

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Rani T. Jarkas
San Francisco, CA,

Respondent.

DECISION

Complaint No. 2009017899801

Dated: October 5, 2015

Respondent allowed his firm to conduct a securities business with insufficient net capital, failed to file an application for approval of a material change in business operations, and failed to appear for testimony. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: John S. Han, Esq., Meghan Bailey, Esq., Department of Enforcement,
Financial Industry Regulatory Authority

For the Respondent: Robert J. Stumpf, Jr., Esq.

Decision

Rani T. Jarkas (“Jarkas”) appeals a Hearing Panel decision issued on February 7, 2014.¹ The Hearing Panel found that Jarkas violated NASD Rule 2110 and FINRA Rule 2010 by allowing Global Crown Capital, LLC (“Global Crown”) to conduct a securities business without maintaining sufficient net capital, NASD Rules 1017 and 2110 by failing to file an application for approval of a material change to its business operations, and FINRA Rules 8210 and 2010 by failing to appear and provide on-the-record testimony.² The Hearing Panel barred Jarkas from

¹ The original Hearing Panel decision issued on January 31, 2014 was redacted upon Jarkas’ request to exclude references to his medical history. The Hearing Panel’s decision issued on February 7, 2014 replaces the original decision in its entirety.

² The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

associating with a FINRA member in all capacities for his failure to appear for testimony. In light of his bar, the Hearing Panel imposed no further sanctions against Jarkas for his other misconduct. After an independent review of the record, we affirm the Hearing Panel's findings of violation and bar sanction that it imposed. Our sanctions determination, however, modifies the Hearing Panel's decision by assessing an individual sanction for each violation.

I. Background

Jarkas entered the securities industry in July 1995 and was associated with several member firms until he acquired Global Crown, a registered broker-dealer and investment adviser firm, in 2002. Jarkas owned Global Crown with AB, a silent business partner, and was the firm's chief executive officer.³ He was also registered with Global Crown as a general securities principal. Jarkas voluntarily terminated his employment with Global Crown on September 2, 2009, the same day the firm ceased its operations, and currently is not associated with a FINRA member firm.⁴

II. Procedural History

On April 20, 2011, FINRA's Department of Enforcement ("Enforcement") filed a six-cause complaint against two respondents, including Jarkas.⁵ The three causes of action remaining at issue in this case allege that Jarkas: (1) allowed Global Crown to conduct a securities business without maintaining sufficient net capital in violation of NASD Rule 2110 and FINRA Rule 2010; (2) failed to file an application with FINRA for approval of a material change in the firm's business operations in violation of NASD Rules 1017 and 2110; and (3) failed to appear for on-the-record testimony on two separate occasions in violation of FINRA Rules 8210 and 2010. After a six-day hearing in San Francisco, CA, and Washington, DC, the Hearing Panel rendered a decision making the findings and imposing the sanction described above. This appeal followed.

³ The record reflects various professional titles for Jarkas' position with Global Crown, including: shareholder, managing member, managing director, managing partner, and chief executive officer.

⁴ FINRA subsequently expelled Global Crown from membership on March 16, 2010, for its failure to file annual audit and FOCUS reports for year-end December 2008, third and fourth quarters 2008, and first quarter 2009.

⁵ Enforcement's complaint also alleged violations against the firm's part-time designated Financial and Operations Principal ("FINOP"), William H. Carson ("Carson") related to its net capital deficiencies (causes one, two, three and four). On February 27, 2014, Carson filed a notice of appeal to the Hearing Panel's decision, but withdrew his appeal on May 14, 2014. The National Adjudicatory Council elected not to call for review the Hearing Panel's decision related to Carson's case; thus, the Hearing Panel's decision issued on February 7, 2014 constituted FINRA's final disciplinary action against Carson. Accordingly, the findings set forth in this decision solely pertain to Enforcement's alleged violations committed by Jarkas.

III. Facts

This case emanated from two examinations conducted by FINRA's Department of Member Regulation ("Member Regulation"). In 2008, Member Regulation staff commenced a routine cycle examination to review the firm's supervision, financials, and anti-money laundering policies. The 2008 examination found that, from August to September 2008, a number of securities positions were held in the firm's average price account overnight, and, in some cases, for several days. The securities transactions were not linked to a particular customer order or customer account, and thus such positions were deemed to be proprietary trades. As a \$50,000 minimum net capital broker-dealer, the firm was not approved by FINRA to conduct proprietary trading, which requires a minimum net capital of \$100,000. The examination further found that the firm did not possess the requisite amount of capital for proprietary trading, and thus operated a securities business in violation of the net capital rule on August 27, August 29, September 29, and September 30, 2008.

In 2009, while concluding its 2008 examination, Member Regulation staff received a Notice of Levy from the Internal Revenue Service ("IRS") against Global Crown, which stated that the firm owed \$244,246 for its failure to pay payroll taxes for the quarters ending in June and September 2008. The staff commenced a special FINOP examination to review the firm's financial reporting and net capital requirements. The staff's review found that the firm failed to include the IRS tax lien as a liability in its books and records and its net capital computation for quarters ending December 31, 2008, and March 31, 2009. The staff's recalculation of the firm's net capital inclusive of the tax lien revealed that the firm conducted a securities business with insufficient net capital on March 31 and April 27, 2009.

FINRA sent Global Crown several requests for information pursuant to FINRA Rule 8210 to determine the firm's federal tax lien liabilities and consider whether a net capital violation had occurred. FINRA did not receive complete responses to its requests for information. FINRA sent two letters requesting Jarkas to appear for on-the-record testimony on November 11 and November 30, 2009, respectively. Jarkas failed to appear for testimony on both requested dates.

A. Proprietary Trading in the Average Price Account

Global Crown had an account through its clearing firm, Penson Financial Services, Inc. ("Penson Financial"), known as an "average price account." This account allowed Global Crown registered representatives to buy and sell securities in small increments throughout the trading day and then allocate those positions to one or more customers at or after the market close using a volume weighted average price.⁶ The average price account was a firm account

⁶ The firm had three average price accounts to cover trades for its institutional and retail customers, as well as an overflow account when two different registered representatives were trading in the same stock to avoid errors. Only one account—its retail average price account—is at issue in this case. With the exception of a few trades entered via telephone, almost all trades

titled “Global Crown Retail Average Price” but designed solely to benefit Global Crown customers by facilitating customer transactions at reduced commissions and fees. Ultimately, any securities positions remaining in the average price account at the end of the trading day were to be allocated by Philip Wayne Flotow (“Flotow”), the firm’s senior director of operations, to the designated customer’s account thereby leaving the average price account “flat” each day.

Although any Global Crown registered representative could use the average price account for their respective customer orders, only two people at Global Crown had direct access to enter trades in the average price account trading platform—Jarkas and Flotow. Flotow was primarily responsible for executing the trades in the average price account and allocating the positions at market close to customer accounts, as instructed.

