The Handbook, to which Epstein twice signed attestations, contained a section advising registered representatives to have a reasonable basis for believing that recommendations to clients, particularly elderly clients, were suitable.

Epstein's mutual fund switch recommendations subjected the customers to higher expenses, longer holding periods, or denied them lower operating expenses to which they would have been entitled with the passage of time. Epstein frequently recommended that a customer switch from a less expensive mutual fund to one with a higher expense ratio. Epstein also failed to recommend cheaper mutual fund alternatives within the same fund family, which would have avoided triggering new CDSC holding periods for Class B shares. In addition, Epstein frequently failed to disclose that a switch between mutual funds with similar investment objectives and strategies would result in higher expenses that would reduce potential investment returns. Epstein did not tell the customers that several of his mutual fund switch recommendations triggered new CDSC holding periods. In some instances, when recommending a switch to a mutual fund with a one-year holding period, Epstein did not disclose to customers that, while the CDSC charge would disappear after one year, the higher operating costs associated with the recommended Class C shares would continue indefinitely. Epstein also did not inform several customers that, if they held onto their existing investment in Class B shares, those shares would

---

23/ See Sathianathan, 89 SEC Docket at 782; Maximo Justo Guevara, 54 S.E.C. 655, 662 (2000) (applying suitability rule), petition denied, 47 Fed Appx. 198 (3d Cir. 2002) (Table); Rafael Pinchas, 54 S.E.C. 331, 341 (1999) (same).

24/ Dane S. Faber, 57 S.E.C. 297, 310-11 (2004). In interpreting the suitability rule, we have stated that a registered representative's "recommendations must be consistent with his customer's best interests." Sathianathan, 89 SEC Docket at 782; Belden, 56 S.E.C. 496, 503 (2003); Jack H. Stein, 56 S.E.C. 108, 113 (2003); Daniel Richard Howard, 55 S.E.C. 1096, 1100 (2002), aff'd, 77 Fed. Appx. 2 (1st Cir. 2003).

25/ NASD Notice to Members 95-80 (Sept. 26, 1995).

soon mature into Class D shares with lower operating expenses and a resultant increase in yield. Instead, by convincing these customers to switch mutual funds, Epstein disrupted their original investment's holding period and eliminated the availability of a lower expense ratio.

Epstein does not argue, and the record does not suggest, that Epstein had reasonable grounds for believing that such recommendations were suitable for his customers based on their other security holdings and their financial situation and needs. The record shows that Epstein's mutual fund switch recommendations served his own interest by generating substantial production credits, but did not serve the interests of his customers. Epstein abdicated his responsibility for fair dealing when he put his own self-interest ahead of the interests of his customers. 26/

B. NASD Conduct Rule 2310(b) requires that, prior to the execution of a transaction recommended to a customer, a registered representative "make reasonable efforts to obtain information" concerning the customer's financial status, tax status, investment objectives, and any other information "used or considered to be reasonable" by the registered representative in making recommendations to a customer. We have stated previously that a registered representative must "tailor his recommendations to the customer's financial profile and investment objectives." 27/ NASD Notice 95-80 states that the "starting point" of a mutual fund recommendation is "to clearly define the investor's objectives and financial situation." 28/ FINRA advises registered representatives who sell mutual funds to "ask the investor what are his or her investment goals and objectives, including the investor's time horizon." 29/ In addition, NASD Notice to Members No. 94-16 states that a registered representative who sells "funds to elderly, retired, or first-time investors must have an adequate and reasonable basis for selling a particular fund to the investor." 30/

Epstein did not make reasonable efforts to update or verify the information in the Merrill Lynch databases concerning his customers' financial circumstances. Epstein's failure to do so was particularly problematic here because of the asserted unreliability of the FAC computer system. Indeed, Epstein's conversations with most of these customers were too brief – ranging

---

26/ See Kenneth C. Krull, 53 S.E.C. 1101, 1111 (1998) (finding that respondent "placed his own interests in garnering commissions above those of his customers"), aff'd, 248 F.3d 907 (9th Cir. 2001).

27/ F.J. Kaufman & Co., 50 S.E.C. 164, 168 (1989).

28/ NASD Notice to Members 95-80.

29/ Suitability Issues for Multi-Class Mutual Funds, NASD Regulatory and Compliance Alert (Summer 2000).

30/ NASD Notice to Members 94-16 (Mar. 1994).

from around four minutes to twenty minutes – to permit a meaningful discussion of their financial situation. Although these were the first conversations that Epstein was having with them, he did not probe the customers' tolerance for risk or assess their investment objectives. In some cases, Epstein did not even make any pretense of gathering information, but rather, after noting the yield on the customer's investment, immediately pressed the customer to make a mutual fund switch.

