

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 86497 / July 26, 2019

Admin. Proc. File No. 3-18359

In the Matter of the Application of
MEYERS ASSOCIATES, L.P. (n/k/a WINDSOR
STREET CAPITAL, L.P.) and
BRUCE MEYERS

For Review of Disciplinary Action Taken by
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY
PROCEEDING

Former member firm and its former principal appeal from FINRA disciplinary action finding that they used unbalanced and misleading communications with the public and failed to establish and maintain a reasonable supervisory system for the preparation of books and records. FINRA also found that the firm failed to maintain accurate books and records, to report customer complaint information, to establish and maintain a reasonable supervisory system for the review of electronic correspondence, and to establish and maintain a reasonable system of supervisory controls. *Held*, FINRA's findings of violations and imposition of sanctions are sustained.

APPEARANCES:

Lawrence R. Gelber for Meyers Associates, L.P. and Bruce Meyers.

Alan Lawhead and *Gary Dernelle* for FINRA.

Appeal filed: February 5, 2018
Last brief received: May 29, 2018

I. Introduction

Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.) (the “Firm”), a former FINRA member firm, and its former principal, Bruce Meyers (together, “Applicants”), seek review of FINRA disciplinary action.¹ The Firm became a FINRA member in 1994 and engaged in a retail securities and investment banking business. Meyers founded, owned, and served as the managing partner and CEO of the Firm, and was registered through it as a general securities representative and a general securities principal. Meyers could hire and fire employees and implement changes in policies and procedures. Meyers’s association with the Firm terminated in June 2016 after he became subject to a statutory disqualification.² FINRA expelled the Firm from membership in May 2018, and it withdrew its broker-dealer registration in June 2018.³

This case stems from a complaint FINRA’s Department of Enforcement filed against Applicants in 2014. After a six-day hearing, a FINRA Extended Hearing Panel (the “Hearing Panel”) issued a decision finding violations and imposing sanctions.⁴ The Hearing Panel found that Applicants violated NASD Rule 2210(d) and FINRA Rule 2010 by using unbalanced and misleading communications with the public from January 2011 through June 2011.⁵ The Hearing Panel found further that the Firm violated NASD Rule 3110(a), FINRA Rules 4511(a)

¹ See *Meyers Assocs., L.P.*, Complaint No. 2010020954501, 2018 WL 306684 (FINRA NAC Jan. 4, 2018), available at <http://www.finra.org/industry/NAC>.

² See *Meyers Assocs., L.P.*, Exchange Act Release No. 81778, 2017 WL 4335044, at *1, 4, & 9 (Sept. 29, 2017) (dismissing Applicants’ appeal from the denial of a membership continuance application seeking permission for Meyers to continue his association with the Firm notwithstanding his statutory disqualification).

³ See *Windsor St. Capital, L.P.*, SD-2172, slip op. at 1, 20, 26 (FINRA NAC May 14, 2018) (denying Firm’s membership continuance application seeking permission to continue FINRA membership notwithstanding its statutory disqualification as a result of a July 2017 Commission settlement order finding that it had willfully violated the federal securities laws), available at <http://www.finra.org/industry/NAC>, appeal withdrawn, Exchange Act Release No. 83734, 2018 WL 3618520, at *1 (July 27, 2018) (granting the Firm’s request to withdraw its application for review based on it having ceased its broker-dealer business).

⁴ See FINRA Rule 9231(c) (providing for the appointment of “a Hearing Panel or an Extended Hearing Panel to conduct the disciplinary proceeding and issue a decision” and that the matter “shall be designated an Extended Hearing, and . . . shall be considered by an Extended Hearing Panel,” upon “consideration of the complexity of the issues involved, the probable length of the hearing, or other factors that the Chief Hearing Officer deems material”).

⁵ As a result of the consolidation of the regulatory functions of NASD and NYSE Regulation into FINRA and the development of a new consolidated FINRA rulebook, see Exchange Act Release No. 56148, 2007 WL 2159604, at *2 (July 26, 2007), Applicants were subject to both FINRA and NASD rules during the period at issue.

and 2010, and Section 17(a)(1) of the Securities Exchange Act of 1934 and Rules 17a-3, 17a-4, and 17a-5 thereunder by failing to maintain accurate books and records in 2011 and 2012; and NASD Rules 3070 and 2110 and FINRA Rule 2010 by failing to report customer complaint information from March 2007 through July 2010. The Hearing Panel also found three supervisory violations: (1) that Applicants failed to establish and maintain a reasonable supervisory system for the preparation of books and records; (2) that the Firm failed to establish and maintain a reasonable supervisory system for the review of electronic correspondence; and (3) that the Firm failed to establish and maintain a reasonable system of supervisory controls.

The Hearing Panel dismissed three other allegations: (1) that Applicants violated FINRA Rule 2010 by engaging in an unregistered offering of securities without an exemption from the registration provisions of Section 5 of the Securities Act of 1933; (2) that Applicants violated FINRA Rule 2010 by falsifying, or causing to be falsified, federal tax forms; and (3) that Meyers was also liable for the Firm's recordkeeping violations.⁶

The Hearing Panel fined the Firm \$50,000 for the unbalanced and misleading communications; \$50,000 for the recordkeeping violations; \$200,000 for the failure to report customer complaint information; \$100,000 for the recordkeeping supervisory violations; \$200,000 for the electronic correspondence supervisory violations; and \$100,000 for the failure to establish and maintain a reasonable supervisory control system. It fined Meyers \$25,000 for the unbalanced and misleading communications and \$50,000 for the recordkeeping supervisory violations and barred Meyers from acting in a principal or supervisory capacity. Applicants appealed to FINRA's National Adjudicatory Council ("NAC").⁷

The NAC affirmed the Hearing Panel's findings of liability but modified some of the fines because it took a different approach than the Hearing Panel in applying FINRA's Sanction Guidelines. The modifications resulted in the total fine for the Firm remaining at \$700,000 but the total fine for Meyers increasing from \$75,000 to \$100,000. As to the unbalanced and misleading communications, the NAC increased the fine for the Firm from \$50,000 to \$200,000 and for Meyers from \$25,000 to \$50,000 by applying the higher guideline range for "intentional or reckless use of misleading communications"; the Hearing Panel had applied the range for "inadvertent use of misleading communications."⁸ The NAC found that the use of misleading communications "resulted, at a minimum, from reckless misconduct." It stated that the "large number of misleading communications, the extended period over which they were sent, their

⁶ FINRA also charged a third respondent, Imtiaz A. Khan, a vice president of the Firm's investment banking department, with liability for the Firm's recordkeeping violations. Those charges were also dismissed. The Hearing Panel found that "Meyers and Khan did not cause Meyers Associates to maintain inaccurate books and records."

⁷ FINRA's Department of Enforcement did not cross-appeal the Hearing Panel's decision.

⁸ The Sanction Guidelines recommend a fine up to \$29,000 for "inadvertent use of misleading communications," and a fine up to \$146,000 for "intentional or reckless use of misleading communications." FINRA Sanction Guidelines at 80-81 (Apr. 2017).

wide dissemination, and the potential for the firm to gain monetarily lead us to conclude that Meyers Associates' misconduct was decidedly egregious and merits a significant fine." Similarly, the NAC stated that the "numerous pieces of unbalanced and misleading sales literature used, the extended period of their use, and the potential for Meyer's financial gain support a sanction at the high end of the Guidelines for advertising violations."

The NAC decreased the fine for the Firm's remaining misconduct from \$650,000 to \$500,000 because, rather than assessing sanctions for each violation as the Hearing Panel did, it imposed a unitary sanction under the guideline for systematic supervisory failures.⁹ The NAC found this approach to be appropriate because the remaining misconduct "resulted fundamentally from the firm's persistent supervisory failures." For Meyers's supervisory violation, the NAC imposed the same sanctions as the Hearing Panel: a \$50,000 fine and a bar from acting in a principal or supervisory capacity. The NAC further assessed costs. This appeal followed.

II. Analysis

Under Exchange Act Section 19(e)(1), we review FINRA disciplinary action to determine whether Applicants engaged in the conduct FINRA found, whether that conduct violated the rules specified in FINRA's determination, and whether those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.¹⁰ We base our findings on an independent review of the record and apply a preponderance of the evidence standard.¹¹

Under Exchange Act Section 19(e)(2), we must sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.¹² We consider any aggravating or mitigating factors,¹³ and whether the sanctions imposed are

⁹ For systemic supervisory failures, the Sanction Guidelines recommend a fine up to \$292,000 or higher where aggravating factors predominate. Guidelines at 105. If assessed by each violation, the Guidelines recommend the following fines: (i) for recordkeeping violations, up to \$15,000 or \$146,000 where aggravating factors predominate; (ii) for failures to report, up to \$146,000; and (iii) for failures to supervise, up to \$73,000. *Id.* at 29, 74, 104.

¹⁰ 15 U.S.C. § 78s(e)(1).

¹¹ *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, 9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

¹² 15 U.S.C. § 78s(e)(2). The record does not show, nor do Applicants claim, that FINRA's sanctions impose an unnecessary or inappropriate burden on competition.

¹³ *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013).

remedial or punitive.¹⁴ In imposing sanctions, the NAC relied on FINRA’s Sanction Guidelines.¹⁵ Although not binding on us, we have used the Guidelines as a benchmark.¹⁶

We sustain the NAC’s findings of violations and the sanctions imposed.

A. Applicants’ use of unbalanced and misleading communications with the public

NASD Rule 2210(d) imposes content standards for “communications with the public.”¹⁷ Such communications “must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service.”¹⁸ No member may “omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading,”¹⁹ “make any false, exaggerated, unwarranted or misleading statement or claim,”²⁰ or “publish, circulate or distribute” a communication the member “knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.”²¹ Communications “may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast.”²²

NASD Rule 2210 includes “sales literature” as a subset of “communications with the public.”²³ Sales literature includes “[a]ny written or electronic communication, other than an advertisement, independently prepared reprint, institutional sales material and correspondence, that is generally distributed or made generally available to customers or the public.”²⁴ Sales

¹⁴ *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065-66 (D.C. Cir. 2007).

