

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 80322 / March 28, 2017

Admin. Proc. File No. 3-17406

In the Matter of the Application of
Keith D. Geary
For Review of Disciplinary Action Taken by
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY
PROCEEDINGS

Failure to Comply with Net Capital Requirements

Conduct Inconsistent with Just and Equitable Principles of Trade

President of former FINRA member firm appeals from FINRA disciplinary action finding him responsible for his firm's failure to comply with net capital requirements. *Held*, FINRA's findings of violation and imposition of sanctions are sustained.

APPEARANCES:

Joe M. Hampton and *Amy J. Pierce*, of Corbyn Hampton Barghols Pierce, PLLC, for Keith D. Geary.

Alan Lawhead, *Andrew Love*, and *Megan Rauch* for FINRA.

Appeal filed: August 18, 2016
Last brief received: December 5, 2016

Keith D. Geary, a registered representative of FINRA member Union Capital Company, and formerly the owner, president, and chief executive officer of former FINRA member Geary Securities, Inc. f/k/a Capital West Securities, Inc. (“GSI”),¹ appeals from FINRA disciplinary action. FINRA found that Geary violated its rule requiring adherence to just and equitable principles of trade in connection with net capital violations under Rule 15c3-1 under the Exchange Act (the “net capital rule”).² FINRA barred Geary from acting in any principal or supervisory capacity with any FINRA member firm, suspended him for 30 business days in all capacities, fined him \$20,000, and assessed costs. Based on our de novo review of the record, we sustain FINRA’s findings of violation and the sanctions it imposed.

I. Background

This appeal concerns Geary’s role in allowing GSI to conduct a securities business in May 2009 and February 2010 while it lacked sufficient net capital. Under the net capital rule, broker-dealers are required to maintain, at all times, a minimum amount of net capital, i.e., a minimum level of highly liquid assets.³ The rule ensures that, in the event of financial difficulties, a broker-dealer has “maintain[ed] sufficient liquid assets to . . . liquidate in an orderly fashion without the need for a formal legal proceeding.”⁴

A broker-dealer is required to maintain at least \$250,000 of net capital if it “receives checks, drafts, or other evidences of indebtedness made payable to itself or persons other than the requisite registered broker or dealer . . .”⁵ During the periods at issue, GSI was required to maintain \$250,000 in net capital under the rule because it received checks in the firm’s name from its customers. Geary had also signed a FINRA Membership Agreement agreeing that GSI would maintain \$250,000 in net capital.

¹ Geary purchased Capital West Securities, Inc. in 2007 and changed its name to Geary Securities, Inc. in December 2009. The charged violations occurred both before and after the firm’s name change. We refer to the firm during both periods as “GSI.”

² FINRA requires members and their associated persons to “observe high standards of commercial honor and just and equitable principles of trade” in the conduct of business. *See* FINRA Rule 2010 (applying these standards to members) and FINRA Rule 140(a) (stating that associated persons “have the same duties and obligations as a member under the Rules”).

³ *Financial Responsibility Rules for Broker-Dealers*, Exchange Act Release No. 70072 (July 30, 2013), 78 FR 51824 (Aug. 21, 2013) (describing the fixed dollar amount and financial ratio calculations required under the rule).

⁴ *Net Capital Rule*, Exchange Act Release No. 38248 (Feb. 6, 1997), 62 FR 6474, 6475 (Feb. 12, 1997).

⁵ 17 C.F.R. § 240.15c3-1(c)(2)(i).

The charged violations occurred while Geary was planning to purchase, repackage and resell “private label” collateralized mortgage obligations (“CMOs”) in connection with a “Credit Enhanced Mortgage Pool” or “CEMP.” Geary was familiar with the market for private label CMOs because a significant portion of his business involved selling such securities to local banks. By the spring of 2009, the market for CMOs was flooded with sellers and prices were dropping precipitously. As Geary explained at the hearing, he planned to purchase CMOs “on the cheap,” get a “AAA rating” for restructured securities that combined the CMOs with treasury bonds, and then profit from sales of the resulting CEMP securities.

A. Geary’s CMO purchases resulted in net capital deficiencies in 2009.

Geary attempted to put his CEMP plan into motion after he learned that a longtime customer, Frontier State Bank, needed to sell a large block of its CMO holdings as a result of FDIC concerns about those holdings. At the time, Frontier was involved in an FDIC cease and desist proceeding.⁶ As Geary testified, he knew at the time that the FDIC had told Frontier that “they were going to have to adjust their positions on private label securities” and had issued warnings that “large concentrations” of such securities would be considered “imprudent.”⁷

In early May, Geary discussed his CEMP plans with GSI’s primary financial and operations principal, Norman Frager, but did not specifically mention Frontier’s CMO holdings. Frager, who was familiar with securities that were restructured in the way Geary envisioned under his CEMP plan, warned Geary: “We can’t do this in the broker-dealer. We don’t have the capital. You have to set up a special purpose entity.”

1. Geary ordered GSI purchases of CMOs without the funds to pay for them.

On May 28, 2009, while the firm had approximately \$1 million in net capital, Geary caused the firm to buy Frontier’s CMOs holdings for \$77 million for GSI’s proprietary account. Geary did so despite Frager’s warning, and, according to his testimony, without further discussions with Frager, without making arrangements to pay for the purchase, and without a potential repurchaser in mind. Geary claimed that he believed GSI’s clearing firm, Pershing LLC, would allow the firm to retain the CMOs in GSI’s Pershing account, without paying for them, for several weeks while it repackaged and resold them.