The firm’s written supervisory procedures required that all customer orders be identified by customer or account name prior to execution.⁷ As a matter of practice, however, Flotow routinely received trading instructions from Jarkas to transact in the average price account without a customer order or identifying a customer’s name or account. Instead, Flotow testified that he would execute Jarkas’ orders in the average price account, and then contact Jarkas at the end of the trading day to obtain the customer’s name or account for allocation purposes. On occasion, Flotow could not reach Jarkas to perform the customer allocation, or Jarkas would instruct him to wait until the next day to finish the allocations. In these instances, the securities positions would be held in the average price account until an allocation was made. In other instances, Flotow never received customer allocation instructions from Jarkas. These securities positions were closed (i.e., sold) without a customer allocation, which resulted in either a profit or loss on the firm’s books and records.

Penson Financial produced a trade report on a daily basis that summarized all trades and resulting securities positions in the average price account. From August 1 through September 30, 2008, 30 securities positions were held in the average price account for at least two trading days before the positions were either allocated to a customer’s account or closed without

[cont’d]

in the average price account were entered through a trading platform, called OmniPro. After the market closed, any securities positions in the average price account would migrate from the OmniPro trading platform to the AxisPro trading platform where the positions would then be allocated to customer accounts.

⁷ The firm’s written supervisory procedures provided: “Before any customer order is executed, the account name/designation must be placed upon the memorandum for each transaction.” A “customer” as defined under Rule 15c3-3(a)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) is “any person from whom or on whose behalf a broker or dealer has received or acquired or holds funds or securities for the account of that person.” 17 CFR 240.15c3-3(a)(1).

allocation, thus causing the firm to incur profits or losses attributed to those transactions.⁸ Because the trades were held for several days in a firm account and were executed without a particular customer name or account designation, FINRA staff determined that the trades were deemed proprietary. Based on the staff's findings, the staff recalculated firm's net capital computation using the higher minimum net capital level of \$100,000.

B. IRS Notice of Levy

In April 2009, FINRA's Member Regulation staff received an IRS Notice of Levy regarding a tax lien imposed against Global Crown and Jarkas totaling \$244,246.07. Concurrent with its 2008 exam, the staff immediately commenced a special FINOP examination to determine the impact of the outstanding tax lien on the firm's net capital position. Upon reviewing the firm's FOCUS filings for quarters ending on December 31, 2008 and March 31, 2009, the staff discovered that the firm's payroll taxes were not recorded as a liability and the corresponding outstanding IRS tax lien went unreported in the firm's net capital computation for those quarters.⁹

On April 27, 2009, FINRA staff contacted Jarkas and other Global Crown representatives to discuss the IRS Notice and its impact on the firm's net capital position. The staff informed Jarkas of the IRS tax lien and stated that based on the firm's most recent FOCUS reports, it appeared to be conducting a securities business with insufficient net capital. Jarkas informed the staff that he had no previous knowledge about the IRS payroll tax lien but that he would take care of it immediately. The next day, on April 28, 2009, Jarkas had \$249,980 deposited in the firm's operating account via a wire from AB's bank account overseas.

FINRA staff sought to verify the source of funds and requested that Jarkas provide supporting documentation. On April 28, 2009, the staff sent Jarkas a letter requesting documents

⁸ Enforcement's complaint and supplemental briefs reported 49 securities positions held "overnight" in the average price account. The Penson Financial trade reports, however, did not provide time stamped data and it is unclear from the report the positions that were ultimately allocated to a customer's account. This decision therefore regards the 30 securities positions held in the average price account with trade dates that unquestionably extended beyond a full 24 hour period of time (i.e., trade date plus one business day). Cf. *FINRA Interp. of Fin. and Op. Rules* 1, 42 (2008), available at http://www.finra.org/sites/default/files/SEA.Rule_.15c3-1.Interpretations.pdf (interpreting that, for net capital purposes, a firm need not take a haircut for resulting error positions by floor brokers provided that the position is immediately liquidated "no later than the closing of the business day after the day the error occurred").

⁹ The IRS payroll tax lien also went unreported in the firm's trial balance sheet for month-end September 2008 and its general ledger as of October 10, 2008. Global Crown's December 31, 2008 FOCUS filing reported the firm's net capital as \$496,248. Global Crown's most recent FOCUS filing for the quarter ending March 31, 2009, however, reported the firm's net capital as \$100,358. The unreported IRS tax lien placed the firm under its net capital requirement.

and information related to the IRS payroll tax liability. Jarkas responded to FINRA's request on the same day. His response letter, however, was either incomplete or he outrightly refused to provide FINRA with the requested information.

Specifically, Jarkas provided FINRA with two documents in connection with the IRS tax lien: a new net capital computation, which included the tax liability as an "IRS Payable" minus \$45,624.74; and a single paged self-created document that was labeled as follows:

"Item 10—IRS Payable"

\$198,577.09
\$244,201.83
<u>-45,624.74</u> withdrawn from Operating Account -8426
\$198,577.09

Both documents suggested that the firm already paid \$45,624.74 to the IRS, thereby reducing its payroll tax liability. Neither document, however, included supporting documentation or further details regarding the IRS payment.¹⁰

The record reflects that FINRA staff sent Jarkas and Global Crown a minimum of nine subsequent request letters for information and documents related to the IRS tax lien.¹¹ Despite these repeated requests, Jarkas never produced supporting documentation such as a bank statement or canceled checks proving that the \$45,624.74 payment was made to the IRS, or that the IRS tax lien was satisfied.¹² The staff used the information it had to compute the firm's net

¹⁰ It is unclear why the self-created document has a line item in the amount of \$244,201.83, which is a different amount than the outstanding IRS tax lien of \$244,246.07. The firm also provided FINRA with its general ledger as of April 29, 2009, which had two line items labeled "IRS." One line item, named "General Journal," showed a credit in the amount of \$244,246. It was dated April 27, 2009. A second line item, named "Check," showed a debit amount of \$45,624.74. It was dated April 20, 2009. While it appeared that this debit line item recorded a check coming out of the firm's operating account, there was no check number or other identifying information associated with the \$45,624.74 entry, as is provided in the other debit line items of the general ledger.

¹¹ FINRA staff also attempted to conduct its onsite examination of the firm's records, but the firm refused their entry.

¹² In its response letter to FINRA dated October 20, 2009, for example, the firm refused to respond to and/or provide documentation for each and every item requested by FINRA in its September 28, 2009 letter. In response to FINRA's request of the firm's proof of payment to the IRS, the firm responded "information related to the firm's taxes is private and confidential and the firm declines to provide any information related to its taxes."

capital.¹³ The staff's net capital computation revealed that the firm was operating a securities business with insufficient net capital on March 31, April 27, and April 28, 2009.

C. Jarkas' Failure to Appear for Testimony

On October 21, 2009, FINRA sent a letter pursuant to FINRA Rule 8210 requesting Jarkas to appear at an on-the-record interview at FINRA's San Francisco office on November 11, 2009. The request letter instructed that if Jarkas was unable to appear for testimony on the date scheduled, he should contact FINRA and "agree on another mutually acceptable date and time." The letter also stated: "Unless and until a postponement is agreed to, you are still obligated to appear on the date and at the time specified in this letter." Jarkas did not reschedule his testimony date and failed to appear for testimony on November 11, 2009.

On November 12, 2009, FINRA sent a second request letter informing Jarkas that he failed to appear for testimony on November 11 and requesting that he appear at an on-the-record interview at FINRA's San Francisco office on November 30, 2009. The second request letter provided the same rescheduling instructions as the first, and warned that Jarkas' failure to appear for and testify at his scheduled on-the-record interview could subject him to a FINRA disciplinary action and the imposition of sanctions up to, and including, a bar from the securities industry. Jarkas did not contact FINRA to reschedule and failed to appear for testimony on November 30, 2009.

