

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Dennis A. Mehringer, Jr.
Altadena, CA,

Respondent.

DECISION

Complaint No. 2014041868001

Dated: June 15, 2020

Registered representative: (1) engaged in unsuitable short-term trading of mutual funds in a customer's accounts; (2) exercised discretion in the customer's accounts without written authorization or firm approval; (3) gave his firm false information about a charitable trust for which he served as a trustee; (4) settled a customer's complaint without notifying his firm; and (5) falsely told his firm that he had not settled any customer complaints. Held, findings modified and sanctions affirmed in relevant part.

Appearances

For the Complainant: Jonathan Golomb, Esq., Leo Orenstein, Esq., Lane Thurgood, Esq.,
Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: C.G. Gordon Martin, Esq., Sylvia Scott, Esq.

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Decision

Dennis A. Mehringer, Jr. appeals an extended Hearing Panel decision issued on April 30, 2018. The Hearing Panel found that Mehringer: (1) engaged in unsuitable short-term trading of mutual funds in a customer's accounts; (2) exercised discretion in the customer's accounts without written authorization or firm approval; (3) breached his fiduciary obligations to a charitable trust; (4) gave his firm false information about the charitable trust; (5) settled a customer's complaint without notifying his firm; and (6) falsely told his firm that he had not settled any customer complaints. For the short-term mutual fund trading, the Hearing Panel barred Mehringer in all capacities, fined him \$50,000, and ordered him to disgorge \$108,131.21, plus interest. The Hearing Panel declined to impose sanctions for the remaining five causes of action in light of the bar. After an independent review of the record, we modify the Hearing Panel's findings, affirm the bar and order of disgorgement that the Hearing Panel imposed for Mehringer's misconduct, and modify other sanctions as discussed in this decision.

I. Mehringer's Background

When the conduct in this case occurred, Mehringer had been in the securities industry for nearly 30 years. Mehringer entered the securities industry in 1981. Since entering the securities industry, Mehringer has been associated with several FINRA members. For purposes of this decision, we focus on Mehringer's tenure with Western International Securities, Inc. ("Western International Securities" or the "Firm").

In March 2009, Mehringer registered with Western International Securities as a general securities representative, general securities principal, municipal fund securities principal, direct participation programs representative, and investment company and variable contracts products representative. Mehringer remained associated with Western International Securities until May 2018. Mehringer is not currently registered or associated with any FINRA member.¹

II. Procedural History

This case began with an annual cycle examination of Western International Securities and a FINRA arbitration claim that a customer filed against Mehringer and Western International Securities in June 2014. The customer's arbitration claim alleged that Mehringer had excessively traded his account, and that Mehringer had traded his account without authorization.

In December 2016, FINRA's Department of Enforcement ("Enforcement") filed a six-cause complaint against Mehringer. The first cause of action alleged that Mehringer engaged in unsuitable short-term trading of mutual funds in a customer's accounts, in violation of FINRA Rules 2111 and 2101 and NASD Rule 2310.² The second cause of action alleged that Mehringer exercised discretion in the customer's accounts without written authorization or Western

¹ In October 2019, Mehringer consented to a bar for failing to appear for on-the-record testimony in an unrelated matter.

² We discuss the rules in effect when the conduct occurred.

International Securities's approval, in violation of NASD Rule 2510 and FINRA Rule 2010. The third cause of action alleged that Mehringer breached his fiduciary obligations as a trustee of a charitable trust, in violation of FINRA Rule 2010. The fourth cause of action alleged that Mehringer gave Western International Securities false information concerning the charitable trust and his use of the charitable trust's proceeds, in violation of FINRA Rule 2010. The fifth cause of action alleged that Mehringer settled a customer's complaint without notifying Western International Securities, in violation of FINRA Rule 2010. The sixth cause of action alleged that Mehringer falsely stated on Western International Securities's annual compliance questionnaire that he had not settled any customer complaint without notifying the Firm, in violation of FINRA Rule 2010.

A four-day hearing took place in Los Angeles, California, in September 2017. Five witnesses testified: Mehringer; the customer who filed the complaint with FINRA against Mehringer in June 2014; an Enforcement investigator; Western International Securities's then-current chief compliance officer; and a forensics investigator who testified about Mehringer's trading activities.

The Hearing Panel issued its decision in April 2018. The Hearing Panel found that Mehringer: (1) engaged in unsuitable short-term trading of mutual funds in a customer's accounts (cause one); (2) exercised discretion in the customer's accounts without written authorization (cause two); (3) breached his fiduciary obligations to a charitable trust (cause three); (4) gave Western International Securities false information about the charitable trust and his use of the charitable trust's funds (cause four); (5) settled a customer's complaint without notifying Western International Securities (cause five); and falsely told Western International Securities that he had not settled any customer complaints (cause six). The Hearing Panel barred Mehringer, fined him \$50,000, and ordered him to disgorge \$108,131.21, plus interest, for the unsuitable short-term trading of mutual funds in the customer's accounts. The Hearing Panel declined to impose sanctions for the remaining five causes of action in light of the bar. This appeal followed.

III. Discussion

As explained below, we: (1) affirm the Hearing Panel's findings for the unsuitable short-term trading of mutual funds in a customer's accounts (cause one); (2) affirm, in relevant part, the Hearing Panel's findings concerning Mehringer's exercise of discretion in a customer's accounts without written authorization or Western International Securities's approval (cause two); (3) reverse and dismiss the Hearing Panel's findings related to Mehringer's breach of his fiduciary obligations to a charitable trust (cause three); (4) affirm the Hearing Panel's findings for Mehringer's misrepresentations to Western International Securities about the charitable trust and his use of the charitable trust's funds (cause four); (5) affirm the Hearing Panel's findings for Mehringer's settlement of a customer's complaint without notifying Western International Securities (cause five); (6) affirm the Hearing Panel's findings for Mehringer's misrepresentations to Western International Securities about his settlement of the customer complaint (cause six); and (7) affirm the bar and order of disgorgement that the Hearing Panel imposed for Mehringer's misconduct, but modify other sanctions, as discussed below.

A. Causes One and Two: Mehringer's Short-Term Trading of Mutual Funds and Exercise of Discretion in ES's Accounts

The first and second causes of action relate to Mehringer's trading activity in the accounts of customer, ES. We affirm the Hearing Panel's findings for these two causes of actions, subject to the factual modifications for cause two discussed below, and we affirm, in relevant part, the sanctions that the Hearing Panel imposed.

1. Cause One: Unsuitable Short-Term Trading of Mutual Funds

Under the first cause of action, the Hearing Panel found that Mehringer engaged in unsuitable short-term trading of mutual funds in ES's accounts. We affirm these findings.

a. NASD Rule 2310 and FINRA Rule 2111

Mehringer's short-term trading of mutual funds in ES's accounts implicates two versions of FINRA's suitability rule – NASD Rule 2310 for conduct occurring before July 9, 2012, and FINRA Rule 2111 for conduct occurring on or after July 9, 2012.³ NASD Rule 2310(a) provided that, “[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.”⁴ NASD Interpretive Material 2310-2(b)(3) (Trading in Mutual Fund Shares) provided guidance for NASD Rule 2310 and stated that, “[i]t is clear that normally these securities [mutual fund shares] are not proper trading vehicles and such activity on its face may raise the question of [an NASD Rule 2310] violation.”

FINRA Rule 2111(a) provides that an associated person “must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer” based on the customer's investment profile. A customer's investment profile includes the customer's age, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the associated person. FINRA Rule 2111(a); FINRA Supplementary Material 2111.04 (Customer's Investment Profile).

³ FINRA Rule 2111 replaced NASD Rule 2310, effective July 9, 2012. *See New Implementation Date for and Additional Guidance on the Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations, FINRA Regulatory Notice 11-25, 2011 FINRA LEXIS 45, at *1 (May 2011); SEC Approves Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations, FINRA Regulatory Notice 11-02, 2011 FINRA LEXIS 11, at *1 (Jan. 2011).*

⁴ When in effect, NASD Rule 2310 applied with equal force to FINRA members and their associated persons pursuant to NASD Rule 0115(a). NASD Rule 0115(a) explained that FINRA's rules “shall apply to all members and persons associated with a member [p]ersons associated with a member shall have the same duties and obligations as a member under these [r]ules.”

FINRA Supplementary Material 2111.05(c) (Components of Suitability Obligations) explains that quantitative suitability, in particular, requires that an associated person “who has actual or de facto control over a customer account to have a reasonable basis for believing that a series of recommended transactions, even if suitable when viewed in isolation, are not excessive and unsuitable for the customer when taken together in light of the customer’s investment profile.”⁵

b. A Pattern of Mutual Fund Switches Creates a Presumption of Unsuitability

A pattern of mutual fund switches violates FINRA’s suitability rule and creates a rebuttable presumption of unsuitability. *See Kenneth C. Krull*, 53 S.E.C. 1101, 1104 (1998) (“Mutual fund shares generally are suitable only as long-term investments and cannot be regarded as a proper vehicle for short-term trading, especially where such trading involves new sales loads.”), *aff’d*, 248 F.3d 907 (9th Cir. 2001); *Dep’t of Enforcement v. Epstein*, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *67-68 (FINRA NAC Dec. 20, 2007) (“A pattern of switches from one fund to another by several customers of a registered representative, where there is no indication of a change in the investment objectives of the customers and where new sales loads are incurred, is not reconcilable with the concept of suitability.”), *aff’d*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *38-43 (Jan. 30, 2009); *Dep’t of Enforcement v. Wilson*, Complaint No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at *15-24 (FINRA NAC Dec. 28, 2011) (same).