⁶ See *Frontier State Bank, Oklahoma City, Oklahoma*, Decision and Order to Cease and Desist, FDIC-07-288b (Apr. 12, 2011), available at: <https://www.fdic.gov/bank/individual/enforcement/2011-04-76.pdf> (ordering that the bank cease and desist from, among other things, operating with inadequate capital, and describing May 28, 2009 amendment to the notice of charges), *petition denied*, 702 F.3d 588 (10th Cir. 2012).

⁷ We take official notice of the Financial Institution Letter that Geary described at the hearing. Rule of Practice 323, 17 C.F.R. § 201.323. *Risk Management of Investments in Structured Credit Products*, Financial Institution Letter, FIL-20-2009 (April 30, 2009) <https://www.fdic.gov/news/news/financial/2009/fil09020.html> (last visited Mar. 16, 2017).

On May 29, however, Pershing issued GSI a \$31.8 million margin call for the purchase. Geary asked Pershing for financing in response, but Pershing had a policy against extending credit for private label CMOs and refused. There is no evidence that Geary took any further action on May 29, and GSI continued to operate (as it had on May 28).

On June 1, the following Monday, Geary finally told Frager about the trade. In response, Frager reiterated that the CMOs “can’t be in the firm’s account” and had to be “moved.” As Geary later acknowledged, he “understood from talking to [Frager] that [the CMO purchase] had created a net capital violation.” Later on June 1, after this conversation with Frager, Geary contacted Frontier’s president, Joseph McKean, who agreed to repurchase the CMOs through GSI accounts McKean controlled at the \$77 million price GSI originally paid. The resale of the CMOs was completed over two days, June 1 and June 3.

2. *FINRA found net capital deficiencies during a November 2009 examination of GSI.*

Although GSI’s net capital report for May 2009 did not reflect the CMO purchase, Oklahoma state regulators learned of the CMO transactions and alerted FINRA.⁸ FINRA then conducted an examination of the firm in November 2009. FINRA staff determined that the firm had erroneously excluded the purchase of the CMOs from its May 2009 net capital calculation. In calculating net capital under Rule 15c3-1, a broker-dealer is required to make specified adjustments to the firm’s net worth, including deductions, or “haircuts,” of specified percentages from the market value of securities held by the firm. In calculating GSI’s net capital including the firm’s CMO holdings, FINRA ultimately applied a 15% haircut to the \$77 million CMO purchase price (\$11.5 million), resulting in net capital deficiencies of approximately \$10.7 million on both May 28 and May 29.⁹

FINRA staff explained its deficiency determination to Frager and asked the firm to file a net capital deficiency notice. Frager disputed the deficiency and refused to file the notice. Frager said that he planned to contact Pershing to “correct[]” the trade records to show that the CMOs had never been held by the firm but had rather been resold “as of” May 28.

GSI then contacted Pershing to change the trade date recorded for the McKean transactions from June 1 and June 3 to May 28, 2009. Geary described this effort during his

⁸ The record does not indicate how these trades came to the Oklahoma regulator’s attention. As discussed below, Oklahoma conducted a separate investigation, and instituted proceedings against Geary regarding, among other things, the transactions at issue in this case.

⁹ Although evidence indicates that GSI continued to hold a portion of the CMOs on June 1 and 2, FINRA did not charge and found no violations related to the CMO purchase beyond May, which limits the parameters of this review proceeding. *See* Exchange Act § 19(e), 15 U.S.C. § 78s(e)(1) (stating that the Commission reviews on appeal whether the associated person “has engaged in [the] acts or practices, or has omitted [the] acts,” found by FINRA).

investigative testimony as “backdat[ing] the [trade] tickets to make the capital violation go away.” The firm also submitted changes to the recorded settlement dates for the sales to McKean, but Pershing refused, and they remained June 1 and June 3.

B. GSI operated with deficient net capital in February 2010.

During the final months of 2009, Frager warned Geary repeatedly about GSI’s deteriorating finances. GSI ended the year with more than \$300,000 in losses due in part to GSI’s failed attempts to close a CEMP transaction in December 2009. Geary was relying on the anticipated proceeds from this transaction to meet the firm’s net capital requirement.

By mid-January 2010, Frager calculated that GSI’s net capital had dropped by \$100,000 to \$323,913. Frager warned Geary that GSI was “getting close” to a net capital violation and needed to inject \$250,000 into the firm “by the end of January.” Frager further advised Geary that, to remain in net capital compliance, GSI would ultimately have “to close the CEMP deal,” obtain a total capital infusion of \$500,000; or amend the firm’s FINRA membership and restructure its operations to lower its net capital requirement. Frager also testified that he warned Geary that “if you violate [the net capital rule], you have to cease doing business,” i.e., “stop taking [customers’] orders.” By the end of January, the CEMP transaction had not closed, and Geary had failed to take either of the other steps Frager outlined to address the impending deficiency. On January 31, 2010 GSI had a net capital deficiency of \$55,735.

On February 4, 2010, the firm’s bookkeeper first learned that there was a deficiency and notified Geary. In response, Geary immediately transferred \$75,000 in personal funds to the firm and sought a bank loan to address the continuing net capital problem.

