

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 66467 / February 24, 2012

Admin. Proc. File No. 3-14417

In the Matter of the Application of

HOWARD BRAFF  
4 Mews Court  
Holtsville, NY 11742

For Review of Disciplinary Action Taken by  
Financial Industry Regulatory Authority, Inc.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - REVIEW OF DISCIPLINARY  
PROCEEDINGS

**Failure to Provide Written Notice to Member Firms and Brokerage Firms**

**Conduct Inconsistent with Just and Equitable Principles of Trade**

General securities representative, general securities principal, and options principal of member firms of registered securities association failed to provide written notification to those member firms that he maintained trading accounts at other brokerage firms, and failed to provide written notification to the brokerage firms in which he maintained the outside accounts that he was associated with member firms. *Held*, association's findings of violations and sanctions imposed are *sustained*.

APPEARANCES:

*Howard Braff, pro se.*

*Marc Menchel, Alan Lawhead, and Jante C. Turner, for the Financial Industry  
Regulatory Authority, Inc.*

Appeal filed: June 9, 2011

Last brief received: September 28, 2011

**I.**

Howard Braff, formerly registered as a general securities representative, general securities principal, and options principal with various Financial Industry Regulatory Authority, Inc. ("FINRA") member firms, seeks review of disciplinary action taken by FINRA.<sup>1</sup> FINRA found that Braff violated NASD Rule 3050(c) and NASD Rule 2110 because he failed to provide written notice of his outside brokerage accounts to three member firms with which he was associated.<sup>2</sup> FINRA also found a separate violation of Rule 3050(c) and Rule 2110 because Braff failed to provide written notice of his association with the member firms to the brokerage firms where he maintained the outside accounts. FINRA further found that Braff violated Rule 2110 because he falsely stated on certain employment documents that he had no outside brokerage accounts. FINRA fined Braff \$25,000 and suspended him in all capacities for two years. We base our findings on an independent review of the record.

**II.****A. Background**

Braff entered the securities industry in July 1983 as a registered representative. From October 2005 through April 2007, the period at issue, Braff was registered with FINRA as a general securities representative, general securities principal, and options principal and was associated on various dates with three member firms: PGP Financial, Inc. ("PGP Financial"), PHD Capital, and Pointe Capital, Inc. ("Pointe Capital"). Braff has not been registered with a member firm since May 2011.

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<sup>1</sup> On July 26, 2007, the Commission approved a proposed rule change that NASD filed seeking to amend its Certificate of Incorporation to reflect its name change to the Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of its member firm regulatory functions with NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522, 523. Following the consolidation, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* Exchange Act Rel. No. 58643 (Sept. 25, 2008), 73 Fed. Reg. 57,174 (Oct. 1, 2008). FINRA's disciplinary action was instituted after the consolidation of NASD and NYSE, but the conduct at issue took place before the consolidated rules took effect. Accordingly, NASD conduct rules apply and references to FINRA herein include references to NASD.

<sup>2</sup> NASD Rule 3050(c) provides that an associated person shall provide written notification to his member firm about any accounts he maintains at a brokerage firm and provide written notification to the brokerage firm about his association with the employer firm. [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3728](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3728). NASD Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade." [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=5504](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504).

## 1. Braff's Outside Brokerage Accounts

From September 1993 through June 12, 2000, Braff was associated with Scottrade, Inc. ("Scottrade"). On June 15, 2000, after leaving Scottrade, Braff opened a brokerage account with that firm in which he established an individual retirement account to roll over his 401(k). On January 28, 2004, while he was associated with another FINRA member firm, Milestone Group Management LLC ("Milestone"), Braff completed an account application with TD Waterhouse Investor Services, Inc. ("TD Waterhouse").<sup>3</sup> Under the section titled "Occupation," Braff stated that he was a "solar energy engineer" and marked "No" in the box asking whether he was employed by a broker-dealer.

## 2. PGP Financial

On October 25, 2005, as part of his application to associate with PGP Financial, Braff completed two documents in which he stated that he had no outside brokerage accounts. One document was a questionnaire that contained PGP Financial's policy regarding the maintenance of an outside brokerage account:

Employees of the Firm are required to disclose any outside brokerage account established by either themselves or their immediate family members prior to their employment with the firm.

In addition, no employee may have the authority to effect transactions in a securities or commodities account in an outside brokerage account for any one without first obtaining the *prior written* consent of the Compliance Department.

The next page of the questionnaire required Braff to either state that he did not maintain an outside brokerage account or provide detailed information about any outside brokerage account that he owned. Braff drew a line through the questionnaire and wrote "none," on the page. The second document, titled "Brokerage Account Disclosure Form," also required Braff to provide details about any outside brokerage accounts. Braff wrote his initials in a box that stated "none" and left the remainder of the form blank. Braff registered with PGP Financial on November 7, 2005.

In January 2006, Braff executed a purchase agreement with PGP Financial's owners. The agreement provided that Braff would purchase twenty percent of the firm's stock immediately and serve as the branch manager and sole on-site principal and supervisor for a branch office of

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<sup>3</sup> It appears that Braff opened the TD Waterhouse account at an earlier, unspecified date. The record contains a letter dated July 18, 2003 in which Braff notified TD Waterhouse about his employment with Milestone. The letter refers to the same account number that is on the January 2004 account application. Braff testified that he had to complete the January 2004 account application because "there were like three or four mergers that Waterhouse went through" that necessitated new paperwork.

PGP Financial.<sup>4</sup> A section of the firm's 2006 written supervisory procedures stated that Braff, in connection with his new responsibilities, was to oversee each annual compliance meeting. These meetings would address, among other things, requirements related to outside brokerage accounts. Another section of those supervisory procedures addressed the requirements associated with having an outside brokerage account, and designated Braff as the individual responsible for reviewing all "confirms and statements received from the firms at which employees maintain securities accounts."

While Braff was associated with PGP Financial, he placed numerous trades in his brokerage accounts at Scottrade and TD Waterhouse. Braff admits that many of those trades involved Document Security Systems, a security that PGP Financial salespersons (including some supervised by Braff) contemporaneously recommended to customers. Braff left PGP Financial on October 5, 2006.

### **3. PHD Capital**

On October 10, 2006, Braff became associated with PHD Capital and served as a compliance manager for a branch office. On October 5, 2006, Braff completed a document titled, "Transaction for or by Associated Person - Conduct Rules (NASD)," which required PHD Capital employees to disclose in writing any brokerage account. The document stated that the compliance department would approve or reject the account and, for approved accounts, required that duplicate statements and confirmations be sent to the firm's compliance officer for review. In the section of the document that sought detailed information about any accounts Braff might have, Braff wrote "None." At the bottom of the page, Braff signed his name below text that stated that he read the information regarding his obligations in accordance with the firm's and NASD's Conduct Rules, that he did not have any account to disclose at the time, and he understood that, should his situation change, he would comply with "the Rule, or be subject to disciplinary action."

While associated with PHD Capital, Braff actively traded in his Scottrade and TD Waterhouse accounts. For example, on October 6, 2006, one day after completing the document described above, Braff effected several trades in his TD Waterhouse account. Two of those October 6 trades involved the purchase of 2,000 shares of Document Security Systems, which PHD Capital salespersons also were recommending to their customers. Braff left PHD Capital on January 17, 2007.

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<sup>4</sup> The agreement also provided that Braff would purchase the remaining eighty percent of the firm at a later date, but that purchase never occurred.

#### 4. Pointe Capital

From March 21, 2007 through April 2, 2007, Braff was associated with Pointe Capital. He received a copy of, among other things, the firm's written supervisory procedures that included a policy regarding outside brokerage accounts:

*Securities Accounts.* All personnel must advise Pointe Capital, Inc. of all accounts at "notice-registered broker/dealers" . . . maintained in their name . . . . Pointe Capital, Inc. does not as a matter of policy permit any Registered Representative or employee to maintain a securities account with another broker-dealer without express prior written permission of the designated Principal.

*Duplicate Confirmations.* Duplicate confirmations, statements and/or other information related to all non-Pointe Capital, Inc. account transactions must be sent contemporaneously to the designated Principal.

Braff signed the policy, acknowledging that he had "read and understood, and accept[ed] and agree[d] to abide by, the above policy."

In March 2007, FINRA learned that a Pointe Capital salesperson that Braff supervised was permitted to resign from the firm after he had failed to follow the firm's electronic communication procedures while posting messages about Document Security Systems. During the course of the investigation, FINRA discovered that Braff actively traded in his outside brokerage accounts while associated with PGP Financial, PHD Capital, and Pointe Capital, and that his employer firms were not aware of such trading.

#### 5. FINRA Initiates a Disciplinary Proceeding

FINRA instituted this proceeding on July 27, 2009 and held a hearing on March 16, 2010. Braff stipulated that he failed to notify Scottrade or TD Waterhouse that he was associated with PGP Financial or PHD Capital, but he did not stipulate as to Pointe Capital. On that point, he testified that he considered it to be standard industry practice for an associated person to assume that an employer would notify an outside brokerage firm of the employee's firm association. On the other hand, he admitted that he, not his employer, had provided written notification to Scottrade and TD Waterhouse on one occasion in July 2003 about his pending association with Milestone.<sup>5</sup>

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<sup>5</sup> See *supra* note 3.

Braff stipulated that he failed to notify PHD Capital that he had accounts with Scottrade and TD Waterhouse. With respect to PGP Financial, Braff stated that Ellen Lozinski, PGP Financial's former president and chief compliance officer,<sup>6</sup> told him that he "should write none on the [disclosure] form in terms of having duplicate statements sent from the two [brokerage] firms," given that he was going to be the branch office's compliance officer. However, Lozinski testified that she did not speak with Braff about his outside brokerage accounts, and that, if she had, she would have told Braff to arrange for duplicate confirmations and statements to be sent directly to the firm to be reviewed by someone other than Braff.

Braff testified that he notified Pointe Capital orally and in writing about his outside brokerage accounts. Paul Chuzi, Pointe Capital's former director of compliance, testified that Braff never sought written permission to maintain outside brokerage accounts, that he recalled no conversations with Braff concerning his outside brokerage accounts, and that, if Braff had disclosed the brokerage accounts to him, he would have required Braff to do so in writing.

Braff further testified that it was more important to him to be able to have an outside brokerage account than to have a job with a member firm. For example, Braff testified that "if I cannot get a brokerage firm to allow me to have outside accounts, I will not work there." He reasoned that "you have to go to a discount broker . . . because I would have gone broke doing my hobby, trading actively, at \$20 a ticket charge" if he traded where he worked. Braff also testified it is "just a bad idea to have an account at the same firm you worked for" because "if there is a problem at the clearing company or that firm, they freeze your accounts." Braff acknowledged at the hearing that he had placed hundreds of trades totaling \$3,744,406 in his Scottrade and TD Waterhouse accounts while working at PGP Financial, PHD Capital, and Pointe Capital. He also admitted that he traded Document Security Systems stock during his association with PGP Financial and PHD Capital.

FINRA's Hearing Panel found that Braff violated Rule 3050(c) and Rule 2110 by failing to disclose his outside brokerage accounts to PGP Financial, PHD Capital, and Pointe Capital and failing to disclose his associated person status to Scottrade and TD Waterhouse, and that he also violated Rule 2110 by making false statements on the PGP Financial and PHD Capital disclosure documents. The Hearing Panel fined Braff \$15,000 and suspended him from associating with a member firm in all capacities for one year. Braff appealed the Hearing Panel's decision to FINRA's National Adjudicatory Council ("NAC"). At the oral argument before the NAC, Braff stated that "[t]his is absolutely a situation where a mountain, indeed, Mount Everest, has been made out of a molehill," and characterized his conduct as "an insignificant infraction . . . ." Although Braff acknowledged that he traded in Document Security Systems while it was being recommended to PGP Financial and PHD Capital customers, he stated, "[t]o that I say a big, so what?"

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<sup>6</sup> In its opinion, the National Adjudicatory Council stated that Lozinski was not the firm's compliance officer. However, Lozinski testified that she was the firm's president and chief compliance officer. A PGP Financial board resolution regarding the purchase agreement, dated January 19, 2006, is consistent with Lozinski's testimony.

The NAC affirmed the findings of violation but increased the sanctions to a two-year suspension and \$25,000 fine. The NAC concluded that "the Hearing Panel's sanctions [we]re inadequate to remedy Braff's misconduct and insufficient to deter Braff from engaging, again, in the type of misconduct presented here." For purposes of assessing the sanctions, the NAC aggregated the two counts of the complaint, reasoning that Braff's misconduct stemmed from "a single systemic problem or cause," *i.e.*, his failure to disclose the existence of his outside brokerage accounts.<sup>7</sup> This appeal followed.

### III.

NASD Rule 3050(c) provides that an associated person shall notify his member firm in writing about any accounts he maintains at a brokerage firm and notify the brokerage firm in writing about his association with the employer firm.<sup>8</sup> On appeal, Braff does not challenge FINRA's findings of violation, but only the sanctions imposed.

The record establishes that Braff did not make the required disclosures to any of his three employers. Braff stipulated that he failed to notify PHD Capital in writing about his outside brokerage accounts with Scottrade and TD Waterhouse. The record contains no evidence that Braff notified PGP Financial in writing, and his false statements on the firm's questionnaire regarding outside brokerage accounts are consistent with a finding that he failed to properly notify the firm. Although Braff testified that he provided written notice to Pointe Capital, he provided no documentary evidence in support. Moreover, Paul Chuzi, Pointe Capital's former director of compliance, testified that Braff never sought written permission to maintain outside brokerage accounts.

The record also establishes that Braff failed to provide written notification to Scottrade and TD Waterhouse about his status as an associated person. Braff admitted his failures to notify these firms about his association with PGP Financial and PHD Capital. The record contains no evidence that he notified Scottrade or TD Waterhouse about his association with Pointe Capital and supports a finding that he failed to do so. Accordingly, we find by a preponderance of the evidence that Braff violated NASD Rule 3050(c) and Rule 2110.<sup>9</sup>

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<sup>7</sup> The FINRA Sanction Guidelines authorize the aggregation of "similar types" of violations, particularly if, among other things, "the violations resulted from a single systemic problem or cause." FINRA Sanction Guidelines at 4 (General Principles Applicable To All Sanction Determinations, No. 4) (2011).

<sup>8</sup> NASD Conduct Rule 3050(c), [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3728](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3728).

<sup>9</sup> *John M. Crute*, 53 S.E.C. 870, 880 (1998) (finding that applicant violated former Article III, Sections 1 and 28(c), which were recodified as NASD Rule 3050, by failing to notify his broker-dealer employer in writing of his personal securities account at a firm, and to notify such firm in writing of his broker-dealer employment); *see also Guang Lu*, 58 S.E.C. 43, 52 & (continued...)

Braff does not dispute that he falsely represented that he had no outside brokerage accounts on the PGP Financial and PHD Capital disclosure documents. His Scottrade and TD Waterhouse accounts were open when he made these representations, and he actively traded in those accounts during his association with the two firms. Braff's false statements on these disclosure documents are inconsistent with just and equitable principles of trade.<sup>10</sup> We therefore find by a preponderance of the evidence that Braff also violated NASD Rule 2110 by engaging in this misconduct.

#### IV.

Pursuant to Exchange Act Section 19(e)(2), we will sustain FINRA's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.<sup>11</sup> FINRA suspended Braff from associating with any FINRA member firm in all capacities for two years and imposed on him a \$25,000 fine.

A. The sanctions imposed by FINRA are consistent with FINRA's Sanction Guidelines. Although the Commission is not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).<sup>12</sup> The Sanction Guidelines

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<sup>9</sup> (...continued)

n.17 (2005) (finding that applicant violated NASD Rule 3050(c) and Rule 2110 by failing to notify both employer firm and brokerage firm, in writing, that he was exercising discretionary authority over a brokerage account while he was associated with employer); *Brian Prendergast*, 55 S.E.C. 289, 309-10 (2001) (finding that applicant opened an account at member firm without giving prior written notice to employer firm).

<sup>10</sup> See *John M.E. Saad*, Exchange Act Rel. No. 62178 (May 26, 2010), 98 SEC Docket 28591, 28597 (finding that applicant's entry of false information in firm records violated NASD Rule 2110 and noting that entry of accurate information in firm records is foundation of FINRA's regulatory oversight of its members), *appeal filed*, No. 10-1195 (D.C. Cir. July 23, 2010); *Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8986 (stating that "conduct that reflects negatively on an applicant's ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade" and finding that applicant's submission of false information to his member firm violated NASD Rule 2110).

<sup>11</sup> 15 U.S.C. § 78s(e)(2). Braff does not claim, and the record does not show, that FINRA's action imposes an unnecessary or inappropriate burden on competition.

<sup>12</sup> E.g., *Mission Sec. Corp.*, Exchange Act Rel. No. 63453 (Dec. 7, 2010), 99 SEC Docket 35510 A1, 35510 A21 n.44.



recommend a fine of \$1,000 to \$25,000 for violations of NASD Rule 3050(c).<sup>13</sup> In egregious cases, the Guidelines suggest a suspension of up to two years, or a bar.<sup>14</sup> As to Braff's misrepresentations on the PGP Financial and PHD Capital account disclosure documents, for which there is no specific Guideline, FINRA concluded that the Guidelines regarding Forgery and/or Falsification of Records under NASD Rule 2110 were the most analogous. For such a violation, the Guidelines recommend a fine between \$5,000 and \$100,000 and a suspension in any and all capacities for up to two years, if mitigation exists.<sup>15</sup> In egregious cases, the Guidelines suggest a bar.<sup>16</sup>

Rule 3050(c) is intended to prevent associated persons from engaging in improper trading "by providing the employer member with more complete knowledge of its associated persons' trading activities."<sup>17</sup> The written notification requirement allows member firms to create and enforce internal compliance procedures and "facilitate more direct and early detection of the existence of potential rule violations," such as conflicts of interest with the firm or its customers.<sup>18</sup> A firm's ability to effectively monitor and address trading activity that may result in violative conduct is therefore highly dependent on the receipt of accurate and comprehensive information about an associated person's brokerage accounts.

We agree with FINRA that Braff's misconduct was egregious. Braff failed to disclose his outside brokerage accounts and firm associations over the course of eighteen months.<sup>19</sup> During this time, Braff made intentional efforts to conceal his outside brokerage accounts and personal trading activities from his employers.<sup>20</sup> The documents that Braff completed when he joined PGP Financial and PHD Capital contained unambiguous language requiring the disclosure of outside brokerage accounts. Yet, Braff falsely stated on the documents that he had no such brokerage accounts. While associated with Pointe Capital, Braff signed a document stating that

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<sup>13</sup> See Sanction Guidelines at 16.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 37.

<sup>16</sup> *Id.*

<sup>17</sup> NASD Notice to Members 91-27, [http://finra.complinet.com/en/display/display\\_viewall.html?rbid=2403&element\\_id=1200](http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=1200).

<sup>18</sup> *Id.*

<sup>19</sup> See Sanction Guidelines at 6 (Principal Consideration 9) (considering whether the misconduct occurred over an extended period of time).

<sup>20</sup> *Id.* at 7 (Principal Consideration 13) (considering whether the respondent's misconduct was the result of an intentional act, recklessness or negligence); *id.* at 6 (Principal Consideration 10) (considering whether the respondent attempted to conceal his misconduct).

he had read, understood, and would comply with the firm's written supervisory procedures, which included explicit language regarding outside brokerage accounts. He nonetheless failed to comply with those procedures.<sup>21</sup>

Braff's extensive experience, including having been in the securities industry for twenty-two years, is further evidence that he intended to conceal his outside brokerage accounts in violation of Rule 3050(c). Moreover, while at PGP Financial, Braff assumed supervisory and compliance responsibilities that included reviewing all confirmations and statements regarding employees' personal brokerage accounts. He also oversaw annual compliance meetings addressing, among other things, requirements related to outside brokerage accounts. Yet, despite his supervisory responsibilities in these areas, he repeatedly failed to disclose his outside brokerage accounts.

Braff admitted that he had previously complied with Rule 3050(c) when he notified Scottrade and TD Waterhouse in July 2003 about his pending association with Milestone. He then failed to report his continued association with Milestone on the January 2004 TD Waterhouse account application. Although the false information on the account application does not serve as a basis for a finding of violation, we consider it for purposes of assessing sanctions.<sup>22</sup> Braff testified that he knew that having an outside brokerage account was a more economical approach to facilitating his active trading hobby, and that such an account would be less susceptible to being frozen for various reasons. Indeed, Braff testified that having outside brokerage accounts was more important than having a job with a member firm. In this context, we agree with FINRA that Braff's misconduct "was not a matter of mere administrative oversight."

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<sup>21</sup> The Sanction Guidelines suggest that adjudicators consider whether the respondent provided verbal notice of the violative conduct to the employer member and/or brokerage firm and whether the employer member verbally acquiesced. *See* Sanction Guidelines at 16 (Principal Consideration 3 regarding a violation of Rule 3050). Braff testified that he orally notified PGP Financial and Pointe Capital about his brokerage accounts. Witnesses from PGP Financial and Pointe Capital testified that Braff did not mention his brokerage accounts, and if he had, they would have required Braff to disclose the existence of the accounts in writing and provide documentation that would allow the firms to monitor those accounts. The Hearing Panel did not make a credibility finding, and neither party urges us to consider as dispositive whether, if Braff provided verbal notice, PGP Financial or Pointe Capital verbally acquiesced. Based on the lack of information in the record, we have not considered this element of the Sanction Guidelines in our analysis.

<sup>22</sup> *See, e.g., Edgar B. Alacan*, 57 S.E.C. 715, 742 n.70 (2004) (considering evidence regarding respondent's actions after the ending date specified in the order instituting proceedings, not as a basis for findings of violation, but in assessing the public interest for purposes of determining appropriate sanction); *Joseph J. Barbato*, 53 S.E.C. 1259, 1282 (1999) (considering in setting sanctions respondent's efforts to influence customer witnesses' testimony).

Braff's trading in his personal accounts created, at a minimum, the potential for conflicts of interest with the firms with which he was an associated person and their customers, and is precisely the kind of activity that the Rule 3050(c) was meant to address. Braff actively traded in his outside brokerage accounts while associated with PGP Financial, PHD Capital, and Pointe Capital and acknowledged that he placed hundreds of trades valued at \$3,744,406. Moreover, Braff admitted that many of those trades involved Document Security Systems, a security that was recommended to customers of PGP Financial by its salespersons, including those whom Braff supervised. Braff continued to trade in Document Security Systems while working at PHD Capital, where salespersons also were recommending that security to customers. In fact, on October 6, 2006, one day after stating in a PHD Capital disclosure document that he had no personal brokerage accounts, Braff bought 2,000 shares of Document Security Systems through his TD Waterhouse account. This pattern of trading raised at least the potential for conflict between Braff's financial interests and his duties to his firms and their customers. Given these facts, we agree with FINRA that "Braff purposely thwarted safeguards intended to protect the integrity and transparency of the securities industry, and in so doing, created an environment ripe for customer abuse."

**B.** Braff claims that the sanctions imposed by FINRA are "overly severe" and "excessively harsh" in light of what he asserts are mitigating factors. Braff points to his "lack of any previous violations, and generally outstanding disciplinary background." However, "we have repeatedly stated that 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.'"<sup>23</sup> Braff asserts that he cooperated with FINRA and that he did not "conceal any wrongdoing during any investigations." When Braff registered with FINRA, "he agreed to abide by its rules, and compliance with his obligation to cooperate with an investigation is not a mitigating factor."<sup>24</sup>

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<sup>23</sup> *Dennis S. Kaminiski*, Exchange Act Rel. No. 65347 (Sept. 16, 2011), 101 SEC Docket 45925, 45941 & n.35 (citing *Scott Epstein*, Exchange Act Rel. No. 59329 (Jan. 30, 2009), 95 SEC Docket 1833, 13865 (quoting *Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 801 n.20)); *see also Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (holding that lack of disciplinary history is not a mitigating factor); *Robert J. Prager*, 58 S.E.C. 634, 666-67 (2005) (finding no mitigation in respondent's "otherwise 'pristine' disciplinary record"); *Ernest A. Cipriani*, 51 S.E.C. 1004, 1007 & n.15 (1995) (rejecting respondent's "otherwise spotless" disciplinary record as a mitigating factor for purposes of sanctions).

<sup>24</sup> *Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22038 & n.25 (citing *Keyes*, 89 SEC Docket at 801 & nn.20 & 22 (finding cooperation during NASD investigation and a lack of disciplinary history not mitigating) (citing cases), *aff'd*, 416 F. App'x 95 (2d Cir. 2011); *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (3d Cir. 1994)).

Braff argues that his "violation was never done for any reasons in an attempt to monetarily gain even one cent at the expense of any clients, firms, or anyone. And, in fact, it was never found that I had gained anything monetarily." The absence of monetary gain or customer harm is not mitigating, "as our public interest analysis 'focus[es] . . . on the welfare of investors generally.'"<sup>25</sup> Braff's failure to disclose his brokerage accounts and trading activity undermined his employers' ability to detect actual or potential conflicts of interest, or other violative conduct.<sup>26</sup> Thus, even if a failure to disclose an outside brokerage account or firm association does not result in an applicant's monetary gain or harm to investors, it is serious because it impedes detection of other potentially violative conduct.<sup>27</sup>

Braff claims that he "self-corrected" his disclosure failures before the investigation began.<sup>28</sup> It appears that Braff is referring to the fact that he disclosed his brokerage accounts to PHD Capital when he joined the firm for a second time in June 2007, after the events at issue. There is no evidence, however, that Braff *ever* corrected any of the information in the PGP Financial and PHD Capital disclosure documents or provided the required written notification to the brokerage firms or to his three employers regarding his status from October 2005 through April 2007, the period at issue. Braff's claimed compliance therefore is irrelevant. In any event, FINRA initiated the investigation that led to the discovery of Braff's violations four months before he made his disclosures to PHD Capital in June 2007. As we have stated, FINRA should not have to bring disciplinary proceedings in order to obtain compliance with its rules.<sup>29</sup>

Braff states that he is remorseful. At the same time, Braff has attempted to minimize the

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<sup>25</sup> See *vFinance Inv., Inc.*, Exchange Act Rel. No. 62448 (Jul. 2, 2010), 98 SEC Docket 29918, 29944 & n.56 (quoting *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14259).

<sup>26</sup> See Sanction Guidelines at 16, 6 (Principal Considerations 1 and 11) (considering whether the violation presented real or perceived conflicts of interest for the employer firm and/or customers and whether the respondent's misconduct resulted directly or indirectly in injury to investing public, employer firm, and/or other market participants).

<sup>27</sup> Cf. *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5129 ("[F]ailing to respond [to requests for information] undermines NASD's ability to detect misconduct that may have occurred and that may have resulted in harm to investors or financial gain to respondents. Thus, even if the failure to respond does not result in direct improper financial benefit to respondents or harm to investors, it is serious because it impedes detection of such violative conduct.").

<sup>28</sup> See Sanction Guidelines at 6 (Principal Consideration 3) (considering whether respondent employed subsequent corrective measures prior to detection).

<sup>29</sup> Cf. *Kent M. Houston*, Exchange Act Rel. No. 66014 (Dec. 20, 2011), \_\_ SEC Docket \_\_, \_\_ & n.23 (stating that NASD should not have to bring disciplinary proceedings in order to obtain compliance with its rules governing its investigations).

severity of his actions by characterizing these proceedings as a mountain made out of a "molehill," his violations as an "insignificant infraction," and his trading in Document Security Systems as a "big so what?" He also blamed Ellen Lozinski for the manner in which he completed the PGP Financial disclosure document and insisted that his employer firms should have notified the brokerage firms about his associations. Braff's attempt to shift blame for his violations to others and his failure to appreciate the fundamental duty to provide the notification required by Rule 3050(c) justifies the imposition of a serious sanction, particularly given his twenty-two years in the securities industry.<sup>30</sup>

Braff claims that FINRA's counsel incorrectly told the Hearing Panel that "the guidelines can only be used to make sanctions HARSHER but can not be used to make sanctions lower." Braff is incorrect. At the oral argument before the NAC, FINRA's counsel stated that "the supposed guidelines that Mr. Braff mentioned are guidelines for the reduction of sanctions are actually what should be considered to be aggravating factors, not mitigating factors. The absence of an aggravating factor does not warrant a reduction in a fine or suspension." Counsel's statement is consistent with our view that the absence of an aggravating factor under the Sanction Guidelines is not necessarily mitigating, and we have addressed Braff's claims of mitigation.<sup>31</sup>

Braff challenges FINRA's application of the Sanction Guideline governing Forgery and/or Falsification of Records to his false statements on the PGP Financial and PHD Capital disclosure documents. He asserts that the Guideline, "which deals with sanctions for FORGERY, is totally inappropriate" because he did not forge any document. But the Sanction Guidelines encourage adjudicators to look at analogous guidelines to determine sanctions for violations that are not addressed specifically.<sup>32</sup> The NAC explained in its decision that the Guideline for Forgery and/or Falsification of Records was helpful and the most analogous under the facts presented because Braff's "false statements about the existence of the Scottrade and TD Waterhouse accounts on PGP Financial's and PHD Capital's disclosures caused the firms' records to contain false information concerning those accounts." We find that FINRA reasonably determined that the

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<sup>30</sup> See *Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800, 802 (rejecting claim of remorse given attempts to shift blame to others and failure to appreciate the fundamental duties of a securities professional, and finding claimed ignorance of obligations aggravated in light of fifteen years of securities industry experience).

<sup>31</sup> *Michael Frederick Siegel*, Exchange Act Rel. No. 58737 (Oct. 6, 2008), 94 SEC Docket 10501, 10519 (finding that, while the presence of certain factors could constitute aggravating circumstances justifying an increase in sanctions under the Guidelines, their absence is not mitigating), *vacated and remanded in part on other grounds*, 592 F.3d 147, 157 (D.C. Cir. 2010).

<sup>32</sup> See Sanction Guidelines at 1 (Overview) (encouraging adjudicators to look at analogous guidelines to determine sanctions for violations that guidelines do not address specifically).

falsification of records was the most analogous guideline and that its application to Braff's violation was appropriate.<sup>33</sup>

Accordingly, we find that the \$25,000 fine and two-year suspension are remedial because they will deter Braff and others from failing to disclose information about outside brokerage accounts and firm associations thereby protecting the investing public by facilitating more direct and early detection of potential rule violations, such as a conflict of interest with a firm or its customers. We conclude that the sanctions are neither excessive nor oppressive.

An appropriate order will issue.<sup>34</sup>

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

Elizabeth M. Murphy  
Secretary

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<sup>33</sup> See *Saad*, 98 SEC Docket at 28602 (finding that FINRA reasonably determined and properly applied the most analogous guideline based on the facts).

<sup>34</sup> 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. 66467 / February 24, 2012

Admin. Proc. File No. 3-14417

In the Matter of the Application of

HOWARD BRAFF  
4 Mews Court  
Holtsville, NY 11742

For Review of Disciplinary Action Taken by  
Financial Industry Regulatory Authority, Inc.

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by the Financial Industry Regulatory Authority, Inc. against Howard Braff, and its imposition of costs, be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy  
Secretary