Holding periods of less than one year for mutual funds have been deemed short-term. *See Krull*, 248 F.3d at 912 n.6 (average of 10 months); *Terry Wayne White*, 50 S.E.C. 211, 212 (1990) (average of 70 days, ranging from seven days to 130 days); *DBCC No. 2 v. Koppel-Heath*, Complaint No. C02950044, 1998 NASD Discip. LEXIS 10, at *5 (NASD NBCC Jan. 6, 1998) (holding periods of 228 days); *Russell L. Irish*, 42 S.E.C. 735, 737 (1965) (37 percent held for less than one year and 29 percent held between one year and two years), *aff’d*, 367 F.2d 637 (9th Cir. 1966).

Once a pattern of excessive activity in mutual funds is shown, “it is incumbent upon the person responsible to demonstrate the unusual circumstances which justified such a clear departure from the manner in which investments in mutual funds are normally made.” *Winston H. Kinderdick*, 46 S.E.C. 636, 639 (1976); *see Wilson*, 2011 FINRA Discip. LEXIS 67, at *17-28 (same); *Epstein*, 2007 FINRA Discip. LEXIS 18, at *67 (same). This burden cannot be met by offering assorted explanations, such as generating tax advantages, loss of faith in fund management, or concerns about a particular industry, in the face a broad pattern of short-term trading. *See Irish*, 42 S.E.C. at 739-40.

⁵ Although FINRA Rule 2111 eliminated NASD Interpretive Material 2310, FINRA Rule 2111 incorporated the type of misconduct that the interpretative material discussed, including short-term trading. *See SEC Approves Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations, FINRA Regulatory Notice 11-02*, 2011 FINRA LEXIS 11, at *4 n.8.

In making a suitability determination, an associated person must evaluate “the net investment advantage of any recommended switch from one fund to another” because mutual fund switches “may be difficult to justify if the financial gain or investment objective to be achieved by the switch is undermined by the transaction fees associated with the switch.” *NASD Reminds Members of Mutual Fund Sales Practice Obligations, NASD Notice to Members 94-16*, 1994 NASD LEXIS 18, at*5 (Mar. 1994); *NASD Further Explains Members Obligations and Responsibilities Regarding Mutual Funds Sales Practices, NASD Notice to Members 95-80*, 1995 NASD LEXIS 109, at *9 (Sept. 1995). As explained below, we find that:

- Enforcement established a presumption of a suitability violation against Mehringer because Enforcement demonstrated that Mehringer engaged in a pattern of short-term trading of mutual funds in ES’s accounts;
- Mehringer did not rebut the presumption that Enforcement established because Mehringer failed to demonstrate the “unusual circumstances which justified such a clear departure from the manner in which investments in mutual funds are normally made;” and
- Mehringer’s short-term trading of mutual funds in ES’s accounts were unsuitable for ES in light of ES’s investment objective and time horizon.

c. Facts for Cause One

(1) ES’s Background and Accounts at Western International Securities

ES met Mehringer in mid-2010. ES’s accountant introduced ES to Mehringer. When Mehringer met ES, ES was married, 45 years old, and owned a company that provided post-production audio and recording services for the television and movie industry. According to new account forms, in 2010 and 2011, ES’s annual income was \$500,000 and his net worth was \$6 million, \$4 million of which was held in liquid investments.

The new account forms stated that ES had 20 years of experience investing in stocks, bonds, and mutual funds, and no experience trading options and commodities. Mehringer testified that he wrote that ES had 20 years of investment experience on the new account forms because “[ES] had been in the market for a number of years,” ES “knew the difference between common stocks, bonds, [and] mutual funds, . . . and . . . didn’t know anything about equity participation [and] CDs, [al]though I had to spend a couple of hours’ time with him to explain how they worked.” Mehringer added that he knew that ES had at least 10 years of investing experience, and, when he asked ES whether “20 years sound[ed] about right,” ES said yes. For his part, ES denied that he had between 15 and 20 years of investment experience when he opened his accounts with Mehringer. ES testified that he had “[e]xtremely little [investment] experience.”

ES initially allowed Mehringer to handle only ES's company's trust account and the company's employee non-brokerage accounts. Between July 2010 and July 2011, however, ES opened five brokerage accounts with Mehringer at Western International Securities.⁶ ES transferred cash and securities from accounts that he held at another broker-dealer to fund the five accounts. ES transferred more than \$1.2 million in cash and \$3.8 million in securities into the accounts, and he had between \$3.3 million and \$5 million in assets in the accounts held at Western International Securities.

With the exception of the company employee account, ES's investment objective for each account was "growth." ES testified that he selected "growth" as his investment objective because "it was at the time in my life that I felt I was earning money from my business, and I didn't need an income. I just wanted th[e] long-term outlook to grow the fund . . . for the future."⁷ ES selected "Moderate" as his "risk profile" because his "mindset was just kind of middle ground . . . not aggressive because I don't want to lose what I've painstakingly amassed . . . and not too conservative because I wouldn't be building any growth." His investment time horizon for each account was in the middle of the three ranges available on the new account forms – five years to 10 years.⁸ ES testified that he did not intend to engage in short-term trading, because his "[modus operandi] was to look at the long term and to kind of approach things in a moderate way. The short-term trading was too risky."⁹

(2) Mehringer's Trading of Mutual Fund Shares in ES's
Accounts

As soon as Mehringer opened ES's five accounts, Mehringer began trading mutual funds in the accounts on a short-term basis. An "Attachment A" to Enforcement's complaint details

⁶ ES opened the following five accounts with Mehringer at Western International Securities: (1) a defined benefit pension plan in July 2010 (the "pension account"); (2) a joint account between ES and his wife in July 2010 (the "joint account"); (3) a company voluntary employees' beneficiary association account in November 2010 (the "company employee account"); (4) ES's 401(k) profit sharing plan in May 2011 (the "401(k) account"); and (5) ES's personal account in July 2011 (the "personal account").

⁷ ES testified that he did not select one of the more aggressive investment objective options available on the new account form, "Trading" or "Speculation," "because I wanted to play it rather conservatively, minimal amount of risk, and I feel that those two ["Trading" or "Speculation"] would be too much risk up and down involved."

⁸ The other two options for investment time horizon were "Short (0-5 years)" and "Long (>10 years)."

⁹ The new account forms for the company employee account stated that the account's investment objective was "Income and Growth," the risk profile was "Moderate," and the investment time horizon was "Long (>10 years)." The company employee account's annual income was \$58,000, according to the new account form, and the account's net worth, or assets held by the account, totaled more than \$1.5 million.

Mehring's trading activities. Attachment A lists 82 sets of trades of mutual fund shares, which the Hearing Panel adopted and found established Mehringer's unsuitable short-term trading of mutual funds in ES's accounts.¹⁰ The Hearing Panel also relied on an "Addendum A" to its decision. Addendum A is a 14-set subgroup of the trades from Attachment A. The Hearing Panel provided Addendum A to distinguish 14 instances of Mehringer's intra-day switches of mutual fund shares in ES's accounts from the more general discussion of Mehringer's unsuitable short-term trading of ES's mutual fund shares. We have reviewed, and independently verified, the transactions set out in Attachment A and Addendum A, and we base our findings on the information contained in those documents. Specifically, our review of Attachment A and Addendum A provide for the following eight observations concerning Mehringer's short-term trading of mutual funds in ES's accounts.

First, we note that Mehringer's short-term trading of mutual funds in ES's accounts involved Class A shares with front-end loads.¹¹ These front-end loads placed a high cost on Mehringer's mutual fund trading in ES's accounts and imposed a significant fee-burden on ES's investments.

Second, although the trades occur across all five of ES's accounts with Mehringer and Western International Securities, the bulk of the short-term mutual fund trading took place in either ES's pension account or company employee account. The pension account and company employee account were, by far, the largest of ES's five accounts.

Third, during the three-year period under review (July 2010 to August 2013), Mehringer's short-term trading of mutual funds in ES's accounts resulted in investments in 45 different mutual fund families. When asked about this fact at the hearing, Mehringer characterized himself as a trader and not a "buy-and-hold" kind of broker. Mehringer described his trading activities in ES's accounts as an "investment strategy," which he had developed into a "habit" acquired over his 40-year career.

Fourth, in each group of transactions, the mutual funds were held for less than one year, and usually for considerably less than one year. Of the investments listed in Attachment A, 66 positions were held for less than 90 days, 58 positions for between three months and six months, and only 25 positions were held for more than six months. The transactions listed in Attachment A involved 146 separate purchase transactions, totaling more than \$5 million, and 91 separate sales transactions.

¹⁰ Attachment A actually lists 84 sets of trades, but prior to the hearing, Enforcement removed two sets of trades (set nos. 53 and 59) because they were offsetting transactions.

¹¹ Class A shares have higher short-term costs than Class C shares. *See Mutual Fund Classes*, <https://www.sec.gov/fast-answers/answersmfclasshtm.html>. Class A shares have a front-end sales load that investors pay at the time of purchase. *See id.* Class C shares generally have a contingent deferred sales load, a fee investors pay only when they redeem fund shares that typically decreases to zero if the investor holds the shares for a sufficient amount of time. *See id.* The contingent deferred sales load in Class C shares is typically lower than the front-end sales load of Class A shares. *See id.*

Fifth, in many instances, instead of making a single large purchase of mutual fund shares, Mehringer made multiple smaller purchases of mutual fund shares before selling the entire position in a single sell transaction. This approach prevented ES from receiving certain volume discounts that may have applied to the transactions. For example, Mehringer made five purchases of shares of Invesco Global Health Care between September 25, 2012 and December 6, 2012, totaling \$99,150, before selling them on April 3, 2013. In another set of transactions, Mehringer made seven purchases of shares of Putnam Equity Spectrum between August 7, 2012 and October 8, 2012, totaling \$97,101, before selling all of the shares on November 6, 2012.