Geary’s loan approval was delayed through most of February while GSI’s net capital deficiencies continued. On February 10, when Geary still had not received the loan, another firm officer considered sending an e-mail to brokers telling them to stop conducting securities business. But after conferring with Geary and others, Frager instructed the officer “not to send out any notice to brokers” (emphasis in original) because a loan was pending and would be approved the next week. At the hearing, Geary admitted that, although Frager had previously reminded him that deficiencies required a broker-dealer to stop doing business, it was Geary’s decision to continue GSI’s operations despite the deficiencies.

Geary did not receive the loan or make the necessary capital infusion until February 26, but he continued to operate GSI throughout this period despite varying net capital deficiencies. GSI sent FINRA net capital deficiency notices on February 10, 12, and 26 and began daily net capital calculations on February 10, which the bookkeeper reported to Geary on a daily basis. At the hearing, FINRA explained its net capital calculations showing that the firm had deficient net

capital on fifteen of the seventeen business days from February 2 to February 25, with deficiencies ranging from \$3,903 to \$131,273 short of the firm's \$250,000 requirement.¹⁰

FINRA and Oklahoma state regulators began investigating GSI in March 2010. In February 2012, Geary settled with Oklahoma by consenting, among other things, to heightened supervision and to not register as a principal, officer, or director of an Oklahoma broker-dealer for 25 months. GSI withdrew its FINRA registration in February 2012 and terminated Geary's association with the firm in April 2012.

C. FINRA instituted proceedings.

On September 17, 2012, FINRA's Department of Enforcement filed a complaint against Geary and Frager, who later settled.¹¹ Enforcement charged Geary with allowing GSI to operate with deficient net capital in May 2009 and February 2010. After hearing testimony from Geary, Frager and other firm and Pershing employees, the Hearing Panel found that Geary knowingly or at least recklessly permitted GSI to operate with deficient net capital in May 2009 and February 2010. The panel barred Geary from acting in a principal or supervisory capacity, imposed consecutive all-capacity suspensions of 30 business and 60 calendar days for the May 2009 and February 2010 deficiencies, respectively, and imposed a combined fine of \$30,000. Geary appealed the panel decision, and FINRA's National Adjudicatory Council (the "NAC") affirmed the findings of violation. Assessing a unitary sanction for the violations, the NAC sustained the bar but reduced the all-capacities suspension to 30 days and the fine to \$20,000.

II. Analysis

In reviewing FINRA disciplinary action, we determine whether the applicant engaged in the conduct found by FINRA, whether such conduct violates FINRA rules as FINRA found, and whether such FINRA rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.¹² As explained below, we find that Geary allowed GSI to conduct a securities business without the requisite net capital, that such conduct violated the just and equitable

¹⁰ The record indicates that GSI also had deficient net capital on February 1, 2010, but this deficiency was not covered by FINRA's complaint or FINRA's findings that are subject to this appeal. *See supra* note 9.

¹¹ Enforcement charged Frager with recordkeeping and financial notification violations as well as with allowing GSI to operate with deficient net capital in February 2010. We take official notice, pursuant to Rule of Practice 323, 17 C.F.R. § 201.323, of Frager's settlement with FINRA. *See Order Accepting Offer of Settlement as to Respondent Frager*, Disciplinary Proceeding No. 2009020465801 (Oct. 23, 2013), available from: <http://www.finra.org/industry/finra-disciplinary-actions-online> (settling, without admitting or denying the allegations, charges related to the February 2010 deficiencies).

¹² 15 U.S.C. § 78s(e)(1).

principles of trade required under FINRA Rule 2010, and that Rule 2010 is, and was applied in a manner, consistent with the purposes of the Exchange Act.

A. GSI repeatedly violated the net capital rule.

The net capital rule was promulgated under Exchange Act Section 15(c)(3), which prohibits broker-dealers from effecting any securities transactions in contravention of the Commission’s financial responsibility rules.¹³ Because the rule is focused on ensuring that firms have sufficient liquid assets to satisfy their obligations at all times, and requires adherence on a continuous, “moment to moment” basis,¹⁴ a broker-dealer violates the rule when it engages in securities business without the required level of net capital.¹⁵ The record shows that GSI was required to maintain \$250,000 in net capital and that it operated its securities business on each of the days at issue here. We agree with FINRA that GSI violated the net capital rule on May 28 and May 29, 2009 because it conducted securities business with net capital deficiencies of at least \$10.7 million on both days.¹⁶ We also agree with FINRA that GSI repeatedly violated the net capital rule from February 2 to February 25, 2010 because it conducted securities business with deficiencies ranging from \$3,903 to \$131,273 during that period.¹⁷

Geary does not dispute the February 2010 deficiencies,¹⁸ but argues that FINRA’s May 2009 net capital calculations are incorrect. According to Geary, they should reflect “zero liability” for the CMOs because Pershing’s records were later changed to show a May 28 trade date for the resales to McKean—meaning that the firm’s purchase from and resale to McKean and Frontier occurred on the same date. But Geary admitted, and the contemporaneous records and e-mails confirm, that GSI held all of the CMOs on May 28 and May 29 in its own Pershing proprietary account; that Geary ordered the purchase intending to hold the CMOs for two to three weeks (not to immediately resell them); and that Geary did not discuss a CMO repurchase

¹³ 15 U.S.C. § 78o(c)(3).

¹⁴ NASD Notice to Members 07-16 (April 2007).

¹⁵ *James Michael Brown*, Exchange Act Release No. 31223, 1992 WL 31223, at *4 n.4 (Sept. 23, 1992) (“Under Section 15(c)(3) of the Exchange Act, our net capital requirements apply only to firms that effect transactions in securities.”).

¹⁶ Although FINRA’s calculations applied a 15% haircut, which its expert characterized as “most beneficial” to the firm, circumstances may have warranted use of a much higher deduction. *See, e.g.*, No-Action Letter Securities Industry Association, Marketability of Asset-Backed Securities Issued by Special Purpose Vehicles (July 13, 2001) available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/sia071301-out.pdf>.

¹⁷ An Appendix to this opinion details the net capital deficiencies on each day.

¹⁸ Although Geary vaguely asserts in his petition for review that FINRA erred in finding violations based on the February 2010 deficiencies, he failed to explain or support his objections and the record amply supports the findings.

with McKean until June 1. GSI's success, after the fact, in amending the recorded trade date in no way changes the reality that GSI—and not McKean or Frontier— held the CMOs on May 28 and May 29 and was required to include them in calculating its net capital.

Geary claims that FINRA's examiner and expert witness failed to acknowledge or account for the backdated trade date, but we agree with FINRA that the "repapering of the trade date did not reflect the reality of the transaction." Net capital calculations cannot be based on altered or non-contemporaneous records—let alone records that, as Geary admitted, were deliberately "backdated. . . to make the [net] capital violation[s] go away."¹⁹ The backdated trade date was irrelevant to the calculation of GSI's net capital and its net capital violation.

B. Geary was responsible for the firm's net capital violations.

An associated person of a broker-dealer, such as Geary, violates just and equitable principles of trade under FINRA Rule 2010 if he is responsible for a violation of the net capital rule.²⁰ As FINRA found, Geary is responsible for operating GSI's securities business with deficient net capital in violation of Rule 2010. We have long held that the president of a broker-dealer "bears a heavy responsibility" and "duty" to ensure compliance with the net capital requirements.²¹ As Geary admitted at the hearing, the firm's net capital compliance was ultimately his responsibility. Yet Geary received warnings about and advice for preventing net capital violations but repeatedly failed to ensure compliance.

Indeed, Geary's own purchase of CMOs through GSI led to its May 2009 violations, and he made this purchase contrary to Frager's clear warning not to do so. He also repeatedly ignored or failed to respond appropriately to warnings from Frager and others about the firm's declining net capital in connection with the February 2010 violations. As we have held, the duty of ensuring compliance with net capital requirements "is particularly important, and the attention" that officers must pay "is even greater when the firm has been experiencing difficulties

¹⁹ See *Kirk L. Ferguson*, Exchange Act Release No. 34621, 1994 WL 482332, at *5 n.12 (Aug. 31, 1994) (declining to consider accountant letter as evidence of the net capital computation because the letter post-dated the relevant event and did not reflect relevant facts); *Edward B. Daroza*, Exchange Act Release No. 30957, 1992 WL 188933, at *2 (July 27, 1992) (finding after-the-fact adjustments to tax liability were "of no consequence" to the amounts that should have been included in the net capital computation).

²⁰ *Paul Joseph Benz*, Exchange Act Release No. 51046, 2005 WL 106887, at *3 (Jan. 14, 2005) (finding that firm's president violated just and equitable principles of trade because he was responsible for the firm's violation of the net capital rule).

²¹ *Fox & Co. Invs., Inc.*, Exchange Act Release No. 52697, 2005 WL 2848468, at *7 (Oct. 28, 2005).

or is operating close to permissible limits.”²² Geary failed in these duties. With respect to both the May 2009 and February 2010 violations, Geary failed to ensure that the firm was operating with sufficient net capital despite being aware of the conditions that led to the violations.

Geary attempts to distance himself from the firm’s net capital violations by arguing that he delegated and relied on qualified industry professionals who he claims were ultimately responsible for the violations. According to Geary, he did not have any “personal involvement” with GSI’s violations and “Frager—without consulting Geary—made all of the decisions that are the bases for the violations.” But it is undisputed that Geary, not Frager, ordered the CMO purchase that caused the May 2009 deficiencies and that he did so despite Frager’s warnings. Moreover, it was his, not Frager’s, decision to continue the firm’s violative operations notwithstanding his awareness of deficiencies that were continuing in February 2010. He again disregarded reminders of his obligation to suspend operations in making that decision.

Geary also contends that he “lacked any knowledge, awareness or suspicion” of the May 2009 net capital violations and did not intend to violate the rule. As an initial matter, intent is not necessary to establish a responsible person’s liability for a net capital violation.²³

In any case, the record supports FINRA’s finding that Geary acted with scienter. Although Geary testified at the hearing that he “didn’t have the knowledge base that [the May 28 CMO purchase] was going to trigger a net capital violation,” the hearing panel did not credit him. The panel, which had “knowledge of trade practice in the securities industry,” rejected Geary’s testimony after observing his demeanor.²⁴ We see no basis for rejecting the panel’s assessment. Indeed, Geary’s claims of ignorance regarding the violations triggered by the May 2009 CMO trades are undermined by Frager’s testimony that he told Geary that the firm did not have the capital to implement Geary’s CEMP idea. We agree with the panel’s holding that “Geary had to know that Frager’s instruction was linked to net capital concerns even if Frager did not expressly state the net capital ramifications” and thus acted at a minimum recklessly.

Even if Frager had not warned him, Geary’s actions reflect a reckless disregard for the clear purpose of the net capital rule: to ensure that broker-dealers have “enough liquid assets on

²² *Hutchison Fin.*, Exchange Act Release No. 32215, 1993 WL 138533, at *4 (Apr. 26, 1993).

²³ *Benz*, 2005 WL 106887 at *3; *W. N. Whelen & Co., Inc.*, Exchange Act Release No. 28390, 1990 WL 312067, at *11 (Aug. 28, 1990) (“Proof of intent to violate is unnecessary to establish net capital violations.”); *Hutchison Fin.*, 1993 WL 138533, at *4-5 (finding that firm president violated the predecessor to the net capital rule by allowing his firm’s “inadvertent” net capital violation even though there was no showing that he intended a deficiency).

²⁴ *William K. Cantrell*, Exchange Act Release No. 38570, 1997 WL 219926, at *3 (May 5, 1997) (giving “substantial weight” to a hearing panel’s resolution of an issue that involves the panel’s “collective experience and its knowledge of trade practice in the securities industry.”).

hand at all times to cover current indebtedness.”²⁵ Geary well knew, when he acquired the CMOs, that the firm unquestionably lacked the funds to pay the \$77 million purchase price or even meet Pershing’s impending margin call. As Frager testified at the hearing, “it would have put the firm out of business” to purchase the CMOs “if [it] had no buyers” for the CMOs.

With respect to the February 2010 violations, Geary acted knowingly. Before those violations, Geary received warnings from Frager about the firm’s declining net capital and the implications for the firm’s ability to continue operations. Frager also provided Geary with specific advice on how GSI could remain compliant. But Geary ignored that advice. And after Frager and others confirmed that the firm was experiencing the deficiencies Frager predicted, Geary rejected other firm officials’ reminders that GSI needed to suspend operations.

Finally, Geary argues that he should not be held liable for GSI’s refusal to file a net capital notice in November 2009, for the timeliness of the February 2010 deficiency notices, or for not sending an e-mail to employees about the 2010 net capital violations. But whatever his role in or responsibility for those matters, FINRA’s findings of violation are based solely on his responsibility for allowing the firm to operate without required net capital. As Geary admitted, the decisions that resulted in the firm’s violative operations were ultimately his.

C. FINRA Rule 2010 is, and was applied in a manner, consistent with the purposes of the Exchange Act.

We find that FINRA Rule 2010 is, and was applied in a manner, consistent with the purposes of the Exchange Act. Rule 2010 requires that member firms and their associated persons “observe high standards of commercial honor and just and equitable principles of trade,” and is consistent with the purposes of Exchange Act Section 15A(b)(6), which requires FINRA to design its rules to “promote just and equitable principles of trade.”²⁶ FINRA applied Rule 2010 in a manner consistent with the purposes of the Exchange Act when it found that Geary violated the rule by allowing the firm to violate Exchange Act Rule 15c3-1. Applying Rule 2010 to persons responsible for violations of the net capital rule is consistent with just and equitable principles of trade because it ensures that broker-dealers maintain sufficient liquid assets to promptly satisfy their liabilities, including claims by customers and other broker-dealers.²⁷

²⁵ *Dillon Sec., Inc.*, Exchange Act Release No. 31573, 1992 WL 383783, at *2 (Dec. 8, 1992).

²⁶ 15 U.S.C. § 78o-3(b)(6).

²⁷ *Benz*, 2005 WL 106887, at *2.

III. Sanctions

Under Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find that it is “excessive or oppressive” or imposes an unnecessary or inappropriate burden on competition.²⁸ As part of this review, we consider any aggravating or mitigating factors;²⁹ we also consider whether the sanctions are remedial in nature and not punitive.³⁰ Although the Commission is not bound by the Sanction Guidelines, we use them as a benchmark for our review.³¹ Geary argues that the sanctions FINRA imposed were inconsistent with FINRA’s Sanction Guidelines and failed to appropriately consider mitigating factors. We disagree and find the sanctions satisfy the statutory requirements.

A. The sanctions are consistent with FINRA’s Sanction Guidelines, and FINRA considered the appropriate aggravating and mitigating factors.

The Sanction Guidelines for net capital violations provide that persons responsible for such violations may be subject to fines ranging from \$1,000 to \$73,000, a suspension for 30 business days in any or all capacities and, in “egregious cases,” a two-year suspension or a bar.³² FINRA barred Geary from acting in any principal or supervisory capacity with any FINRA member firm, suspended him for 30 business days in all capacities, and fined him \$20,000. In so doing, FINRA found that Geary’s conduct was egregious and that he was directly responsible for the net capital violations.³³ FINRA noted, among other things, the large amount of the 2009 net capital deficiency that his own trading triggered, the extended 2010 deficiency period, and the short time between the two deficiency periods, which demonstrated a pattern of misconduct. FINRA found, and we agree, that there is no evidence that Geary tried to conceal violations after they occurred—one of the guideline’s “principal considerations.” Nevertheless, his repeated failures to heed clear warnings, and willingness to continue the firm’s business while knowing of deficiencies—the other principal consideration in the guidelines—demonstrate a troubling attitude toward critical regulatory requirements and justify significant sanctions.

Geary challenges FINRA’s finding that his conduct was egregious by claiming that no such finding can be warranted unless there is “fraudulent conduct,” a fraudulent

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

²⁹ *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013).

³⁰ *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007).

³¹ *John Joseph Plunkett*, Exchange Act Release No. 69766, 2014 WL 4593195, at *4 (Sept. 16, 2014).

³² Sanction Guidelines at 28 (2015 ed.).

³³ *See Listrom v. SEC*, 975 F.2d 866 (8th Cir. 1992) (table) (approving sanctions imposed after considering the applicants’ “individual responsibility for the violations”).

misrepresentation, or a “high level of scienter.” But the guidelines do not require such a showing, and we have long deemed net capital violations egregious notwithstanding the absence of fraud or scienter.³⁴ In any event, as discussed, Geary acted with scienter. Given that finding, the guidelines authorize significant sanctions, including sanctions that exceed those recommended.³⁵

Geary contends that the sanctions imposed by the hearing panel were unfair because they exceeded the sanctions recommended by Enforcement before the hearing. We find no unfairness because the complaint and the Sanctions Guidelines put Geary on notice that the sanctions ultimately imposed by FINRA could exceed that recommendation.³⁶ Geary challenges other aspects of the panel decision, but “[i]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of FINRA which is subject to Commission review.”³⁷

Geary identifies various circumstances which he claims FINRA did not properly consider mitigating. To the contrary, FINRA considered Geary’s claims but found that the factors he identified were either not mitigating or were outweighed by other, aggravating factors and therefore did not justify lesser sanctions. We agree with FINRA’s determination.

Geary asserts that “no customer suffered any negative financial impact as a result of the net capital violations,” that he did not “financial[ly] gain” from his misconduct, and that he injected personal funds into GSI in February 2010. Although it does not appear that customers suffered any losses, by disregarding net capital requirements Geary “subject[ed] the firm’s

³⁴ See, e.g., *Fox & Co.*, 2005 WL 2848468, at *9 (stating that FINRA properly concluded that the applicant’s conduct was egregious without finding fraud or scienter); *Davrey Fin. Servs., Inc.*, Exchange Act Release No. 51780, 2005 WL 1323032, at *4 (June 2, 2005) (finding net capital violations were egregious based on a prior warning from NASD to the firm, the repeated net capital violations and violations resulting from a “fail[ure] to account for operating losses”); *Litwin Sec., Inc.*, Exchange Act Release No. 38673, 1997 WL 274926 (May 27, 1997) (imposing bar on firm president with a history of disciplinary violations that “ha[d] proven him. . . incapable of managing the finances and operations of a broker-dealer” without finding scienter).

³⁵ Sanction Guidelines at 2 (stating that “[a]djudicators should assess sanctions that exceed the recommended range” when the violations “result from reckless or intentional actions”).

³⁶ The complaint authorized “one or more of the sanctions provided under FINRA Rule 8310(a),” which includes, among other things, suspensions, bars and fines. See *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 WL 4258143, at *11 & n.51 (Aug. 12, 2016) (rejecting claim that applicant lacked notice of potential sanctions exceeding the range specified in guidelines and exceeding those sought by Enforcement).

³⁷ *Harry Friedman*, Exchange Act Release No. 64486, 2011 WL 1825025, at *7 (internal citations omitted).

customers to undue risks.”³⁸ And in net capital cases “[w]e look beyond the interests of particular investors . . . to the protection of investors generally.”³⁹ That Geary did not profit from the net capital violations also is not mitigating because “the lack of an aggravating factor . . . does not establish a mitigating factor.”⁴⁰ As for Geary’s injection of funds into GSI, that contribution—which FINRA acknowledged in assessing sanctions—was inadequate to address the ongoing deficiencies.

Geary asserts that, aside from this and the related state proceedings, he has “never had any disciplinary action” taken against him. Although disciplinary history is an aggravating factor, the guidelines indicate, and we have repeatedly affirmed, that the absence of such a disciplinary history is not mitigating in FINRA proceedings “because an associated person should not be rewarded for acting in accordance with his duties as a securities professional.”⁴¹ We further reject as mitigating Geary’s related assertion that GSI never “had any compliance issues prior to this instance”; given GSI’s violations on multiple days, in successive years, we cannot, as Geary does, characterize “[t]he conduct at issue [as] aberrant.”

Geary asserts further that FINRA failed to consider that he accepted responsibility for the deficiencies and took corrective action. We recognize Geary’s testimony at the hearing acknowledging that he was “the guy at the top responsible for everything.” But the significance of such an acknowledgement is undermined by his continuing insistence—despite ample evidence to the contrary—that the firm’s net capital problems were caused by others and that he was largely uninvolved and therefore not responsible. Geary’s efforts to shift blame to others indicates a disturbing approach to regulatory compliance and its role in protecting customers.

In any case, FINRA credited Geary’s efforts, beginning on February 4, to obtain additional capital through a bank loan, which it characterized as “earnest.” But as FINRA explained, such efforts do not “excuse the fact that he knowingly permitted the [f]irm to continue to operate below its required minimum net capital” when approval of the loan was delayed. Geary made similar efforts to promptly resell the CMOs to McKean in June 2009, but the need for such action was entirely the result of his own disregard of Frager’s advice.

³⁸ *Fox & Co.*, 2005 WL 2848468, at *10; *accord Townsley Assoc. and Co.*, 1991 WL 288211, at *4 (explaining that the “exposure of customers to the risk posed by violations of the [net capital rule] is in itself the abuse at which the [rule] is aimed”).

³⁹ *Dratel Grp., Inc.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *16 (Mar. 17, 2016).

⁴⁰ *See West v. SEC*, 641 F. App’x 27, 30 n.6 (2d Cir. 2016).

⁴¹ Sanction Guidelines at 6 n.1 (citing *Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006)); *Kent M. Houston*, Exchange Act Release No. 71589A, 2014 WL 936398, at *7 & n.55 (Feb. 20, 2014) (citing cases).

Geary also asserts that he “immediately devoted his full time and attention to . . . maintain[ing] compliance” when told “that the firm was approaching its net capital threshold.” To the contrary, Frager warned Geary about imminent deficiencies in January 2010, yet Geary did not take any such action until weeks later—after the bookkeeper told him that the firm had actually fallen out of compliance. Subsequent efforts to monitor and report net capital deficiencies were initiated not by Geary but by others at the firm.

Finally, Geary claims that FINRA failed to consider testimony from its staff regarding his cooperation. But FINRA expressly credited Geary for providing “substantial assistance” during its investigation and specifically acknowledged testimony from FINRA staff that Geary had provided such assistance. FINRA also credited Geary with providing substantial assistance during the November 2009 examination even though Geary did not speak with the examiner about the deficiencies that were discovered. While we have considered the staff’s testimony, we note that nothing in that testimony or elsewhere in the record indicates that Geary took any steps beyond complying with FINRA’s rules requiring him to cooperate with staff inquiries into issues that others had brought to FINRA’s attention.⁴² Contrary to Geary’s claims, it is not mitigating that he did not delay the investigation, conceal information, or otherwise mislead the investigators. He had an “unequivocal” responsibility to fully cooperate with FINRA, and failures to cooperate could have resulted in additional liability under Rule 8210.⁴³ In any case, FINRA did not fail to consider Geary’s cooperation.

B. The bar and suspension are not excessive or oppressive.

In light of the foregoing analysis, we find that the bar and suspension that FINRA imposed are not excessive or oppressive. We are not persuaded by Geary’s challenges to those sanctions as “[a]n abuse of discretion,” a “flagrant departure from the adjudicating agency’s policy and practice,” and more severe than those imposed in similar cases. We have affirmed similar sanctions where, as here, the applicant “displayed a disturbing lack of understanding and ignorance of FINRA rules.”⁴⁴ Geary argues that the all-capacity suspension was not properly “tailor[ed] . . . to the capacity in which he was acting” because his “net capital responsibility was in the context of his principal capacity, rather than as a general securities representative.” But

⁴² *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *12 (Jan. 9, 2015) (“Associated persons do not provide substantial assistance by simply fulfilling their obligations to provide FINRA information pursuant to an investigation.”).

⁴³ *See, e.g., Michael Nicholas Romano*, Exchange Act Release No. 5693099, 2015 WL 5693099, at *6 (Sept. 29, 2015).

⁴⁴ *ACAP Fin., Inc.*, Exchange Act Release No. 70046, 2013 WL 3864512, at *18 (July 26, 2013), *petition denied*, 783 F.3d 763 (10th Cir. 2015); *see also Troy A. Wetter*, Exchange Act Release No. 33086, 1993 WL 430285 (Oct. 21, 1993) (affirming all-capacities bar for repeated net capital violations and effecting transactions while firm was suspended).

the relevant guidelines cover any persons “responsible” for net capital violations, not just principals and supervisors, and expressly authorize all-capacities suspensions and bars.

It would have been extremely reckless, given GSI’s capital, for *any* associated person to purchase \$77 million in distressed securities without arranging financing and to repeatedly fail to heed warnings and advice for protecting firm capital. That Geary was GSI’s president makes his misconduct especially troubling. And Geary’s insistence that he did not understand Frager’s advice or that his proprietary trading could undermine the firm’s capital position confirms our concerns about his ability to comply with regulatory requirements generally. Geary remains in the industry, where his activities could affect the capital of his member firm. A suspension of 30 business days is appropriate to impress on him the importance of conforming his conduct to the net capital rule and other regulatory requirements so that in the future he does not address violations after they occur.

The cases Geary cites in support of lesser sanctions do not alter our conclusion that FINRA acted appropriately. FINRA has “broad discretion . . . in choosing how to respond to rule violations”⁴⁵ based on the facts and circumstances presented, and the appropriate sanctions “cannot be precisely determined by comparison with action take[n] in other proceedings.”⁴⁶ Geary argues that, based on relevant net capital precedent, the “severe” sanctions imposed by FINRA are inappropriate because he did not disregard warnings or instructions from regulators, had not previously been sanctioned for net capital violations, did not ignore continuing net capital violations, and did not block an examination.⁴⁷ But Geary cites no case for the proposition that a bar and all-capacities suspension to remedy net capital violations is appropriate only in those situations. We view the cited authority as consistent with FINRA’s sanctioning determination that suspensions and bars are appropriate for applicants, like Geary, who show a serious lack of regard for or understanding of the net capital requirements. Even though Geary did not personally receive prior warnings from FINRA, he received advance warnings (along with continuing reports while GSI was operating with deficiencies) from Frager, GSI’s own financial and operations principal, and others, which he failed to heed.

⁴⁵ *Wedbush Sec.*, 2016 WL 4258143, at *16.

⁴⁶ *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *28 (July 2, 2013) (internal quotation omitted), *petition denied*, 751 F.3d 472 (7th Cir. 2014).

⁴⁷ *D’Antoni & Assocs., Inc. v. SEC*, 289 F.2d 276, 277 (5th Cir. 1961) (finding revocation of registration appropriate when Commission staff advised the firm of “time to time” net capital violations); *Listrom v. SEC*, 975 F.2d 866 (8th Cir. 1992) (finding that bars and suspensions were appropriate in light of the respondents’ individual responsibility, securities industry experience, and “previous sanctions for similar violations”); *Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 WL 1272876, at *13 (Apr. 1, 2016) (two year all-capacity suspension was appropriate when respondent “knew or should have known,” but did not receive advance notice, “that his actions had exposed the Firm and its customers to net capital risk” and that the firm obstructed FINRA’s investigation).

Geary claims the sanctions are excessive in comparison to the sanctions that we approved in *Paul Joseph Benz*, which included a \$5,000 fine, a 30-day principal capacity suspension, and requirement to requalify as a principal.⁴⁸ But we sustained the sanctions in that case in light of Benz's good faith efforts to suspend operations following discovery of the violation.⁴⁹ Here, Geary refused to suspend operations for weeks despite his knowledge of continuing violations. And unlike the other cases he cites, Geary directly controlled the transactions and events leading to the violations, which, in the first instance, resulted in at least a \$10.7 million deficiency. Moreover, before the violations occurred, he knowingly or recklessly ignored prescient warnings about risks to the firm's required net capital and failed to follow direct, specific advice for preventing violations.⁵⁰

Nor do we believe that a reduction in the sanctions is merited because of Geary's settlement with Oklahoma. FINRA considered the Oklahoma settlement in light of its "independent statutory mandate to enforce the provisions of the Exchange Act," including the net capital rule and just and equitable principles of trade.⁵¹ The Oklahoma settlement was limited to that state, whereas FINRA's jurisdiction is nationwide; it covers the Arizona-based FINRA member firm and four additional states where Geary registered as a general securities representative following the Oklahoma settlement. Like FINRA, we believe that the Oklahoma settlement, given its limited scope, did not "sufficiently remediate" Geary's misconduct.

Geary's contention that the sanctions are inappropriate because he has no subsequent disciplinary history or customer complaints is no more persuasive. His compliance during a limited period of heightened supervision does not provide any meaningful assurance as to future violations, particularly when he continues to shift responsibility for the violations that occurred. Although Geary cites *McCarthy v. SEC* to argue that the absence of subsequent violations is mitigating,⁵² *McCarthy* focused on the absence of subsequent violations in light of other facts,

⁴⁸ *Benz*, 2005 WL 106887, at *4. Geary also cites the sanctions in two settled FINRA proceedings, but sanctions in settlements are not useful comparisons. See, e.g., *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 WL 1039460, at *10 (Mar. 15, 2016).

⁴⁹ 2005 WL 106887, at *4.

⁵⁰ *Id.* (net capital violation caused by a failure to recognize a liability in a customer account); *Hutchison Fin.*, 1993 WL 138533, at *5 (finding that the respondent "displayed a level of inattention to the problem that was clearly inappropriate" when the violations resulted from recordkeeping problems rather than the respondent's own actions); *Whiteside and Co. v. SEC*, 883 F.2d 7 (5th Cir. 1989) (upholding \$10,000 fine without finding that there had been any prior warnings of net capital violations); *Stuart-James Co. v. SEC*, 857 F.2d 796, 801 (D.C. Cir. 1988) (upholding censure and \$500 fine even though the adjudication resolved an interpretive question regarding the net capital rule).

⁵¹ *Kirk A. Knapp*, Exchange Act Release No. 31556, 1992 WL 365568, at *11 (Dec. 3, 1992).

⁵² 406 F.3d 179 (2d Cir. 2005).

absent here, suggesting an unlikelihood of future violations, including the respondent's inexperience at the time of the violation and minor role in a larger scheme.⁵³ Unlike McCarthy, Geary was an experienced professional, was directly responsible for the violations at the heart of this case, and ignored express warnings and advice for avoiding the violations.

C. The \$20,000 fine is neither excessive nor oppressive.

Geary argues the \$20,000 fine is punitive in light of his other financial obligations. But while a bona fide inability to pay is a proper consideration, “[i]t is well settled that a respondent bears the burden of demonstrating an inability to pay, and that [FINRA] is entitled to make a searching inquiry into any such claim,” including by requiring appropriate documentation.⁵⁴ We agree with FINRA that Geary did not establish his inability to pay a \$20,000 fine, particularly when he failed to document his income, assets or expenses. Geary’s additional claim that the suspension will hamper his ability to pay the fine is unavailing. Such a collateral effect of his misconduct does not justify any reduction of the fine.⁵⁵

An appropriate order will issue.⁵⁶

By the Commission (Acting Chairman PIWOWAR and Commissioner STEIN).

Brent J. Fields
Secretary

⁵³ *Id.* at 185, 188.

⁵⁴ *Murphy*, 2013 WL 3327752, at *26 (internal punctuation and citations omitted).

⁵⁵ *Johnny Clifton*, Securities Act Release No. 9417, 2013 WL 3487076, at *16 n.116 (July 12, 2013).

⁵⁶ We have considered all of the parties’ contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

Appendix

GSI's Net Capital Deficiencies	
2009	
May 28	\$10,730,207
May 29	\$10,727,730
2010	
February 2	\$90,342
February 3	\$131,273
February 4	\$119,151
February 5	\$37,632
February 8	\$3,903
February 9	\$18,027
February 10	\$64,385
February 12	\$31,978
February 16	\$28,764
February 17	\$24,790
February 18	\$24,787
February 19	\$9,053
February 23	\$8,294
February 24	\$45,422
February 25	\$30,733

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 80322 / March 28, 2017

Admin. Proc. File No. 3-17406

In the Matter of the Application of
Keith D. Geary
For Review of Disciplinary Action Taken by
FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

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

ORDERED that the disciplinary action taken by FINRA against Keith D. Geary is
SUSTAINED.

By the Commission.

Brent J. Fields
Secretary