In many cases, Epstein did not discuss with the customer the investment objectives, strategy, and risks associated with the particular mutual fund he was recommending, nor did he disclose the different classes of shares available for investment and their advantages and disadvantages. Krasner testified that Epstein "failed right across the board to discuss the operations costs of each of these classes of mutual fund." Krasner testified that "these clients, for the most part, did not receive sufficient information from Mr. Epstein to make a judgment as to whether the switches were suitable." The record therefore demonstrates that Epstein did not make reasonable efforts to obtain information concerning the customers' financial status, tax status, investment objectives, or any other information that might be considered reasonable when he recommended that they switch mutual funds, nor did he discuss with them the pros and cons of the recommended switches.

C. Epstein complains that the Hearing Officer's decision permitted the "Roberts letter, only tape-recordings of her telephone conversation with Epstein, and the tape-recordings of the other customers' conversations with Epstein, to be introduced into evidence without hearing from any witnesses." Epstein argues that "acceptance of the letter and recordings without witness testimony" deprived him of his "right to cross-examination of these witnesses." Moreover, according to Epstein, FINRA was "required to justify their failure to produce any customer witnesses, in violation of" NASD Rule 9253. 31/

NASD Rule 9253 imposes no such requirement. NASD Rule 9253 merely permits a respondent to request the production of witness statements pertaining to direct witness testimony. Moreover, it is well-established that hearsay evidence is admissible in administrative proceedings and can provide the basis for findings of violation, regardless of whether the declarants testify. 32/ We have held that "hearsay statements may be admitted in evidence and, in an

---

31/ Epstein also cites to Commission Rule of Practice 235, 17 C.F.R. § 201.235, which governs the introduction of prior sworn statements of witnesses into the record of Commission-instituted administrative proceedings. That rule does not apply to FINRA proceedings. See infra note 54.

32/ See, e.g., David C. Ho, Exchange Act Rel. No. 54481 (Sept. 22, 2006), 88 SEC Docket 3194, 3206 ("We have long held that hearsay evidence is admissible in administrative proceedings"), aff'd, 2007 U.S. App. LEXIS 9882 (Apr. 18, 2007) (unpublished); Robert Fitzpatrick, 55 S.E.C. 419, 433 (2001) (citing Otto v. SEC, 253 F.3d 960, 966 (7th Cir.

(continued...)

appropriate case, may form the basis for findings of fact." 33/ In determining whether to rely on hearsay evidence, "it is necessary to evaluate its probative value and reliability, and the fairness of its use." 34/ The factors to consider include "the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated." 35/

We believe that the hearsay evidence at issue meets sufficient criteria to establish that it is reliable and probative. Under the circumstances of this case, we see no unfairness in the use of such evidence. We have found violations of NASD's suitability rules previously without the benefit of live testimony from customers. 36/ While the Commission has indicated that customer testimony may be the "most compelling evidence" in certain cases, it "is not essential" if the relevant information can be obtained from other sources in the record. 37/ The extensive recordings and transcripts of the conversations between Epstein and the customers, relevant customer account statements, and expert and other testimony at the hearing, among other things, evidence the switch recommendations that Epstein made to the customers. There is no indication, nor does Epstein allege, that any of the customers was biased. Several of the customers executed declarations which, although unsworn, were made under the penalty of perjury. 38/ We have stated previously that "other indicia, such as declarations, could be used"

32/ (...continued)
2001)). See also Charles D. Tom, 50 S.E.C. 1142, 1145 (1992) (setting forth test for admission of hearsay evidence).

33/ Tom, 50 S.E.C. at 1145.

34/ Id.

35/ Id.

36/ Cf. Sathianathan, 89 SEC Docket 774 (finding, among other things, that associated person of member firm made unsuitable mutual fund recommendations to customers).

37/ Canady, 54 S.E.C. 65, 76 ("supporting evidence need not be limited to customer testimony, but also may include testimony by the salesperson, other firm personnel, customer affidavits or even customer correspondence"). Cf. Michael David Sweeney, 50 S.E.C. 761, 767 (1991) (finding excessive trading in the absence of customer testimony where the relevant information was "readily available").

38/ See 28 U.S.C. § 1746, which generally treats an unsworn declaration as the equivalent of a sworn declaration, provided that the unsworn declaration is in writing, is signed and dated, and is subcribed by the declarant as true under penalty of perjury. See also Tom, 50 S.E.C. at 1145 (stating that, although a customer declaration was unsworn, "it averred
(continued...)

as they were here, "to provide sufficient evidence" to establish the violations at issue. 39/ Those customer declarations are corroborated by record evidence. Moreover, many of the customers were elderly and NASD does not have the authority to compel customers to appear at a hearing before it. Based on the totality of the evidence before us, we find that the absence of customer testimony at the hearing does not require a result different from FINRA's conclusion and that Epstein's actions in making the recommendations at issue violated NASD Rules 2310(a), 2310(b), IM-2310-2, and 2110.