Sixth, several of Mehringer's trades of the mutual funds in ES's accounts were circular with each round of purchases generating commissions for Mehringer. Typically, Mehringer would buy mutual fund shares, shortly thereafter sell them, and then buy back the same mutual fund shares that he had sold. For example, on April 19, 2012, April 20, 2012, and May 10, 2012, respectively, Mehringer purchased \$16,943, \$75,000, and \$17,500 (totaling \$109,443) worth of Transamerica Capital Growth for ES's pension account. On May 21, 2012, 11 days after his last purchase of Transamerica Capital Growth, Mehringer sold all of the shares for \$98,673, generating a loss of \$10,769 because the unit price of the shares dropped. ES paid \$4,286 in commissions on the investment. Mehringer received \$3,600 of this amount.¹² Less than a month later, Mehringer started purchasing additional shares of Transamerica Capital Growth for ES's pension account. On June 14, 2012, July 12, 2012, and July 13, 2012, respectively, Mehringer purchased \$13,300, \$5,200, and \$15,000 (totaling \$33,500) worth of Transamerica Capital Growth for the account. Two months later, on September 20, 2012, Mehringer sold all of the shares for \$34,187, generating a profit of \$687 and commissions of \$1,591. Mehringer received \$1,336 of this amount.

Three weeks later, on October 8, 2012, Mehringer, once again, purchased \$50,000 of shares of Transamerica Capital Growth for ES's pension account. Mehringer sold the shares five months later, on March 4, 2013, at a loss, but ES made \$584 in profit after accounting for \$1,094 in interest and dividends paid during the period that he held the investment. ES paid \$2,000 in commissions on the investment with Mehringer receiving \$1,680 of this amount.

Seventh, Mehringer made 14 intra-day mutual fund switches in three of ES's accounts – the personal account, the pension account, and the company employee account.¹³ ES paid a total of \$25,038 in commissions on the purchases associated with the 14 intra-day mutual fund switches. Mehringer received commissions of \$21,032. In each instance, Mehringer sold one mutual fund and used the proceeds to purchase one or more shares of another mutual fund on that same day. For example, on November 6, 2012, in the company employee account, Mehringer sold \$36,540 in Putnam Equity Spectrum, and, on the same day, purchased \$36,500 in Transamerica Capital Growth. On January 30, 2013, in ES's pension account, Mehringer sold \$48,433 in Transamerica High Yield Bond, and, on the same day, purchased \$48,000 in PNC Mutual Fund Small Cap.

¹² Western International Securities paid Mehringer 90 percent of the commissions generated on each transaction, and Mehringer paid the Firm six percent for ticket charges. Accordingly, Mehringer received 84 percent of the commissions for the transactions that he generated.

¹³ See Addendum A to the Hearing Panel's decision.

In some instances, Mehringer used the proceeds from one mutual fund sale to make new investments in more than one mutual fund. For example, on April 3, 2013, Mehringer sold \$100,277 of Invesco Global Health Care and used the proceeds to purchase \$49,000 in Pimco Real Estate Real Return and \$49,000 in Prudential Financial Services Fund. In other instances, Mehringer's intra-day switching of mutual funds involved selling mutual fund shares that ES had held for a very short period of time. For example, on July 18, 2013, Mehringer sold \$80,325 of Growth Fund of America in the company employee account. He used the proceeds to buy interests in three other mutual funds on that same day. He had made the most recent purchase of Growth Fund of America (\$30,000) only three days earlier, on July 15, 2013.

Finally, we analyzed the effect of Mehringer's short-term trading of mutual funds in ES's five accounts. ES lost \$54,581.43 on the purchases and sales of the mutual funds and paid commissions of \$182,299.07. Of that amount, Western International Securities paid Mehringer 84 percent, or \$153,131.21.¹⁴ Nevertheless, overall, the value of ES's accounts increased. Across all of ES's five accounts, which included investments in mutual funds, equities, and CDs, ES earned \$529,574 during the time that he had accounts at Western International Securities.

(3) ES Terminates His Relationship with Mehringer and Western International Securities

Mehringer handled ES's accounts for approximately three years. Sometime in the summer of 2013, a former Western International Securities registered representative contacted ES. The representative had worked for Mehringer. ES testified that the representative told him that he should look at his account statements to "see what [] Mehringer was doing" because "there [were] things going on with [the] accounts that weren't on the up-and-up, and I was losing money." ES met with the representative two or three times to discuss Mehringer's trading activity in his accounts. The representative told ES that Mehringer was excessively trading his accounts and charging him unfairly high commissions. In September 2013, ES emailed Mehringer instructing him to cease all trading in his accounts. This was around the last time that ES spoke with Mehringer. Subsequently, ES closed his accounts at Western International Securities, retained an attorney, and, in June 2014, filed an arbitration claim against Mehringer and Western International Securities with FINRA Dispute Resolution. In 2016, Western International Securities, Mehringer, and ES reached a settlement. ES received \$290,000, of which Mehringer contributed \$45,000.

d. Conclusions of Law for Cause One

Under cause one, we find that Mehringer violated NASD Rule 2310 for conduct occurring before July 9, 2012, FINRA Rule 2111 for conduct occurring on or after July 9, 2012, and FINRA Rule 2010 because he engaged in unsuitable short-term trading of mutual funds in ES's accounts.¹⁵ We make three specific findings in this area.

¹⁴ Mehringer's trading in mutual fund shares generated 55 percent of all of the commissions that Mehringer earned from trading in ES's accounts.

¹⁵ A violation of FINRA's suitability rule constitutes conduct that is inconsistent with high standards of commercial honor and just and equitable principles of trade, and, consequently,

First, we find that Enforcement established a presumption of a suitability violation against Mehringer because Enforcement demonstrated that Mehringer engaged in a pattern of short-term trading of mutual funds in ES's accounts.¹⁶ See *Epstein*, 2007 FINRA Discip. LEXIS 18, at *67-68 (explaining that a pattern of mutual fund switches, where there is no indication of a change in the investment objectives and new sales loads are incurred, is unsuitable). During the three-year period under review, Mehringer sold 82 mutual fund share positions in ES's accounts within one year of purchasing them. Often, Mehringer sold the positions within six months, or even three months, of purchasing them. Mehringer also engaged in circular trading of mutual funds in ES's accounts, made intra-day switches of the mutual funds, and dissected purchase transactions, buying smaller lots of mutual fund shares, before liquidating the entire position in a single transaction. Mehringer made more than \$150,000 in commissions from these transactions, while ES lost nearly \$55,000. Mehringer had no reasonable basis to believe that his short-term trading of mutual funds in ES's accounts was suitable.

Second, we find that Mehringer did not rebut the presumption of a violation because he failed to demonstrate the existence of unusual circumstances that would have justified his departure from the normal use of mutual funds as long-term investments. See *Kinderdick*, 46 S.E.C. at 639 (explaining that an applicant can rebut the presumption that a pattern of mutual fund switches is unsuitable by showing "unusual circumstances which justified such a clear departure from the manner in which investments in mutual funds are normally made"). As an initial matter, Mehringer testified that he knew he was going to be trading the mutual funds in ES's accounts on a regular basis when he purchased them, and that he had no intention of holding them as long-term investments. At that point, Mehringer's short-term trading of mutual funds in ES's accounts became a conscious trading decision, not a response to unusual circumstances. Moreover, although Mehringer provided explanations for his trading activities in ES's accounts, we are hard-pressed to find unusual circumstances sufficient to rebut the presumption of unsuitability that Enforcement has established.

Finally, we find that Mehringer's short-term trading of mutual funds in ES's accounts was unsuitable for ES in light of ES's investment objective and time horizon. ES had significant

[cont'd]

violates FINRA Rule 2010. See *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *1 n.2 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012). FINRA Rule 0140 subjects registered representatives and associated persons, like Mehringer, to FINRA Rule 2010.

¹⁶ Suitability rule violations require proof of a "recommendation." See *Dep't of Enforcement v. Medeck*, Complaint No. E9B2003033701, 2009 FINRA Discip. LEXIS 7, at *34 n.14 (FINRA NAC July 30, 2009). As an initial matter, Mehringer recommended each of the trades discussed in this case because he solicited the transactions. The confirmations for Mehringer's trading of mutual funds in ES's accounts are all marked as "solicited." Second, as discussed in Part III.A.2. (Mehringer Exercised Discretion Without Authorization in ES's Accounts), Mehringer's unauthorized exercise of discretionary authority over ES's accounts satisfies the recommendation requirement of the suitability rule. See *id.* ("[W]here the broker has discretionary authority (or engages in unauthorized trading), the transactions are deemed to have been implicitly recommended for purposes of the suitability rule.").

financial resources and some financial experience. But those attributes do not negate that ES was an investor who only wanted to take on moderate risk. ES's investment objective for most of his accounts was "growth." His investment time horizon was five to 10 years, the middle of the three ranges available for new accounts. ES also testified that he had "painstakingly amassed" his wealth, and that he specifically did not intend to engage in short-term trading because it was "too risky." Mehringer's short-term trading of mutual funds in ES's accounts was at odds with ES's investment objective and time horizon.

e. Mehringer's Explanations for His Short-Term Trading of Mutual Funds

Mehringer offers several explanations for his short-term trading of mutual funds in ES's accounts. Mehringer's explanations are not persuasive.