¹⁵ Meyers does not challenge the NAC’s use of the 2017 Guidelines in this proceeding. We find that the NAC properly applied the 2017 Guidelines because those guidelines were in effect while this matter was pending before it. *See* Guidelines at 8 (“These guidelines are effective as of the date of publication, and apply to all disciplinary matters, including pending matters.”).

¹⁶ *See, e.g., John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 & n.68 (June 14, 2013) (citing cases).

¹⁷ NASD Rule 2210(d). FINRA Rule 2210 replaced NASD Rule 2210 effective February 4, 2013.

¹⁸ NASD Rule 2210(d)(1)(A).

¹⁹ *Id.*

²⁰ NASD Rule 2210(d)(1)(B).

²¹ *Id.*

²² NASD Rule 2210(d)(1)(D).

²³ NASD Rule 2210(a)(2).

²⁴ *Id.*

literature “must prominently disclose the name of the member” and “reflect any relationship between the member and any non-member or individual who is also named.”²⁵

FINRA Rule 2010 requires members and their associated persons to “observe high standards of commercial honor and just and equitable principles of trade” in the conduct of their business.²⁶ FINRA Rule 2010 replaced NASD Rule 2110, which was identical. A violation of another Commission or FINRA rule violates FINRA Rule 2010 and NASD Rule 2110.²⁷

1. We sustain the finding that Applicants violated NASD Rule 2210(d) and FINRA Rule 2010 by using unbalanced and misleading communications.

a. Applicants engaged in the conduct FINRA found.

Between January 2011 and June 2011, Meyers used his Firm email address to send 1,037 emails concerning SignPath Pharma, Inc. (“SignPath”), a biotechnology company he co-founded. Meyers and the Firm collectively owned more than 60 percent of SignPath’s common stock. Meyers composed the emails and sent them to persons identified as being involved with, or having invested in, biotechnology companies. Meyers signed many of the emails as “President, Meyers Associates.” In some emails, however, he made no mention of the Firm or his association with it. Instead, in these emails Meyers referred to SignPath as “my biotech company” and himself as a “principal” of the company.

Meyers testified that the emails were intended to generate interest in SignPath and its products. The emails described SignPath as a development phase company and provided information about its formulations of curcumin (a compound found in the turmeric plant) for applications in human diseases, its progress through various stages of testing and development, and its prospects for acquiring the rights to other promising drugs. Some emails claimed SignPath had “obtained confirmation of the rights” to Dutogliptin, a drug designed for individuals with type II diabetes. Other emails claimed SignPath “has a unique opportunity in obtaining” Dutogliptin, “which will catapult SignPath Pharma’s direct entry into clinical Phase III and IV within the next several months.” The emails did not disclose that Meyers had learned from SignPath by October 2010 that SignPath needed to raise at least \$3 million to purchase Dutogliptin, that the U.S. Food and Drug Administration (“FDA”) had requested an additional Phase III clinical trial because of its cardiotoxicity concerns about Dutogliptin, and that the requested clinical trial was anticipated to cost \$125 million.

²⁵ NASD Rule 2210(d)(2)(C)(i), (ii).

²⁶ FINRA Rule 2010; *see also* FINRA Rule 0140(a) (stating that persons associated with a member shall have the same duties and obligations as a member).

²⁷ *See Lek Sec. Corp.*, Exchange Act Release No. 82981, 2018 WL 1602630, at *10 (Apr. 2, 2018) (“We have held that a violation of another Commission or NASD rule or regulation also constitutes a violation of NASD Rule 2110 and thus also of identical FINRA Rule 2010.”) (internal quotation marks and citation omitted).

The emails did not refer to any specific offering of SignPath securities but stated that SignPath “is a public entity which anticipates trading shares in the 1st Quarter of 2011.” Many emails predicted, without further explanation, that “financial returns on investment within the immediate two years will enhance the stature of SignPath Pharma, Inc. as a young but imposing pharmaceutical company.” The emails stated that SignPath was “seeking prospective investors” and “capital” and told recipients to “take advantage of the opportunity presented” by contacting Meyers.

b. Applicants’ public communications violated FINRA’s rules.

We find that the emails constituted sales literature that violated FINRA’s content standards. NASD Rule 2210 defines sales literature “very broadly.”²⁸ We have held that a summary of an investment sent to 57 customers constituted sales literature.²⁹ Here, Meyers sent over 1,000 emails to members of the public that stated SignPath was seeking investors and that recipients should contact Meyers to take advantage of the opportunity SignPath presented. These emails fall within the definition of sales literature as “electronic communication[s]” “generally distributed or made generally available to customers or the public.”

As a result, the content standards of NASD Rule 2210 applied to the emails. We find that the emails violated these standards. Specifically, we find that the emails did not provide a sound basis for evaluating the claims made therein, contained false or misleading claims, were not fair and balanced, included baseless performance predictions and misleading forecasts, and did not disclose the name of the Firm and its relationship with SignPath.

NASD Rule 2210(d)(1)(A) required that the emails provide a sound basis for evaluating the claims made therein.³⁰ But hundreds of emails claimed that SignPath anticipated its shares would trade publicly beginning in the first quarter of 2011 without providing any basis for that

²⁸ *Excel Fin., Inc.*, Exchange Act Release No. 39296, 1997 WL 685323, at *4 n.21 (Nov. 4, 1997).

²⁹ *Id.* at *2, 4-5; *see also, e.g., Brian Prendergast*, Exchange Act Release No. 44632, 2001 WL 872693, at *8 (Aug. 1, 2001) (finding that letters sent to all investors in a hedge fund that included reports or summaries of the hedge fund’s performance fell “squarely within the definition of” sales literature in predecessor rule to Rule 2210).

³⁰ NASD Rule 2210(d)(1)(A).

claim.³¹ That claim also was not true; at the time Applicants sent the emails SignPath did not anticipate public trading of its shares. Indeed, SignPath’s CEO, whose approval was needed to have the shares trade, wanted to defer public trading until SignPath had clinical trial data. Applicants’ emails contained additional statements that violated Rule 2210(d)(1)(B)’s prohibition against “false” or “misleading” claims.³² The claim that SignPath had “obtained confirmation of the rights” to Dutogliptin was untrue. So was the claim that SignPath had “a unique opportunity in obtaining” Dutogliptin. The opportunity to purchase Dutogliptin was not “unique” to SignPath—rather, Phenomix, the company that owned the drug, was looking to sell it to the highest bidder, other companies were bidding, and SignPath’s bid was ultimately never accepted.³³

Rule 2210(d)(1)(A) also requires that communications be fair and balanced,³⁴ which we have stated means sales literature must “disclose in a balanced way the risks and rewards of the touted investments.”³⁵ The emails did not disclose the negative aspects of purchasing Dutogliptin of which Applicants were aware, including that SignPath needed to raise at least \$3 million to do so, the FDA had requested an additional Phase III clinical trial because of its cardiotoxicity concerns about Dutogliptin, and the clinical trial was anticipated to cost

³¹ See *CapWest Sec., Inc.*, Exchange Act Release No. 71340, 2014 WL 198188, at *4 (Jan. 17, 2014) (finding that communications promoting an investment did not provide “a sound basis for evaluating the facts regarding” the investment in violation of Rule 2210(d)(1)(A) because the communications did not discuss how the investment worked or how a transaction could qualify as such an investment); *Pac. On-Line Trading & Sec., Inc.*, Exchange Act Release No. 48473, 2003 WL 22110356, at *5 (Sept. 10, 2003) (finding that communication stating that online trading broker-dealer was the “fastest Access to the Market today” was misleading in violation of Rule 2210(d)(1) because “it did not provide a basis for investors to evaluate the assertion”).

³² NASD Rule 2210(d)(1)(B).

³³ See *CapWest Sec.*, 2014 WL 198188, at *5, *6 (finding statements concerning tenancy-in-common (“TIC”) investments violated Rule 2210(d)(1)(B) by “exaggerate[ing] the level of protection that industry and regulatory oversight provided to TIC investors, as well as the likelihood of a successful investment” and by indicating that the investment allowed the investor to “avoid taxes altogether” when the investment “merely allow[ed] taxes to be deferred”).

³⁴ NASD Rule 2210(d)(1)(A).

³⁵ *CapWest Sec.*, 2014 WL 198188, at *4 (quoting *Jay Michael Fertman*, Exchange Act Release No. 33479, 1994 WL 17055, at *5 (Jan. 14, 1994)).

\$125 million. Discussing SignPath’s prospects for acquiring and developing Dutogliptin without a fair and balanced risk disclosure rendered the emails misleading.³⁶

Some of the emails also violated Rule 2210(d)(1)(D)’s prohibition on performance predictions and “unwarranted . . . forecasts.”³⁷ The emails did not explain the basis for the prediction that there would be “financial returns on investment within the immediate two years.” Even if SignPath had acquired Dutogliptin and Dutogliptin had passed its clinical trials, SignPath still might not have been profitable, let alone within two years.³⁸

The emails further violated Rule 2210(d)(1)(A)’s requirement that they not omit “any material fact or qualification” necessary to make the statements contained in the communications not misleading. Despite the forecast that there would be “financial returns on investment within the two immediate years,” the emails did not disclose the risks associated with an investment in SignPath—such as SignPath’s history of significant losses, anticipated lack of revenue in the foreseeable future, lack of financial resources to successfully develop and market its products, lack of experience in manufacturing, selling, marketing, and distributing its products, and illiquidity of its shares. These omissions were material because they were “substantially likely to be considered important by a reasonable person reading the communication;”³⁹ indeed,

³⁶ See *id.* at *4 (finding that communications promoted positive features of TIC investments in an unfair and unbalanced way by “not mention[ing] any of the negative attributes of such investments” in violation of Rule 2210(d)(1)(A)); *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *17-18 (July 2, 2013) (finding that communication was “unbalanced” in violation of Rule 2210(d)(1)(A) because it highlighted the upsides of “safe” option strategies but “failed to mention . . . the risk of substantial losses should the value of the underlying security change significantly”), *petition denied sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

³⁷ NASD Rule 2210(d)(1)(D).