D. Jarkas' Medical Condition

In January 2008, Jarkas was diagnosed with a serious medical condition. He became gravely ill and spent a considerable amount of time in the hospital in July 2008. Because of his medical condition, there were periods of time when Jarkas was not available or in the office. Over the course of the next months, Jarkas spent a considerable amount of time recovering from his condition. Jarkas was diagnosed with another related medical condition in May 2009 that required surgery. Although Jarkas went to the doctor in or around July 2009, he testified that he was not physiologically prepared to go through a surgery for his condition at that time and that he would instead monitor it. From May 2009 through February 2010, Jarkas testified to spending extended periods of time in the Cayman Islands to "relax and take it easy." During that time, Jarkas continued to engage in business activities, including business travel and performing consulting work for Cedrus Investments Ltd., a Cayman Island investment firm, with which he

¹³ During the 2009 examination, the staff learned of an additional past judgment and federal tax liens imposed against Jarkas and Global Crown that went unreported as liabilities on the firm's books and records—including a FINRA arbitration award issued against Jarkas and Global Crown, jointly and severally, on July 8, 2009, in the amount of \$1,688,000. The FINRA examiner responsible for computing the firm's net capital, David Lee, testified that he used the firm's independent audit report, as well as any known unreported outstanding liabilities as of the date of calculation, to recalculate the firm's net capital computation.

was affiliated.¹⁴ Jarkas ultimately had surgery for his 2009 diagnosed medical condition in February 2010.¹⁵

IV. Discussion

Based on our independent review of the record and the briefs submitted on appeal, we affirm the Hearing Panel's findings of violation.

A. Insufficient Net Capital

"Section 15(c) of the Exchange Act is the foundation for Exchange Act Rule 15c3-1," which is better known as "the net capital rule." *Dep't of Enforcement v. Inv. Mgmt. Corp.*, Complaint No. C3A010045, 2003 NASD Discip. LEXIS 47, at *13-14 (NASD NAC Dec. 15, 2003). The net capital rule requires firms to maintain a sufficient level of liquid assets based on its ratio requirement and the activities performed by the firm.¹⁶ The rule establishes "fundamental safeguards" designed to "protect customers and other market participants from broker-dealer failures and to enable those firms that fall below the minimum net capital requirements to liquidate in an orderly fashion without the need for a formal proceeding or financial assistance from the Securities Investor Protection Corporation." *Fox & Co. Invs., Inc.*, 58 S.E.C. 873, 884, 897 (2005) (citations omitted). The rule also requires "moment-to-moment" compliance, which means that at any moment firms must be able to demonstrate compliance consistent with its business activities as of the date and time the net capital computation is

¹⁴ At the time, the Global Crown's operations were winding down and a July 2009 press release announced that Cedrus Investments Ltd. had acquired Global Crown's institutional business. Jarkas testified to his involvement with the acquisition and continued involvement in Global Crown's business operations before it ceased operations in September 2009. Jarkas also testified that, during this time, he had traveled to different parts of the world, including Lebanon and Asia.

¹⁵ Jarkas presented as a witness Eddie Abdalla, a surgical oncologist at the MD Anderson Cancer Center in Houston, Texas, to testify about his medical condition. Abdalla confirmed that Jarkas became his patient in February 2010, and that he performed the surgery for his second diagnosed condition which had gotten progressively worse since he was initially diagnosed in May 2009. Jarkas was not Abdalla's patient during the time he was required to appear for testimony at or around November 2009 and therefore could not testify to his medical condition during that time.

¹⁶ See *Inv. Mgmt. Corp.*, 2003 NASD Discip. LEXIS 47, at *17 (noting that the purpose of the net capital rule is to ensure that firms have sufficient liquid assets on hand at all times to cover its indebtedness; and with liquidity as the rule's paramount concern, firms must be able to demonstrate that certain assets towards its net worth are readily convertible into cash).

performed.¹⁷ *See NASD Notice to Members 07-16* (Apr. 2007), 2007 NASD LEXIS 36, at *1 (noting that the net capital rule requires a broker or dealer to maintain its required net capital continuously); *FINRA Interp. of Fin. and Op. Rules*, *supra* note 10, at 1 (“Broker-dealers must maintain sufficient net capital at all times prior to, during and after purchasing or selling proprietary securities.”).

A violation of the net capital rule also violates FINRA Rule 2010, which requires members and associated persons in the conduct of their business to observe high standards of commercial honor and just and equitable principles of trade. *See id.* at 883 (finding respondent conducted a securities business without sufficient net capital, in violation of Exchange Act Rule 15c3-1 and NASD Rule 2110); *see also Dep’t of Enforcement v. Geary*, Complaint No. 2009020465801, 2014 FINRA Discip. LEXIS 26, at *39 (FINRA Hearing Panel July 8, 2014) (“Rule 2010 is a broad prohibition that covers not only unlawful conduct and violations of other regulatory requirements, but . . . applies to all business-related conduct.”) (citation omitted).

We affirm the Hearing Panel’s finding that Jarkas violated NASD Rule 2110 and FINRA Rule 2010 by allowing the firm to conduct a securities business while below the requisite net capital minimum. Jarkas’ own missteps on two occasions primarily caused the net capital violations here: first, in 2008, when he instructed Flotow to trade securities in the firm’s average price account that were not customer orders; and second, in 2009, when he failed to include the IRS payroll tax lien as a liability in the firm’s net capital computation.

1. Insufficient Net Capital due to Proprietary Trading in the Average Price Account

Pursuant to Exchange Act Rule 15c3-1(a)(2)(iii), a broker-dealer that effects more than 10 proprietary transactions in any one calendar year is generally required to have a minimum net capital of \$100,000.¹⁸ From August through September 2008, the firm maintained 30 securities positions in the average price account for periods of up to seven business days before either allocating the positions to the customer’s account, or, in some cases, liquidating the securities positions without a customer allocation.

¹⁷ *See NASD Notice to Members 07-16* (Apr. 2007), 2007 NASD LEXIS 36, at *1 (noting that the net capital rule requires a broker or dealer to maintain its required net capital continuously); *FINRA Interp. of Fin. and Op. Rules*, *supra* note 10, at 1 (“Broker-dealers must maintain sufficient net capital at all times prior to, during and after purchasing or selling proprietary securities.”).

¹⁸ *See* 17 CFR 240.15c3-1(a)(2)(iii) (stating that a “dealer,” defined as “[a]ny broker or dealer that effects more than ten transactions in any one calendar year for its own investment account[,]” shall maintain net capital of not less than \$100,000); *see also FINRA Interp. of Fin. and Op. Rules*, *supra* note 10, at 23 (noting that for purposes of counting the ten transactions, buy and sell transactions are each individually counted as one transaction even if the buy and sell transactions are for the same security).