IV.

Epstein's appeal is focused on various claims of procedural deficiency. Epstein argues that these deficiencies effectively denied him due process and that, as a result, this proceeding should either be dismissed or the sanction set aside. Epstein's contentions can be grouped into three related categories: (1) that Epstein is the victim of selective prosecution and that the disciplinary proceeding against him was improperly instituted; (2) that FINRA staff failed to follow their own rules by, among other things, refusing to provide him with exculpatory evidence in their possession; and (3) that the Hearing Officer assigned to this case was biased against Epstein.

We note as an initial matter that it is well-established that self-regulatory organizations ("SROs") are not subject to the Constitution's due process requirements. 40/ However, the Exchange Act requires NASD to provide "fair procedure[s]" for its disciplinary actions, the standard we apply to these proceedings. 41/ As discussed below, the record does not support Epstein's claims of procedural deficiency or FINRA misconduct.

A. Epstein claims that he was "selectively prosecuted for being a 'whistle blower'" and "for submitting lengthy letters" concerning conditions at the FAC "to [then-NASD vice

---

38/ (...continued)
that it was made under the penalty of perjury and for present purposes we consider it the equivalent of a sworn affidavit.").

39/ Joseph J. Barbato, 53 S.E.C. 1259, 1279 n.28 (1999). See also Sathianathan, 89 SEC Docket 774 (finding, despite absence of customer testimony, that respondent made unsuitable mutual fund recommendations).

40/ See, e.g., Desiderio v. NASD, 191 F.3d 198, 206-07 (2d Cir. 1999) (stating that constitutional requirements generally do not apply to NASD), cert. denied, 531 U.S. 1069 (2001). See also Mark H. Love, 57 S.E.C. 315, 322 n.13 ("We have held that NASD proceedings are not state actions and thus not subject to constitutional requirements.").

41/ 15 U.S.C. § 78o-3(b)(8).

chairman] Mary Schapiro and to [FINRA counsel] in August and November 2004," i.e., before November 11, 2004, when FINRA filed its complaint against him. 42/

The record does not support Epstein's claim of improper selective prosecution. To establish such a claim, a petitioner must demonstrate that he was unfairly singled out for prosecution based on improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right. 43/ No such showing was made here.

Nor does the record support Epstein's claim that this proceeding was instituted in retaliation for any efforts to alert regulators about misconduct at the FAC. FINRA commenced its investigation of Epstein when it received Rose Roberts's complaint letter in August 2002 concerning possible misconduct by Epstein. FINRA took Epstein's investigative testimony on October 10, 2003. The "whistle blower" letters at issue were prepared by Epstein's attorneys and sent in response to a May 2004 "Wells" letter from FINRA notifying Epstein of FINRA's intention to charge him with misconduct.

Epstein claims further that, in proceeding against him instead of Merrill Lynch management or many of the other ISAs whom he alleges engaged in similar practices, FINRA was acting to "protect[] its largest member." 44/ However, as Epstein concedes, NASD

42/ Epstein asserts that these letters contained information regarding "massive securities violations" at the FAC. For example, the letters referenced "the intensity of the [sales] competitions" at the FAC and the "involvement of [the Firm's] senior management" in promoting such contests, and also accused Merrill Lynch of "specifically set[ting] up" the FAC "to act as a 'bucket shop' or 'boiler room'" for the purpose of "the switching of customers from one mutual fund to another." As discussed below, we find nothing improper in FINRA's institution of this proceeding. Nor do we see the relevance to this proceeding of the federal and state statutes that Epstein cites. These whistle-blower statutes "do not purport to provide a defense in a disciplinary action or to estop NASD from taking disciplinary action consistent with its rules." Sathianathan, 89 SEC Docket at 788.

43/ United States v. Huff, 959 F.2d 731, 735 (8th Cir. 1992) (setting forth elements of selective prosecution claim). See also Eagletech Commc'ns, Inc., Exchange Act Rel. No. 54095 (July 5, 2006), 88 SEC Docket 1225, 1231 (same); Sathianathan, 89 SEC Docket at 788-89; D'Alessio, 56 S.E.C. 396, 426 (2003); Guevara, 54 S.E.C. 655, 665 (2000); Richard J. Puccio, 52 S.E.C. 1041, 1046 (1996).