³⁸ See *CapWest Sec.*, 2014 WL 198188, at *6-7 (finding that communications that included improper performance predictions, claims, and forecasts violated Rule 2210(d)(1)(D)).

³⁹ *Id.* at *6. Although the negative information was disclosed in SignPath’s public filings, “Rule 2210 focuses not on all information that is available to a potential investor, but on the content of the communication itself, requiring that the communication on its own be ‘fair and balanced’ and ‘provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service.’ It is in this context that the NASD Rule introduces the concept of materiality: ‘No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.’ As a result, we determine materiality here by looking to whether a fact is substantially likely to be considered important by a reasonable person reading the communication.” *Id.* at *8 n.47 (internal citation omitted).

information about a company's financial condition, solvency and profitability like that at issue here is undoubtedly material.⁴⁰

Some emails also violated Rule 2201(d)(2)(C)'s requirement that they disclose prominently the name of the broker-dealer from which they originated and Meyers's role at the Firm as well as the relationship between SignPath and the Firm.⁴¹ In these emails, the domain name of Meyers's email address was the only indication of his association with the Firm.⁴² The emails did not disclose Applicants' ownership interest in SignPath or that the Firm had raised approximately \$13 million in capital for SignPath and earned more than \$1 million in compensation since SignPath's inception in 2006.

c. FINRA's rules are, and were applied in this case in a manner, consistent with the purposes of the Exchange Act.

Having found that Applicants engaged in the conduct FINRA found, and that this conduct violated NASD Rule 2210(d) and FINRA Rule 2010, we also find that those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. We make this finding as to Rule 2210(d) because the Rule's content standards protect investors from receiving public communications that are unbalanced and misleading, and because FINRA's application of Rule 2210(d) was appropriate in light of the unbalanced and misleading statements in Applicants' emails. We make this finding as to FINRA Rule 2010 because it reflects the mandate of Exchange Act Section 15A(b)(6) that FINRA's rules "promote just and equitable principles of trade,"⁴³ and Applicants' misconduct was inconsistent with those principles.⁴⁴

Applicants argue that they should not be held liable because the recipients of the emails were not solicited as part of SignPath's separate offering of its securities. According to them,

⁴⁰ *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) ("Surely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge."); *SEC v. Tecumseh Holdings Corp.*, 765 F. Supp. 2d 340, 354 (S.D.N.Y. 2011) (finding that omission that company was "operating at a loss at the time" it was projecting profits over a three-year period was "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality"); *see also Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 WL 516282, at *11 (Feb. 20, 2007) ("[N]egative financial information . . . constitute[d] material facts.").

⁴¹ NASD Rule 2210(d)(1)(C)(i), (ii).

⁴² *See Prendergast*, 2001 WL 872693, at *10 (finding that advertisement failed to identify NASD member firm with which applicant was associated in violation of predecessor provision to NASD Rule 2210(d)(2)).

⁴³ 15 U.S.C. § 78o-3(b)(6).

⁴⁴ *See Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 WL 1272876, at *10 (Apr. 1, 2016) (finding FINRA Rule 2010 consistent with the purposes of the Exchange Act).

Enforcement “failed to present evidence that tied the Firm’s 1,037 emails to SignPath’s offering” of securities, and “not one person/entity who received an actual prospectus for the SignPath offering ever received an email.” But these facts are irrelevant. Application of NASD Rule 2210(d)(1) here is entirely consistent with its plain language and purpose. The Rule applies to “all member communications with the public”;⁴⁵ it does not require that a communication name a specific investment or a specific offering of a security in order to be violative.⁴⁶ We also reject Applicants’ argument that the NAC erred in finding that they violated Rule 2210 despite the Hearing Panel’s finding that they did not engage in a general solicitation to offer or sell SignPath’s securities in violation of Securities Act Section 5. There is no requirement that member communications with the public also constitute general solicitations for the offer or sale of securities for Rule 2210’s content standards to apply. Similarly, we reject Applicants’ reliance on the Commission staff’s no-action letter in *Bateman Eichler, Hill Richards, Inc.*,⁴⁷ which concerned whether certain activities would constitute a general solicitation under Rule 502(c) of Regulation D.⁴⁸ The no-action letter did not concern NASD Rule 2210.

Applicants also argue that what they characterize as “sales hyperbole” in their emails “has routinely been held to be not actionable under the anti-fraud provisions of the federal securities laws.” But this case involves NASD Rule 2210(d)(1), which specifically prohibits exaggerated statements, claims, opinions, or forecasts, and requires that public communications

⁴⁵ NASD Rule 2210(d); *see* NASD IM-2210-1 (“Every member is responsible for determining whether any communication with the public . . . complies with all applicable standards, including the requirement that the communication not be misleading.”); *see also* *Robert L. Wallace*, Exchange Act Release No. 40654, 1998 WL 778608, at *4 (Nov. 10, 1998) (stating that Rule 2210 is “not limited to advertisements for securities, but provide[s] standards applicable to all NASD member communications with the public”).

⁴⁶ *Sheen Fin. Res., Inc.*, Exchange Act Release No. 35477, 1995 WL 116484, at *3 n.22 (Mar. 13, 1995) (finding that predecessor rule to Rule 2210 did “not require that a communication name a specific security in order for it to violate the rule’s provisions” and that advertisement that “promote[d] specific types of securities” was within the scope of the rule); *see also* *CapWest Sec.*, 2014 WL 198188, at *7 (“CapWest cites no authority to support its apparent position that these requirements apply only to testimonials in advertisements related to specific products or services, and there is nothing in Rule 2210 that would suggest that its scope is so limited. Rule 2210 applies equally to all member firm communications with the public.”).

⁴⁷ SEC No-Action Letter, 1985 WL 55679 (Dec. 3, 1985).

⁴⁸ 17 C.F.R. § 230.502(c).

“be based on principles of fair dealing and good faith” and “be fair and balanced.”⁴⁹ In any case, we have found the omission of material facts from optimistic statements to violate the antifraud provisions of the federal securities laws.⁵⁰

Applicants argue further that the email recipients were sophisticated and therefore were not misled, did not “suffer[] any economic harm,” and could not “be deemed to have been ‘defrauded.’” But we need not determine whether the recipients were sophisticated because

⁴⁹ NASD Rule 2210(d)(1)(A), (B), & (D); *see also Davrey Fin. Servs., Inc.*, Exchange Act Release No. 51780, 2005 WL 1323032, at *7 (June 2, 2005) (finding statements “were exaggerated, unwarranted, and misleading” in violation of Rule 2210, including discussion of “Stocks to Watch” list that had “unwarranted promises of future performance,” and discussion of a “million dollar plan” that “contained no risk disclosure, no description of the risky strategies on which it was based, and promised specific results without a reasonable basis”).

⁵⁰ *See Donner Corp. Int'l*, 2007 WL 516282, at *9-10 (finding applicants violated Exchange Act Section 10(b) and Rule 10b-5 by making “optimistic” statements in research reports about companies’ financial and business prospects that rendered the reports misleading, such as that a company was “well-positioned” to grow and its stock was “undervalued,” while omitting “material negative information” about the company’s financial condition); *M.V. Gray Invs., Inc.*, Exchange Act Release No. 9180, 1971 WL 120492, at *3 (May 20, 1971) (finding applicant violated Securities Act Section 17(a), Exchange Act Section 10(b), and Rule 10b-5 by making “optimistic representations and predictions” to customers without a reasonable basis and omitting that the issuer “had been losing money”); *see also James E. Cavallo*, Exchange Act Release No. 26639, 1989 WL 991979, at *3 (Mar. 17, 1989) (“A salesman’s honest belief in an issuer’s prospects does not warrant his making exaggerated and unfounded representations and predictions to others.”), *petition denied*, 993 F.2d 913 (D.C. Cir. 1993).

NASD Rule 2210(d) does not provide an exception for communications to sophisticated recipients.⁵¹ Nor does it require proof of reliance, harm, or fraud.⁵²

Applicants also argue that SignPath maintained a website from which interested persons could obtain additional information about the company, and that the emails should be considered in conjunction with the website. But in determining whether a communication violated NASD Rule 2210, we look to the content of the communication alone and not to other documents.⁵³ Applicants may not depend on scattered information available to the customer for the requisite disclosure of information omitted from their communications.⁵⁴ Sales literature must stand on its

⁵¹ See *Excel Fin.*, 1997 WL 685323, at *5 (“The fact that some of the intended audience were accredited investors did not excuse [applicants’] failure to provide disclosure that was not misleading [in violation of predecessor provision to Rule 2210].”); cf. *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 & n.18 (1998) (finding “no authority . . . for varying the standard of materiality depending on” the recipient of “the withheld or misrepresented information”). See generally NASD IM-2210-1(2) (recognizing that members “must consider the nature of the audience to which the communication will be directed” and that “[d]ifferent levels of explanation or detail may be necessary depending on the audience to which a communication is directed” but affirming that all communications with the public must comply “with the requirement that the communication not be misleading”).

⁵² NASD Rule 2210(d); cf. *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1244 (11th Cir. 2012) (“[A] private plaintiff’s ‘reliance’ does not bear on the determination of whether the securities laws were violated, only whether that private plaintiff may recover damages.”); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (“Unlike private litigants seeking damages, the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money.”).