We affirm the Hearing Panel’s finding that these trades were proprietary in that the firm—and not a customer—absorbed the market risk associated with the securities positions. *See William K. Cantrell*, 52 S.E.C. 1322, 1323 (1997) (noting that the higher net capital requirement on dealers that trade for their own account is “in recognition of the risks of a dealer’s business, including the potential for severe market volatility”). Although the average price account was supposed to facilitate customer orders, Jarkas had become accustomed to opening and closing securities positions in the account without attributing orders to a particular customer. *See id.* at 1325 (finding proprietary trading for net capital purposes when the firm amassed a large volume of securities positions in its error account and thereafter sold the positions in a series of principal trades). The firm was thus engaging in proprietary trading, which impacted its net capital requirement. *See Carrol P. Teig*, 46 S.E.C. 615, 618 (1976) (deeming long securities positions in the firm’s error account as proprietary when ordinarily held unattributed to a salesman or customer and disposed of at some later time).

Because more than ten transactions were executed during the review period, the firm’s net capital requirement increased to the \$100,000 minimum requirement. The staff’s recalculation of the firm’s net capital revealed that on August 27, August 29, September 29, and September 30, 2008, the firm was operating its securities business without sufficient net capital in violation of NASD Rule 2110 and the net capital rule. Following is an approximation of the firm’s net capital deficiency based on the higher minimum net capital required:

Date	Net Capital (Firm Calculation)	Minimum Net Capital Required	Actual Net Capital (Staff Calculation)	Actual Excess Net Capital (Staff Calculation)
August 27, 2008	--	\$100,000	(\$86,606.97)	(\$186,606.97)
August 29, 2008	\$99,871.31	\$100,000	\$93,097.89	(\$6,902.11)
September 29, 2008	--	\$100,000	(\$63,892.08)	(\$163,892.08)
September 30, 2008	\$185,504.27	\$100,000	(\$290,192.03)	(\$390,192.03) ¹⁹

While Jarkas does not dispute that the trades were held in the average price account, he argues on appeal that he did not intend to conduct proprietary trading. He asserts that if he wanted the firm to engage in proprietary trading, he would have filed an application with FINRA and sought approval as he has done in the past. The nature of the trades in the average price account and historical trading in the account, according to Jarkas, should support his argument that the securities positions at issue were retail customer trades. Based on this, Jarkas argues that Enforcement’s allegation that he allowed the firm to engage in proprietary trading was unfounded. We disagree.

¹⁹ Enforcement staff represented that the net capital computation performed on this day included both the increase in the minimum net capital required to \$100,000, and the IRS payroll tax liability owed for tax period ending September 30, 2008, discussed more fully below.

Regardless of what Jarkas' originally intended, the record reflects that Global Crown executed more than 10 trades in the average price account that were not allocated to customers in a timely manner or, in some cases, at all. Both Flotow and Jarkas testified to their routine practice of executing trades in the average price account without attributing the resulting positions to a customer or an account.²⁰ Jarkas also testified that his understanding of proprietary trading was "when the firm engages in activities in its own account for its own capital"—which is exactly what happened in this case. Despite Jarkas' intentions, the securities positions held in the account were firm trades and not customer trades. Some positions were held in the account for more than a week without allocation to a customer and eventually closed out resulting in a profit or loss to the firm.²¹ We affirm the Hearing Panel's finding that the securities transactions were proprietary, and thus triggered a higher net capital requirement.

2. Insufficient Net Capital Due to Unreported IRS Payroll Tax Liability

We also affirm the Hearing Panel's finding that on March 31, April 27, and April 28, 2009, Jarkas allowed the firm to conduct a securities business without sufficient net capital in violation of FINRA Rule 2010. On these dates, Global Crown failed to reflect the IRS payroll tax liability in its net capital computation and FOCUS filings for quarters ending in December 31 and March 31, 2009. Had the tax liability been reported, it would have shown that the firm was operating without sufficient net capital. Following is an approximation of the firm's net capital deficiency based on the firm's outstanding tax liabilities:

Date	Net Capital (Firm Calculation)	Minimum Net Capital Required ²²	Actual Net Capital (Staff Calculation)	Actual Excess Net Capital (Staff
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²⁰ Although Enforcement did not charge a supervision violation in this case, it appears Jarkas disregarded the firm's written supervisory procedures which required that *before* the execution of a customer order, the "account name/designation must be placed on the memorandum for each transaction." The record did not reflect any specific firm procedures regarding trading in the average price account.

²¹ According to Penson Financial's monthly "Correspondent Settlement Summary" report, in August 2008, the firm profited by \$1,116.72 from the securities transactions held in the average price account. In September 2008, the report reflected \$18,888.76 in losses attributed to the firm.

²² Enforcement represented that it used the 6-2/3% of the firm's aggregate indebtedness in lieu of \$50,000 dollar amount to determine the minimum net capital required. *See generally Net Capital Rule*, Exchange Act Release No. 28927, 1991 SEC LEXIS 332, at *6 (Feb. 28, 1991) ("the net capital rule requires a registered broker-dealer conducting a general securities business to maintain net capital in excess of the greater of \$25,000 or 6 2/3 percent of its liabilities and other obligations (basic or aggregate indebtedness method)" (internal quotation marks omitted)).

				Calculation)
March 31, 2009	\$100,356	\$36,627.09	(\$358,775.31)	(\$395,402.40)
April 27, 2009	--	\$35,046.22	(\$360,704.02)	(\$395,750.24)
April 28, 2009	\$166,414.36	\$34,320.00	(\$110,285.33)	(\$144,605.33)

3. Jarkas' Defenses to his Net Capital Violation

On appeal, Jarkas raises several defenses to this violation. First, he asserts that the firm's FINOP, Carson, and not him, was responsible for calculating and reporting the firm's net capital. Second, Jarkas argues that he had no knowledge of the tax liens until FINRA staff contacted him on April 27, 2009; and once he was made aware of the liability, he resolved any net capital issues by facilitating an immediate capital infusion the next business day. Third, referring to his net capital violation as one "only in the technical sense," Jarkas claimed that, during the 2009 examination, FINRA staff stonewalled his attempts to resolve the firm's net capital deficiencies. Although he corrected the issue "immediately" by depositing almost \$250,000 in the firm's operating account, Jarkas claims that his capital infusion was rejected by the staff. As a result, he argues that the firm was only permitted to perform liquidating transactions for three and one-half weeks, which had "devastating" effects and ultimately put the firm out of business. Finally, Jarkas argues that he had a medical condition that impacted his ability to be regularly in the office. Concerned that he might not survive, Jarkas argues that the firm's net capital deficiencies occurred at a time when he was just returning to work on a limited basis, and that he delegated his responsibilities in running the firm over to Henry Carter, the firm's former director of compliance.

None of Jarkas' defenses prevail over the fact that a net capital violation occurred. First, Jarkas is incorrect in his assertion that only the firm's FINOP was responsible for net capital compliance. Indeed, the FINOP's role is to ensure that the firm complies with applicable net capital, recordkeeping and other financial and operational rules. The FINOP, however, does not act independently of those who control the operations of the firm. "Officers of securities firms bear a heavy responsibility in ensuring that the firm compl[ies] with all applicable rules and regulations[,] including the duty of ensuring that the firm comply with the net capital requirement." *Fox & Co. Invs., Inc.*, 58 S.E.C. at 889 (internal quotations and citations omitted). Although both Jarkas and Carson claimed they were unaware of the tax lien, as the firm's owner and chief executive officer, Jarkas was better positioned to appropriately address the IRS tax liability because he controlled and oversaw the firm's operations. *See Kirk A. Knapp*, 51 S.E.C. 115, 126 (1992) (holding the president of a brokerage firm responsible for net capital compliance, as the controller and operator of the firm's operations).

Evidence in the record reveals that Carson immediately terminated his position as the firm's FINOP upon discovering the unreported IRS tax lien. The firm, however, ultimately produced the IRS Notice of Federal Tax Lien. It was dated February 18, 2009, which suggests that Jarkas knew or should have known about the tax liability since February 2009—well before his conversation with FINRA staff. Jarkas therefore cannot shift his financial responsibilities as an official of the firm to his FINOP or other third party service provider. *See id.* (rejecting firm president's claim that he was not responsible for net capital deficiencies because he was not the

FINOP and finding shared responsibility by both parties); *James Michael Brown*, 50 S.E.C. 1322, 1326 (1992), *aff'd*, 21 F.3d 1124 (11th Cir. 1994) (finding the firm president was responsible for the firm's compliance efforts and could not shift responsibility to outside accountants for recordkeeping and reporting violations).

Next, contrary to Jarkas' assertions that FINRA stonewalled the firm's securities operations for over three weeks, the evidentiary record sheds a different light. Since the commencement of Member Regulation's 2009 exam, the staff repeatedly requested Jarkas to provide documents and information related to his capital infusion and the IRS tax lien.²³ While he produced some documents, Jarkas never completely responded to any of FINRA's written requests.²⁴ Instead of cooperating with the staff's investigative process, Jarkas tried to circumvent it by threatening to withhold customer and other firm records unless FINRA allowed the firm to resume its operations.²⁵ In the interim, the staff discovered that Global Crown had additional outstanding judgments and liens that also went unreported in the firm's filings, which

²³ Firms are required to record the date and amount of all capital contributions or distributions, and have readily available bank statements and other documentation supporting the transfer of assets to the firm's operating account, including a description of the source and purpose of the infusion. See *NASD Notice to Members 07-16*, *supra* note 19, at *8 (describing the types of documentation a broker-dealer is required to maintain with respect to capital contributions or distributions).

²⁴ The firm provided a partial response to FINRA's request but did not provide all the requested documents. On May 5, 2009, FINRA sent to Jarkas' outside counsel, Nixon Peabody, LLP, a letter referring to previous documents that were requested on April 28, April 29, and April 30, 2009, and requesting additional records to verify the accuracy of the firm's books and records, net capital computation, and its overall financial condition. Nixon Peabody responded on May 8, 2009, requesting additional time to provide the requested documents. Over the course of several weeks, the staff continued to request, but never received, a full production of the documents and information it requested from the firm.

²⁵ Enforcement presented three witnesses that testified to a telephone call between FINRA staff and Jarkas and other firm representatives which occurred on April 27, 2009. On that call, FINRA staff informed Jarkas that based on the most recent FOCUS filing, the firm did not appear to be in compliance with the net capital rule and should cease operating its securities business (other than to engage in liquidating transactions). On the same day, FINRA staff sent Jarkas a letter reiterating the firm's noncompliance and requesting information and documents related to the IRS tax lien. The staff also sent a similar letter to Global Crown's clearing firm, Legent Clearing, LLC. Global Crown provided a partial response to FINRA's request for information but did not provide all the requested documents. Instead of cooperating with the staff, the record reflects that Global Crown representatives blocked the staff's attempt to conduct an onsite examination, and withheld access to the firm's records unless or until the staff withdrew its "cease business" notification letter and permitted the firm to continue operating.

further impacted its net capital deficiencies.²⁶ Based on the record, we find that Jarkas' malfeasance and lack of cooperation with FINRA staff—and not the staff's rejection of his capital infusion—were the cause of any delays in resolving the firm's net capital deficiency.

Moreover, while it is true that Jarkas was faced with a serious medical condition, the record reflects that the firm's director of compliance had a very limited role in preparing the firm's financial statements. In fact, during the relevant period, the record reflects that Jarkas made significant capital contributions to the firm, which demonstrates his direct involvement and ongoing knowledge of the firm's financial condition.²⁷ Jarkas produced no evidence showing that Carter had access to the firm's bank account and finances. To the contrary, Carter testified to his restricted access to the firm's books and records, stating that he was "always restricted from seeing things behind the [FOCUS] report." Jarkas therefore cannot blame Carter for the firm's net capital deficiencies. *See Knapp*, 51 S.E.C. at 134 (finding that participants in the industry must take responsibility for their compliance obligations which "cannot be excused by pointing the finger of blame at employees who do not have the authority to prevent the alleged violations").

Wholly taken, Jarkas' defenses lack evidentiary support and do not obviate the fact that a net capital violation occurred. We therefore find no basis to overrule the Hearing Panel's findings of a net capital violation and thus affirm the Panel's findings that Jarkas violated NASD Rule 2110 and FINRA Rule 2010.

B. Failure to File a Continuing Membership Application

We also affirm the Hearing Panel's finding that Jarkas failed to file a continuing membership application in violation of NASD Rules 1017 and 2110. NASD Rule 1017 requires a firm to file an application and receive FINRA approval upon certain events or changes occurring to its ownership, control or business operations. One such significant event or change that requires FINRA approval occurs when the firm engages in a business activity, such as proprietary trading, that triggers a higher minimum net capital requirement.²⁸

²⁶ Unreported outstanding debt included a judgment lien that was entered against the firm and Jarkas on September 25, 2008 in the amount of \$16,885.96, and two federal tax liens for tax periods ending December 31, 2008 and March 31, 2009 that were entered against the firm in the amounts of \$137,746.94 and \$89,074.94, respectively.

²⁷ Specifically, from February 2008 through April 2009, Jarkas made capital contributions to Global Crown almost on a monthly basis, totaling \$658,000.

²⁸ *See* NASD Rule 1011(k)(3) (defining a "material change in business" to include the firm's adding of business activities that require a higher minimum net capital under SEC Rule 15c3-1).

On June 9, 2003, Jarkas signed Global Crown's membership agreement. At that time, he undertook to operate the firm's business pursuant to Exchange Act Rule 15c3-3(k)(a)(iv) as an introducing broker-dealer with a minimum net capital of \$50,000. He also undertook to file a written notice and application with FINRA pursuant to NASD Rule 1017 at least 30 days before effecting a material change in its business operations as defined under NASD Rule 1011(k). Under the membership agreement, the firm was approved to engage in a number of business activities—but proprietary trading was not one of them.

From August to September 2008, the firm engaged in proprietary trading, which triggered a higher minimum net capital requirement of \$100,000 and the corresponding filing requirement of an application under NASD Rule 1017(a), which Jarkas failed to file. Jarkas therefore violated NASD Rules 1017 and 2110.²⁹

C. Failure to Appear for On-the-Record Testimony

FINRA Rule 8210 requires members and persons associated with a member to provide FINRA with information orally, in writing, or electronically, and to testify at a location specified by FINRA staff under oath or affirmation with respect to any matter involved in an investigation, complaint, examination, or proceeding. FINRA Rule 8210 also permits FINRA staff to inspect and copy the books, records, and accounts of such member or associated person that are within their possession, custody or control. Failure to provide information or testimony or to permit an inspection and copying of books, records, or accounts is a violation of FINRA Rule 8210. A violation of FINRA Rule 8210 also “constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of FINRA Rule 2010.” *N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *13 (May 8, 2015) (citation omitted).

On two separate occasions, FINRA requested Jarkas to appear for on-the-record testimony, pursuant to FINRA Rule 8210. The first request letter, dated October 21, 2009, was sent to his personal and business addresses of record in the Central Registration Depository (“CRD”[®]) by U.S. first class and certified mail. Although the certified mailing to his personal residence was returned unclaimed, the certified mailing sent to his business address was received and signed by “JR,” who Jarkas testified was an employee of Global Crown. The first letter requested that Jarkas appear for on-the-record testimony at FINRA's San Francisco District Office on November 11, 2009. The letter also stated that if Jarkas could not appear for testimony on the scheduled date, he was to contact FINRA “to agree on another mutually acceptable date and time.” On November 11, 2009, Jarkas did not appear for testimony.

The staff sent a second request letter, dated November 12, 2009, to Jarkas' personal and business addresses of record in CRD again by U.S. first class and certified mail. The certified

²⁹ “It is well established that a violation of other NASD rules or securities laws or regulations also constitutes a violation of Rule 2110.” *Kirlin Sec. Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *65 (Dec. 10, 2009).

mailings were signed by parties authorized to receive mail at each respective address. The second letter requested that Jarkas appear for on-the-record testimony at FINRA's San Francisco District Office on November 30, 2009, with the same instruction as the first letter to contact FINRA for a mutually agreeable new date and time should he not be available. On November 30, 2009, Jarkas did not appear for testimony.

The Hearing Panel found that Jarkas violated FINRA Rules 8210 and 2010 when he failed to appear for on-the-record testimony and we affirm the Hearing Panel's findings. Jarkas had a duty to appear and provide testimony as requested by FINRA staff and he failed to comply with his obligation. *See CMG Inst. Trading, LLC*, 2010 SEC LEXIS 3405, at *13 (Oct. 7, 2010) (holding that firms and associated persons must cooperate fully in providing requested information). Although not separately charged in Enforcement's complaint, Jarkas' failure to appear for testimony was part of a series of repeated requests pursuant to FINRA Rule 8210 that he disregarded.

We are unpersuaded by Jarkas' defenses on appeal. He first argues that, contrary to the Hearing Panel's finding that he completely failed to respond to FINRA's requests to appear for testimony, he in fact did respond when he instructed his attorney to contact FINRA and explain that he would be unavailable. Jarkas claims that upon receiving the first request letter to appear, the firm's general counsel, MP, contacted FINRA examiner David Lee ("Lee"). MP testified on Jarkas' behalf that he spoke with Lee at which time he explained that Jarkas was ill and thus unable to appear for testimony. MP also testified that he told Lee "I cannot tell you when he will be around to -- to give you testimony" and Lee responded with a noncommittal "okay," which Jarkas claims he understood to mean that his nonappearance for testimony was acceptable, and that FINRA agreed to postpone his examination.³⁰

We find this defense unavailing because in his testimony Lee denied—and Jarkas provided no supporting evidence—that such conversation between MP and Lee ever took place.³¹ Even if the conversation did occur, MP testified that he did not attempt to seek a mutually acceptable rescheduled date and time, as was instructed by FINRA in the 8210 request letter. *See Dep't of Enforcement v. Evansen*, Complaint No. 2010023724601, 2014 FINRA

³⁰ Jarkas also claims on appeal that he did not receive FINRA's second request letter. FINRA's second request letter, however, was not returned by either U.S. or certified mail.

³¹ We also find it troubling that this defense is being proffered for the first time on appeal. Previously, Jarkas argued before the Hearing Panel that he failed to appear for testimony because he had already testified on-the-record in connection with the investigation, and MP advised that he was not required to testify again. Now Jarkas switches his story. His new defense on appeal is that Lee relieved him from his FINRA Rule 8210 obligations by responding to MP with a noncommittal "okay." His claim, however, is inconsistent with the fact that Lee sent a second request letter noting that Jarkas' failed to appear for testimony, and requesting him to appear on a subsequent date and time.

Discip. LEXIS 10, at *27, n.24 (FINRA NAC Jun. 3, 2014) (noting that even if respondent had difficulty testifying at the location and time set forth by FINRA, he should have raised, discussed and resolved these issues with the staff in a cooperative spirit and prompt manner as contemplated by FINRA Rule 8210), *appeal docketed*, SEC Admin. Proceeding No. 3-15964 (Jul. 3, 2014).

Jarkas then suggests that his health concerns mentally affected his ability to testify. He argues that the Hearing Panel gave little credence to his life threatening concerns when in fact he underwent surgery for his second diagnosed condition in February 2010. But, as discussed more fully in Section V.C. of this decision, Jarkas provided no evidence showing that his medical condition prevented him from testifying several months earlier on the two requested dates and thus his nonappearance for testimony cannot be excused. *See Lee Gura*, 57 S.E.C. 972, 977 (2004) (holding that “unsubstantiated personal and medical problems do not excuse [] [a respondent’s] failure to respond”); *Dep’t of Enforcement v. Walblay*, Complaint No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *18-20 (FINRA NAC Feb. 25, 2014) (rejecting respondent’s medical defense for his failure to appear for testimony while noting that he never provided alternative dates for testimony, a reasonable explanation why his medical condition prevented him from appearing, and a physician’s note indicating the need to obtain medical postponement).

We therefore determine that the Hearing Panel appropriately found Jarkas liable in his failure to appear for testimony in violation of FINRA Rules 8210 and 2010.

V. Sanctions

The Hearing Panel barred Jarkas from associating with any member firm in all capacities for failing to testify before FINRA staff in violation of FINRA Rules 8210 and 2010. In light of Jarkas’ bar, the Hearing Panel did not impose further sanctions against him for his net capital and FINRA Rule 1017 violations. In assessing sanctions for Jarkas’ misconduct, we have considered FINRA’s Sanction Guidelines (“Guidelines”), including the Principal Considerations in Determining Sanctions set forth therein, and any case specific factors.³² We find that a bar is the appropriate sanction against Jarkas for his failure to testify. In modifying the Hearing Panel’s sanction decision, we find it remedially appropriate to individually assess sanctions against Jarkas for his net capital and Rule 1017 violations, but do not impose such sanctions in light of his bar. Following is a discussion of our sanctions determination for each violation.

A. Net Capital Violation

For a net capital violation, the Guidelines recommend a fine against an individual ranging from \$1,000 to \$50,000, a suspension in any or all capacities of up to 30 business days, and in

³² See *FINRA Sanction Guidelines* (2013), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter “*Guidelines*”].

egregious cases, a lengthier suspension for up to two years, or a bar.³³ The Hearing Panel found that Jarkas violated the net capital rule, but did not impose a sanction against Jarkas for his misconduct. Jarkas' egregious misconduct warrants a \$50,000 fine and two year suspension, which fall within the Guidelines.

The Guidelines contain two principal considerations in determining sanctions specific to net capital violations: (1) whether the firm continued to engage in or ceased to conduct its business while knowing of the deficiencies and inaccuracies; and (2) any attempts by the respondent to conceal deficiencies or inaccuracies by any means.³⁴

As co-owner and chief executive officer, Jarkas was directly responsible for the events that triggered the firm's inaccurate net capital computations. The record demonstrates that he knew or should have known about the firm's deficiencies. His misuse of the average price account did not involve only a couple of trades, but entailed a pervasive pattern of proprietary trading that exposed the firm and its customers to market and net capital risk. *See Fox & Co. Inv., Inc.*, 58 S.E.C. at 897 (stating that respondents exposed customers to undue risks by conducting a securities business while not in compliance with its net capital requirements). The record also demonstrates that Jarkas knew or should have known about the IRS tax lien. He controlled the firm and its financial affairs. Yet, for almost a year, Jarkas allowed the firm to engage in a securities business with insufficient net capital due to this unreported liability. *See Cantrell*, 52 S.E.C. at 1327 (finding sanctions neither excessive nor oppressive when respondent permitted the firm to operate with substantial net capital deficiencies thereby depriving its customers protections afforded to them by the net capital requirements and exposing them to undue risk).

We also find Jarkas' lack of cooperation during the 2009 examination aggravating, along with his attempt to pass off his regulatory obligations to other firm representatives.³⁵ *Knapp*, 51 S.E.C. at 134 (emphasizing that "participants in the industry must take responsibility for their compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements"). For these reasons, we find Jarkas' misconduct egregious, thereby warranting a sanction of a \$50,000 fine and a two year suspension in all capacities.

B. Failure to File a Continuing Membership Application

For member agreement violations, the Guidelines recommend a fine ranging from \$2,500 to \$50,000.³⁶ In cases involving a serious breach of a restrictive agreement, the Guidelines also

³³ *Guidelines*, at 28.

³⁴ *Id.*

³⁵ *See Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions, Nos. 2, 12).

³⁶ *Id.* at 44.

recommend us to consider suspending the firm or responsible individual in any or all capacities for up to two years, and in egregious cases, a bar.³⁷ There are three principal considerations in determining sanctions for membership agreement violations: (1) whether the respondent breached a material provision of the agreement; (2) whether the respondent breached a provision of the agreement that contained a restriction that was particular to the firm; and (3) whether the firm had applied for, was in the process of applying for, or had been denied a waiver of a restriction at the time of the misconduct.³⁸

In the present case, Jarkas breached a material provision of the firm's membership agreement by engaging in proprietary trading while not authorized to do so. Upon signing the membership agreement, Jarkas undertook that he would file the requisite application to obtain FINRA approval before effecting a material change in its business operations, yet he failed to do so, as required by FINRA rules. In assessing an appropriate sanction, we considered Jarkas' role in exposing firm customers to risk unduly when he engaged proprietary trading for several weeks without the requisite net capital, as well as his lack of regard for the firm's own internal policy and procedures in handling customer orders.³⁹ For his NASD Rules 1017 and 2110 violations, we find it appropriately remedial to assess a \$5,000 fine and 30 business-day suspension in all capacities, which are well within the Guidelines.

C. Failure to Provide On-the-Record Testimony

FINRA Rule 8210 is the primary means by which FINRA investigators obtain the information necessary to conduct investigations and determine compliance with FINRA rules. "Delay and neglect on the part of members and their associated persons undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest." *Evansen*, 2014 FINRA Discip. LEXIS 10, at *22 (citation omitted).

The Guidelines address the failure to respond to FINRA Rule 8210 requests as an action impeding regulatory investigations. For partial but incomplete responses to requested information, the Guidelines recommend a fine of \$10,000 to \$50,000.⁴⁰ The Guidelines also instruct that, for individual respondents, a bar is considered standard for partial but incomplete responses to information requests unless the individual can demonstrate that the information

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 5, 9, and 18)

⁴⁰ *Guidelines*, at 33. We note that, although the Hearing Panel's decision found Jarkas' refusal to testify a complete failure to respond, we assess his sanction under the partial, but incomplete, response analysis taking into account Jarkas' previous appearance for an on-the-record testimony and partial responses to the staff's Rule 8210 requests for documents and information during the 2008 and 2009 examinations.

provided to FINRA substantially complied with all aspects of the request.⁴¹ Where mitigation exists, adjudicators should consider suspending the individual in any or all capacities for up to two years.

Based on our independent review, we uphold the Hearing Panel's decision to impose the sanction of a bar against Jarkas for his failure to respond completely to FINRA's Rule 8210 requests. In assessing this sanction, we have deliberated on the three principal considerations provided in the Guidelines when a respondent provides a partial, but incomplete, response to FINRA's request for information. First, we considered the importance of the requested information that Jarkas failed to provide as viewed from FINRA's perspective and find that the staff's request for Global Crown's financial and other records in order to verify payments to the IRS and outstanding tax liabilities was necessary and important in furtherance of assessing the firm's true financial condition and performing an accurate net capital computation.

Second, we weighed the number of requests made and degree of regulatory pressure required to obtain a response. We find it quite disturbing that FINRA staff had to repeatedly send written requests for information, all to be refuted by Jarkas and other Global Crown representatives. The staff's two 8210 requests for Jarkas' on-the-record testimony constituted the staff's ultimate attempt at obtaining information from Jarkas. His failure to appear on the scheduled dates was part of a series of noncooperation that unnecessarily expended staff time and resources. To date, the staff never received a complete response from Jarkas or the firm on the IRS tax lien issue.

Third, we considered the factors Jarkas asserts mitigate his failure to appear for testimony and find that none of these factors justify a reduced sanction.

A primary factor Jarkas raised for mitigation against a bar was his serious and potential life-threatening medical condition. He claims that he was suffering from physical and psychological effects from a diagnosed medical condition that impacted his ability to testify. Because Jarkas also raised his medical condition as a defense to the Panel's finding of a Rule 8210 violation, we closely examined the record and the events that occurred to determine whether his medical condition mitigated his sanction of a bar. We find that it does not.

In the *Saad* decision, we noted that although generally "personal problems such as stress and health issues do not mitigate violations of FINRA rules," personal problems might give rise to some mitigation if there is evidence that the problems *interfered* with the respondent's ability to comply with FINRA rules. *See Dep't of Enforcement v. Saad*, Complaint No. 2006006705601R, slip op., at 9 (FINRA NAC Mar. 16, 2015). We also stressed in *Saad* that excusing respondent's misconduct due to such personal or medical condition was a difficult burden to overcome. *See id.* at 11 (noting that case precedent demonstrates that showing stress or personal circumstances interfered with an ability to comply with FINRA rules is a "difficult burden to meet and, in fact, has rarely been met").

⁴¹ *Id.*

Taken in context, at the time FINRA requested Jarkas to appear for testimony, Jarkas had already terminated his registration with Global Crown, shut down the firm's operations, and either relocated, or had spent a considerable amount of time, overseas. Jarkas testified to spending extended periods of time in the Cayman Islands to "relax and take it easy." But the evidence does not support that his physical or psychological state at the time in question interfered with his ability to testify before FINRA on the two required dates. *See Dep't of Enforcement v. Mielke*, Complaint No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *79-82 (FINRA NAC July 18, 2014), *appeal docketed*, SEC Admin. Proceeding No. 3-16022 (Aug. 19, 2014) (finding that respondents failed to prove that their significant health issues interfered with their ability to respond completely and timely to FINRA's requests for information and testimony).

Contrarily, Jarkas continued to work professionally while in the Cayman Islands as a business consultant for Cedrus Investments, an investment firm and affiliate. He traveled for business and personal reasons to various parts of the world. His active lifestyle corroborates Jarkas' medical records, in which he was described as being in complete remission. According to his records, Jarkas was observed to be fully functional, active, coherent, and in no acute distress. *Cf. DBCC v. Nelson*, Complaint No. C9A920030, 1996 NASD Discip. LEXIS 17, at *9 (NASD NBCC Mar. 8, 1996) (finding respondent's illness a mitigating factor when it caused respondent to be bedridden, at home or in the hospital, for long periods of time, and unable to recover to return to work). Likewise, the record lacks evidence that Jarkas was physically incapacitated or otherwise unable to appear for testimony. While we acknowledge that his medical condition might have caused concern and stress for him, we find no evidence that Jarkas' medical condition at the time he was required to appear for testimony provoked a lapse of judgment or inability to understand his compliance obligations to FINRA. We therefore do not find his medical condition mitigating.

D. Jarkas' Other Arguments for Mitigation Fail

Other factors that Jarkas raises on appeal in favor of mitigation included his relocation to the East Coast and the fact that he was no longer registered with FINRA. Although he provides no explanation, we assume Jarkas is implying that we should find it mitigating that he was no longer conducting a securities business when FINRA sent the Rule 8210 requests to appear. We, however, do not find this mitigating.

As an initial matter, FINRA retains jurisdiction up to two years from the date a person ceases to be associated with a FINRA member.⁴² Jarkas also was required to update CRD with his new relocation information while FINRA retained jurisdiction over him. *See Dep't of*

⁴² *See* FINRA Bylaws, Article V, Section 4(a) (stating that a person associated with a member that is no longer registered shall continue to be subject to FINRA rules and shall continue to provide information requested by FINRA pursuant to its rules for up to two years after the date the person ceases to be registered).

Enforcement v. Hodde, Complaint No. C10010005, 2002 NASD Discip. LEXIS 4, at *7-9 (NASD NAC Mar. 27, 2002) (finding respondent was in default when he failed to update his residential address with CRD and made no effort to inform Enforcement staff of his alleged new address knowing that he was the subject of an ongoing investigation); *NASD Notice to Members 99-77* (Sept. 1999) (noting that FINRA may request information from, and file a formal disciplinary proceeding against, persons no longer registered with a member and therefore requiring such persons to keep their address in CRD current during the two-year period). Therefore, being no longer registered or employed in the securities industry in itself does not weigh against any misconduct Jarkas committed while registered.

We are equally unpersuaded by Jarkas' mitigating claim that he relied on his attorney's advice not to appear for testimony because he was no longer registered with FINRA. "While reasonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions," *Walblay*, 2014 FINRA Discip. LEXIS 3, at *16; *see also Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 7), such reliance must be *reasonable* and based on *competent* legal advice—two elements not found in the present case.

Jarkas fails to demonstrate that he reasonably relied on competent legal advice. His attorney, MP, admitted in testimony that he had no legal experience in securities regulation or compliance. MP also testified that he warned Jarkas that, notwithstanding his opinion that Jarkas did not have to appear, "FINRA may take a different view." Despite this warning, Jarkas independently decided not to appear for testimony. With over 14 years of securities industry experience, we find it unreasonable that Jarkas would rely on MP's limited experience with FINRA rules and the securities laws. *See Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962) (stating "reliance on a lawyer's opinion is not a safe harbor if a reasonable man would know that the opinion does not reflect a prudent lawyer's serious efforts to ascertain the applicable law on the subject of the opinion."). Notwithstanding this, it was Jarkas, and not his attorney, who ultimately bore the responsibility of complying with FINRA rules. *See Sundra Escott-Russell*, 54 S.E.C. 867, 872-873 (2000) (stating "[r]eliance on counsel is immaterial to an associated person's obligation to supply requested information to [FINRA]." (citing *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd* 34 F.3d 99 (2d Cir. 1994))); *Walblay*, 2014 FINRA Discip. LEXIS 3, at *16 (holding reliance on counsel did not excuse respondent's failure to appear for testimony and that even if delegated to his attorneys the task of communicating with FINRA staff about requests for testimony, respondent was ultimately responsible for ensuring compliance with his regulatory obligations).⁴³

⁴³ For the same reasons, we also reject Jarkas' claim of mitigation that he reasonably assumed FINRA had "tabled" its request for his testimony. We find his assumption unreasonable considering that an Enforcement investigation was ongoing and Jarkas never provided the staff with any date certain when he could testify. Further, had Jarkas complied with FINRA rules and updated CRD with his new address, he would have known that the staff sent a second request letter to appear for testimony on a new scheduled date the day after he failed to appear on November 11, 2009.

Lastly, although Jarkas claims on appeal that he previously had good relations with FINRA staff, the evidence in this proceeding depicted a downward spiral of antagonism by Jarkas that thwarted the staff's investigation—a factor we find to be more aggravating than mitigating.⁴⁴ See *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 4625, at *43-44 (Apr. 17, 2014) (stressing the critical importance to the self-regulatory system that members and associated persons cooperate with FINRA investigations); *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *30-31 (Aug. 22, 2008) (noting that the ability to request and obtain information from its associated persons is crucial to FINRA's performance of its mission).⁴⁵

Weighing these foregoing factors, we find no basis to overrule the Hearing Panel's imposition of a bar and thus affirm the Panel's sanction.

VI. Conclusion

We affirm the Hearing Panel's findings that Jarkas allowed the firm to conduct a securities business without maintaining sufficient net capital in violation of NASD Rule 2110 and FINRA Rule 2010, failed to file an application for approval of a material change to its business operations in violation of NASD Rules 1017 and 2110, and failed to appear and provide on-the-record testimony requested by FINRA staff during an investigation in violation of FINRA Rules 8210 and 2010.

⁴⁴ See *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12).

⁴⁵ Jarkas also raises on appeal his lack of prior disciplinary history as a mitigating factor; however, the SEC and FINRA have repeatedly held “a lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional.” *Dep't of Enforcement v. Craig*, Complaint No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *24 (FINRA NAC Dec. 27, 2007), *aff'd*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844 (Dec. 22, 2008). Nevertheless, Jarkas' disciplinary record is not entirely unblemished. In January 2010, he was fined \$25,000 and suspended for six months from associating with a FINRA member firm in all capacities after agreeing to an offer of settlement, of which Jarkas consented, without admitting or denying the allegations in the complaint, to findings of excessive trading and making unsuitable recommendations in a customer's discretionary account.

Accordingly, for failing to appear for testimony on the record before FINRA, Jarkas is barred from associating with any FINRA member in any capacity, and is ordered to pay his proportionate share of hearing costs totaling \$5,436.14, and \$1,542.02 in appeal costs. In light of imposing a bar, we consider the additional sanctions assessed redundant and do not impose them. The bar will become effective immediately upon issuance of this decision.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith
Senior Vice President and Corporate Secretary