44/ Epstein's assertion that other ISAs also engaged in misconduct but were not subject to disciplinary proceedings does not support his claim of improper selective prosecution. "NASD disciplinary proceedings are treated as an exercise of prosecutorial discretion." Schellenbach v. SEC, 989 F.2d 907, 912 (7th Cir. 1993). As such, "it is no defense that

(continued...)

disciplined Merrill Lynch. 45/ Epstein also alleges that, in bringing this proceeding, FINRA staff colluded improperly with senior Merrill Lynch executives, against whom Epstein had a pending arbitration proceeding. The record indicates, however, that Epstein did not file his arbitration claim against Merrill Lynch until July 28, 2004, again long after FINRA's investigation had begun. There is no evidence in the record suggesting any type of collusion between FINRA staff and Merrill Lynch executives; rather, Epstein's assertion is the sole basis for such claim of collusion.

B. Epstein contends that, after instituting this proceeding, FINRA staff failed to follow its own rules. 46/ In particular, Epstein claims that FINRA staff "fraudulently" concealed material evidence, obstructed justice, and abused their authority by concealing from him "material evidence necessary for his defense." Epstein complains that FINRA failed to produce documents relating to Merrill Lynch's culpability in the operation of the FAC and to its supervision of the registered representatives who worked there. Epstein contends that, because the Commission granted an earlier motion by him to adduce certain documents into evidence, "there is a strong likelihood that Epstein was unconstitutionally deprived of presenting evidence material to understanding" of his pressurized work environment, his poor training, and the lack

---

44/ (...continued)
others in the industry may have been operating in a similarly illegal or improper manner." Patricia H. Smith, 52 S.E.C. 346, 348 n.8 (1995).

45/ See supra note 6. Epstein asserts that the sanctions imposed on Merrill Lynch are disproportionate to those imposed on Epstein. However, courts have held that sanctions are not to be compared. See Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. 182, 187 (1973); Geiger v. SEC, 363 F.3d 481, 488 (D.C. Cir. 2004). We have also observed that sanctions in settled cases may understate the sanctions that would be imposed in litigated cases because settled sanctions reflect pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary litigation. See, e.g., Dennis Todd Lloyd Gordon, Exchange Act Rel. No. 57655 (Apr. 11, 2008), 93 SEC Docket 5089, 5118 (noting that respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings); Puccio, 52 S.E.C. at 1045 (Oct. 22, 1996) (same).

46/ Epstein complains that during the hearing, FINRA made a request pursuant to NASD Rule 8210, that Epstein appear and testify at the hearing in this matter. As noted, Epstein did not appear; however, he has not been charged with a violation of Rule 8210. We do not see any prejudice to Epstein.

of supervision that, he claims, contributed to his misconduct. 47/ Epstein misconstrues the Commission order. While the order stated that certain of the documents Epstein submitted "may be relevant to an assessment of the sanctions imposed by FINRA," and admitted them to avoid further delay in this appeal, the order made no finding that the evidence was material to a determination of Epstein's liability.

Our review of the record indicates that FINRA staff complied with its rules in its production of documents and other information in this proceeding. NASD Rule 9251 requires FINRA to make available to a respondent documents prepared or obtained in connection with the investigation that led to the institution of the disciplinary proceeding. 48/ FINRA counsel represented at the hearing that Epstein was "given every document [he] was entitled to under [NASD's] Code of Procedure" and that Epstein "received all the exhibits in these two binders [distributed to the hearing panel] as part of the process." FINRA counsel also represented that Epstein received "every shred of paper that we had in our investigative file pertaining to Scott Epstein" and "ha[d] fully received every document that we had that was discoverable in this case."

It appears from the record that FINRA staff provided Epstein with those documents and other information that relate directly to its investigation of him, including the discoverable documents in their investigative file, the revised schedule of relevant trades that they introduced at the hearing, the prospectuses for the relevant mutual funds, customer account information, and recordings of the telephone conversations between Epstein and the customers, among other exhibits.

Epstein objects that he was not provided with evidence relating to what FINRA counsel described as "other investigations involved in this matter which" were "non-public." For

---

47/ See Order Granting in Part and Deferring in Part Motion for Reconsideration of Order Denying Motion for Introduction of Additional Evidence and for Other Relief, Admin. Proc. File No. 3-12933 (May 9, 2008). Those documents, which Epstein asserts he later obtained through his arbitration case against the Firm, include: (a) a Wells notice dated July 1, 2004 that was issued to Merrill Lynch; (b) Merrill Lynch's response to that Wells notice; (c) Merrill Lynch's Letter of Acceptance, Waiver and Consent; (d) a chart purporting to be Epstein's expert's analysis of trading blotter reports of mutual fund trades at the FAC; (e) a Merrill Lynch internal document entitled "FAC Investment Process"; (f) a Merrill Lynch internal document entitled "FAC Segmentation Review"; (h) several Merrill Lynch sales contest flyers and spreadsheets tabulating contest results; and (i) hard copies of a Merrill Lynch sales presentation involving the FAC. We consider the relevance of this evidence infra in Section V.