⁵³ *CapWest Sec.*, 2014 WL 198188, at *8 & n.47 (rejecting argument that communication should be viewed in conjunction with disclosures provided in private placement memoranda); cf. *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp.*, 709 F.3d 109, 127 (2d Cir. 2013) (stating “[t]here are serious limitations on a corporation’s ability to charge its stockholders with knowledge of information omitted from a document such as a . . . prospectus on the basis that the information is public knowledge and otherwise available to them”) (alteration and omission in original) (quoting *Kronfeld v. Trans World Airlines, Inc.*, 832 F.2d 726, 736 (2d Cir. 1987)).

⁵⁴ *Capwest Sec.*, 2014 WL 198188, at *8; cf. *New Jersey Carpenters Health Fund*, 709 F.3d at 127 (stating that “sporadic news reports . . . should not be considered part of the total mix of information that would clarify or place in proper context . . . representations’ that were contained in materials that the company provided ‘directly’”) (omissions in original) (quoting *United Paperworks Int’l Union v. Int’l Paper Co.*, 985 F.2d 1190, 1199 (2d Cir. 1993)).

own when considered under the standards of Rule 2210.⁵⁵ Representations in other materials do not cure the failure to adhere to Rule 2210's standards in the communications at issue when those communications contain misleading statements or omit information necessary to make the statements made in the communications not misleading.⁵⁶

Finally, Applicants argue that it is not possible for a communication to be "false, exaggerated, misleading, or omit[] necessary information" under NASD Rule 2210(d)(1) if, as here, "every statement [in the communication is] true." We disagree with both their argument and its premise. It is well established that literally true statements may be made misleading through the omission of material facts.⁵⁷ And Rule 2210(d)(1) obligates firms to include information necessary to make their public communications "fair and balanced" and to "provide a sound basis for evaluating the facts." As discussed above, Applicants' emails failed to do so and also omitted material facts. In any event, the emails also contained numerous falsehoods.

⁵⁵ *Capwest Sec.*, 2014 WL 198188, at *8 & n.50; *Donner Corp. Int'l*, 2007 WL 516282, at *10 ("The research reports themselves needed to convey a complete and accurate picture and could not depend on other information available to investors."); *Pac. On-Line Trading & Sec.*, 2003 WL 22110356, at *5 (finding that disclaimers provided at seminars and when customers opened new accounts did not cure misleading advertisements because "[a]dvertisements must stand on their own when judged against the standards of [Rule 2210]"') (quoting *Sheen Fin. Res.*, 1995 WL 116484, at *4).

⁵⁶ *Capwest Sec.*, 2014 WL 198188, at *8 (rejecting argument that "communications did not violate Rule 2210 since the PPMs would include risk and other disclosures that were not included in the communications themselves" because the PPMs "would not cure the Firm's failure to provide a balanced presentation in the communications").

⁵⁷ See *SEC v. First Am. Bank & Trust Co.*, 481 F.2d 673, 678 (8th Cir. 1973) ("[A] statement which is literally true, if susceptible to quite another interpretation by the reasonable investor . . . may properly . . . be considered a material misrepresentation."); see also *SEC v. Gabelli*, 653 F.3d 49, 57 (2d Cir. 2011) ("The law is well settled, however, that so-called 'half-truths'—literally true statements that create a materially misleading impression—will support claims for securities fraud."), *rev'd on other grounds*, 568 U.S. 442 (2013); *CapWest Sec.*, 2014 WL 198188, at *6 ("Even if certain of these statements (such as the statement that a 1031 Exchange may be executed 'without a tax consequence') may be literally true with respect to the initial transaction, the failure of the advertisement to explain the ultimate tax effect of a 1031 Exchange gave the misleading impression that taxes could be avoided altogether.").

2. We sustain the Firm’s \$200,000 fine and Meyers’s \$50,000 fine for the unbalanced and misleading communications as not excessive or oppressive.

FINRA’s Sanction Guidelines recommend a fine of \$10,000 to \$146,000 in cases involving “intentional or reckless use of misleading communications” with the public.⁵⁸ The Guidelines’ general principles also authorize sanctions beyond the range recommended for a particular violation in cases involving egregious misconduct or recidivism.⁵⁹ We find, as did the NAC, that Applicants’ use of unbalanced and misleading communications was at least reckless and was egregious, and that Applicants are recidivists based on their disciplinary histories, which the NAC described as “extensive” and “troubling.” In so finding, we have considered the Principal Considerations for imposing sanctions under the Sanction Guidelines.⁶⁰

Recklessness is highly unreasonable conduct that represents an “extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it.”⁶¹ Meyers not only drafted the emails about SignPath but was an owner, investment banker, and placement agent of SignPath. He must have known that it was untrue to state in the emails that SignPath anticipated its shares would be publicly traded in early 2011 and had obtained confirmation of the rights to Dutogliptin. Meyers also must have known that it was misleading to predict that SignPath would be profitable in two years without a basis for that prediction or disclosing the company’s significant financial problems, its difficulties in acquiring and developing Dutogliptin, and Meyers’s conflict of interest. Meyers’s scienter is imputed to the Firm.⁶²

Applicants’ misconduct was also egregious. The Principal Considerations in the Sanction Guidelines recommend that adjudicators consider “[w]hether the respondent engaged in the misconduct over an extended period of time” and “[w]hether the respondent engaged in numerous acts and/or a pattern of misconduct.”⁶³ We have also previously considered the “wide circulation” of communications that violated NASD Rule 2210 to be an aggravating factor in

⁵⁸ Guidelines at 82. The Guidelines also recommend a suspension for “up to two years” “[i]n cases involving intentional or reckless use of misleading communications with the public,” and “expelling the firm, and/or barring the responsible individual” in cases “involving numerous acts of intentional or reckless misconduct over an extended period of time.” *Id.*

⁵⁹ *Id.* at 2-3 (General Principle 2) & 4 (General Principle 3).

⁶⁰ *See id.* at 7-8 (Principal Considerations for all violations) & 81 (Principal Considerations for use of misleading communications).

⁶¹ *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

⁶² *Warwick Capital Mgmt.*, Advisers Act Release No. 2694, 2008 WL 149127, at *9 n.33 (Jan. 16, 2008) (“A company’s scienter is imputed from that of the individuals controlling it.”).

⁶³ Guidelines at 7-8 (Principal Considerations 8 & 9).

determining sanctions for a violation of that rule.⁶⁴ Here, Applicants included their unbalanced and misleading statements in a large number of communications over an extended period of time. And Applicants' undisclosed conflict of interest created the potential for financial gain.⁶⁵

Furthermore, Applicants have significant disciplinary histories.⁶⁶ Their past misconduct includes misconduct similar to that at issue here and “evidences a reckless disregard for regulatory requirements, investor protection, [and] market integrity.”⁶⁷ FINRA's BrokerCheck shows that, at the time of the complaint in this action, the Firm had been the subject of 15 final regulatory and disciplinary actions—some concerning misleading omissions of material fact.⁶⁸ BrokerCheck also shows that Meyers had been the subject of five final regulatory and disciplinary actions.⁶⁹ The Firm was fined a total of \$306,500, and Meyers a total of \$47,000. Meyers also had been suspended for four months from acting in any principal or supervisory capacity.

Considering Applicants' scienter, the egregiousness of their misconduct, and their disciplinary histories, we sustain the \$200,000 fine imposed on the Firm and the \$50,000 fine imposed on Meyers. For the reasons discussed above, we agree with the NAC that applying the higher guideline range for “intentional or reckless use of misleading communications” was appropriate; as a result, it was reasonable for the NAC to impose higher fines than did the Hearing Panel. We also agree with the NAC that a significant fine was warranted in light of the large number of misleading communications, the extended period over which they were sent, their wide dissemination, and the potential for Meyers Associates and Meyers to gain monetarily. Although the Sanction Guidelines would have authorized suspending or expelling Meyers Associates, or suspending or barring Meyers, the NAC did not impose those sanctions. We find

⁶⁴ *CapWest Sec.*, 2014 WL 198188, at *9.

⁶⁵ Guidelines at 8 (Principal Consideration 16) (“[w]hether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain”).

⁶⁶ See Guidelines at 2 (General Principle 2) (stating that adjudicators should “impos[e] progressively escalating sanctions on recidivists beyond those outlined in these guidelines, up to and including barring associated persons and expelling firms”); cf. *Castle Sec. Corp.*, Exchange Act Release No. 52580, 2005 WL 2508169, at *5 (Oct. 11, 2005) (finding a firm's disciplinary history to be “a significant aggravating factor and an important consideration”).

⁶⁷ Guidelines at 3 (General Principle 3) (“Adjudicators also should consider imposing more severe sanctions when a respondent's disciplinary history includes significant past misconduct that: (a) is similar to that at issue; or (b) evidences a reckless disregard for regulatory requirements, investor protection, or market integrity.”).

⁶⁸ See BrokerCheck, available at <https://brokercheck.finra.org/firm/summary/34171>. We take official notice of this information pursuant to Rule 323, 17 C.F.R. § 201.323.

⁶⁹ See BrokerCheck, available at https://files.brokercheck.finra.org/individual/individual_1045447.pdf. We take official notice of this information.

that the imposition of fines that exceeded the range recommended by the Guidelines was remedial and not excessive or oppressive under the circumstances of this case.⁷⁰

B. The Firm’s recordkeeping and reporting violations

1. We sustain the finding that the Firm violated NASD Rule 3110, FINRA Rules 4511 and 2010, Exchange Act Section 17(a), and Exchange Act Rules 17a-3, 17a-4, and 17a-5 by creating and maintaining inaccurate books and records.