(1) Harvesting Profits

Mehringer argues that he engaged in short-term mutual fund trading in ES's accounts because he was "harvesting profits to achieve [ES's] growth investment objective." Mehringer explained that his trading in mutual fund shares "played a complementary role in the overall investment strategy" for ES's accounts. But the issue here focuses on whether Mehringer's short-term trading in mutual fund shares "served a reasonable investment objective" when he recommended the trades. *Krull*, 248 F.3d at 913. It did not. Mehringer could have generated profits for ES without the excessive costs associated with his trading of the mutual funds in the manner that he did.¹⁷

(2) Cash for ES's Tax Bills and Capital Calls

Mehringer states that ES "needed cash to pay tax bills or meet capital calls arising from prior investments." But the record indicates that ES's tax bills and capital calls were funded with sales of equities, not mutual funds. For example, in September 2012, ES told Mehringer that he owed \$60,000 in taxes and asked Mehringer to provide funds from his investments to satisfy the tax obligation. A few days later, Mehringer sold more than \$170,000 of equities from one of ES's accounts and transferred \$65,000 out of that account for ES's payment of the tax debt. No mutual funds were sold to meet this obligation.

In addition, when ES needed cash to fund capital calls for partnership investments, Mehringer, once again, liquidated equities. On December 2, 2011, ES notified Mehringer that he needed \$28,289.16 for capital calls for a personal account and \$38,750 for capital calls for his pension. Mehringer sold \$63,871 in equities from ES's pension account that day and transferred \$38,750 out to meet ES's capital call for his pension. Later that day, Mehringer sold \$27,736 in

¹⁷ Mehringer argues that ES's "accounts needed cash to variously purchase stocks, which met [ES's] increasingly aggressive objective to grow his accounts." But there is no evidence in the record that ES changed his investment profile, investment objective, investment time horizon, or risk tolerance from a moderate one to a more aggressive one.

equities, and only \$1,000 in mutual funds, from ES's personal account to meet ES's other capital call.

(3) Liquidations to Shift Assets to Other Accounts

Mehringer explains that ES "wanted to shift assets from one [account] to another account which required liquidations of equity and mutual fund position[s]." But, as was the case with the payment of ES's tax bills and capital calls, Mehringer relied heavily on the liquidation of equities, not mutual funds. For example, in July 2011, when ES wanted to protect the assets held in the joint account from his wife, Mehringer opened a new account for ES, i.e., the personal account.¹⁸ To fund the personal account, Mehringer sold \$323,555 in 15 different equities and \$27,353 of one mutual fund.

(4) Trading Strategy and Market-Based Events

Mehringer argues that his short-term trading of mutual funds in ES's accounts was part of an overall trading strategy and a response to certain market-based events such as the poor performance of a particular mutual fund or the health problems of a specific mutual fund manager. These factors, however, do not provide valid defenses to an ongoing pattern of short-term mutual fund trading. As the Commission has observed in a case involving 65 short-term mutual fund trades, "[w]hile an occasional switch from a fund of one type to that of another might have been justified in a particular situation, the volume of switching evidenced in this case cannot be explained on the basis of the considerations advanced by registrant." *Irish*, 42 S.E.C. at 740. By his own estimation, Mehringer's trading was not focused on ES's investment profile, investment objective, investment time horizon, or risk tolerance, as it should have been; rather, Mehringer was concentrated on the market, its fluctuations, and other assorted factors. But market conditions, volatile or otherwise, do not justify Mehringer's short-term trading of the mutual funds in ES's account.¹⁹ *See Wilson*, 2011 FINRA Discip. LEXIS 67, at *48 (rejecting market volatility as an explanation of respondent's short-term trading of customers' mutual funds).

¹⁸ See note 8.

¹⁹ To explain his trading activities in ES's accounts, Mehringer relies heavily on the NAC's decision in *Dep't of Enforcement v. Respondent*, Complaint No. C07010037, 2003 NASD Discip. LEXIS 16, at *1 (NASD NAC May 13, 2003). But that case is not helpful to Mehringer. The case involved 14 switches among five customers over a period of three and a half years, far less trading than occurred here. *See id.* at *24. In addition, although Enforcement established a pattern of excessive activity in mutual funds, the respondent overcame that presumption of unsuitability by providing explanations for each of the 14 switches. *See id.* at *11-13. Mehringer's general (and generic) explanations for his short-term trading of mutual funds in ES's accounts are not comparable to the respondent's specific and in-depth explanations of the mutual fund switches in the case that he cites.

f. Mehringer's Other Arguments

Mehringer offers other arguments to absolve himself of liability for his unsuitable short-term trading of mutual funds in ES's accounts. Each of them fails.

(1) The Intra-Day Switching Claims

Mehringer argues that he was not provided with adequate notice of the allegations related to the 14 instances of intra-day mutual fund switches identified in the Hearing Panel's Addendum A. Mehringer states that "[t]hese 'switches' were *not* identified in the [c]omplaint, *not* identified in Enforcement's prehearing brief, and *not* identified in Enforcement's summary exhibits reflecting the transactions at issue." While we agree that the 14 intra-day switches were not specifically identified in Enforcement's prehearing brief or summary exhibits, we note that the complaint identified this issue and provided Mehringer with adequate notice that intra-day mutual fund switches comprised part of the suitability violation. *See Jonathan Feins*, 54 S.E.C. 366, 378 (1999) (rejecting respondent's notice argument where complaint listed only seven of the 16 trades reviewed at the hearing).

Under the heading, "First Cause of Action: *Unsuitable Short-Term Trading and Intra-[D]ay Switching of Mutual Funds*," the complaint alleges that "Mehringer recommended the short-term mutual fund trading and the intra-day mutual fund switching . . . without reasonable grounds to believe that the recommendations were suitable for ES in light of the frequency and nature of the transactions" In addition, Attachment A to the complaint identified the short-term mutual fund trades, which included the 14 intra-day switches. Mehringer's intra-day switching of mutual funds in ES's accounts is not a stand-alone violation.²⁰ It is part and parcel of Mehringer's unsuitable short-term mutual fund trading. The fact that Enforcement did not isolate the 14 sets of intra-day switches from the overall set of short-term trades in Attachment A is not a basis for Mehringer to claim inadequate notice of the allegation. *See Thomas E. Warren, III*, 51 S.E.C. 1015, 1019 n.18 (1994) ("The Commission has previously recognized that, even if an administrative pleading is defective, the defect can be remedied if the record demonstrates that the respondent understood the issue and was afforded a sufficient opportunity to justify his conduct with respect thereto."), *aff'd*, 1995 U.S. App. LEXIS 30824 (10th Cir. Oct. 23, 1995).²¹

²⁰ To be clear, our decision only considers the intra-day mutual switches in two ways – as a characteristic of Mehringer's unsuitable short-term trading of mutual funds in ES's accounts as discussed in Part III.A.1.c.(2) (Mehringer's Trading of Mutual Fund Shares in ES's accounts) and as a factor for sanctions as discussed in Part III.A.3. (Sanctions for Causes One and Two).

²¹ Mehringer quibbles with certain findings that the Hearing Panel made concerning breakpoint discounts. Breakpoint discounts are volume discounts on the sales loads charged to investors who purchase mutual fund shares. *See Sales Charges and Breakpoints*, <https://www.finra.org/rules-guidance/key-topics/mutual-funds>. "The extent of the discount depends on the amount invested in a particular family of funds." *See id.* The issue of breakpoint discounts does not factor into our analysis, and, consequently, we do not reach that issue.

(2) Mehringer's Handling of ES's Accounts Post April 2013

Mehringer argues that he should not be responsible for the trading activity in ES's accounts after April 2013. Mehringer explains that, in April 2013, he retired and sold most of his business, including ES's accounts, to another registered representative. But the record contradicts Mehringer's claims. ES's account statements show that Mehringer remained listed as the representative of record on all of ES's accounts, with Mehringer's name appearing ahead of the other representative. Mehringer's records in CRD show that Mehringer remained associated with Western International Securities until May 2018. And, most significantly, post April 2013, Mehringer continued to buy and sell mutual fund shares for ES's accounts,²² continued to communicate with ES via email, and never told ES he was no longer his representative.²³ Consequently, we find that Mehringer remained involved with ES's accounts, and continued to function as ES's representative, after April 2013.²⁴

(3) ES's Authorization to Handle the Company Employee Account

Mehringer requests dismissal of the Hearing Panel's findings related to the short-term mutual fund trading in the company employee account.²⁵ Mehringer argues that an accountant, not ES, was the individual with trading authority for the account. Mehringer explains that "[the accountant] did not testify at the hearing," "Enforcement made no attempt . . . to talk to [the accountant] or to have him appear at the hearing," and, "[a]s a consequence, there was no evidence to contradict Mehringer's testimony and the documentary eviden[ce] as to the suitability of the transactions in this account" But this cause of action focuses on the suitability of Mehringer's short-term trading of mutual funds, not the improper exercise of discretionary authority (cause two) or unauthorized trading (not charged). Based on the record before us, we find that Mehringer's short-term trading of mutual fund shares in the company employee account, which involved at least 25 sets of trades, was unsuitable in light of the account's investment objective and time horizon.

²² For example, in late May 2013, the period after Mehringer claims that he was no longer responsible for activity in ES's accounts, Mehringer sold ES's position in certain Japanese market funds following a sudden decline in the funds' value. This trade is the subject of the unauthorized discretionary trading discussed in Part III.A.2. (note 42) (Cause Two: Exercise of Discretion Without Authorization).

²³ For example, when ES directed Mehringer to stop trading in his accounts in September 2013, Mehringer did not respond to ES by telling him that he was no longer handling his accounts.

²⁴ Even if we were to credit Mehringer's retirement claims (we do not), it would not materially affect our findings related to the short-term mutual fund trading discussed in this case. Only five sets of short-term trades occurred after April 2013.

²⁵ Mehringer refers to this account as the "VEBA Account."

(4) ES's Financial Sophistication and Bias Against Mehringer

Mehringer argues that the Hearing Panel incorrectly found that ES: “(1) did not understand the order confirmations that he reviewed; (2) did not pay attention to and did not understand the activity in his account; and (3) had no incentive to mislead the [Hearing] Panel.” Mehringer concludes that ES was an “experienced,” or sophisticated, investor who was biased against him and had a motive to lie.

As an initial matter, we find that ES's financial sophistication has little bearing here. The fact that ES may have had some level of financial sophistication did not transform Mehringer's short-term trading of mutual funds in ES's account from an unsuitable trading activity to a suitable one. *See William C. Piontek*, 57 S.E.C. 79, 94 (2003) (“a customer's wealth [and sophistication] does not give a [registered representative] a license to disregard the customer's investment objectives.”). ES was an investor who was willing to take on a moderate, or limited, amount of risk,²⁶ and Mehringer's short-term mutual fund trading in ES's accounts was unsuitable for ES in light of ES's investment objective and time horizon.

The Hearing Panel observed ES's demeanor at the hearing during his testimony and determined that ES was a credible witness. We have no basis to disturb to the Hearing Panel's determinations. *See Allen Holeman*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *21 n.15 (July 31, 2019) (“[T]he credibility determination of the initial decision maker [in a FINRA disciplinary proceeding] is entitled to considerable weight and deference, since it is based on hearing the witnesses' testimony and observing their demeanor.”), *appeal docketed*, No. 19-1251 (D.C. Cir. Nov. 26, 2019).

(5) Western International Securities's Role in Mehringer's Misconduct

Mehringer argues that he is not liable for the short-term trading of mutual funds in ES's accounts because Western International Securities “scrutinized and approved the activity in the accounts.” Mehringer explains that Western International Securities reviewed his daily trade blotters, examined the movement of funds in customer accounts, and audited his office. But Mehringer cannot use Western International Securities's general supervision of his trading activities and sales to customers as a substitute for his own judgment on the issue of the

²⁶ Even if ES were willing to take on more risk than his investment profile, investment objective, investment time horizon, and risk tolerance suggested (there is no evidence to support that he was), Mehringer had an obligation to refrain from engaging in trading that was at odds with these factors. *See Gordon Scott Venters*, 51 S.E.C. 292, 294-95 (1993) (notwithstanding the customer's interest in investing in speculative securities, the representative had a duty to refrain from recommending such investments when he learned about his customer's age and financial situation); *John M. Reynolds*, 50 S.E.C. 805, 809 (1992) (regardless of whether the customer wanted to engage in aggressive and speculative trading, the representative was obligated to abstain from making recommendations that were inconsistent with the customer's financial situation).

suitability of his mutual fund trading for ES. *See Larry Ira Klein*, 52 S.E.C. 1030, 1038 n.30 (1996). Nor can Mehringer point to the approval of the transactions at issue in this case by Western International Securities's supervisory personnel to escape liability.²⁷ *Cf. Sharon M. Graham*, 53 S.E.C. 1072, 1084-85 (1998) (finding that a salesperson aided and abetted antifraud violations notwithstanding a compliance officer's assurances that the trades were "fine"), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000). Mehringer is liable for the short-term mutual fund trading that occurred in ES's accounts.

(6) Federal Statute of Limitations, Fairness, and Laches

Mehringer argues that the Hearing Panel's findings for the short-term mutual fund trades should be reversed based on the five-year federal statute of limitations, fairness, and the doctrine of laches. Mehringer explains that the conduct underlying Enforcement's complaint dates back to July 2010, that Enforcement did not file the complaint until December 2016, that Mehringer was "severely disadvantaged" as a result of this delay, and that it was "inherently unfair to bring an enforcement action against [him] for the transactions that are more than five years old." The precedent in this area renders Mehringer's arguments untenable.

As an initial matter, FINRA, as a self-regulatory organization, is not subject to the federal five-year statute of limitations.²⁸ *See William D. Hirsh*, 54 S.E.C. 1068, 1077 & n.11 (2000) ("We have consistently held that no statute of limitations applies to the disciplinary actions of the [e]xchange or other self-regulatory organizations."); *Shamrock Partners, Ltd.*, 53 S.E.C. 1008, 1015 n.15 (1998) ("The five-year statute of limitations . . . does not apply to NASD proceedings."). As the Commission has explained, applying a limitations period to FINRA actions would "impair [FINRA's] statutory obligations and duty to protect the public and discipline its members." *Frederick C. Heller*, 51 S.E.C. 275, 280 (1993). We therefore find that the federal five-year statute of limitations does not apply here.²⁹

²⁷ Mehringer states that his "mutual fund transactions were regularly reviewed by Western [International Securities's] management personnel."

²⁸ The five-year statute of limitations limits the timeframe for the federal government to commence legal proceedings:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462 (2020).

²⁹ Mehringer's arguments concerning the federal five-year statute of limitations applies to 23 sets of Mehringer's short-term mutual fund trades in ES's accounts. That leaves 59 sets of unsuitable short-term mutual fund trades. Even if we found Mehringer's argument concerning the statute of limitations to be valid (we do not), we find that 59 sets of unsuitable short-term

Mehringner's arguments concerning the fairness of FINRA's proceedings based on the six-year delay between the mutual fund trades and Enforcement's filing of the complaint similarly fails. In assessing the effect of a delay on the fairness of a disciplinary proceeding, there are "not establish[ed] bright line rules about the impact of the length of a delay." *Mark H. Love*, 57 S.E.C. 315, 323 (2004). The fairness of a proceeding is based on the "entirety of the record," and whether respondent has shown that his "ability to mount an adequate defense was harmed by any delay in the filing of a complaint against him." *Id.* at 324 (rejecting argument that delay was unfair where respondent failed to show that he was prejudiced). To assess the overall fairness of a disciplinary proceeding when there are questions of delay, the Commission considers the times between the filing of the complaint and: (1) the initial misconduct; (2) the last misconduct; (3) notice of the misconduct to the self-regulatory organization; and (4) the initiation of the investigation. *Dep't of Enforcement v. Rooney*, Complaint No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *89 (FINRA NAC July 23, 2015).

In this case, the timeframe between Mehringner's first short-term mutual fund trades (July 2010) and the filing of the complaint (December 2016) was six years and five months. The timeframe between the end of the review period (August 2013) and the filing of the complaint (December 2016) was three years and four months. The timeframe from FINRA's learning about Mehringner's short-term mutual fund trades from ES's filing of the arbitration claim (June 2014),³⁰ FINRA's initiation of the investigation of this matter (June 2014), and the filing of the complaint (December 2016) was two years and six months. Based on the record before us, we find that these timeframes did not deny Mehringner a fair hearing.³¹

[cont'd]

mutual fund trades is substantial and establishes a pattern for a presumption of unsuitability. Consequently, Mehringner's argument, even if successful (it is not), would not alter our findings or analysis for this cause of action.

³⁰ See Part III.A.1.c.(3) (ES Terminates His Relationship with Mehringner and Western International Securities).

³¹ To support his position, Mehringner points to *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), *Jeffrey Ainley Hayden*, 54 S.E.C. 651 (2000), and *Department of Enforcement v. Morgan Stanley DW, Inc.*, Complaint No. CAF000045, 2002 NASD Discip. LEXIS 11, at *1 (NASD NAC July 29, 2002). But the timeframes in these cases are longer (*Hayden* and *Morgan Stanley DW*), or at least comparable (*Johnson*), to the ones presented here. In *Johnson*, the disciplinary proceeding commenced six years and two months after respondent's misconduct began, five years and four months after the last incident of misconduct, and five years and four months after the began its investigation. See *Johnson*, 87 F.3d 484. In *Hayden*, the NYSE filed a case against Hayden 14 years after the misconduct began, six years after the most recent incident of misconduct, and five years after it had learned of the applicant's misconduct. See *Hayden*, 54 S.E.C. at 654. In *Morgan Stanley DW*, FINRA dismissed a complaint that was brought eight years after the misconduct began, seven years after it ended, five years and nine months after Enforcement learned of the misconduct, and four years and nine months after Enforcement began the investigation. See *Morgan Stanley DW*, 2002 NASD Discip. LEXIS 11, at *15-17.

Finally, Mehringer requests that we dismiss the allegations against him based on the doctrine of laches. But Mehringer fails to meet the standards for a laches defense. To successfully assert the defense of laches, a respondent bears the burden of proof and “must demonstrate a lack of diligence by [FINRA,] and that he has been prejudiced.” *Robert Tretiak*, 56 S.E.C. 209, 230 (2003). Mehringer has not proven a lack of diligence on the part of Enforcement,³² and he has not proven that he has been prejudiced.³³ Accordingly, we find that Mehringer’s statute of limitations, fairness, and laches defenses fail.

* * *

In summary, the record in this case establishes a presumption of a suitability violation against Mehringer because Mehringer engaged in a pattern of short-term trading of mutual funds in ES’s accounts. Mehringer did not rebut that presumption because he failed to prove the existence of unusual circumstances that would have justified his departure from the normal use of mutual funds as long-term investments. Accordingly, we find that Mehringer’s short-term trading of mutual funds in ES’s accounts was unsuitable for ES in light of ES’s investment objective and time horizon, and that Mehringer violated NASD Rule 2310 for conduct occurring before July 9, 2012, FINRA Rule 2111 for conduct occurring on or after July 9, 2012, and FINRA Rule 2010.

2. Cause Two: Exercise of Discretion Without Customer Authorization and Firm Approval

Under the second cause of action, the Hearing Panel found that Mehringer violated NASD Rule 2510(b) and FINRA Rule 2010 because he exercised discretionary trading authority over ES’s accounts without prior written authorization and firm approval. We generally affirm the Hearing Panel’s findings for this cause of action, but we limit our findings to the one proven instance of Mehringer’s exercise of discretionary authority contained in the record.

a. NASD Rule 2510

NASD Rule 2510(b) prohibits a registered representative from exercising discretionary authority in a customer’s account unless the customer has given prior written authorization to the

³² Enforcement commenced its investigation in June 2014, as soon as it learned of Mehringer’s conduct from ES’s arbitration claim against Mehringer and Western International Securities.

³³ Mehringer claims that the delays in FINRA’s disciplinary process prejudiced him because he did not maintain all of his notes of conversations with ES, and his recollection of those conversations was “hazy.” But our review of the record, specifically, the hearing transcripts, demonstrates that Mehringer remembered a number of events, particularly those events that exculpated his misconduct. For example, Mehringer recalled details of his trading strategy, his “habit” of trading mutual fund shares, his review of trade confirmations with ES, and the commissions that he (Mehringer) charged for commissions on ES’s trades in equity securities.

representative, and the representative's member firm has accepted the account as discretionary and evidenced that acceptance in writing.³⁴ Compliance with the requirements of NASD Rule 2510(b), among other FINRA rules, ensures effective supervision of sales practices at member firms by providing the firm with a meaningful opportunity to "review all discretionary accounts at frequent intervals in order to detect and prevent transactions which are excessive in size or frequency in view of the financial resources and character of the account." NASD Rule 2510(c). As explained below, we find that Mehringer violated NASD Rule 2510(b) by exercising discretion in ES's account on one occasion.

b. Conclusions of Law for Cause Two

The Hearing Panel determined that ES did not give Mehringer written authorization to exercise discretion in his accounts, that Western International Securities did not accept ES's account as a discretionary account,³⁵ and that Mehringer acknowledged one instance of exercising discretion in ES's account.³⁶ From there, the Hearing Panel found that Mehringer "routinely" traded in ES's accounts without obtaining ES's authorization. The record is not sufficiently developed in this area for us to affirm this finding in whole, and, on appeal, we limit our finding to the one incidence of discretion identified in the record.

The record contains ample evidence of emails, meetings, and telephone calls between ES and Mehringer. In many instances, Mehringer presented ES with account performance reports, and ES and Mehringer discussed the purchase and sale of specific securities. For example, in an email from January 2011, Mehringer provides ES with comparison reports on the performance of his accounts, and they revisit investments that they had previously discussed. During these email communications, ES tells Mehringer to "move quickly" with some of the stock ideas that they had discussed. In another email, from February 2011, Mehringer tells ES that he will "send [him] . . . a list of additional stocks we should buy before their earnings come out next week." Within a day or so, Mehringer emails ES with a proposal to transfer his bond funds to stock holdings and recommends specific investments in CDs and other equities.

As Enforcement notes, it "has not alleged, and the Hearing Panel did not find, that every trade was made without [ES's] explicit approval, but rather that Mehringer did so from time to time." The lack of specificity concerning the occurrences of Mehringer's exercises of discretion, the underdevelopment of this issue in the proceedings before the Hearing Panel, and the copious documentary evidence in the record concerning ES's and Mehringer's emails, meetings, and

³⁴ A violation of NASD Rule 2510(b) constitutes a violation of FINRA Rule 2010. *See Wilson*, 2011 FINRA Discip. LEXIS 67, at *31 n.21.

³⁵ In the years that ES was Mehringer's customer, Mehringer submitted annual compliance questionnaires to Western International Securities certifying that he did not have any discretionary accounts.

³⁶ In response to declines in the Japanese markets, after failing to reach ES after multiple attempts, Mehringer sold ES's position in a Japanese-based fund without ES's approval to avoid losses in ES's account.

telephone calls about the purchase and sale of securities leads us to conclude that Mehringer exercised discretion without authorization in ES's accounts on the one occasion that Mehringer sold ES's position in Japanese-based funds without ES's authorization or Western International Securities's approval.³⁷ Accordingly, we find that, for this one instance, Mehringer violated NASD Rule 2510(b) and FINRA Rule 2010. *See Michael Pino*, Exchange Act Release No. 74903, 2015 SEC LEXIS 1811, at *17-18 (May 7, 2015) (finding that the respondent violated NASD Rule 2510(b) when he did not have customer written authorization and permission from firm to effect trades).

3. Sanctions for Causes One and Two

In the proceedings below, the Hearing Panel imposed separate sanctions for Mehringer's short-term trading of mutual funds, and unauthorized exercise of discretion, in ES's accounts. For the short-term mutual fund trading, the Hearing Panel barred Mehringer in all capacities, fined him \$50,000, and ordered him to disgorge \$108,131.21. For the unauthorized exercise of discretion, the Hearing Panel suspended Mehringer for 30 business days and fined him \$7,500. The Hearing Panel declined to impose the sanctions for the unauthorized discretionary trading because of the bar that it had imposed for short-term mutual fund trading. We modify these sanctions as follows: (1) aggregate the sanctions for causes one and two; (2) eliminate the fines under causes one and two; (3) eliminate the suspension, which was not imposed, under cause two; (4) impose a bar in all capacities; and (5) affirm the Hearing Panel's disgorgement order of \$108,131.21, plus prejudgment interest.

We begin our analysis with FINRA's Sanction Guidelines ("Guidelines").³⁸ For purposes of sanctions, we have decided to aggregate, or batch, Mehringer's ES-involved violations – the unsuitable short-term trading of mutual funds across ES's five accounts and the established instance of Mehringer's unauthorized exercise of discretion in ES's one account.³⁹

The Guidelines for unsuitable recommendations recommend a fine between \$2,500 and \$116,000.⁴⁰ The Guidelines advise adjudicators to consider suspending an individual in any or

³⁷ See note 38.

³⁸ See *FINRA Sanction Guidelines* (Mar. 2019), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter, "Guidelines"]. In assessing the appropriate sanctions for Mehringer's misconduct across all causes of action, we applied the applicable Guidelines in place at the time of this decision and considered the specific Guidelines related to each violation. *Id.* at 8. We also consulted the General Principles Applicable to All Sanction Determinations and Principal Considerations in Determining Sanctions, which adjudicators consult in every disciplinary case. *Id.* at 2-8.

³⁹ See *id.* at 4 (General Principles Applicable to All Sanction Determinations, No. 4) (explaining that the aggregation or "batching" of violations may be appropriate for purposes of determining sanctions in disciplinary proceedings).

⁴⁰ *Id.* at 95 (Suitability – Unsuitable Recommendations).

all capacities for a period of 10 business days to two years.⁴¹ When aggravating factors predominate a respondent's misconduct, the Guidelines suggest that adjudicators strongly consider barring the respondent.⁴² There are no specific considerations for the Guidelines related to unsuitable recommendations.⁴³ Instead, the Guidelines direct adjudicators to apply the General Principles Applicable to All Sanction Determinations and Principal Considerations in Determining Sanctions.⁴⁴

For exercising discretion without a customer's written authority, the Guidelines recommend a fine between \$2,500 and \$16,000.⁴⁵ When aggravating factors predominate a respondent's misconduct, the Guidelines recommend suspending a respondent in any or all capacities for at least 10 to 30 business days.⁴⁶ When applying the Guidelines for the exercise of discretion without authorization, the Guidelines direct adjudicators to consider the following factors: (1) whether customer's grant of discretion was express or implied; (2) whether firm's policies or procedures prohibited discretionary trading; (3) whether the firm prohibited the respondent from exercising discretion in customer accounts; and (4) whether the respondent's exercise of discretion went beyond time and price discretion.⁴⁷ The application of the factors from the Guidelines for unsuitable recommendations, and the exercise of discretion without written authority, demonstrate that aggravating factors predominate Mehringer's misconduct, and that Mehringer should be barred.

First, Mehringer engaged in numerous violative acts that constituted a pattern of misconduct.⁴⁸ When Mehringer traded the mutual funds in ES's accounts, ES held 66 positions for less than 90 days, 58 positions for between three months and six months, and only 25 positions for more than six months. Mehringer initiated 146 separate purchase transactions, totaling more than \$5 million, and 91 separate sales transactions in 45 different mutual fund families. Second, Mehringer's short-term mutual fund trading involved a number of troublesome hallmarks, including multiple, disassembled purchases and sales, circular trading, and intra-day

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 86 (Discretion—Exercise of Discretion Without Customer's Written Authority).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 8) (considering whether the respondent engaged in numerous acts or a pattern of misconduct).

switching of mutual funds.⁴⁹ Third, Mehringer's trading disregarded ES's investment objectives and time horizon. ES was willing to take on a limited amount of risk. His investment objective was growth. Fourth, Mehringer's trading saddled ES with high transaction costs that dampened the substantial gains that occurred in the securities markets during that time. Fifth, in at least one instance, Mehringer exercised discretion in ES's account without written or verbal authorization from ES or approval from Western International Securities.⁵⁰ Sixth, Mehringer's misconduct occurred over an extended period of time – for more than three years.⁵¹ Finally, Mehringer's trading activities in ES's accounts resulted in his monetary gain,⁵² while ES incurred a financial loss.⁵³ Mehringer received \$153,131.21. ES lost \$54,581.43.

The securities industry “presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants.”⁵⁴ Within this regulatory framework, it is FINRA's obligation to protect the investing public and the securities markets, and, when confronted with evidence of abuse and overreaching, to act decisively. Mehringer's short-term mutual fund trading ignored ES's financial interests and came at significant expense to ES. Based on these facts, we find that Mehringer poses a serious risk to the investing public, and that a bar is necessary to prevent Mehringer from inflicting the same harm upon customers in the future that he inflicted upon ES in this case.⁵⁵

⁴⁹ See *id.* at 8 (Principal Considerations in Determining Sanctions, No. 13) (considering whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence).

⁵⁰ “[D]iscretionary trading in a customer's account is a practice that is inherently susceptible to abuse.” *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *27 (July 2, 2013), *aff'd sub nom., Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014). It can lead to any number of ancillary violations, including the trading activity that occurred here. See *Dep't of Enforcement v. Griffith*, Complaint No. 2010025350001, 2015 FINRA Discip. LEXIS 55, at *13-14 (FINRA NAC Dec. 22, 2015).

⁵¹ See *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 9) (considering whether the respondent engaged in the misconduct over an extended period of time).

⁵² See *id.* at 8 (Principal Considerations in Determining Sanctions, No. 16) (considering whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain).

⁵³ See *id.* at 7 (Principal Considerations in Determining Sanctions, No. 11) (considering whether the respondent's misconduct resulted directly or indirectly in injury to the investing public or other parties).

⁵⁴ *Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995).

⁵⁵ See *Raghavan Sathianathan*, 2006 SEC LEXIS 2572, at *43 (Nov. 8, 2006) (“[N]umerous violations of NASD's suitability rule warrant serious sanctions.”), *aff'd*, 304 F. App'x 883 (D.C. Cir. 2008).

We also affirm the Hearing Panel's order of disgorgement. "[D]isgorgement is intended to force wrongdoers to give up the amount by which they were unjustly enriched."⁵⁶ Disgorgement is appropriate in all sales practice cases, even where an individual is barred, if among other things, "the respondent has retained substantial ill-gotten gains."⁵⁷ Such is the case here, and we accordingly order Mehringer to pay disgorgement of \$108,131.21,⁵⁸ plus prejudgment interest, as a fine payable to FINRA.⁵⁹

B. Causes Three Through Six: Mehringer's Activities with the Mehringer Education Trust, Settlement of a Customer Complaint, and Misrepresentations About the Trust, Complaint, and Settlement

The remaining four causes of action relate to Mehringer's activities with a charitable trust, the "Mehringer Education Trust," his settlement of a customer complaint, and his representations to Western International Securities about the trust, complaint, and settlement. As explained below, we dismiss cause three and affirm the Hearing Panel's findings for causes four, five, and six. We also affirm the suspension and fine that the Hearing Panel imposed for causes four, five, and six, but we have added requalification and independent consultant requirements to the sanctions for these violations.

1. FINRA Rule 2010

Causes three through six allege that Mehringer's conduct violated FINRA Rule 2010. FINRA Rule 2010 is FINRA's ethical standards rule. The rule requires that associated persons observe high standards of commercial honor and just and equitable principles of trade. The reach of FINRA Rule 2010 is not limited to rules of legal conduct, but states a broad ethical principle. *See Timothy L. Burkes*, 51 S.E.C. 356, 360 n.21 (1993). FINRA Rule 2010 applies broadly to all business-related misconduct, regardless of whether the misconduct involves securities. *See id.* The principal consideration of FINRA Rule 2010 is whether the misconduct

⁵⁶ *Michael David Sweeney*, 50 S.E.C. 761, 768 (1991).

⁵⁷ *Guidelines*, at 10 (Technical Matters); *see also id.* at 5 (General Principles Applicable to All Sanction Determinations, No. 6) (advising adjudicators to consider a respondent's ill-gotten gain when determining an appropriate remedy); *id.* at 95 n.1 (Suitability – Unsuitable Recommendations) (instructing adjudicators to order disgorgement).

⁵⁸ We calculated the amount of disgorgement by taking the amount of commissions that Mehringer received on the short-term mutual fund trades from ES's accounts, \$153,131.21, and subtracting the \$45,000 that Mehringer contributed toward the settlement of ES's arbitration claim.

⁵⁹ We order the disgorgement paid to FINRA because the harm caused to ES was the subject of a settlement between ES, Mehringer, and Western International Securities. The Hearing Panel also found that Mehringer's misconduct warranted the imposition of a \$50,000 fine. We deem to the bar sufficient to address the misconduct at issue here, and we decline to assess or impose any fine for Mehringer's misconduct in light of the bar.

“reflects on the associated person’s ability to comply with the regulatory requirements of the securities business.” *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002).

2. Dismissal of Cause Three: Fiduciary Obligations to the Mehringer Education Trust

Under the third cause of action, the Hearing Panel found that Mehringer violated FINRA Rule 2010 because he breached his fiduciary obligations to the Mehringer Education Trust. While FINRA Rule 2010 applies broadly to all business-related misconduct, including conduct that does not involve a security, we have decided to focus our findings for the remainder of this decision on Mehringer’s settlement of the customer complaint without notifying Western International Securities and his misrepresentations to the Firm about the Mehringer Education Trust, customer complaint, and settlement. *See Burkes*, 51 S.E.C. at 360 n.21.

“In determining whether a respondent’s conduct is inconsistent with [FINRA] Rule 2010’s mandate where the alleged violation is not premised on the violation of another FINRA rule, we must determine whether the respondent has acted unethically or in bad faith.” *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 SEC LEXIS 394, at *28 (Feb. 7, 2020). The clearest evidence of whether Mehringer acted unethically, or in bad faith, was his undisclosed settlement of the customer’s complaint and misrepresentations to Western International Securities about the trust, complaint, and settlement.⁶⁰ Accordingly, we focus on these violations and dismiss the third cause of action.

3. Facts and Conclusions of Law for Cause Four: Misrepresentations to Western International Securities About the Mehringer Education Trust

Under the fourth cause of action, the Hearing Panel found that Mehringer violated FINRA Rule 2010 because he provided Western International Securities with false information about the purpose of the Mehringer Education Trust and the use of its funds. We affirm these findings.

In March 2013, Mehringer established the Mehringer Education Trust. Mehringer formed the trust to help a customer, JB, avoid paying taxes on monies owed to him by two other individuals. Once Mehringer established the trust, the individuals who borrowed money from JB would repay their loans to JB through the Mehringer Education Trust as tax-deductible contributions. Mehringer and JB served as co-trustees of the trust.

⁶⁰ The Hearing Panel declined to reach the issue of whether Mehringer breached his fiduciary obligations to the Mehringer Education Trust when he: (1) commingled the trust’s funds with his personal funds to purchase a residential property in his name; and (2) failed to conduct due diligence when the trust made an investment in a nursing home. We too do not review these issues. In addition, we decide not to affirm the finding that Mehringer’s involvement in organizing and operating the Mehringer Education Trust was unethical, not because he misused the assets, but because he allowed the trust’s funds to be used for non-charitable purposes.

In October 2014, one of the individuals who owed money to JB repaid the debt with a payment to the Mehringer Education Trust. Western International Securities's anti-money laundering officer asked Mehringer to explain the "business purpose" of the deposit.⁶¹ Mehringer responded that it was a donation to the trust "to benefit underprivileged children." The anti-money laundering officer provided the Firm's chief compliance officer with Mehringer's response, and, in April 2015, the Firm's chief compliance officer gave that information to FINRA.

In November 2014, Western International Securities's compliance department followed-up with Mehringer about his earlier responses to questions about the deposit. Compliance department personnel asked Mehringer, "[h]ow does the money get to the underprivileged children?" Mehringer responded via email, "[t]he money is sent to the schools where they attend as a scholarship." In December 2014, in another email, Mehringer told Western International Securities's compliance department that the "donations were made to" the private school.

Mehringer's representations to Western International Securities about the Mehringer Education Trust, its purpose, and its use of funds were false. Although Mehringer had informed Western International Securities that the purpose of the Mehringer Education Trust was to provide scholarships for underprivileged children, Mehringer used the trust's funds to pay the private school tuition of JB's children.

Mehringer's misrepresentations to Western International Securities about the Mehringer Education Trust, its purpose, and its use of funds demonstrates dishonesty, violates FINRA Rule 2010, and is misconduct that calls into question Mehringer's "ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and the protection of the public." *Dep't of Enforcement v. Davenport*, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *9-10 (NASD NAC May 7, 2003).

4. Facts and Conclusions of Law for Cause Five: Settling a Customer Complaint Without Notifying Western International Securities

Under the fifth cause of action, the Hearing Panel found that Mehringer violated FINRA Rule 2010 because he received and settled a customer's complaint without notifying Western International Securities. We affirm these findings.

In early-2014, Mehringer's customer, MN, instructed Mehringer to sell a bond from his account. Mehringer agreed to purchase the bond from MN at the price MN had paid for it, but the bond desk would not let him do so. By the time the trade was executed, about one week later, the issuer had declared bankruptcy, the price of the bond had fallen, and the bond was sold at the then-current market price. Soon after the sale, MN sent Mehringer an email stating, "I see the sale at our full loss, now what?" Mehringer responded, "I am overnighting you a check for the difference. The balance is classified as a 'settlement of a legal claim' and is NOT taxable income." Mehringer sent MN a personal check for \$47,777.98 to cover the loss, writing

⁶¹ Mehringer opened an account for the Mehringer Education Trust at Western International Securities.

“Settlement of Claim” on the memo line.⁶² Western International Securities did not learn about Mehringer’s settlement with MN for more than one year. In mid-2015, FINRA examiners discovered a copy of the settlement check during an audit of Mehringer’s offices.

Settling a customer complaint without a firm’s knowledge or approval violates FINRA Rule 2010.⁶³ See *Dep’t of Enforcement v. Paratore*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *13 (FINRA NAC Mar. 7, 2008). Disclosing customer complaints to a firm’s compliance department is a basic and widely known obligation of a registered representative, and a representative’s failure to report customer complaints and settlements interferes with the firm’s ability to supervise its representatives. See *DBCC v. DiAngelo*, Complaint No. C10960003, 1996 NASD Discip. LEXIS 34, at *6 (NASD NBCC Oct. 16, 1996) (“In order to discharge their supervisory obligations adequately, member firms must be aware of all business- related contact and communications between their registered representatives and customers, particularly with respect to customer complaints.”).

MN complained about losses incurred due to a delay in selling his bond as ordered. Mehringer resolved the complaint by paying MN in what Mehringer described as a settlement of a claim. Mehringer admits that he did not report MN’s complaint to Western International Securities and did not report the settlement payment to his supervisor or anyone in Western International Securities’s compliance department. Mehringer’s conduct was inconsistent with just and equitable principles of trade, and his failure to notify Western International Securities of the customer complaint and settlement was unethical. Accordingly, we find that Mehringer violated FINRA Rule 2010.⁶⁴

⁶² The check was made out to MN’s wife as the owner of the account.