48/ These documents generally include requests for information from FINRA members and their associated persons pursuant to NASD Rule 8210, responses thereto, transcripts and transcript exhibits, and other documents obtained from persons not employed by NASD.

example, Epstein asserts that he was not provided with "material exculpatory and mitigating documents or a list of documents being withheld, including the 14 [on-the-record] transcripts of witness depositions taken by the [Department of Enforcement]" apparently compiled during FINRA's separate investigation of Merrill Lynch. Under NASD Rule 9251, NASD is required to produce only the investigatory file that led to Epstein's disciplinary proceeding. There is no evidence that these additional documents were relevant to this proceeding. 49/

Epstein asserts that FINRA staff prevented his developing a record regarding conditions at the FAC. However, his own actions, or failure to act, were largely responsible for this result. There is no indication that Epstein sought evidence regarding these matters from sources other than FINRA, such as from customers or other ISAs with whom he worked, or made a request pursuant to NASD Rule 9252 for information from Merrill Lynch. 50/ Nor did he choose to testify about them himself, despite the Hearing Officer's suggestion that he do so. 51/ We have stated previously that "the failure of a respondent to testify and adduce available evidence to meet the charges against him and show mitigating factors does not entitle him to have the proceedings reopened after the issuance of an adverse decision." 52/ Instead, "[p]ublic policy considerations favor the expeditious disposition of litigation, and a respondent cannot be

---

49/ Epstein attached to his reply brief excerpts from two of the fourteen OTR transcripts. They were not a part of the record below, and he has not moved for their introduction pursuant to Rule 452 of our Rules of Practice. Rule of Practice 452 permits a party to adduce new evidence on appeal only if the moving party shows "with particularity" both (a) that the evidence is "material" and (b) that there were "reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. § 201.452. The testimony excerpts relate to the particular witnesses' general dissatisfaction with the FAC's operation. They do not mention Epstein or his customers. They do not appear material, and we do not admit them into the record.

50/ As relevant here, NASD Rule 9252 requires a respondent who requests that NASD compel the production of documents or testimony at a hearing to: submit such request in writing to the Hearing Officer no later than twenty-one days before the hearing date; describe such documents or testimony with specificity; explain the materiality of the documents or testimony; describe the requesting party's previous efforts to obtain the documents or testimony through other means; and state whether the custodian of the documents or testimony is subject to NASD jurisdiction.

51/ Epstein asserts that he did not do so to avoid providing Merrill Lynch with his testimony in the arbitration. As mentioned, Epstein's counsel explained Epstein's absence from the hearing by stating that Epstein was "not [there at the time] because he [was] working."

52/ Kenneth W. Haver, CPA, Exchange Act Rel. No. 54824 (Nov. 28, 2006), 89 SEC Docket 1237, 1240 n.11 and accompanying text (Order Denying Motion to Reopen Proceeding or Vacate Suspension) (quoting David T. Fleischman, 43 S.E.C. 518, 522 (1967)).

permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action." 53/ Under the circumstances, we find that FINRA complied with its discovery requirements. 54/

C. Epstein contends that the Hearing Officer was "biased" against him and, as a result, made adverse rulings and conducted this proceeding in a manner that compromised Epstein's right to a fair hearing. 55/ Epstein alleges that the "extremely narrowed discovery and unreasonably limited rulings" to which he was subject were "done intentionally and with malicious [sic]." Adverse rulings, by themselves, generally do not establish improper bias. 56/ We have held previously that "bias by a hearing officer is disqualifying only when it stems from an extrajudicial source and results in a decision on the merits based on matters other than those

---

53/ Ho, 88 SEC Docket at 3205 (citing Fleischman, 43 S.E.C.at 522).

54/ We previously deferred ruling on Epstein's motion for additional discovery. We now deny that motion. Epstein's invocation of Commission Rule of Practice 235 to adduce such evidence is misplaced; that rule applies to Commission-instituted administrative proceedings, not to our review of SRO disciplinary proceedings. Moreover, while the Commission has the authority to refer certain SRO matters to an administrative law judge for supplemental evidentiary hearings, such a referral is "an extraordinary ancillary procedure," which is "reserved for truly exceptional cases." Allen Mansfield, 47 S.E.C. 184, 185 & n.5 (1979). This proceeding does not meet that high threshold. Epstein is "entitled only to items 'material to his defense'" and "is not entitled to conduct a fishing expedition . . . in an effort to discover something that might assist him in his defense," Dan Adlai Druz, 52 S.E.C. 416, 428 (1995) (internal citations omitted), or "in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory." G.K. Scott & Co., Inc., 51 S.E.C. 961, 973 (1994), aff'd, 56 F.3d 1531 (D.C. Cir. 1995) (Table). As discussed below, the type of deficiencies in the record of which Epstein complains result from his, and his counsel's, decision not to participate in the FINRA hearing process. Under the circumstances, additional discovery at this stage would not be appropriate.