NASD Rule 3110(a) and FINRA Rule 4511(a)⁷¹ require that members make and preserve books and records as required under Exchange Act Section 17(a) and Exchange Act Rules 17a-3, 17a-4, and 17a-5.⁷² Exchange Act Section 17(a)(1) requires broker-dealers to “make and keep for prescribed periods such records . . . and make and disseminate such reports as the Commission, by rule, prescribes.”⁷³ Rule 17a-3(a)(2) requires broker-dealers to “make and keep current . . . [l]edgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts.”⁷⁴ Rules 17a-5(a) and (d) require broker-dealers to file monthly and quarterly “FOCUS” reports and annual audited reports with the Commission.⁷⁵ And Rule 17a-4 requires broker-dealers to preserve required records for specified periods of time.⁷⁶ Implicit in

⁷⁰ See *Lek Sec. Corp.*, 2018 WL 1602630, at *12 n.47 (finding that the fine would “protect investors by impressing upon [applicant] the importance of complying with FINRA rules” without “resort to a more serious sanction such as suspension or expulsion of [applicant] from FINRA membership”); cf. *Wedbush Secs., Inc.*, Exchange Act Release No. 78568, 2016 WL 4258143, at *15 (Aug. 12, 2016) (“Under the circumstances, we find that FINRA’s decision to impose a fine that exceeded the Guidelines recommendations, while declining to impose the suspension that the Guidelines would have authorized, did not result in an excessive or oppressive sanction.”), *petition denied*, 719 F. App’x 724 (9th Cir. 2018).

⁷¹ FINRA Rule 4511 replaced NASD Rule 3110(a) effective December 5, 2011.

⁷² NASD Rule 3110(a); FINRA Rule 4511; see also *Howard R. Perles*, Exchange Act Release No. 45691, 2002 WL 507029, at *9 (Apr. 4, 2002) (“NASD Rule 3110 requires members to make and keep accurate records required by Section 17(a) of the Exchange Act and the rules promulgated by the Commission thereunder.”).

⁷³ 15 U.S.C. § 78q(a)(1).

⁷⁴ 17 C.F.R. § 240.17a-3(a)(2).

⁷⁵ *Id.* § 240.17a-5(a), (d). FOCUS Reports enable periodic monitoring of a company’s financial and operational soundness. *E. Magnus Oppenheim & Co., Inc.*, Exchange Act Release No. 51479, 2005 WL 770880, at *1 n.3 (Apr. 6, 2005).

⁷⁶ 17 C.F.R. § 240.17a-4 (“not less than six years” as to Rule 17a-3(a)(2) records and “not less than three years” as to Rule 17a-5(a) and (d) records).

these requirements is that the records be accurate.⁷⁷ Scienter is not required to violate these provisions.⁷⁸ The record establishes that with respect to its books and records the Firm engaged in the conduct FINRA found; that conduct violated NASD Rule 3110, FINRA Rule 4511, and Exchange Act Section 17(a) and the rules thereunder; and those provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.

In November 2010, the Firm entered into employment agreements with Meyers and another senior officer, Imtiaz Khan,⁷⁹ that required it to reimburse them “each month for all expenses and disbursements of any kind or nature incurred” “in connection with or on behalf of” the Firm in the performance of their duties. The covered expenses included “travel, entertainment, meals, car expense, airline travel and certain personal expenses,” up to \$10,000 per month for Meyers and \$7,500 for Khan. In 2011 and 2012, as Applicants admit, the Firm reimbursed Meyers and Khan for more than \$60,000 in personal expenses that they charged to their corporate and personal credit cards. Although there is no allegation that the reimbursements were improper, the Firm inaccurately recorded them in its general ledger as business expenses rather than employee compensation.⁸⁰ This caused the Firm to underreport employee compensation in its FOCUS reports and annual audited reports for 2011 and 2012. After FINRA’s investigation, the Firm issued new Forms 1099 restating Meyers’s and Khan’s incomes for 2011 and 2012. Applicants do not argue that the reimbursements were recorded properly.

As a result of this conduct, the Firm violated NASD Rule 3110(a), FINRA Rules 4511(a) and 2010, Exchange Act Section 17(a)(1), and Exchange Act Rules 17a-3, 17a-4, and 17a-5. By classifying the payments it made for personal expenses as business expenses, the Firm inaccurately reported the compensation for two senior officers in its ledger, monthly FOCUS

⁷⁷ *The Dratel Group, Inc.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *13 (Mar. 17, 2016); *Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *11 (Feb. 27, 2012), *petition denied sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013); *see also Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971) (stating that there is “an obligation” under Exchange Act Section 17(a) that “voluntarily suppl[ied]” information “be truthful”).

⁷⁸ *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *12 (May 27, 2015) (finding that NASD Rule 3110 has no scienter requirement); *Orlando Joseph Jett*, Exchange Act Release No. 49366, 2004 WL 2809317, at *23 (Mar. 5, 2004) (“Scienter is not required to violate Exchange Act Section 17(a)(1) and the rules thereunder.”).

⁷⁹ *See supra* note 6.

⁸⁰ *See* 26 U.S.C. § 61(a)(1) (defining “gross income” as “all income from whatever source derived,” including “fringe benefits”); Internal Revenue Service, *Executive Compensation-Fringe Benefits Audit Techniques Guide* (02-2005), 2005 WL 1500302, at *3 (Feb. 2005) (“Personal expenses paid on behalf of executives are taxable fringe benefits that should be included in wages.”).

reports, and annual audited reports for 2011 and 2012.⁸¹ We find that the provisions the Firm violated are, and were applied in a manner, consistent with the Exchange Act's purpose of protecting investors and the public interest because those provisions "require[] that member firms conduct their business operations with regularity and that their records accurately reflect those operations" and here the Firm's records were not accurate.⁸²

Applicants argue that the Firm should not be held liable for the recordkeeping violations because the inaccuracies in their records were not material and did not threaten investors. But materiality and the potential for investor harm are not elements of the recordkeeping rules.⁸³

Applicants also argue that they did not act with scienter, that "[n]othing was concealed," and that the "wrong jar into which the penny was placed was transparent." Although they state that the NAC found their recordkeeping violation to be intentional, the NAC made no such finding. As noted above, scienter is not required to establish recordkeeping violations.⁸⁴

Applicants argue further that the Firm's outside auditor issued two "clean opinion letters" for fiscal years 2011 and 2012. According to Applicants, the Firm received a letter from its auditor stating that it "had reviewed the Firm's general ledger and . . . accounting for the payment of expenses on behalf of" Meyers and Khan and that "the auditing staff . . . was familiar with the provision in each [employment] agreement [for Meyers and Khan] regarding the payment of employee-related business and personal expense allowance." A representative from the auditor testified, however, that this letter was not in the audit files and that the audit staff had not reviewed the Firm's accounting for reimbursements or been provided with the employment agreements. The letter also was dated several years after the audits and was not corroborated by

⁸¹ See *Fillet*, 2015 WL 3397780, at *12-13 (finding that applicant violated NASD Rule 3110(a) and Exchange Act Rule 17a-3 by backdating customer account records); *Jett*, 2004 WL 2809317, at *23 (finding that firm's misstatement of profits in ledger and FOCUS reports violated Exchange Act Section 17(a)(1) and Rules 17a-3 and 17a-5).

⁸² See *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 WL 5608531, at *16 (Sept. 24, 2015) (internal quotation and citation omitted); see also *supra* notes 27, 43, and 44.

⁸³ See *Palm State Equities, Inc.*, Exchange Act Release No. 35873, 1995 WL 380142, at *2 (June 20, 1995) (stating that Rule 17a-3 "does not permit a broker-dealer to avoid" the requirement to keep and maintain accurate books and records "merely because, in retrospect, the resulting adjustments prove to be immaterial"); *James F. Novak*, Exchange Act Release No. 19660, 1983 WL 821144, at *4 n.15 (Apr. 8, 1983) ("[T]he effect the false records may have had on investigators or customers is irrelevant to the question of whether there was a violation of recordkeeping requirements.").

⁸⁴ *Fillet*, 2015 WL 3397780, at *12. As also noted above, the NAC did not impose a separate sanction for the Firm's recordkeeping violations.

other evidence. In any case, a broker-dealer cannot shift its responsibility to maintain accurate books and records to its auditors; that responsibility rests with the Firm and its officers.⁸⁵

2. We sustain the finding that the Firm violated NASD Rules 3070 and 2110 and FINRA Rule 2010 by failing to report customer complaint information.

NASD Rule 3070(c) requires firms to report to FINRA “statistical and summary information regarding customer complaints . . . by the 15th day of the month following the calendar quarter in which customer complaints are received by the [firm].”⁸⁶ FINRA’s investigator testified that he reviewed email correspondence between the Firm’s registered representatives and their customers that revealed the presence of customer complaints. But from March 2007 through July 2010, FINRA’s customer complaint reporting system did not receive from the Firm statistical and summary information regarding 49 written customer complaints the Firm had received. FINRA’s investigator testified that he made this determination by “check[ing] the system with the names of the customers or potential customers in the email complaints to see if the firm reported them and [the Firm] did not.” Many of the complaints alleged serious sales practice abuses, including unauthorized trading. And at least six of the complaints were received by the Firm’s supervisory personnel. Yet as of the final day of the 2015 hearing in this proceeding, the Firm still had not reported them. The Firm also reported the statistical and summary information for three written customer complaints it received in 2009 more than one year late. Accordingly, we find that the Firm engaged in the conduct FINRA found and that such conduct violated NASD Rules 3070(c) and 2110 and FINRA Rule 2010.⁸⁷

We also find that those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. NASD Rule 3070(c) is consistent with the purposes of the Exchange Act because it requires firms to “provide FINRA with important information to identify timely problem members, branch offices, and registered representatives and to detect and investigate possible sales practice violations and operational problems.”⁸⁸ The investing public, in turn, benefits when FINRA has this information.⁸⁹ As a result, the failure to file

⁸⁵ See *Tiger Options*, Exchange Act Release No. 37866, 1996 WL 616368, at *5 (Oct. 25, 1996) (“It is clear, however, that while a broker-dealer can use outside accountants, the firm cannot shift the obligation to comply with its recordkeeping and reporting responsibilities.”).

⁸⁶ See NASD Rule 3070(c). FINRA Rule 4530 replaced NASD Rule 3070(c) effective July 1, 2011.

⁸⁷ See *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 WL 1892137, at *12 (June 29, 2007) (finding that applicant violated NASD Rule 3070(c) by failing to file reports concerning eleven customer complaints); see also *supra* notes 27, 43, and 44.

⁸⁸ *Wedbush Sec.*, 2016 WL 4258143 at *14; see also *Kresge*, 2007 WL 1892137, at *12 (stating that NASD Rule 3070(c) is “intended to protect public investors by helping to identify potential sales practice violations in a timely manner”).

⁸⁹ *Wedbush Sec.*, 2016 WL 4258143 at *14.

reports under Rule 3070(c) accurately and on time deprives FINRA of information that would help it efficiently set investigative priorities.⁹⁰ Applying Rule 3070 in this case was appropriate because the Firm's failure to report customer complaint information frustrated FINRA's ability to monitor its members and protect the public.⁹¹

Applicants acknowledge that "there were gaps in timing" for filing Rule 3070 reports. Nevertheless, they contend that it was unfair for FINRA to wait "over four years to bring formal charges which they claim was "designed to hobble [their] ability to fully paper their defenses" and resulted in the "eliminat[ion] [of] two key witnesses." Yet Applicants have not explained what their defenses might have been or how evidence not in the record would have supported those defenses. Applicants have not even explained how the two witnesses might have testified. As for the delay in bringing the case, FINRA responds that the Firm "delayed FINRA's inquiry into the violations, and thus the filing of the [c]omplaint, by repeatedly providing incomplete and non-responsive answers to FINRA's document and information requests." In any case, we find no unfairness because Applicants do not dispute, and the record establishes, that they failed to file the reports as Rule 3070 required.⁹²

C. Applicants' supervisory violations

1. We sustain the findings that Applicants violated NASD Rules 3010 and 2110 and FINRA Rule 2010 and the Firm violated NASD Rules 3012 and 2110.

a. Applicants failed to establish and maintain a reasonable supervisory system for the preparation of books and records.

NASD Rule 3010(a) and (b) require firms to establish and maintain a supervisory system "reasonably designed to achieve compliance with applicable securities laws and regulations, and

⁹⁰ *Id.*

⁹¹ As noted above, the NAC did not impose a separate sanction for this violation.

⁹² *See Mark H. Love*, Exchange Act Release No. 49248, 2004 WL 283437, at *4 (Feb. 13, 2004) (rejecting argument that delay in filing complaint rendered NASD proceeding unfair by making two witnesses unavailable because the "NASD based its decision on facts that [applicant] did not dispute"); *see also Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *18 (Feb. 13, 2015) (rejecting defense based on the passage of time where applicant "identifie[d] no specific instances" of prejudice) (citing cases).

with applicable NASD Rules.”⁹³ The supervisory system must include “written procedures to supervise the types of business in which [the firm] engages and to supervise the activities of . . . associated persons.”⁹⁴ But during 2011 and 2012, the Firm did not have written procedures for ensuring that it accurately accounted in its books and records for the reimbursement of Meyers’s and Khan’s personal expenses as employee compensation.

Despite the fact that their employment agreements provided that their personal expenses would be reimbursed, no procedures required Meyers and Khan to share the terms of their employment agreements with the personnel who prepared the books and records or to differentiate between personal and business expenses when seeking reimbursements. Instead, the Firm permitted Meyers and Khan to submit only the first page of their credit card statements, which stated the total monthly charges but did not itemize or differentiate business and personal expenses. As a result, the Firm’s accounting personnel did not know about the reimbursement of personal expenses pursuant to the employment contracts, and the personal expenses were misclassified in the books and records as business expenses rather than as employee compensation.

Accordingly, we find that the Firm engaged in the conduct FINRA found and that the Firm violated NASD Rule 3010(a) and (b). The Firm had no procedures for ensuring that the personal expenses reimbursed under Meyers’s and Khan’s employment agreements were recorded as employee compensation and complied with the recordkeeping rules.⁹⁵ Rather, the Firm’s accounting personnel were unaware of the employment agreements and unable to maintain accurate books and records. We also find that NASD Rule 3010 is consistent with the Exchange Act’s purpose of protecting investors because we have “long emphasized that the responsibility of broker-dealers to supervise their employees is a critical component of the

⁹³ NASD Rule 3010(a). FINRA Rule 3110 replaced NASD Rule 3010 effective December 1, 2014.

⁹⁴ NASD Rule 3010(a)(1) & (b).

⁹⁵ *See, e.g., Wedbush Sec.*, 2016 WL 4258143, at *7 (finding that firm and its president failed reasonably to supervise regulatory reporting in violation of NASD Rule 3010 “where supervisors and executives across the Firm took insufficient steps to ensure that regulatory reporting was completed timely and accurately”) (internal quotations omitted); *East/West Sec. Co.*, Exchange Act Release No. 43479, 2000 WL 1585633, at *3 (Oct. 25, 2000) (finding that firm violated NASD Rule 3010 by failing to have procedures stating “how it would monitor compliance with the Regulatory Element [Continuing Education Program] rule and what action it would take against a registered person who failed to comply with the rule[]”).

federal regulatory scheme.”⁹⁶ Applying Rule 3010 here was consistent with that purpose given the unreasonableness of the Firm’s supervisory failures.⁹⁷

Meyers also violated NASD Rule 3010 as a result of this conduct. “It is well established that the president of a member firm bears ultimate responsibility for compliance with all applicable requirements unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person’s performance is deficient.”⁹⁸ Here, the Firm’s written supervisory procedures (“WSPs”) made Meyers, the Firm’s CEO, responsible for the “ultimate supervision” of the Firm’s supervisory personnel. The WSPs also stated, and Meyers testified, that from January to May 2011, Meyers supervised Victor Puzio, who was the Firm’s CFO and financial and operations principal (“FINOP”).⁹⁹ The WSPs stated that Puzio was responsible for “maintain[ing] the books and records” and “for the proper completion and filing of all focus reports and relevant financial reports with FINRA.” Yet Meyers did not disclose to Puzio that the Firm was reimbursing his and Khan’s personal expenses. Nor did he develop procedures concerning the reimbursement of personal expenses under his and Khan’s employment agreements or divulge the terms of those agreements to Puzio and the accounting personnel. Meyers therefore knew or must have known that Puzio and the accounting personnel did not have the necessary information to properly account for the reimbursement of personal expenses as employee compensation and thus maintain accurate books and records. Under the circumstances, Meyers failed to exercise reasonable supervision.¹⁰⁰

Applicants argue that because Puzio maintained, and an accounting firm reviewed, the books and records, holding Applicants liable would be “tantamount to imposing a requirement that brokerage firm principals have accounting degrees and double check the work of their outside accountants.” We have already rejected Applicants’ argument that they could shift their responsibility for maintaining accurate books and records to their accounting firm. Applicants do not explain how their outside accountants could be responsible for the failure to have WSPs governing the reimbursement of personal expenses. Indeed, the outside accountants could not be

⁹⁶ *Wedbush Sec.*, 2016 WL 4258143, at *10 (internal quotations and citations omitted).

⁹⁷ *See Thaddeus J. North*, Exchange Act Release No. 17909, 2018 WL 5433114, at *7 (Oct. 29, 2018) (finding FINRA’s application of Rule 3010 “was appropriate in this case given the unreasonableness of the written supervisory procedures”); *see also supra* notes 27, 43, and 44.

⁹⁸ *Wedbush Sec.*, 2016 WL 4258143, at *8 (internal quotations and citations omitted).

⁹⁹ In August 2011, the Firm revised its WSPs to state that, as of May 2011, the Firm’s new president, Donald Wojnowski, supervised Puzio, and Meyers supervised Wojnowski.

¹⁰⁰ *See Donner Corp. Int’l*, 2007 WL 516282, at *14-15 (finding that firm’s president violated Rule 3010 because firm did not have any procedures governing the preparation or review of research reports despite president knowing that firm was disseminating such reports).

so responsible because they were not associated with the Firm.¹⁰¹ To the extent Applicants argue that they should not be liable because they did not commit an “intentional act,” we reject that argument because Applicants knew the terms of Meyers’s and Khan’s employment agreements yet Meyers did not develop procedures concerning the reimbursement of personal expenses or otherwise ensure that the Firm’s accounting personnel knew about the agreements and could properly record the reimbursements that the Firm made as employee compensation.¹⁰²

b. The Firm failed to establish and maintain a reasonable supervisory system for the review of electronic correspondence.

NASD Rule 3010(d) requires firms to establish written procedures “for the review by a registered principal of . . . electronic correspondence of its registered representatives with the public relating to [its] investment banking or securities business.”¹⁰³ Each member must “develop written procedures that are appropriate to its business, size, structure, and customers for the review of . . . electronic correspondence with the public relating to its investment banking or securities business”¹⁰⁴ Firms must maintain, and make available to FINRA upon request, “[e]vidence that these supervisory procedures have been implemented and carried out.”¹⁰⁵

Between March 2007 and September 2010, the Firm’s WSPs did not address how supervisors were to select electronic correspondence for review, how they were to review it, the frequency of such reviews, and the manner in which to document reviews. Nor did the Firm maintain records of its supervisory review of electronic correspondence. Accordingly, we find that the Firm engaged in the conduct FINRA found; that by failing to have WSPs for the review of electronic correspondence the Firm violated NASD Rule 3010; and that FINRA’s application of NASD Rule 3010 here was consistent with the purposes of the Exchange Act.¹⁰⁶

¹⁰¹ See *Murphy*, 2013 WL 3327752, at *21 n.120 (finding that applicant “could not delegate [supervisory] duties to individuals not associated with the member firm” such as outside auditor).

¹⁰² *Lane*, 2015 WL 627346, at *12 (finding that firm’s WSPs “were also deficient because they did not address interpositioning, even though the Firm regularly engaged in that practice”).

¹⁰³ NASD Rule 3010(d)(1).

¹⁰⁴ NASD Rule 3010(d)(2).

¹⁰⁵ NASD Rule 3010(d)(1).

¹⁰⁶ See *North*, 2018 WL 5433114, at *5 (finding violation of NASD Rule 3010 where WSPs “failed to specify even the most basic parameters for reviewing electronic communications, e.g., the frequency of review, the methodology to be used in selecting communications to be reviewed, whose electronic communications were going to be reviewed, the number of communications to be reviewed, or how to document actions taken as a result of reviews”); see also *supra* notes 27, 43, and 44 and text accompanying note 96.

Applicants argue that the NAC's decision operated as an unfair "pile-on" because it sanctioned the Firm a second time for misconduct that was the subject of a 2008 settlement with FINRA. But the 2008 settlement concerned misconduct regarding the Firm's review of electronic correspondence during the period of April 2005 to April 2006; here, the case concerns the Firm's misconduct that occurred from March 2007 to September 2010. Notwithstanding the 2008 settlement agreement, applicants again failed to develop the required procedures. The NAC's decision was not unfair because in this case "[s]ubsequent time periods are at issue."¹⁰⁷

c. The Firm failed to establish and maintain a reasonable supervisory control system.

NASD Rule 3012 requires firms to designate one or more principals to "establish, maintain, and enforce a system of supervisory control policies and procedures that (A) test and verify that the member's supervisory procedures are reasonably designed . . . to achieve compliance with applicable securities laws and . . . NASD rules and (B) create additional or amended supervisory procedures where the need is identified by such testing and verification."¹⁰⁸ The designated principal(s) must submit a report to senior management at least annually that "detail[s] [the] member's system of supervisory controls" and "the summary of the test results."¹⁰⁹ Among other things, the supervisory controls must include written "procedures that are reasonably designed" (i) "to review and supervise the customer account activity conducted by" producing managers;¹¹⁰ (ii) "to provide heightened supervision over the activities of each producing manager who is responsible for generating 20% or more of the revenue of the business units supervised by the producing manager's supervisor";¹¹¹ and (iii) "to review and monitor . . . all transmittals of funds . . . or securities from customers to third party accounts," "outside entities," and "locations other than a customer's primary residence."¹¹²

The record shows, and Applicants do not dispute, that the Firm failed to have these procedures. From 2009 to 2011, the Firm's system of supervisory controls failed to reasonably explain how the Firm would identify producing managers, review the customer account activities of those managers, or determine if those managers were in need of heightened supervision because they generated 20% or more of the revenue of the business units supervised by the manager's supervisor. The Firm's system of supervisory controls also failed to reasonably discuss how the Firm would review and monitor transmittals of customer funds and securities.

¹⁰⁷ *Pac. On-Line Trading & Sec.*, 2003 WL 22110356, at *6.

¹⁰⁸ NASD Rule 3012(a)(1). FINRA Rule 3120 replaced NASD Rule 3012 effective December 1, 2014.

¹⁰⁹ *Id.*

¹¹⁰ NASD Rule 3012(a)(2)(A).

¹¹¹ NASD Rule 3012(a)(2)(C).

¹¹² NASD Rule 3012(a)(2)(B)(i).

Furthermore, the Firm's 2009, 2010, and 2011 annual reports on its system of supervisory controls did not reasonably detail those controls and instead contained only conclusory statements that unspecified methods of testing showed supervisory procedures to be adequate.¹¹³

Accordingly, we find that the Firm engaged in the conduct FINRA found; that that conduct violated NASD Rule 3012; and that NASD Rule 3012 is, and was applied in a manner, consistent with the purposes of the Exchange Act.¹¹⁴ We have stated that NASD Rule 3012 is consistent with the purposes of the Exchange Act because it “reduce[s] the potential for customer fraud and theft” by “requiring members to establish more extensive supervisory and supervisory control procedures to monitor customer account activities of their employees.”¹¹⁵ Given the Firm's unreasonable failure to have the required supervisory controls, FINRA's application of NASD Rule 3012 here was also consistent with the purposes of the Exchange Act.¹¹⁶

2. We sustain the sanctions for Applicants' supervisory violations.

a. The Firm's \$500,000 fine is not excessive or oppressive.

FINRA applied the sanction guideline for “systemic supervisory failures” to impose a single \$500,000 fine for all of the Firm's violations other than the unbalanced and misleading communications. Although the Hearing Panel imposed separate sanctions for each of the other violations, the NAC found that those other violations all “resulted fundamentally from the [F]irm's persistent supervisory failures.” We have recognized previously that the NAC may impose a unitary sanction where “violations result from a single systemic problem or cause.”¹¹⁷ And “it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action

¹¹³ For example, the annual reports signed by a principal of the Firm stated, “At the present time my review and testing, as described above, reflects that our procedures are adequate.” They also stated, “Additionally, it is the responsibility of that principal to create or amend the firm's procedures when it becomes applicable, as a result of the aforementioned testing.” However, the testing is not described or mentioned anywhere in the reports.

¹¹⁴ *See Self-Regulatory Organizations; Order Approving Proposed Rule Change*, Exchange Act Release No. 49883, 2004 WL 1574002, at *17 (June 17, 2004) (approving NASD Rule 3012 and finding it “consistent with the provisions of [Exchange Act] Section 15A(b)(6)”).

¹¹⁵ *Id.*

¹¹⁶ FINRA's finding that the failure to have supervisory controls also violated FINRA Rule 2010 was also consistent with the purposes of the Exchange Act. *See supra* notes 27, 43, and 44.

¹¹⁷ *Mielke*, 2015 WL 5608531, at *18 (sustaining the NAC's determination “to impose a unitary sanction” for violations of NASD Rule 3040 and FINRA Rule 3030 where both violations derived from applicants' “significant involvement and control of Midwest”).

of [FINRA] which is subject to Commission review.”¹¹⁸ As a result, we find that it was proper to aggregate the remaining violations in this way for purposes of determining sanctions.¹¹⁹

The guideline for “systematic supervisory failures” recommends fining a firm \$10,000 to \$292,000, or higher “[w]here aggravating factors predominate.”¹²⁰ “Where aggravating factors predominate,” the guidelines for “systemic supervisory failures” also recommend suspending “the firm with respect to any or all relevant activities or functions” for up to two years, or expelling the firm.¹²¹ We find that aggravating factors predominate here.

Several considerations specific to “systemic supervisory failures” under the Guidelines establish the presence of aggravating factors: (i) the Firm’s supervisory failures “allowed violative conduct to occur or to escape detection,”¹²² such as the misleading SignPath emails; (ii) the Firm “failed to timely correct or address deficiencies once identified,”¹²³ such as the supervisory deficiencies concerning the review of electronic communications identified in the 2008 settlement; (iii) the Firm did not “appropriately allocate[] its resources to prevent or detect the supervisory failure[s],”¹²⁴ as it had been the subject of six prior disciplinary actions involving supervisory violations; (iv) the Firm’s supervisory failures had a meaningful effect on “market integrity, market transparency, the accuracy of regulatory reports, [and] the dissemination of . . . regulatory information” because they resulted in the misleading emails, inaccurate FOCUS reports and annual audited reports, and undisclosed customer complaints that frustrated FINRA’s ability to protect investors;¹²⁵ and (v) the Firm had an unreasonable supervisory control system

¹¹⁸ *Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 WL 3652429, at *6 (Nov. 4, 2009) (stating that “the NAC reviews the Hearing Panel’s decision de novo and has broad discretion to review the Hearing Panel’s decisions and sanctions”).

¹¹⁹ Guidelines at 4 (stating that the “range of monetary sanctions in each case may be applied in the aggregate for similar types of violations rather than per individual violation”) & 106 (stating that adjudicators should use the guideline for systemic supervisory failures “when a supervisory failure is significant and is widespread or occurs over an extended period of time”).

¹²⁰ Guidelines at 106; *see also id.* at 4 (“Adjudicators may determine that egregious misconduct requires the imposition of sanctions above or otherwise outside of a recommended range.”).

¹²¹ *Id.* at 107.

¹²² *Id.* at 106.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 107.

and unreasonable supervisory procedures.¹²⁶ Under these circumstances, the \$500,000 fine imposed on the Firm was remedial and not excessive or oppressive.

Applicants contend that their “gaps in timing” with filing customer complaint information were due to “unfortunate circumstances” in 2009 and 2010, such as “the death of the Firm’s compliance consultant,” “two eye surgeries for the CFO,” and “a fire at the Firm’s office.” Although Applicants acknowledge that these circumstances do not “excuse” the Firm’s violations, they offer them “as an explanation.”¹²⁷ Applicants do not explain how these circumstances prevented the Firm from making quarterly filings throughout 2009 and 2010 of statistical and summary information about customer complaints that they had received. In any case, the Firm’s NASD Rule 3070 violation spanned from March 2007 through July 2010. These circumstances provide no explanation for the Firm’s misconduct in 2007 and 2008. Applicants also contend that they took corrective action by “successfully uncover[ing] the 49 alleged unreported customer complaints . . . and report[ing] each one . . . as of December 24, 2015, some two years before the NAC Decision.” This is not mitigating because Applicants did this after “detection and intervention by” FINRA.¹²⁸

Applicants contend that one factor to be considered under the guideline for “recordkeeping violations” is the “[n]ature and materiality of inaccurate or missing information,”¹²⁹ and that the Firm’s violations “were immaterial and *de minimis* and resulted from Applicants’ reasonable reliance on the Firm’s internal CFO and its outside accountants.” But the NAC applied the guideline for “systemic supervisory failures,” not “recordkeeping violations.” Nor have Applicants established that the Firm relied on the advice of professionals.

¹²⁶ *Id.* (recommending that adjudicators consider “[t]he quality of controls or procedures available to the supervisors and the degree to which the supervisors implemented them”).

¹²⁷ *See Strathmore Sec., Inc.*, Exchange Act Release No. 7864, 1966 WL 83448, at *5 (Apr. 8, 1966) (stating that violations were not “excuse[d]” by applicants’ contention that “the back office was under the supervision of the firm’s late president, who was seriously ill during the period when the violations occurred,” but that the issue was relevant to sanctions).