⁶³ Western International Securities’s written supervisory procedures required that registered representatives report written or oral complaints to the Firm and informed employees that they may “not make payments to customers of any kind to resolve an error or customer complaint.” Western International Securities’s written supervisory procedures stressed that, “[e]rrors and customer complaints must be brought to the attention of the employee’s designated supervisor.”

⁶⁴ Mehringer claims that he thought he only needed to report complaints if they exceeded his \$50,000 insurance deductible. But Mehringer’s interpretation of the customer complaint and settlement notification requirement ignores the purpose of the requirement – to ensure that firms are aware of potential wrongdoing by their registered representatives. See *DiAngelo*, 1996 NASD Discip. LEXIS 34, at *6. The reporting mandate prioritizes the protection of the investing public and the firms’ monitoring of their employees’ conduct. See *id.* It does not focus on insurance-related matters.

5. Facts and Conclusions of Law for Cause Six: Misrepresentations to Western International Securities About Settling the Customer's Complaint

Under the sixth cause of action, the Hearing Panel found that Mehringer violated FINRA Rule 2010 because he falsely told Western International Securities that he had disclosed all of his customer complaints, and that he had not paid money to any customer. We affirm these findings.

MN's complaint, Mehringer's settlement of MN's complaint, and Mehringer's payment to MN occurred in early-2014. Five months after these events, in October 2014, Mehringer completed Western International Securities's annual compliance questionnaire for that year. Under the heading "U4 Form Updates," Mehringer falsely represented that he had promptly reported all written or oral customer complaints to Western International Securities's compliance department. Under the heading "Prohibited Practices," Mehringer falsely answered "no" to the question, "[w]hile associated with the firm, have you ever promised or actually paid money to a client in connection with a securities transaction?" When Mehringer provided these false responses to Western International Securities's annual compliance questionnaire, he engaged in conduct that was inconsistent with high standards of commercial honor and just and equitable principles of trade and violated FINRA Rule 2010.⁶⁵ See *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *39-41 (Mar. 27, 2017) (finding that applicant's false statements on his firm's compliance questionnaires violated FINRA Rule 2010), *aff'd*, 733 F. App'x 571 (2d Cir. 2018).

6. Sanctions for Causes Four, Five, and Six

In the proceedings below, the Hearing Panel imposed an aggregate sanction for causes four, five, and six, suspended Mehringer in all capacities for two years, and fined him \$50,000. As explained below, we find that increased sanctions are merited given the gravity of Mehringer's misconduct. Accordingly, we bar Mehringer in all capacities for these violations.

We begin with the Guidelines and our decision to aggregate the violations related to Mehringer's undisclosed settlement of MN's complaint, his misrepresentations to Western International Securities about MN's complaint and settlement, and his misrepresentations to the Firm about the Mehringer Education Trust.⁶⁶ We next examine whether there are violation-specific Guidelines that are applicable to the violations at issue.

⁶⁵ In his defense, Mehringer claims that he misinterpreted the questions on Western International Securities's annual compliance questionnaire. He explains that he thought the phrase "written or oral customer complaints" meant only written complaints, and that the question regarding payments to customers pertained only to payments made to induce a customer to enter into a transaction. Mehringer's arguments are not persuasive.

⁶⁶ See *Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 4) (discussing the batching of violations).

There are Guidelines for settling customer complaints without notifying the firm, but there are no Guidelines for Mehringer's misrepresentations to Western International Securities about the Mehringer Education Trust and MN's complaint and settlement. Nevertheless, we find that the Guidelines related to the recordkeeping violations are helpful for analyzing Mehringer's misrepresentations,⁶⁷ and we use those Guidelines here.⁶⁸

For settling customer complaints without notifying the firm, the Guidelines recommend a fine between \$2,500 and \$77,000.⁶⁹ The Guidelines advise adjudicators to consider suspending the respondent in any or all capacities for up to two years.⁷⁰ In egregious cases, the Guidelines recommend a bar.⁷¹ The Guidelines instruct adjudicators to consider the following two factors: (1) whether the respondent provided the employer with verbal notice of settlement and the employer acquiesced, or whether the respondent deceived his employer; and (2) whether the actions delayed or obviated the filing of required Forms U4 or U5 or FINRA Rule 4530 filings.⁷²

For recordkeeping violations, the Guidelines recommend a fine between \$1,000 and \$16,000 and a suspension in any or all capacities for a period of 10 business days to three months.⁷³ When aggravating factors predominate the respondent's misconduct, the Guidelines recommend a fine of \$10,000 to \$155,000 and a lengthier suspension of up to two years or a bar.⁷⁴ When significant aggravating factors predominate the respondent's misconduct, the Guidelines advise adjudicators to consider a higher fine.⁷⁵ When assessing sanctions, the Guidelines for recordkeeping violations advise adjudicators to consider the following factors: (1) the nature and materiality of inaccurate or missing information; (2) the nature, proportion, and size of the firm records at issue; (3) whether inaccurate or missing information was entered or omitted intentionally, recklessly, or as the result of negligence; (4) whether the violations occurred during two or more examination or review periods or over an extended period of time,

⁶⁷ See *id.* at 1 (Overview) ("For violations that are not addressed specifically, [a]djudicators are encouraged to look to the guidelines for analogous violations."); see also *See John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *83 (Feb. 10, 2012) (applying the Guidelines for recordkeeping violations for false statements to the firm).

⁶⁸ The Hearing Panel also consulted these Guidelines for its sanctions analysis.

⁶⁹ *Id.* at 34 (Settling Customer Complaints Away From the Firm).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *Guidelines*, at 29 (Recordkeeping Violations).

⁷⁴ *Id.*

⁷⁵ *Id.*

or involved a pattern or patterns of misconduct; and (5) whether the violations allowed other misconduct to occur or to escape detection.⁷⁶

The application of the factors under each of the relevant Guidelines demonstrate that aggravating factors predominate Mehringer's misconduct, and that Mehringer's misconduct was egregious. As an initial matter, we find that Mehringer's misconduct had multiple aggravating components. Mehringer made misrepresentations about the Mehringer Education Trust, and its purpose and funding, to Western International Securities. He failed to notify the Firm about the receipt of MN's complaint. He failed to inform the Firm about his settlement of that complaint. He failed to report his settlement payment to MN. And, if that were not enough, Mehringer made misrepresentations on Western International Securities's annual compliance questionnaire about receiving and settling a customer complaint without notifying the Firm.⁷⁷ Mehringer's settlement of MN's complaint, and his misrepresentations to Western International Securities about the Mehringer Education Trust and his settlement of MN's complaint, are each serious violations.

When viewed together, however, the combination of Mehringer's conduct for these causes strongly supports an increased sanction. Over the entirety of this case hangs a shroud of deception and a lack of candor and integrity. Mehringer willingly assisted a customer with a tax evasion scheme. He made false statements to the firm about the Mehringer Education Trust, the vehicle for that tax evasion scheme. He also settled a customer complaint without notifying the Firm and made misrepresentations to the firm about his settlement of the customer complaint.

The "highest ethical standards [must] prevail in every facet of the securities industry."⁷⁸ Mehringer's conduct is antithetical to the standards of the securities industry. The egregious, numerous,⁷⁹ intentional,⁸⁰ and self-serving nature of Mehringer's misconduct demonstrates his

⁷⁶ *Id.*

⁷⁷ The principal considerations for settling customer complaints without notifying the firm demonstrate the egregious nature of Mehringer's misconduct. Mehringer did not provide Western International Securities with verbal notice of MN's complaint or settlement, his failure to notify the Firm deceived the Firm, and his failure to report the complaint and settlement delayed the Firm's disclosure of the complaint and settlement to FINRA.

⁷⁸ *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *26 (July 26, 2013).

⁷⁹ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 8) (considering whether the respondent engaged in numerous acts or a pattern of misconduct).

⁸⁰ *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 13) (considering whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence).

unfitness to participate in the securities industry in any capacity.⁸¹ Consequently, based on the circumstances presented, we have decided to bar Mehringer in all capacities for causes four, five, and six.

IV. Conclusion

We affirm the Hearing Panel's findings that Mehringer: (1) engaged in unsuitable short-term trading of mutual funds in ES's accounts, in violation of FINRA Rules 2111 and 2010 and NASD Rule 2310 (cause one); (2) exercised discretion in ES's accounts without written authorization and Firm approval, in violation of NASD Rule 2510 and FINRA Rule 2010 (cause two); (3) made misrepresentations to Western International Securities about the Mehringer Education Trust, its purpose, and its use of funds, in violation of FINRA Rule 2010 (cause four); (4) settled MN's complaint without notifying Western International Securities, in violation of FINRA Rule 2010 (cause five); and (5) falsely stated on Western International Securities's annual compliance questionnaire that he had not settled any customer complaint without notifying the Firm, in violation of FINRA Rule 2010 (cause six). We dismiss the cause of action related to Mehringer's breach of his fiduciary obligations to the Mehringer Education Trust (cause three).

For causes one and two, we bar Mehringer in all capacities and order him to pay disgorgement of \$108,131.21, plus prejudgment interest.⁸² For causes four, five, and six, we bar Mehringer in all capacities. We affirm the Hearing Panel's order that Mehringer pay hearing costs of \$6,568.43, and we impose appeal costs of \$1,650.47.⁸³

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

⁸¹ *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 16) (considering whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain).

⁸² Interest shall accrue from August 31, 2013, the last day of the review period for Mehringer's short-term mutual fund trades, until paid. The prejudgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *See Guidelines*, at 11.

⁸³ Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.