55/ At the hearing, Epstein's attorney moved to recuse the Hearing Officer for being a "part of" the alleged "skullduggery" that was occurring at the hearing and accused the Hearing Officer of making "some very, very unfortunate rulings in this case." The Hearing Officer denied Epstein's recusal motion.

56/ Cf. United States v. Azhocar, 581 F.2d 735, 739 (9th Cir. 1978) (stating, in a criminal case, that "[a]dverse rulings" by the trial judge "do not constitute the requisite bias or prejudice" warranting the assignment of the proceeding to another trial judge).

gleaned from participation in a case." 57/ There is no evidence to suggest that this standard was met or that the Hearing Officer's actions were motivated by anything other than what occurred in the course of the proceeding.

Epstein asserts that the schedule that the Hearing Officer set at the pre-hearing conference was so short that it prevented him from marshaling evidence and testimony to mount a proper defense, and thus deprived him of discovery in his arbitration case. We find no basis for Epstein's claims of "unreasoning and arbitrary insistence upon expeditiousness" by the Hearing Officer. 58/ NASD Rule 9235 authorizes a Hearing Officer "to do all things necessary and appropriate to discharge his or her duties," including "regulating the course of the hearing." At the March 11, 2005 pre-hearing conference, the Hearing Officer scheduled the hearing for the week of July 11, 2005. The Hearing Officer properly overruled Epstein's objection. 59/ Thus, Epstein had four months from the date of the prehearing conference, instead of the one year that he sought, to prepare for the hearing. We conclude that four months was an adequate time to prepare for the hearing because Epstein possessed the records that related directly to NASD's investigation of him, including, among other things, the discoverable documents in NASD's investigative file and the recordings of the telephone conversations between Epstein and his customers; moreover, Epstein presumably could have interviewed possible witnesses during this period, as he had all the relevant names.

Epstein also blames his counsel's premature departure from the FINRA hearing – and Epstein's resulting lack of representation during the hearing – on the Hearing Officer's "inflammatory" remarks, which Epstein's counsel viewed as a threat of "contempt." As a result, according to Epstein, his counsel felt compelled to leave the hearing before putting on a defense.

We believe that the Hearing Officer gave Epstein's counsel wide latitude to plead his case. For example, when Epstein missed the deadline for filing his answer to FINRA's complaint, the Hearing Officer resisted FINRA counsel's calls to hold Epstein in default, compromised with Epstein in extending the filing deadline (albeit not to Epstein's complete

---

57/ Phlo Corp., Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1109 (citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)).

58/ Richard W. Suter, 47 S.E.C. 951, 963 (1983).

59/ During that March 11, 2005 pre-hearing conference, Epstein's counsel refused to agree to a hearing date. When the Hearing Officer asked when Epstein would be available for the hearing, Epstein's counsel responded "Next March" – which was a year hence. When the Hearing Officer replied "No way we're going to do that," Epstein's counsel retorted, "I know that. I just wanted to hear you say it." When the Hearing Officer decided that he was "going to set this case for hearing for the week of July 11th in –," Epstein's counsel interrupted him to say that "I think I will probably be on vacation out to see my grandchildren on that date."

satisfaction), and when Epstein missed that deadline as well, did not penalize Epstein for filing the answer eight days after the extended deadline. When the Hearing Officer directed Epstein's counsel to focus on "whether the allegations in the complaint are proved by a preponderance of the evidence," Epstein's counsel insisted that he did not "have to comply with an order that will destroy my case. I don't have to do that." Nonetheless, the Hearing Officer repeatedly gave Epstein's counsel wide latitude in questioning an NASD staff witness, often overruled objections from opposing counsel, and permitted Epstein's counsel to extemporize at length about the alleged unfairness of the proceedings. 60/

The Hearing Officer eventually told Epstein's counsel that "[i]f you want to continue with that kind of conduct I am going to be forced to take sanctions which could include disqualifying you from representing Mr. Epstein." As the record shows, however, before the Hearing Officer made this statement, Epstein's counsel had used derogatory and highly inappropriate language to refer to a Merrill Lynch executive, brought an NASD witness to tears with his aggressive cross-examination, and occasionally resorted to "screaming."

Moreover, our de novo review, in which we have carefully considered all of the evidence in the case and the transcripts of the proceedings below, "dissipates even the possibility of unfairness." 61/ The conduct of the proceedings by the Hearing Officer did not justify the departure of Epstein's counsel. The departure was the decision and choice of Epstein and Epstein's agent, and any effect on the proceedings is solely their responsibility. In any event, the totality of the record before us presents Epstein's arguments and the basis for those arguments, and we do not have adequate grounds to conclude that the departure of Epstein's counsel caused any material prejudice to Epstein's position.