¹²⁸ Guidelines at 7 (Principal Consideration 3) (recommending that adjudicators consider for all violations whether a “member firm respondent voluntarily employed subsequent corrective measures, prior to detection or intervention . . . by a regulator”); *Wedbush Sec.*, 2016 WL 4258143, at *13 (“Applicants point to no corrective measures taken before regulators began notifying the Firm of their concerns, so the record does not support consideration of efforts to improve regulatory reporting as a mitigating factor.”).

¹²⁹ Guidelines at 29.

Among other things, Applicants have not shown that the Firm fully disclosed the relevant facts concerning its reimbursement of Meyers's and Khan's personal expenses.¹³⁰

b. Meyers's \$50,000 fine and bar from associating with a member firm in a principal or supervisory capacity are not excessive or oppressive.

The NAC fined Meyers \$50,000 and barred him from associating with a member firm in a principal or supervisory capacity as a result of his supervisory failures.¹³¹ The sanction guideline for a "failure to supervise" recommends a fine of \$5,000 to \$73,000 and, in "egregious cases," a suspension or bar in any or all capacities.¹³² We find that Meyers's supervisory failures were egregious and that the sanctions imposed on him are remedial and not excessive or oppressive.

The guideline for a failure to supervise recommends considering the "[q]uality and degree of [the] supervisor's implementation of the firm's supervisory procedures and controls."¹³³ Despite being responsible for the "ultimate supervision" of the Firm's supervisory personnel generally and Puzio—who was responsible for the Firm's books and records—specifically, Meyers failed completely to develop procedures concerning the reimbursement of personal expenses under the relevant employment agreements or divulge the terms of those agreements to Puzio. As a result, Meyers's failures were serious because he not only neglected his supervisory duties but also was largely responsible for the Firm's recordkeeping violations.

Two additional factors highlight the severity of Meyers's supervisory failures. First, Meyers testified at the hearing that he was "not involved" with the compliance of the Firm, had "no compliance experience" or "knowledge of compliance *per se*," and did not intend to acquire such knowledge. As the NAC found, despite being the Firm's CEO, Meyers's "testimony showed him to be largely distanced from, and indifferent to, Meyers Associates' obligation to maintain an effective supervisory system." We agree with the NAC that, as a result, a bar in a principal or supervisory capacity is necessary to protect the public.

¹³⁰ See *Lek Sec. Corp.*, 2018 WL 1602630, *12 (rejecting applicant's contention that its reliance on an AML auditor was mitigating because the record did not establish that applicant made full disclosure to the auditor).

¹³¹ These are the same sanctions that the Hearing Panel imposed upon Meyers.

¹³² Guidelines at 105.

¹³³ *Id.*

Second, Meyers has a significant disciplinary history—he has been sanctioned for three prior supervisory failures.¹³⁴ None of those sanctions, including a four-month suspension from acting in a principal or supervisory capacity, has prevented Meyers from committing additional supervisory misconduct. Meyers has demonstrated that he is unfit to serve in a principal or supervisory capacity and that the public needs to be protected from him doing so.¹³⁵

Accordingly, we find that the \$50,000 fine and the bar from acting in any principal or supervisory capacity are remedial and not excessive or oppressive.¹³⁶

III. Applicants' remaining contentions

Applicants object to the NAC imposing different sanctions than the Hearing Panel and imposing fines that exceeded the amount Enforcement requested.¹³⁷ According to Applicants, the NAC took a different approach than the Hearing Panel in determining the amount of the fines in order “to mask an egregious upward departure from the [G]uidelines” that was intended to retaliate against them and “close the Firm.” Applicants argue that the fact that the fines exceeded the amount Enforcement requested further shows retaliatory intent.

We reject these contentions. Our independent review of the record reveals no evidence that the NAC imposed sanctions to retaliate against Applicants. Indeed, it is not improper for the NAC to impose different sanctions than a Hearing Panel imposed or that Enforcement

¹³⁴ See BrokerCheck, available at https://files.brokercheck.finra.org/individual/individual_1045447.pdf. Prior to the filing of FINRA’s complaint in this proceeding, Meyers received the following sanctions for supervisory failures in final regulatory actions: (i) in 2011, for violating NASD Rule 3010 by failing to reasonably supervise the Firm’s responses to FINRA requests for information, FINRA imposed a four-month suspension in a principal or supervisory capacity, a \$35,000 fine, and a censure; (ii) in 2000, for violating NASD Rule 3010 by failing to enforce the Firm’s written procedures regarding insider trading, the NASD imposed a \$10,000 fine and a censure; and (iii) in 1990-1991, for violating the predecessor to NASD Rule 2110 by failing to supervise a statutorily disqualified person, the NASD imposed a \$2,000 fine and a censure, and the Florida Division of Securities precluded Meyers from acting in a principal or supervisory capacity. *Id.* In affirming the sanctions imposed by the NAC, we have not considered that, after the filing of FINRA’s complaint in this proceeding, Meyers was sanctioned for supervisory failures in two additional final regulatory actions. *Id.*

¹³⁵ Cf. *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 WL 5328765, at *17 (Dec. 19, 2008) (“The principal bar will protect investors from dealing with securities professionals who are not adequately supervised.”) (internal quotations and citation omitted).

¹³⁶ We also sustain, and Applicants do not challenge, FINRA’s order to pay costs. See, e.g., *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 WL 1132115, at *14 n.58 (Mar. 27, 2017) (sustaining FINRA’s imposition of costs where sanctions were tailored to the misconduct).

¹³⁷ Enforcement requested a fine of \$750,000 against the Firm and \$55,000 against Meyers.

requested.¹³⁸ Moreover, the NAC imposed the same total fine on the Firm and bar on Meyers as did the Hearing Panel and only increased Meyers's fine by \$25,000. And it increased Meyers's fine due to his role in the Firm's "wide dissemination of violative public communications" that had the "potential for Meyers's financial gain." To the extent Applicants argue that the Firm cannot pay the fine, they have provided no evidence of the Firm's financial condition.¹³⁹

Applicants also contend that they received no "ill-gotten gains," no customers "lost a dime," "none of the charges involved or affected the investing public," and there was no "widespread impact" on the investing public, markets, or "the Firm's ability to comply with its obligations under the federal securities laws or FINRA Rules." Even if true, "the lack of an aggravating factor . . . does not establish a mitigating factor."¹⁴⁰ Here, however, at least some of the violations threatened the investing public, and all of the violations demonstrated Applicants have a continuing inability to comply with the federal securities laws and FINRA Rules.

Applicants argue further that the NAC's decision was unfair because it had "sham, bootstrapped" findings, considered prior disciplinary histories in assessing "whether separately charged violative conduct ever occurred," "improperly . . . discounted or ignored exculpatory evidence," and "relie[d] on circular reasoning to reach a pre-ordained conclusion." As discussed above, our independent review of the record finds no unfairness or impropriety in the NAC's reasoning or its decision. We further reject as unsubstantiated Applicants' general allegation that Enforcement staff engaged in unprofessional or improper conduct.¹⁴¹ Applicants also complain of errors in the Hearing Panel's decision, but "[i]t is the decision of the NAC . . . that is the final

¹³⁸ See *Murphy*, 2013 WL 3327752, at *28 (stating that the NAC "has broad discretion" in its de novo review of hearing panel decisions, and "may affirm, modify, reverse, increase, or reduce any sanction") (internal quotations and citations omitted); see also, e.g., *Jim Newcomb*, Exchange Act Release No. 44945, 2001 WL 34371743, at *5 n.18 (Oct. 18, 2001) (sustaining sanctions imposed by the NAC, which were greater than those imposed by the hearing panel).

¹³⁹ See *ACAP Fin., Inc.*, Exchange Act Release No. 70046, 2013 WL 3864512, at *17 (July 26, 2013) (rejecting argument that sanctions against member firm should have been reduced based on inability to pay because there was "no evidence before [the Commission] of [the firm's] current financial circumstances"), *petition denied*, 783 F.3d 763 (10th Cir. 2015).

¹⁴⁰ *Keith D. Geary*, Exchange Act Release No. 80322, 2017 WL 1150793, at *9 (Mar. 28, 2017) (internal quotations and citation omitted), *petition denied*, 727 F. App'x 504 (10th Cir. 2018); see also *Fillet*, 2015 WL 3397780 at *15 ("The absence of monetary gain or customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally.") (internal quotations and citations omitted).

¹⁴¹ See, e.g., *First Colorado Fin. Serv. Co., Inc.*, Exchange Act Release No. 40436, 1998 WL 603229, at *7 (Sept. 14, 1998) (rejecting claims against NASD Enforcement staff of bias, improper conduct, and selective prosecution as vague and unsubstantiated by the record).

action of [FINRA] . . . subject to Commission review.”¹⁴² As discussed above, we sustain the NAC’s findings of violations and the sanctions imposed.

An appropriate order will issue.¹⁴³

By the Commission (Chairman CLAYTON and Commissioners JACKSON, PEIRCE, ROISMAN, and LEE).

Vanessa A. Countryman
Secretary

¹⁴² *Lane*, 2015 WL 627346, at *17 n.89 (quoting *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 WL 3306103, at *8 (Nov. 8, 2007), *petition denied*, 316 F. App’x 865 (11th Cir. 2008)).

¹⁴³ We have considered all of the parties’ contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 86497 / July 26, 2019

Admin. Proc. File No. 3-18359

In the Matter of the Application of
MEYERS ASSOCIATES, L.P. (n/k/a WINDSOR
STREET CAPITAL, L.P.) and
BRUCE MEYERS

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 Meyers Associates, L.P. (n/k/a Windsor Street Capital, L.P.) and Bruce Meyers is sustained.

By the Commission.

Vanessa A. Countryman
Secretary