Epstein asserts that the Hearing Officer committed error by instructing FINRA staff what to write in their post-hearing brief so that he could "render a decision containing the appropriate findings of fact and conclusions of law that would be more difficult for Epstein to reverse on appeal." According to Epstein, this "further proves" the Hearing Officer's "bias toward Epstein." We disagree. The record demonstrates that the Hearing Officer resisted FINRA counsel's request for a default ruling "given Mr. Epstein's absence from this proceeding and his attorney's

---

60/ See Pinchas, 54 S.E.C. at 347 (rejecting respondent's claims of bias on the part of the hearing panel and NASD staff and noting that the hearing panel repeatedly gave respondent "wide latitude" in questioning witnesses during the hearing). Despite these measures, when the Hearing Officer denied Epstein's counsel's motion to "call the Chief Hearing Officer's office" to determine whether the Hearing Officer could be recused, Epstein's counsel announced that he was leaving the hearing and told the hearing panel to "do what you feel you want to do in terms of their case. But I can't proceed under these circumstances." The record reflects that Epstein's counsel then "left the room" and "closed the door."

61/ Robert Tretiak, 56 S.E.C. 209, 232 (2003).

actions." Stating that "the law abhors a default," the Hearing Officer rejected "the easy way to do it" and instead advised that, "out of an abundance of caution and what I think is the just way to handle this case, is that we take a look at the evidence, evaluate it, and then determine whether you have by a preponderance of the evidence proved the charges." There is no prejudice here. It is not improper for a Hearing Officer to give guidance regarding what issues to brief in post-hearing submissions.

Epstein also claims that FINRA staff sought to prevent his access to documents discoverable in his arbitration case, which was pending at the time, prior to the FINRA disciplinary action by "unreasonably accelerat[ing] discovery and rush[ing] the [disciplinary] hearing." However, Epstein presents no evidence to support this claim and, as discussed, we see nothing unreasonable in the scheduling of discovery or the hearing. Moreover, we fail to see how Epstein's arbitration action or the conduct of the proceedings in that action is relevant to this proceeding.

V.

Section 19(e) of the Securities Exchange Act of 1934 provides that we may cancel, reduce, or require the remission of a sanction if we find the sanction excessive or oppressive. 62/ FINRA Sanction Guidelines (the "Guidelines") recommend imposition of a monetary sanction of between $2,500 and $75,000 for unsuitable recommendations and a suspension for a period of ten business days to one year. 63/ However, in egregious cases, the Guidelines urge consideration of a longer suspension (of up to one to two years) or a bar. 64/ The Guidelines also identify certain factors or considerations as affecting the sanctioning determination, including the number of transactions at issue, whether the misconduct resulted in the potential for a respondent's monetary gain, and the level of sophistication of the affected customer. 65/ Those factors support FINRA's sanctioning decision here.

Epstein's misconduct was egregious. The evidence demonstrates that Epstein violated the suitability rule with respect to numerous customers, nearly all of whom were elderly and, it

---

62/ 15 U.S.C. § 78s(e)(2). Exchange Act Section 19(e) also requires that a sanction not impose an unnecessary or inappropriate burden on competition. Epstein does not claim, and the record does not show, that FINRA's action has imposed an undue burden on competition.

63/ FINRA Sanction Guidelines 99 (2007), available at http://www.finra.org/RegulatoryEnforcement/FINRAEnforcementMarketRegulation/FINRASanctionGuidelines/SalesPractices/index.htm.

64/ Id.

65/ Id. at 6-7.

appears, retired. In addition, several of the customers were relatively unsophisticated with respect to the applicable fee structures and other attributes of the funds at issue. Epstein exploited his customers' vulnerabilities in making recommendations that clearly were unsuitable for them.

In many cases, the mutual fund switches that Epstein recommended burdened the customers with higher expense ratios and triggered new CDSC holding periods. In some instances, he deprived them of the lower expenses to which they would have been entitled had they maintained their investments and their mutual fund holdings matured into less expensive share classes, for example, from Class B to Class D shares – sometimes missing such automatic conversion by a matter of weeks. Disrupting an existing holding period (or one that had already phased out) and restarting an entirely new CDSC holding period that would run for several years, particularly for an elderly customer who might not survive the new holding period, without sufficient countervailing justification, is inexcusable. These kinds of switches that triggered new CDSC holding periods may have burdened the customers with operating expenses for the rest of their lives. Where it might have been appropriate to do so, Epstein never offered customers the opportunity of free or less costly exchanges among funds within the same fund family. Instead Epstein's mutual fund switch recommendations were designed "to maximize his commissions rather than to establish an appropriate portfolio" for the customers. 66/ His repeated violations of the suitability rule, as detailed above, "warrant serious sanctions." 67/

Epstein challenges FINRA's determination to bar him as excessive. In support of a lesser sanction, he cites his young age and limited industry experience. 68/ Epstein also claims that the "severe circumstances under which" he worked at the FAC, including, among other things, the "high-pressured work environment" and the "extreme time pressure" placed on him with respect to the length of customer telephone calls, are mitigating. Citing his lack of disciplinary history and minimizing the seriousness of his actions, 69/ Epstein claims that FINRA's sanction deviates from the principle of "progressive discipline" and amounts to "punitive enforcement."

66/ Sathianathan, 89 SEC Docket at 783.

67/ Id.

68/ Epstein asserts that "never" has an "inexperienced young man out of college" been permanently barred and that a lifetime bar "should be imposed only in cases involving repeat offenders or upon those with experience and knowledge, or 'scienter.'"

69/ Epstein asserts that he did not do something as serious as "sell[ing] a mutual fund and buy[ing] a speculative stock on margin."

We disagree. Despite Epstein's "youth and inexperience," the record demonstrates that "his activities involved more than a mere mistake in judgment." 70/ While we have considered the documents that he submitted and do not dispute Epstein's claims regarding conditions at the FAC, we do not consider them mitigating. "Those who hold themselves out as professionals with specialized knowledge and skill to furnish guidance cannot be heard to claim youth or inexperience when faced with charges of violations . . . ." 71/ Indeed, "[y]outh or inexperience does not excuse a registered representative's duty to his clients." 72/ Nor can Epstein blame his violations on a lack of supervision. 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." 73/ Rather, "[p]articipants in the securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements." 74/ Indeed, Epstein's efforts to blame his conduct on his working environment demonstrate his failure to accept responsibility for his own actions. 75/ Moreover, a "lack of disciplinary history is not a mitigating factor for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional." 76/

70/ T. Joseph Widman, 46 S.E.C. 260, 263 (1976).

71/ SEC v. Hasho, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992).

72/ Id.

73/ Kocherhans, 52 S.E.C. at 531; Patrick G. Keel, 51 S.E.C. 282, 287 (1993) (finding that respondent did not take responsibility for making unsuitable recommendations but blamed his supervisor and customers instead).

74/ Id.

75/ Epstein asserts that he "was 'singled out' to be served a disciplinary complaint while the 300 other ISA's [sic] similarly situated to Epstein, and executing similar transactions in customer accounts, were not." As discussed, Epstein offered no evidence to support this claim. In any event, we consistently have held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases. See Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. at 187; Geiger v. SEC, 363 F.3d at 488. See also D'Alessio, 56 S.E.C. at 427 (same); Robert A. Amato, 51 S.E.C. 316, 321 n.25 (1993).

76/ Phillippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 801. See also Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006) (lack of disciplinary history not a mitigating factor). We also note, in this connection, that, as discussed, Epstein's failure to develop evidence regarding possible mitigation was due, in large measure, to his refusal to participate in this proceeding.

We agree with FINRA that Epstein's "demonstrated insouciance and indifference towards his responsibilities under NASD rules poses a serious risk to the investing public." Based on the record before us, we believe that there is an ample basis for us to conclude that Epstein poses a significant risk to investors and is unfit to be in the securities industry. 77/ Although Epstein has not been employed in the securities industry since his termination from Merrill Lynch, he has expressed an interest in reentering the industry. We believe that taking advantage of elderly investors for "pecuniary benefit," as Epstein did here, "necessitate[s] exclusion from the securities business for the protection of public investors." 78/ For all the reasons stated above, and based on our review of the record, we do not find the sanction imposed by FINRA against Epstein to be excessive or oppressive.

Accordingly, we sustain FINRA's findings of violation and the sanction it imposed against Epstein. An appropriate order will issue. 79/

By the Commission (Commissioners CASEY, AGUILAR and PAREDES); Chairman SCHAPIRO and Commissioner WALTER not participating.

Elizabeth M. Murphy
Secretary

77/ Cf. David M. Haber, 52 S.E.C. 201, 207 (1995) (barring respondent who had been enjoined for, among other things, stock manipulation using high-pressure sales tactics); Frank J. Custable, Jr., 51 S.E.C. 855, 863 (1993) (barring respondent for, among other things, deceptive sales practices).

78/ Ronald Earl Smits, 50 S.E.C. 1020, 1025 (1992).

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59328 / January 30, 2009

Admin. Proc. File No. 3-12933

In the Matter of the Application of

SCOTT EPSTEIN

c/o George L. Mahr, II
Mahr and Mahr, LLC
80 Main Street
P.O. Box 534
Madison, NJ 07940

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the disciplinary action taken by FINRA against Scott Epstein be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary