BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Blair C. Mielke Newburgh, IN, and Frederick W. Shultz Newburgh, IN, Respondents.	DECISION Complaint No. 2009019837302 Dated: July 18, 2014

Registered representatives engaged in undisclosed outside business activities, participated in undisclosed private securities transactions, caused the firm to maintain inaccurate books and records, made misstatements on firm compliance questionnaires, misused customer funds, failed to appear timely for on-the-record testimony, and failed to respond completely and timely to requests for information and documents.

Held, findings affirmed, in relevant part, and sanctions modified.

Appearances

For the Complainant: Dale A. Glanzman, Esq., Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Pro Se

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Decision

Blair C. Mielke and Frederick W. Shultz appeal a Hearing Panel decision issued on September 20, 2012. The Hearing Panel found that Mielke and Shultz engaged in undisclosed outside business activities, participated in undisclosed private securities transactions, and made misstatements on their firm's compliance questionnaires. The Hearing Panel also concluded that Mielke failed to respond completely and timely to FINRA's requests for information and documents, and Shultz caused his firm to maintain inaccurate books and records, misused customer funds, and failed to appear timely for on-the-record testimony.

The Hearing Panel barred Mielke and Shultz for their undisclosed outside business activities and private securities transactions and imposed a separate bar for their violations of FINRA Rule 8210. The Hearing Panel also barred Mielke for his misstatements on his firm's compliance questionnaires, but it declined to assess additional sanctions against Shultz in light of the bars that it had imposed for the other causes of action.

After an independent review of the record, we affirm, in relevant part, the Hearing Panel's findings. We also affirm, with one exception, the sanctions that the Hearing Panel imposed. Specifically, we have decided to impose sanctions for Shultz's misstatements on his firm's compliance questionnaire, where the Hearing Panel declined to do so. As explained later in this decision, we conclude that a bar is the appropriate sanction for that particular cause of action.

I. Background

Mielke entered the securities industry in September 1988, when he registered as an Investment Company Products/Variable Contracts Limited Representative with a FINRA firm. Mielke remained registered with FINRA continuously from September 1988 until the termination of his most recent association in November 2009. During the relevant period, Mielke was registered as an Investment Company Products/Variable Contracts Limited Representative with Brookstone Securities, Inc. Mielke joined Brookstone Securities in June 2007. Brookstone Securities discharged Mielke in November 2009 because of the conduct at issue here.

Shultz knew Mielke and his parents since Mielke was a child. Mielke encouraged Shultz, a retired mathematician, to enter the securities industry, which Shultz did in 2006. Specifically, Shultz registered as an Investment Company Products/Variable Contracts Limited Representative with a FINRA firm in November 2006. Shultz remained associated with that firm until June 2007, when he followed Mielke to Brookstone Securities. Shultz was registered with Brookstone Securities from June 2007 to November 2009. Brookstone Securities also discharged Shultz for the conduct at issue in this case.

II. Procedural History

This case results from a cause examination of the private securities transactions at issue here. In April 2011, FINRA's Department of Enforcement filed an eight-cause complaint against Mielke, Shultz, and two other registered representatives, Thomas J. Gorter and Michael L. Trier.

The first cause of action alleged that Mielke and Shultz engaged in undisclosed outside business activities, in violation of NASD Rules 3030 and 2110 and FINRA Rule 2010. The second cause of action alleged that Mielke, Shultz, Gorter, and Trier participated in undisclosed private securities transactions, in violation of NASD Rules 3040 and 2110 and FINRA Rule 2010. The third cause of action alleged that Shultz's and Gorter's participation in the private securities transactions caused Brookstone Securities to maintain inaccurate books and records, in violation of NASD Rule 3110 and FINRA Rule 2010. The fourth cause of action alleged that Mielke and Shultz made misstatements concerning their outside business activities and private securities transactions on Brookstone Securities' compliance questionnaires, in violation of NASD Rule 2110 and FINRA Rule 2010.

The fifth cause of action alleged that Shultz misused customer funds through his participation in the private securities transactions, in violation of FINRA Rules 2150 and 2010. The sixth cause of action alleged that Mielke failed to respond completely and timely to FINRA's requests for information and documents, in violation of FINRA Rules 8210 and 2010. The seventh cause of action alleged that Shultz failed to appear timely for on-the-record testimony, in violation of FINRA Rules 8210 and 2010. Finally, the eighth cause of action alleged that Gorter failed to respond timely to FINRA's requests for information and documents and failed to appear timely for on-the-record testimony, in violation of FINRA Rules 8210 and 2010.

A four-day hearing took place in Chicago in March 2012. Thirteen witnesses testified at the hearing, including Mielke, Shultz, Gorter, Trier, representatives from Brookstone Securities, and individuals that invested funds with the respondents. The Hearing Panel issued its decision in September 2012.[1] This appeal followed.

III. Discussion

The central allegation in this case is that Mielke and Shultz participated in private securities transactions without written notice or written approval. Each of the other causes of action at issue derive from Mielke's and Shultz's participation in the undisclosed private securities transactions and their subsequent delays in responding to FINRA's attempts to obtain

[1] The Hearing Panel imposed three separate bars for Gorter's misconduct – participating in undisclosed private securities transactions, causing Brookstone Securities to maintain inaccurate books and records, failing to respond timely to FINRA's requests for information and documents, and failing to appear timely for on-the-record testimony. Gorter appealed the Hearing Panel's decision. While this matter was pending before us, Gorter and Enforcement offered a proposed settlement, which we reviewed and accepted. As a result of the settlement, the Hearing Panel's findings and sanctions, as they relate to Gorter, are no longer before us.

The Hearing Panel suspended Trier in all capacities for 30 business days and fined him $2,500 for participating in undisclosed private securities transactions, which was the only cause of action alleged against Trier. Neither Trier nor Enforcement appealed the Hearing Panel's decision. We decline to exercise our discretion in this instance to review findings or sanctions that neither party appealed.

information concerning the transactions. We therefore begin by addressing the findings of fact and conclusions of law related to the private securities transactions.

A. Mielke and Shultz Participated in Private Securities Transactions Without the Required Written Notice or Written Approval

The Hearing Panel found that Mielke and Shultz promoted and sold nonvoting membership interests in a limited liability company, Midwest Investment Partners, LLC, to several investors, including customers of their firm, Brookstone Securities. The Hearing Panel determined that Mielke and Shultz participated in the transactions from January 2008 until October 2009,[2] and did so without the required written notice or written approval. The Hearing Panel concluded that Mielke's and Shultz's conduct violated NASD Rules 3040 and 2110 and FINRA Rule 2010.[3] We affirm.

1. NASD Rule 3040

NASD Rule 3040 prohibits any person associated with a firm from participating in any manner in private securities transactions outside the regular course or scope of his employment without providing prior written notice to the firm. NASD Rule 3040(a), (b), (e)(1). If an associated person is compensated for the transactions, he must receive the firm's written permission before engaging in the transactions. NASD Rule 3040(c)(1).

2. Midwest Investment Partners' Offering

In January 2008, Mielke and another individual, a non-associated person, formed Midwest Investment Partners as a limited liability company. Mielke is the company's President and Chief Executive Officer, and Shultz is the Chief Financial Officer. According to Midwest Investment Partners' offering documents,[4] the company was organized under, and maintained its

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[2] The Hearing Panel found that Mielke invited Shultz to join Midwest Investment Partners in September 2008 and stated that Shultz participated in the transactions from September 2008 through October 2009.

[3] We discuss the rules in effect when the conduct occurred. NASD Rule 2110, FINRA's ethical standards rule, states that, "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." In December 2008, NASD Rule 2110 was transferred without change to FINRA's consolidated rulebook and codified as FINRA Rule 2010. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50, at *32-33 (Oct. 2008). A violation of any FINRA rule, including NASD Rule 3040, violates NASD Rule 2110 and FINRA Rule 2010. *See Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999) ("[A] violation of another Commission or NASD rule or regulation, including Conduct Rule 3040, constitutes a violation of Conduct Rule 2110."). NASD Rule 0115 subjects associated persons to NASD Rule 2110, and FINRA Rule 0140 subjects associated persons to FINRA Rule 2010.

[4] The record contains various drafts of Midwest Investment Partners' offering documents. Although the record does not specify which version of the offering documents each investor

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principal place of business in, Indiana. The offering documents also stated that the company was formed primarily as an investment vehicle, to "invest in fixed income financial instruments either: (1) indirectly by investing in funds which invest in the instruments; or (2) directly by participating in the bond underwriting process." Midwest Investment Partners disclosed that, in this specific instance, the offering's proceeds would be used to invest in a hedge fund, Vestium Equity Fund, LLC.[5]

Midwest Investment Partners intended to raise this investment capital by offering "up to $100 [million] of [the company's] nonvoting membership interests to 'accredited investors,' as that term is defined in Rule 501 promulgated under the Securities Act of 1933, as amended." The offering documents stated that the minimum subscription amount from any investor was

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received, our review of the offering documents suggests that the differences among the drafts of the documents are immaterial to determine whether Mielke and Shultz participated in the private securities transactions at issue here. For purposes of our analysis, however, we will cite to the "final" version of Midwest Investment Partners' offering documents, which Brookstone Securities reviewed, and subsequently approved, in June and August 2009. *See infra* note 19.

[5] At the hearing, Mielke testified that Midwest Investment Partners also intended to use the proceeds from the offering to invest in a second hedge fund, Arcanum Equity Fund, LLC. Mielke testified that Vestium Equity Fund and Arcanum Equity Fund are "basically the same company" and explained that the hedge funds purchased and sold "medium term notes." Midwest Investment Partners' offering documents describe medium term notes as "debt securities issued by corporations, typically with a maturity ranging from [one] to 10 years, but which may have other maturities."

In December 2010, the Commission initiated a civil injunctive action against the managers of Vestium Equity Fund and Arcanum Equity Fund in Florida district court. *See Robert L. Buckhannon*, Litigation Release No. 21787, 2010 SEC LEXIS 4397, at *1 (Dec. 21, 2010). The Commission alleged that the hedge funds' managers used the hedge funds as part of a fraudulent offering scheme, which raised $34 million from 101 investors throughout the United States and Canada. *See id.* Vestium Equity Fund's and Arcanum Equity Fund's managers were barred as investment advisers as a result of the Commission's injunctive action. Neither Mielke nor Shultz was named as a defendant in the Commission's injunctive action, and the record supports they played no role in Vestium Equity Fund's or Arcanum Equity Fund's fraudulent offering.

Before the Commission initiated its injunctive action, Midwest Investment Partners transferred its entire investment in Vestium Equity Fund and Arcanum Equity Fund to a company called Shea Mining and Milling, LLC. Shea Mining and Milling mills precious metals. Mielke testified that he learned of Shea Mining and Milling from the managers of Vestium Equity Fund and Arcanum Equity Fund, but it is unclear whether the hedge fund managers played any role in the mining and milling company.

$250,000, but noted that "lesser amounts may be accepted."[6] The offering documents also explained that the individuals who purchased the membership interests in Midwest Investment Partners did so in a passive capacity and stressed that the "Manager" of Midwest Investment Partners was Harvest Midwest Group, LLC.

3. Harvest Midwest Group

Harvest Midwest Group is an Indiana-based limited liability company and a subsidiary of Harvest Holding Company, LLC (f/k/a Harvest Companies, LLC and Harvest Financial, Inc.).[7] Mielke is the President, Chief Executive Officer, and a Director of Harvest Holding Company. He owns 75 percent of Harvest Holding Company's stock. Shultz is Harvest Holding Company's Chief Financial Officer.[8] Shultz also is a Director of Harvest Holding Company and owns 5 percent of the company's stock.[9]

According to Midwest Investment Partners' offering documents, Harvest Midwest Group and the investors would split any profits received from the investment equally.[10] The offering documents also stated that Harvest Midwest Group has the "exclusive right and power" to manage Midwest Investment Partners' investments and to operate the company. Specifically, Harvest Midwest Group owns all of Midwest Investment Partners' "voting [i]nterests" and controls the company. The offering documents stress this point and note:

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[6] Several drafts of Midwest Investment Partners' offering documents state that the minimum subscription price was $500,000.

[7] We refer to Harvest Holding Company and its predecessors, Harvest Companies and Harvest Financial, collectively as "Harvest Holding Company." Several drafts of the offering documents list Shultz and Harvest Holding Company as the "Managers" of Midwest Investment Partners.

[8] Mielke testified that Shultz receives $1,000 per month to serve as Harvest Holding Company's Chief Financial Officer.

[9] The record does not disclose who owns the remaining 20 percent of Harvest Holding Company.

[10] Several drafts of Midwest Investment Partners' offering documents state that the investors would receive 50 percent of the profits, but only after Midwest Investment Partners paid its expenses and donated the first 10 percent of profits to Harvest Foundation, Inc. Harvest Foundation is a tax-exempt subsidiary of Harvest Holding Company.

> Investors acquiring the [i]nterests offered hereby, which are nonvoting, will have no right to participate in the management of [Midwest Investment Partners], to act for the [c]ompany, or to vote on [c]ompany matters . . . . The officers and directors of the Manager [Harvest Midwest Group] are Blair C. Mielke and Frederick W. Shultz.[11]

4. Mielke and Shultz Violated NASD Rule 3040

To conclude that Mielke and Shultz violated NASD Rule 3040, we necessarily must find: (1) that the membership interests in Midwest Investment Partners constitute "private securities transactions;" (2) that Mielke and Shultz each "participated" in the transactions; and (3) that Mielke and Shultz participated in the transactions without providing Brookstone Securities with written notice. NASD Rule 3040(a)-(b); *see Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *11-12 (Nov. 8, 2006) (setting out the factors to establish a violation of NASD Rule 3040). We also will analyze whether Mielke and Shultz actually received, or had the potential to receive, "selling compensation," which is the factor necessary to determine whether Mielke and Shultz also required Brookstone Securities' written approval prior to participating in the private securities transactions. NASD Rule 3040(c)(1); *see Keyes*, 2006 SEC LEXIS 2631, at *11.

a. Mielke's and Shultz's Activities in Conjunction with the Offering Constitute Private Securities Transactions

NASD Rule 3040 defines "private securities transaction" as "any securities transaction outside the regular course or scope of an associated person's employment with a member, including, though not limited to, new offerings of securities which are not registered with the Commission." NASD Rule 3040(e)(1). There is no question that Mielke's and Shultz's activities in conjunction with Midwest Investment Partners' offering were outside the scope of their employment with Brookstone Securities.

The membership interests promoted and sold in conjunction with Midwest Investment Partners' offering also constitute securities under the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act").[12] Specifically, the membership

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[11] Several drafts of the offering documents refer to the "nonvoting membership interests" as "non-operating membership interests." The non-operating membership interests, similar to the nonvoting membership interests, have no voting or management rights associated with it.

[12] The term "security" means:

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interests are "investment contracts," which fall squarely within the definition of a security under the Securities Act and Exchange Act. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-299 (1946) (explaining that there is an investment contract, and consequently a security, where there is: (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits, (4) to come solely from the efforts of the promoter or a third party).

In this instance, each investor invested money in a common enterprise, Midwest Investment Partners, and did so to earn profits, which would be derived exclusively from the investment efforts of Mielke, Shultz, and the other individuals who managed Midwest Investment Partners. Accordingly, Midwest Investment Partners' membership interests are securities.[13] *See SEC v. Parkersburg Wireless LLC*, 991 F. Supp. 6, 8 (D.D.C. 1997) (concluding that "memberships" in a wireless cable limited liability company constitute securities); *Don A. Long*, Admin. Proceeding No. 3-5788, 1980 SEC LEXIS 2352, at *32-33 (June 30, 1980) (finding that membership interests in investment clubs are investment contracts and securities); *Dep't of Enforcement v. De Vietien*, Complaint No. 2006007544401, 2010 FINRA Discip. LEXIS 45, at *14-26 (FINRA NAC Dec. 28, 2010) (applying the investment contracts test and determining that nonvoting membership interests in a limited liability company constitute securities).

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> [A]ny note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing . . . .

15 U.S.C. § 78c(a)(10) (emphasis added). The definition of a security under the Securities Act and Exchange Act is virtually identical and may be considered the same. *See United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 847 n.12 (1975).

[13] Although our independent application of the investment contracts test leads us to conclude that Midwest Investment Partners' membership interests are securities, we also consider it persuasive that the company's offering documents identify the interests as securities under both federal and state law.

b. Mielke and Shultz Each Participated in the Transactions

We also conclude that Mielke and Shultz "participated" in the transactions. Mielke founded, and Mielke and Shultz owned and managed (through Harvest Midwest Group) Midwest Investment Partners, the investment vehicle for the private securities transactions at issue. Mielke and Shultz promoted and facilitated the sales of Midwest Investment Partners' membership interests to the investing public. Mielke also sold $1.1 million in membership interests to five individuals, at least two of whom were customers of Brookstone Securities.[14]

Danny Woosley, a former employee of Brookstone Securities who worked in the same branch office as Mielke and Shultz,[15] testified about Mielke's and Shultz's roles with regard to Midwest Investment Partners' offering. Woosley identified Mielke and Shultz as the managers of Midwest Investment Partners, and noted that Mielke marketed and sold the membership interests to his Brookstone Securities' customers.[16]

Woosley testified that Shultz "handled the money" and performed general office and accounting duties essential to the operation of Midwest Investment Partners. Woosley explained that Shultz reviewed and approved the investors' subscription agreements, calculated the earnings owed to each investor, and filed documents on behalf of Midwest Investment Partners with the Commission.

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[14] The Hearing Panel found that 31 investors purchased membership interests in Midwest Investment Partners between January 2008 and October 2009, and noted that Midwest Investment Partners raised a total of $4.62 million from the offering. The Hearing Panel attributed each of these 31 transactions to a specific respondent and determined that Gorter made 23 direct sales, Mielke made six direct sales, Trier made two direct sales, and Shultz did not make any direct sales.

After a review of the evidence, we amend the Hearing Panel's findings with regard to Mielke, and we find that Mielke made five direct sales, totaling $1.1 million. The five transactions are as follows: (1) CC ($100,000), (2) MD ($100,000), (3) HG ($300,000), (4) KL ($500,000), and (5) CM ($100,000). With regard to these five individuals, the record contains documentary evidence to support that CC and MD were customers of Brookstone Securities prior to purchasing the membership interests at issue. The record does not contain any evidence to determine whether the other three investors, HG, KL, and CM, were customers of Brookstone Securities when the transactions occurred, and as such, we will not make findings with regard to these investors.

[15] Woosley testified that he worked "for" Mielke. He stated, "I'm the low man on the totem pole. I just did whatever . . . Mielke asked me to do."

[16] Mielke testified that he conducted the due diligence on Vestium Equity Fund and Arcanum Equity Fund and explained that the "due diligence" included meetings with the managers of the hedge funds.

Mielke's and Shultz's activities with Midwest Investment Partners constitute participation within the meaning of NASD Rule 3040. *See Joseph Abbondante*, 58 S.E.C. 1082, 1099-1100 (2006) (finding that respondent participated in private securities transactions where the respondent solicited investors, provided information about the investment, and influenced the investors' decision to invest); *Gluckman*, 54 S.E.C. at 182 (noting that, "the reach of Conduct Rule 3040 is very broad, encompassing the activities of 'an associated person who not only makes a sale but who participates 'in any manner' in the transaction'"); *De Vietien*, 2010 FINRA Discip. LEXIS 45, at *27-28 (finding that respondent's management of company that promoted and sold membership interests violated NASD Rule 3040).

c. Mielke and Shultz Received Selling Compensation in Connection with the Private Securities Transactions

Mielke and Shultz also were entitled to "selling compensation" in connection with the private securities transactions, and consequently, had to obtain Brookstone Securities' written approval prior to participating in any private securities transaction. *See* NASD Rule 3040(e)(2). "Selling compensation" means "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions . . . rights of participation in profits . . . as a general partner or otherwise . . . or expense reimbursements."

The record in this case demonstrates that Mielke and Shultz held "rights of participation in profits" because they maintained an interest in Midwest Investment Partners through their ownership of Harvest Holding Company, and that Mielke received "commissions" as compensation for his sales of the membership interests to the investors. Mielke and Shultz therefore had to obtain Brookstone Securities' written approval. *See generally Dep't of Enforcement v. Siegel*, Complaint No. C05020055, 2007 NASD Discip. LEXIS 20, at *44 (NASD NAC May 11, 2007), *aff'd*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459 (Oct. 6, 2008) (explaining that an associated person is subject to sanctions for undisclosed private securities transactions even if the person does not profit monetarily from participating in the transactions).

d. Mielke and Shultz Participated in the Private Securities Transactions Without Written Notice and Written Approval

Having found that Mielke and Shultz participated in private securities transactions, we turn to the issue that is the central focus of this appeal, whether Mielke and Shultz provided Brookstone Securities with written notice,[17] and obtained the firm's written approval, prior to participating in the transactions. NASD Rule 3040(b)-(c)(1).

[17] Brookstone Securities' written supervisory procedures required that registered representatives provide written notice to the firm's compliance department prior to participating in any private securities transaction. The procedures explained that the written notice should describe the proposed transactions in detail and disclose whether compensation would be received.

The Hearing Panel found that Mielke and Shultz provided notice and obtained approval to participate in the private securities transactions when Brookstone Securities approved Midwest Investment Partners' selling agreement in June 2009, which was 17 months after the sales of the membership interests began. In reaching this conclusion, the Hearing Panel credited the testimony of the witnesses from Brookstone Securities – Antony Turbeville, the firm's President, and David Locy,[18] the firm's Chief Compliance Officer and the principal responsible for reviewing and approving private placements.

Mielke and Shultz assert that the Hearing Panel erred and urge us to reject Turbeville's and Locy's testimony.[19] Specifically, they claim that the totality of the evidence in the record supports that they gave Brookstone Securities oral and written notice in mid-2007, and received the firm's oral and written approval in January 2008, before the first sale occurred.[20] The record,

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[18] Locy served as Brookstone Securities' Chief Compliance Officer from June 2005 until June 2008, at which point he began serving as the firm's President. In August 2009, Locy became Brookstone Securities' Chief Executive Officer, while maintaining his role as the firm's President.

[19] Turbeville testified that he learned of Midwest Investment Partners and the offering in December 2008, when he met with Mielke, Shultz, Gorter, and Mielke's attorney at an Orlando airport to discuss the matter. During the meeting, Turbeville directed Mielke, Shultz, and Gorter to submit their proposal in writing to Locy. Locy testified that he learned about the offering after Turbeville's meeting in Orlando, and that he received a draft of the private placement memorandum in January or February 2009. Locy stated that the draft private placement memorandum was inadequate, and that he informed Mielke that the draft private placement memorandum was incomplete and contained insufficient disclosures. Locy recommended that Mielke find an attorney familiar with securities offerings to assist with revisions to the offering documents. Mielke gave Locy a revised private placement memorandum, operating agreement, selling agreement, and subscription agreement in June 2009.

On June 26, 2009, Locy approved and signed the selling agreement, which authorized representatives registered with Brookstone Securities to sell membership interests in Midwest Investment Partners. Locy approved the private placement memorandum for distribution on August 13, 2009. Turbeville and Locy insisted, and the Hearing Panel credited, that Brookstone Securities had no knowledge that Mielke and Shultz began participating in the private securities transactions in January 2008, and noted that when the firm learned of this fact in November 2009, Brookstone Securities immediately fired Mielke and Shultz for participating in the unapproved sales.

[20] Mielke and Shultz argue that we should reject Turbeville's and Locy's testimony because Turbeville and Locy each has been the subject of FINRA disciplinary proceedings. Turbeville's and Locy's conduct on other occasions is irrelevant. It is Mielke's and Shultz's conduct that is under review in this case, and the Hearing Panel found that Turbeville and Locy credibly testified about Mielke's and Shultz's participation in the private securities transactions. *See, e.g.*, *Dep't of Enforcement v. Davidofsky*, Complaint No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *40 n.41 (FINRA NAC April 26, 2013) (rejecting respondent's blame-shifting arguments); *Dist. Bus. Conduct Comm. v. Aspen Capital Group*, Complaint No. C3A940064,

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however, offers no support for Mielke's and Shultz's position and provides us with no basis to overturn the Hearing Panel's credibility determinations. *See John Montelbano*, 56 S.E.C. 76, 89 (2003) ("[C]redibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference and can be overcome only where the record contains substantial evidence for doing so.").

On appeal, Mielke and Shultz do not assert that they provided written notice, and obtained written approval, to participate in the private securities transactions.[21] To the contrary, Mielke's and Shultz's appeal present a myriad of post hoc explanations for their failures to comply with NASD Rule 3040.[22] For example, Mielke and Shultz assert that they provided Brookstone Securities with oral notice of the private securities transactions, and the firm orally approved the transactions through Locy. Specifically, Mielke testified that he provided Brookstone Securities with oral notice in the "summer of 2007,"[23] and that Locy told Mielke's

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1997 NASD Discip. LEXIS 53, at *11 (NASD NBCC Sept. 19, 1997) (explaining that third-party's potential wrongdoing had no bearing on respondent's misconduct).

[21] Shultz testified that he had no direct information concerning the issue of notice or approval of the transactions, but worked under the "assumption" that Brookstone Securities knew about the transactions and had approved them. To the extent Shultz attempts to claim Mielke's purported notice and approval as his own, it is unavailing. NASD Rule 3040 applies to all persons associated with firms and requires each person who participates in a private securities transaction to provide prior written notice to his firm and, where the individual receives or may receive selling compensation, obtain the firm's approval. *See Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *18-19 (May 13, 2011). Shultz had an independent obligation to provide Brookstone Securities with written notice of his private securities transactions and obtain written approval prior to participating in the transactions. *See id.*; *cf. Gluckman*, 54 S.E.C. at 184 n.29 (explaining that "respondent cannot shift responsibility for compliance to supervisors or the NASD").

[22] Mielke and Shultz did not advance many of these "explanations" in the proceedings before the Hearing Panel, and consequently, they failed to preserve their ability to raise them during this appeal. *See Mayer A. Amsel*, 52 S.E.C. 761, 767 (1996) (holding that arguments are waived where raised for the first time on appeal).

[23] Mielke testified that he told Turbeville about Midwest Investment Partners when he joined Brookstone Securities in June 2007, that he discussed it in conference calls with the firm's compliance department, and that he provided Brookstone Securities with the results of due diligence he had performed. Mielke also testified that he requested copies of the due diligence materials that he had reviewed from his attorney, but the attorney refused to provide the documents.

attorney (not Mielke) that Brookstone Securities approved the transactions in January 2008.[24] Even if true, oral notice and oral approval, however, do not satisfy the requirements of NASD Rule 3040. *See Friedman*, 2011 SEC LEXIS 1699, at *15-16 (rejecting applicant's claims that oral notice satisfies NASD Rule 3040). NASD Rule 3040 is unequivocal and states that the associated person shall provide his or her firm with "*written notice*" and shall obtain approval for the transactions "*in writing*." (emphasis added).

Mielke and Shultz argue that Brookstone Securities received constructive notice and provided constructive approval of the private securities transactions because Midwest Investment Partners made public filings with the Commission, and Brookstone Securities would have reviewed those filings while conducting its due diligence on the company. Constructive notice and constructive approval, similar to oral notice and oral approval, does not satisfy the requirements of NASD Rule 3040.[25] The rule requires actual written notice and written approval prior to an associated person's participation in any private securities transaction. NASD Rule 3040(b)-(c)(1). We also note that the September 2, 2009 filing upon which Mielke and Shultz rely was prepared nearly two years after Mielke and Shultz began promoting and selling the membership interests and three months after Brookstone Securities approved the transactions.[26]

Mielke and Shultz claim that they submitted a draft of Midwest Investment Partners' private placement memorandum to Brookstone Securities in November 2007, and submission of the draft satisfies the written notice requirement of NASD Rule 3040. It does not. As initial matter, we note that the Hearing Panel found that Locy credibly testified that he received the draft private placement memorandum in January or February 2009, more than one year after Mielke and Shultz began promoting and selling the membership interests. *See* NASD Rule 3040(b) (explaining that the associated person should provide written *prior to* participating in the transactions). We also find that the submission of the private placement memorandum, standing alone, does not contain all of the information necessary for written notice under the rule. NASD Rule 3040 requires that the associated person "describ[e] in detail the proposed transaction and the person's proposed role therein and stat[e] whether he has received or may receive selling compensation in connection with the transaction" NASD Rule 3040(b). The draft private placement memorandum did not meet these criteria.[27]

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[24] Mielke admitted that Locy told him that the private placement memorandum was inadequate, but he testified that Locy personally approved Mielke's participation in the private securities transactions in a telephone conversation in January 2008.

[25] For similar reasons, we reject Mielke's and Shultz's assertion that the use of their Brookstone Securities' email accounts to handle business associated with Midwest Investment Partners and the offering satisfies the notice requirements of NASD Rule 3040.

[26] The public filing that Midwest Investment Partners filed with the Commission, which is in the record, states that the date of the first sale in the offering is July 9, 2009. Mielke's first sale was in January 2008.

[27] Mielke and Shultz assert that there are emails between Mielke's attorney and Brookstone Securities that document Mielke's and Shultz's disclosure of the private securities transactions and Brookstone Securities' approval of the transactions. Mielke and Shultz failed to produce

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Mielke and Shultz also state that their responses on Brookstone Securities' "Outside Business Interests Schedules" provided the firm with written notice of the private securities transactions, and they claim that the firm's signing of the schedules constituted written approval of the transactions. That is not the case. During the relevant period, Mielke and Shultz completed Outside Business Interests Schedules in April 2008 and April 2009.[28] The schedules that Mielke and Shultz submitted to Brookstone Securities in April 2008 did not mention anything about Midwest Investment Partners, Harvest Holding Company, or the offering. The schedules that Mielke and Shultz submitted in April 2009, which were completed and worded identically, stated that they were, "[i]n the planning stages of working with an investment group dealing in medium term notes." The schedules did not identify Midwest Investment Partners, Harvest Holding Company, or the offering, and failed to give Brookstone Securities any notice that Mielke and Shultz were promoting and selling membership interests in Midwest Investment Partners to the investing public, including customers of the firm. In addition, Turbeville's signing of the schedules on behalf of the firm merely acknowledges receipt of the schedules and does not evidence Brookstone Securities' written approval of the transactions.[29]

Finally, Mielke and Shultz argue that Brookstone Securities failed to meet the requirements of NASD Rule 3040 because the firm did not provide them with a written

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these emails because, as Mielke testified, his attorney refused his request for the documents. We therefore are unable to assess whether these emails satisfy the written notice and written approval requirements of NASD Rule 3040.

[28] Mielke completed an Outside Business Interests Schedule in October 2009, in which he identified "Midwest Investments (PPM)." Although Mielke disclosed his affiliation with Midwest Investment Partners on the schedule, he did not disclose his ownership interest in the company, the fact that he was promoting and selling the membership interests, or the length of time he had been involved with the venture.

[29] On November 28, 2012, Gorter filed, and Mielke and Shultz joined, a motion for leave to introduce additional evidence pursuant to FINRA Rule 9346(b). Specifically, Mielke and Shultz sought to introduce a request for documents that that their attorney submitted to FINRA pursuant to the Freedom of Information Act (FOIA) and FINRA's denial of that request. Mielke and Shultz asserted that the additional evidence clarified the origin of the draft offering documents, demonstrate that Brookstone Securities produced the documents to FINRA, and evidence that Brookstone Securities had notice of, and approved, the private securities transactions at issue.

The National Adjudicatory Council Subcommittee empanelled to consider this matter denied Mielke's and Shultz's motion to adduce the evidence. The Subcommittee found that the document request and FINRA's response to the request are not relevant or material. The Subcommittee noted that the proposed evidence did not clarify the origin of the draft offering documents, that there was evidence corroborating the Enforcement attorney's attestation that the source of the draft offering documents was Shultz, and that there was ample evidence in the record to determine whether Mielke and Shultz participated in undisclosed private securities transactions. We adopt the Subcommittee's ruling as our own.

disapproval of their participation in the offering. While we agree that NASD Rule 3040 does require firms to disapprove of an associated person's private securities transactions in writing, the written disapproval is contingent upon the associated person's provision of written notice, and Mielke and Shultz failed to provide written notice in this case. *See* NASD Rule 3040(c)(1)(B) ("In the case of a transaction in which an associated person has received or may receive selling compensation, a member which has received notice . . . shall advise the associated person in writing stating whether the member . . . disapproves the person's participation in the proposed transaction.).

Indeed, based on the record and the Hearing Panel's credibility determinations, we find that Mielke and Shultz did not provide Brookstone Securities with written notice of the private securities transactions, that Brookstone Securities was unaware that Mielke and Shultz had been promoting and selling Midwest Investment Partners' membership interests for over a year when they submitted the draft offering documents for approval, and that Brookstone Securities did not provide written approval of Mielke's and Shultz's participation in the transactions until June 2009, 17 months after the sales of the membership interests began.

* * *

The record establishes that Mielke and Shultz participated in private securities transactions without the required written notice or written approval. We therefore affirm the Hearing Panel's determination that Mielke and Shultz violated NASD Rules 3040 and 2110 and FINRA Rule 2010.

B. Mielke and Shultz Engaged in Undisclosed Outside Business Activities

The Hearing Panel found that Mielke and Shultz owned and managed Midwest Investment Partners, received compensation for their activities with the company, and failed to provide Brookstone Securities with prompt written notice of the activities. The Hearing Panel concluded that Mielke and Shultz engaged in undisclosed outside business activities and violated NASD Rules 3030 and 2110 and FINRA Rule 2010.[30] We affirm.

[30] A violation of NASD Rule 3030 constitutes a violation of FINRA Rule 2010. *See Kent M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491, at *18 (Dec. 20, 2011) (finding that violation of NASD Rule 3030 violated just and equitable principles of trade and the predecessor to FINRA Rule 2010).

The Hearing Panel found that Shultz engaged in undisclosed outside business activities between April 2009 and October 2009, and that his conduct violated NASD Rule 3030 and FINRA Rule 2010. The Hearing Panel found that Mielke's undisclosed outside business activities dated back to April 2008 and violated NASD Rule 2110, in addition to NASD Rule 3030 and FINRA Rule 2010. The Hearing Panel noted that the Outside Business Interest Schedule that Shultz completed in April 2008 was not inaccurate because he did not join Midwest Investment Partners until September 2008.

1. NASD Rule 3030

NASD Rule 3030 governs outside business activities and prohibits an associated person from being employed by, or accepting compensation from, any other person as a result of any business activity outside the scope of the associated person's employment with the member, unless the associated person provides prompt written notice to the member. *See* NASD Rule 3030.

2. Mielke and Shultz Failed to Disclose Their Ownership and Management of Midwest Investment Partners

In April 2008 and April 2009, respectively, Mielke and Shultz completed Brookstone Securities' annual disclosure of outside business activities, the Outside Business Interests Schedule.[31] Although the schedule required that Mielke and Shultz disclose all of their outside business activities, neither Mielke nor Shultz provided any information concerning their employment with, or receipt of compensation from, Midwest Investment Partners.[32] There is no mention of Midwest Investment Partners or Harvest Holding Company on the forms that they completed in April 2008, and in April 2009, Mielke and Shultz state only that they are "working with an investment group dealing in medium term notes."

The record, however, demonstrates that Mielke and Shultz owned and managed Midwest Investment Partners while registered with Brookstone Securities, received compensation for doing so, and failed to disclose their outside business activities to the firm. Consequently, Mielke violated NASD Rules 3030 and 2110 and FINRA Rule 2010, and Shultz violated NASD Rule 3030 and FINRA Rule 2010.

C. Shultz Caused Brookstone Securities to Maintain Inaccurate Books and Records

The Hearing Panel found that Shultz failed to ensure that the sales of Midwest Investment Partners' membership interests were properly recorded in Brookstone Securities' books and records, once the firm approved the transactions in June 2009. The Hearing Panel found that Shultz's failure caused Brookstone Securities to maintain inaccurate books and records, and concluded that Shultz violated NASD Rule 3110 and FINRA Rule 2010.[33] We affirm.

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[31] The Hearing Panel found that Mielke's and Shultz's violation of NASD Rule 3030 involved "false" statements on the Outside Business Interests Schedules. We consider Mielke's and Shultz's statements on the schedules under cause four (Misstatements on Firm Compliance Questionnaires).

[32] As previously noted, Mielke and Shultz received compensation as the owners of Midwest Investment Partners and Harvest Holding Company, and Shultz received a monthly salary for his financial management of Midwest Investment Partners. Gorter reinforced this fact, stating that Midwest Investment Partners provided the "bulk" of Mielke's income.

[33] An associated person's failure to comply with NASD Rule 3110 violates FINRA Rule 2010's requirement that members observe high standards of commercial honor and just and

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1. NASD Rule 3110

NASD Rule 3110 requires firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by SEC Rule 17a-3. The record keeping format, medium, and retention period shall comply with Rule 17a-4" Exchange Act Rules 17a-3 and 17a-4 require member firms to make and keep current certain books and records relating to their business activities. *See* 17 C.F.R. § 240.17a-3(a)(6)(i) (2014), § 240.17a-4(b)(1) (2014). Causing a firm to enter false information in its books or records violates NASD Rule 3110. *See Dep't of Market Regulation v. Burch*, Complaint No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *38-40 (FINRA NAC July 28, 2011). The record demonstrates that Shultz caused Brookstone Securities to maintain inaccurate books and records, and that Shultz violated NASD Rule 3110.

2. Shultz Did Not Route Sales Documentation to Brookstone Securities

Shultz was the Chief Financial Officer of Midwest Investment Partners and the individual responsible for reviewing and approving investors' documentation. Once Brookstone Securities approved the sales of the membership interests to the investing public and its customers in June 2009, it was incumbent upon Shultz to ensure that Brookstone Securities received documentation of the sales to record the sales.

In nine transactions between July and October 2009, investors purchased over $1.47 million of Midwest Investment Partners' membership interests. Shultz did not route any of the sales documentation to Brookstone Securities. Shultz therefore caused Brookstone Securities to maintain inaccurate books and records and prevented the firm's books and records from reflecting basic, yet essential, information about the sales of Midwest Investment Partners' membership interests, information such as the investors' names, the dates and amounts of the investments, and the names of the registered representatives that solicited, sold, and processed the sale.

On appeal, Shultz argues that he is not liable for the violation because Brookstone Securities did not direct him to route the sales documentation to the firm's main office. Specifically, Shultz asserts that Brookstone Securities' selling agreement with Midwest Investment Partners did not contemplate the handling of sales documentation.[34] Shultz's argument misses the point. The routing of customer and sales documentation to a firm's main

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equitable principles of trade in the conduct of their business. *See, e.g., Fox & Co. Inv., Inc.*, 58 S.E.C. 873, 890-91 (2005).

[34] We note, however, that Brookstone Securities' written supervisory procedures stressed that all approved private securities transactions should be recorded in the firm's books and records.

office for processing and recording is a matter of due course, which is a basic requirement of any registered representative's duties.

The record demonstrates that Shultz was primarily responsible for Brookstone Securities' inaccurate books and records, and that he should be held accountable for the violation. His purported (and belated) claims of ignorance provide him with no basis for relief. *See ACAP Financial, Inc.*, Exchange Act Release No. 70046, 2013 SEC LEXIS 2156, at *82 (July 26, 2013) (rejecting respondent's claims of lack of understanding and ignorance of FINRA's rules); *Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *40 n.41 (rejecting respondent's blame-shifting arguments). Shultz caused Brookstone Securities to maintain inaccurate books and records, and we affirm the Hearing Panel's determination that Shultz violated NASD Rule 3110 and FINRA Rule 2010.

D. Mielke and Shultz Made Misstatements on Brookstone Securities' Compliance Questionnaires

The Hearing Panel found that Mielke and Shultz made misstatements on Brookstone Securities' compliance questionnaires when they failed to disclose their activities with Midwest Investment Partners on the firm's Outside Business Interests Schedules. The Hearing Panel noted that Mielke made misstatements on the schedule that he completed in April 2008,[35] and that Mielke and Shultz made misstatements on the schedules that they completed in April 2009. The Hearing Panel concluded that Mielke's misstatements in April 2008 violated NASD Rule 2110, and that Mielke's and Shultz's misstatements in April 2009 violated FINRA Rule 2010. We affirm.

1. NASD Rule 2110 and FINRA Rule 2010

FINRA Rule 2010 and, its predecessor, NASD Rule 2110 are FINRA's ethical standards rules. These ethical rules require that associated persons observe high standards of commercial honor and just and equitable principles of trade. The reach of NASD Rule 2110 and 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). NASD Rule 2110 and FINRA Rule 2010 apply broadly to all business-related misconduct, regardless of whether the misconduct involves securities. *See id*. The principal consideration of NASD Rule 2110 and FINRA Rule 2010 is whether the misconduct "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).

A registered representative's failure to disclose material information to his firm violates NASD Rule 2110 and FINRA Rule 2010 and is misconduct that calls into question the registered representative's "ability to comply with regulatory requirements necessary for 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

[35] The Hearing Panel found that Shultz joined Midwest Investment Partners in September 2008, and dismissed Enforcement's allegation that Shultz made misstatements on the Outside Business Interests Schedule that he completed in April 2008. *See supra* note 30.

May 7, 2003); *cf. Dep't of Enforcement v. Skiba*, Complaint No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13 (FINRA NAC Apr. 23, 2010) (holding that registered representative's submission of false and misleading forms to his member firm violated NASD Rule 2110). The record demonstrates that Mielke and Shultz made misstatements on Brookstone Securities' compliance questionnaires, that Mielke violated NASD Rule 2110, and that Mielke and Shultz violated FINRA Rule 2010.

2. Mielke's and Shultz's Responses to Brookstone Securities' Outside Business Interests Schedules Were False

Mielke completed an Outside Business Interests Schedule in April 2008, but did not include any information on the schedule about Midwest Investment Partners, Harvest Holding Company, or the offering. Mielke and Shultz each completed Outside Business Interests Schedules in April 2009. In that instance, they each wrote, "in the planning stages of working with an investment group dealing in medium term notes."[36] The information that Mielke provided on the Outside Business Interests Schedule in April 2008, and that Mielke and Shultz provided in April 2009, was patently false because Mielke's and Shultz's activities with Midwest Investment Partners were well beyond the "planning stages" at that point in time.[37]

When Mielke and Shultz completed the pertinent schedules, they each already owned interests in Midwest Investment Partners. Mielke was Midwest Investment Partners' President and Chief Executive Officer, and Shultz was the company's Chief Financial Officer, in charge of the company's financial operations. Indeed, when Mielke and Shultz completed the Outside Business Interests Schedules, Midwest Investment Partners already was a fully operational business, which had begun promoting and selling membership interests to the investing public.

The record therefore establishes that Mielke and Shultz made misstatements on Brookstone Securities' compliance questionnaires. *See Dep't of Enforcement v. Mullins*, Complaint Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *29-38 (FINRA NAC Feb. 24, 2011) (finding that respondents' misstatements on the firm's compliance questionnaires violated FINRA's rules), *aff'd*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *1 (Feb. 10, 2012). We therefore affirm the Hearing Panel's determination that Mielke violated NASD Rule 2110, and that Mielke and Shultz violated FINRA Rule 2010.

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[36] Shultz testified that he consulted with Mielke when he received the Outside Business Interests Schedule, and that he completed his own schedule and a schedule on behalf of Mielke. Shultz stated that the language on the schedule came from Mielke, and that he (Shultz) wrote exactly what Mielke told him to write.

[37] By April 2008, Midwest Investment Partners had raised $500,000 from the offering. By April 2009, the company had completed 22 transactions and raised more than $3.13 million in capital.

E. Shultz Misused Customer Funds

The Hearing Panel found that Shultz improperly withdrew investor funds that were intended for investment and diverted them to Midwest Investment Partners' Manager, Harvest Midwest Group. The Hearing Panel determined that Shultz's withdrawal and diversion of the investors' funds constituted a misuse of those funds, and that Shultz violated FINRA Rules 2150 and 2010.[38] We affirm.

1. FINRA Rule 2150

FINRA Rule 2150 states that, "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." An associated person misuses customer funds when he or she fails to apply the funds, or uses the funds for some purpose other than, as directed by the customer. *See Dep't of Enforcement v. Patel*, Complaint No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-26 (NASD NAC May 23, 2001). The record supports that Shultz violated FINRA 2150 because he improperly withdrew the investors' funds and diverted them to Harvest Midwest Group.

2. Shultz Misallocated Investor Funds to Harvest Midwest Group

As Midwest Investment Partners' Chief Financial Officer, one of Shultz's primary responsibilities was to calculate the profits that Midwest Investment Partners' investments in Vestium Equity Fund and Arcanum Equity Fund generated for the company. Once Shultz calculated the profits earned for a particular period, he also was responsible for dividing the profits between Midwest Investment Partners and the investors. Harvest Midwest Group received 50 percent of the profits, and the investors received the other 50 percent.

In September 2009 and October 2009, Midwest Investment Partners received $374,500 in investments from three customers – WH, LH, and MH. These funds were to be invested in Vestium Equity Fund. Shultz, however, did not invest the funds. Instead, he left the funds in Midwest Investment Partners' checking account, and in a series of withdrawals between September 2009 and November 2009, misallocated $147,000 to Harvest Midwest Group. Shultz described the payments to Harvest Midwest Group as "Part of [P]rofits" or "Part of Harvest Profits," but Vestium Equity Fund's investor statements for August 2009 through October 2009, show that the hedge fund generated no profits during the period. Before the Hearing Panel, Shultz conceded that he mistakenly paid Harvest Midwest Group more profits than he should have, and he attributed the mistake to "bad accounting."[39]

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[38] The misuse of a customer's funds or securities is contrary to the just and equitable principles of trade mandated under FINRA Rule 2010. *See Mission Sec. Corp.*, Exchange Act Release No. No. 63453, 2010 SEC LEXIS 4053, at *32-33 (Dec. 7, 2010).

[39] The Hearing Panel credited Shultz's testimony that the misallocation of the investors' funds was due to poor accounting practices.

Brad Pund, an accountant that Midwest Investment Partners hired to assist with the company's books and records, testified that he discovered the "misallocation" while reviewing Midwest Investment Partners' books and records in June 2010, and that he rectified the matter with a cash infusion from Harvest Holding Company to Midwest Investment Partners. Pund also testified that Shultz misused approximately $45,000 of the customers' funds because Midwest Investment Partners was entitled to receive $102,000 in accrued, but unpaid, profits.

The record demonstrates that Shultz improperly withdrew investor funds that should have been invested with Vestium Equity Fund and diverted those funds to Harvest Midwest Group as profits. We therefore affirm the Hearing Panel's determination that Shultz misused customer funds and violated FINRA Rules 2150 and 2010.

F. Mielke and Shultz Failed to Respond Completely and Timely to FINRA's Requests Made Pursuant to FINRA Rule 8210

The Hearing Panel found that Mielke failed to respond completely and timely to FINRA's requests for information and documents, and that Shultz failed to appear timely to provide on-the-record testimony. The Hearing Panel explained that Mielke's and Shultz's delays in responding to FINRA's requests for information, documents, and testimony violated FINRA Rules 8210 and 2010.[40] We affirm.

1. FINRA Rule 8210

FINRA Rule 8210 requires that associated persons provide information orally or in writing with respect to any matter involved in a FINRA investigation, complaint, examination, or proceeding. Because FINRA lacks subpoena power, it must rely on FINRA Rule 8210 "to police the activities of its members and associated persons." *Joseph Patrick Hannan*, 53 S.E.C. 854, 858-59 (1998). "Delay and neglect on the part of members and their associated persons undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12-13 (Apr. 11, 2008); *see also Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *24 (Nov. 8, 2007) (finding that applicant's refusal to respond to questions about his tax return violated NASD Rule 8210).

FINRA Rule 8210 is unequivocal and grants FINRA broad authority to obtain from an associated person information regarding matters that are involved in FINRA's investigation. *See Dep't of Enforcement v. Fawcett*, Complaint No. C9A040024, 2007 NASD Discip. LEXIS 2, at *11-12 (NASD NAC Jan. 8, 2007), *aff'd*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *1 (Nov. 8, 2007). Associated persons therefore must cooperate fully in providing FINRA with information and may not take it upon themselves to determine whether the information FINRA has requested is material. *See CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009) (stating that associated persons

[40] A violation of FINRA Rule 8210 constitutes a violation of FINRA Rule 2010. *See Dep't of Enforcement v. Reichman*, Complaint No. 200801201960, 2011 FINRA Discip. LEXIS 18, at *28-29 (FINRA NAC July 21, 2011).

"may not ignore NASD inquiries . . . nor take it upon themselves to determine whether information is material to an NASD investigation of their conduct").

2. Mielke Failed to Respond Completely and Timely to FINRA's Requests for Information and Documents

On January 14, 2010, Mielke provided on-the-record testimony to FINRA staff. After Mielke appeared for the interview, a FINRA examiner sent him a request for information and documents to follow-up on certain statements he made during the course of his testimony. For example, Mielke testified that Brookstone Securities was aware that he was selling interests in Midwest Investment Partners to the investing public, including customers of the firm, that the firm had authorized him to promote and sell the interests, and that correspondence between his attorney and representatives of Brookstone Securities substantiated his claim.

The examiner sent Mielke the request, which was made pursuant to FINRA Rule 8210, on January 22, 2010, and requested that Mielke produce copies of these "substantiating documents." The request detailed various categories of information and documents that Mielke should produce, including: (1) correspondence between Mielke's attorney and Brookstone Securities, (2) Mielke's personal bank account statements and tax returns, (3) documentation of the due diligence that Mielke testified that he had conducted prior to promoting the offering, and (4) a listing of investors that purchased the membership interests, including an accounting of the funds received from the investors and profits paid to the investors. The request required that Mielke respond on or before February 5, 2010. On February 15, 2010, after requesting (and receiving) an extension of the production deadline, Mielke's attorney produced copies of Midwest Investment Partners' offering documents and his tax returns for 2007 and 2008.[41]

For nearly two years, Mielke provided no additional information or documents in response to FINRA's request. Two months before the hearing began, however, Mielke's attorney submitted an email with a spreadsheet that contained investor and profit information. Mielke's attorney sent the email on January 18, 2012, and followed-up with several subsequent emails, containing information and documents, between January 19, 2012 and February 27, 2012. These subsequent emails provided FINRA with updated copies of Mielke's tax returns, investor logs, and disbursement information from Midwest Investment Partners.[42]

Notwithstanding the belated responses and document production, Mielke's response to FINRA's request for information and documents remains incomplete. Indeed, Mielke still has not fully satisfied the original request that the FINRA examiner sent to him on January 22, 2010. Mielke did not produce the correspondence between his attorney and Brookstone Securities, check registers, copies of interest payment checks to the investors, or documents pertaining to his compensation for selling the membership interests.

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[41] The extension allowed Mielke to produce several categories of documents on February 12, 2010, with the balance of the documents due on February 19, 2010.

[42] In one of these subsequent emails, Mielke incorrectly states that, "Gorter did not sell Midwest [Investment Partners'] membership interests."

3. Shultz Failed to Appear Timely for On-the-Record Testimony

On December 3, 2009, a FINRA examiner sent Shultz a letter pursuant to FINRA Rule 8210, requesting that he appear to provide on-the-record testimony in FINRA's Chicago district office on December 18, 2009. Soon thereafter, the examiner rescheduled Shultz's appearance to coincide with Mielke's scheduled appearance because Mielke and Shultz intended to travel together to provide the testimony. Shultz's appearance therefore was rescheduled to occur in Louisville on January 15, 2010, the day after Mielke was scheduled to provide his testimony.

When Mielke's testimony concluded on January 14, 2010, Mielke's attorney, who then was representing both Mielke and Shultz, stated that he would have a conflict of interest if he also represented Shultz during his testimony. The attorney withdrew, leaving Shultz without counsel, and the FINRA examiner adjourned Shultz's on-the-record testimony to enable him to retain new counsel. Shultz's on-the-record testimony was rescheduled to take place in FINRA's Chicago district office on March 5, 2010.

On March 3, 2010, however, Shultz's new counsel sent the examiner a letter, stating that Shultz would not appear for his on-the-record testimony. The letter explained that Shultz's "familial situation makes traveling extremely difficult,"[43] and noted that Harvest Holding Company was awaiting the results of an accounting audit that would render Shultz's testimony "moot." The attorney requested a postponement of Shultz's on-the-record testimony until FINRA received and reviewed the results of the audit.

The examiner responded to the letter from Shultz's attorney the following day. The examiner denied Shultz's request for a postponement and explained that Shultz's failure to appear to provide testimony may result in disciplinary action. Shultz's attorney replied. He stated that he had informed Shultz of the ramifications of failing to appear, and that Shultz had instructed him to advise FINRA that he would not attend and to provide him (Shultz) with the address of "where to send his license." Shultz did not appear to provide testimony on March 5, 2010. Shultz, however, decided to appear to testify nearly two years later.[44] He appeared to provide testimony on February 17, 2012, a month before the hearing before the Hearing Panel began.

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[43] At the hearing, Shultz testified that his daughter and wife have serious health issues that require his full-time attention.

[44] At the hearing, Shultz testified that he had decided to "surrender" his securities license and cease working in the securities industry instead of attending the interview in March 2010. He added that he later learned that the consequences of doing so would be "prejudicial" for him because he would be barred, and the bar would prevent him from continuing to be a managing member of Midwest Investment Partners. He therefore decided to appear and provide on-the-record testimony.

The record establishes that Mielke and Shultz failed to respond completely and timely to FINRA's requests for information, documents, and testimony. Indeed, Mielke and Shultz admit that they did not respond completely and timely to FINRA's requests made pursuant to FINRA Rule 8210. We therefore affirm the Hearing Panel's determination that Mielke and Shultz violated FINRA Rules 8210 and 2010.

IV. Sanctions

The Hearing Panel applied FINRA's Sanction Guidelines and barred Mielke for participating in undisclosed private securities transactions and engaging in undisclosed outside business activities, it imposed a second bar for his misstatements on Brookstone Securities' compliance questionnaires, and it assessed a third bar for his failure to respond completely and timely to FINRA's requests for information and documents.[45] The Hearing Panel barred Shultz for the undisclosed private securities transactions and outside business activities and imposed a separate bar for his failure to appear timely to provide on-the-record testimony. In light of the bars imposed for these three causes of action, the Hearing Panel declined to impose additional sanctions on Shultz for his other misconduct.[46]

As discussed in detail below, we affirm the sanctions that the Hearing Panel imposed on Mielke. We also affirm the Hearing Panel's sanctions for Shultz for each cause of action presented, except for the cause involving Shultz's misstatements on Brookstone Securities' compliance questionnaire. After a review of the evidence, we have decided to bar Shultz for his misstatements on the compliance questionnaire.[47]

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[45] *See FINRA Sanction Guidelines* (2013), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*]. In assessing the appropriate sanctions for Mielke's and Shultz's misconduct, we apply the applicable Guidelines in place at the time of this decision and consider the specific Guidelines related to each violation. *See id.* at 8. We also consult the General Principles Applicable to All Sanction Determinations and Principal Considerations in Determining Sanctions, which adjudicators consult in every disciplinary case. *See id.* at 2-7.

[46] The Hearing Panel noted that it would have imposed a $10,000 fine and a one-year suspension in all capacities for each of the three violations.

[47] On appeal, Mielke and Shultz direct us to sanctions that other individuals involved in this case received as a guide for our assessment of sanctions here. As an initial matter, we find that the sanctions that an individual may receive as the result of a negotiated settlement have no bearing on our determination of sanctions. We also reiterate our well-established precedent in this area and note that the appropriateness of a sanction depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action taken in other proceedings or comparison to other individuals who engaged in similar misconduct. *See PAZ Sec.*, 2008 SEC LEXIS 820, at *30-31; *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) ("The Commission is not obligated to make its sanctions uniform, so we will not compare this sanction to those imposed in previous cases.").

A. Private Securities Transactions and Outside Business Activities – Mielke and Shultz

We have determined that Mielke's and Shultz's undisclosed private securities transactions and outside business activities are related violations, and that any sanction that we impose would be designed and tailored to deter the same underlying misconduct. We therefore have decided to impose a unitary sanction for these two violations.[48] *See Dep't of Enforcement v. Fox & Co. Invs., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NASD NAC Feb. 24, 2005) ("[W]here multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve NASD's remedial goals . . . ."), *aff'd*, 2005 SEC LEXIS 2822, at *36.

To determine sanctions for private securities transactions, the Guidelines advise adjudicators to assess the extent of the selling away, including the dollar amount of sales, the number of customers, and the length of time over which the selling away occurred.[49] The Guidelines also direct adjudicators to consider 10 other principal considerations applicable to selling away violations, including: (1) whether the securities product violated federal or state securities laws; (2) whether the respondents had a proprietary or beneficial interest in the selling enterprise or issuer, and if so, whether the respondents disclosed the interest to customers; (3) whether the respondents attempted to create the impression that the firm sanctioned the activity; (4) whether the selling away resulted in injury to the investing public, and if so, the nature and extent of the injury; (5) whether the respondents sold away to customers of the firm; (6) whether the respondents gave oral notice of the proposed transaction, and if so, the firm's oral or written response, if any; (7) whether the respondents sold away after being instructed not to sell the securities product involved in the case; (8) whether the respondents sold directly to customers; (9) whether the respondents recruited other registered individuals to sell the product; and (10) whether the respondents misled the firm about the selling away or otherwise concealed the selling away activity.[50]

For private securities transactions involving sales over $1 million, the Guidelines recommend, as a starting point, a fine between $5,000 and $50,000, a suspension of at least one

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[48] Mielke and Shultz request that we aggregate all of their various violations to impose a unitary sanction. The circumstances of this case do not support aggregating all of Mielke's and Shultz's violations. *See Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 4) ("Depending on the facts and circumstances of a case, however, multiple violations may be treated individually such that a sanction is imposed for each violation. In addition, numerous, similar violations may warrant *higher* sanctions, since the existence of multiple violations may be treated as an aggravating factor." (emphasis added)).

[49] *See Guidelines*, at 14 (Private Securities Transactions).

[50] *See id.* at 14-15.

year, or a bar.[51] The Guidelines stress that the "presence of one or more mitigating or aggravating factors may either raise or lower the above-described sanctions."[52]

For engaging in undisclosed outside business activities, the Guidelines recommend a fine of $2,500 to $50,000.[53] The Guidelines also recommend a suspension of up to 30 business days, when the outside business activities do not include aggravating conduct.[54] Where there is aggravating conduct, however, the Guidelines suggest a suspension of up to one year.[55] In egregious cases, such as those involving a substantial volume of activity, the Guidelines recommend a longer suspension, or a bar.[56]

In assessing sanctions for cases involving undisclosed outside business activities, the Guidelines advise adjudicators to consider: (1) whether the outside activity involved customers of the firm; (2) whether the outside activity resulted directly or indirectly in injury to customers of the firm; (3) the duration of the outside activity, the number of customers, and the dollar volume of sales; (4) whether the respondent's marketing and sale of the product or service could have created the impression that the firm had approved the product or service; and (5) whether the respondent misled the firm about the existence of the outside activity or otherwise concealed the activity from the firm.[57] Mielke's and Shultz's undisclosed private securities transactions and outside business activities present several aggravating factors.

We consider Mielke's and Shultz's proprietary interests in Midwest Investment Partners, through their ownership of Harvest Holding Company, and find that their interests in the company constitute an aggravating factor.[58] Mielke founded, and with Shultz, owned and operated the selling enterprise at issue here. As the offering documents reinforce, the sole purpose of Midwest Investment Partners was to create investment opportunities for accredited investors, while using Mielke's and Shultz's customers at Brookstone Securities as their potential pool of investors.[59] Mielke's and Shultz's participation in the profits of Midwest Investment Partners as the company's owners, Shultz's monthly salary from the company, and

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51 *See id.* at 14.

52 *Id.*

53 *See id.* at 13 (Outside Business Activities).

54 *See id.*

55 *See id.*

56 *See id.*

57 *See id.*

58 *See id.* (Principal Considerations in Determining Sanctions, No. 5). The record does not reflect whether Mielke and Shultz disclosed their proprietary interests in Midwest Investment Partners to the investors.

59 *See id.* at 15 (Principal Considerations in Determining Sanctions, No. 8).

Mielke's commissions for direct sales of the membership interests highlight their self-interests related to the sales of these securities.

We also consider whether Mielke and Shultz provided oral notice, and obtained oral approval, to participate in the securities transactions or business activities, and we conclude that there was no oral notice or approval of the transactions or activities.[60] To the contrary, the record establishes that Mielke and Shultz intentionally concealed their activities with Midwest Investment Partners from Brookstone Securities while they worked with the firm to amend the selling agreement and private placement memorandum.[61] With these factors before us, we examine Mielke's and Shultz's individual role in the misconduct to determine the appropriate sanctions for each respondent.[62]

1. Mielke

Mielke began promoting and selling the membership interests in Midwest Investment Partners in January 2008. His misconduct continued for 17 months, until Brookstone Securities approved the selling agreement in June 2009. During that period, January 2008 to June 2009, Mielke participated in 22 private securities transactions, which raised a total of $3.14 million for Midwest Investment Partners.[63] Indeed, Mielke directly sold $1.1 million in Midwest Investment Partners' membership interests to five individuals,[64] at least two of whom were customers of Brookstone Securities.[65]

Mielke orchestrated the entire enterprise at issue in this case. Mielke founded Midwest Investment Partners and Harvest Holding Company. Mielke decided that Midwest Investment Partners should conduct an offering to raise capital for the company. Mielke hired the attorney

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60 *See id.* at 15 (Principal Considerations in Determining Sanctions, No. 9).

61 *See id.* (Principal Considerations in Determining Sanctions, No. 13).

62 We acknowledge that neither Mielke nor Shultz tried to create the impression that Brookstone Securities sanctioned the transactions or was otherwise involved in the sales. We also note that the record supports that Mielke's and Shultz's participation in the undisclosed private securities transactions may have caused injury to the investors, but the record does not contain sufficient evidence to determine the nature and extent of the investors' injury. We therefore view the issue of customer or investor harm in this case as a neutral factor, which is neither aggravating nor mitigating for purposes of determining sanctions.

63 The stated figures in note 14 (31 transactions, totaling $4.62 million) cover the entire period under review, January 2008 through October 2009. We, however, have reduced these numbers to remove transactions that occurred after June 2009, which we have determined is the notice and approval date for Mielke's and Shultz's activities with Midwest Investment Partners.

64 All of Mielke's sales occurred prior to June 2009, the "notice date."

65 *See id.* at 15 (Principal Considerations in Determining Sanctions, No. 11).

to prepare the offering documents and recruited Shultz and Gorter to promote and sell the membership interests in Midwest Investment Partners.[66]

Mielke also conducted the due diligence on the subject of the offerings' investments, Vestium Equity Fund and Arcanum Equity Fund, and handled the relationships with the hedge funds' managers. As we consider Mielke's decision to place the investors' funds with Vestium Equity Fund and Arcanum Equity Fund, we note that the hedge funds were found to have violated the federal securities laws and find that the hedge funds' securities laws violations present an aggravating factor.[67]

Finally, Mielke has a relevant disciplinary history, which includes findings that he previously participated in undisclosed private securities transactions.[68] Mielke's disciplinary history presents a significant aggravating factor in our determination of sanctions.[69] *See Dist. Bus. Conduct Comm. v. Gluckman*, Complaint No. C02960042, 1998 NASD Discip. LEXIS 8, at *17 (NASD NBCC Jan. 23, 1998) (explaining that a person who has previously been sanctioned for violating Rule 3040 should be expected to have a "heightened awareness" of its requirements), *aff'd*, 54 S.E.C. 175 (1999).

As we determine the appropriate sanctions for Mielke's misconduct, we find that his role in the private securities transactions and outside business activities, his direct sales to investors, including customers of Brookstone Securities, and his disciplinary history are highly aggravating factors that support imposing a bar.

2. Shultz

Although we conclude that Mielke orchestrated the offering and recruited the additional participants in the transactions, our findings do not detract from Shultz's role in Midwest Investment Partners and Harvest Holding Company. Shultz was Midwest Investment Partners' and Harvest Holding Company's Chief Financial Officer. He maintained a beneficial interest in Harvest Holding Company and served as a director of the company. Indeed, in several instances, Midwest Investment Partners' offering documents identify Shultz as the "Manager" of the offering.

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66 *See id.* (Principal Considerations in Determining Sanctions, No. 12).

67 *See id.* at 14 (Principal Considerations in Determining Sanctions, No. 4); *see also supra* note 5.

68 In April 2008, Mielke consented to findings that he participated in undisclosed private securities transactions, failed to provide prior written notice of the proposed transactions to his firm, failed to obtain the firm's written approval to participate in the transactions, and failed to disclose that he referred customers of the firm to a third-party entity. Mielke was fined $5,000 and suspended in all capacities for six months for the violations.

69 *See id.* at 2 (General Principles Applicable to All Sanction Determinations, No. 2); *see also id.* at 6 (Principal Considerations in Determining Sanctions, No. 1).

Shultz also managed financial and accounting matters that were essential to the operation of Midwest Investment Partners' offering. Shultz reviewed and approved the investors' subscription agreements, calculated the earnings owed to each investor, and filed documents on behalf of Midwest Investment Partners with the Commission. Despite his relative lack of experience in the securities industry, Shultz knew that he was required to provide written notice prior to participating in private securities transactions or outside business activities, and that his undisclosed employment with Midwest Investment Partners and Harvest Holding Company was contrary to FINRA's rules and Brookstone Securities' written supervisory procedures.

Finally, we note that Shultz's misconduct continued for nine months, and that he participated in 19 private securities transactions, which raised a total of $2.29 million for Midwest Investment Partners. Accordingly, as we consider Shultz's integral role in Midwest Investment Partners and Harvest Holding Company, and his intentional participation in the undisclosed private securities transactions, we conclude that a bar is the proper sanction for Shultz's misconduct.

B. Inaccurate Books and Records – Shultz

For recordkeeping violations, the Guidelines recommend a fine of $1,000 to $10,000.[70] The Guidelines also suggest a suspension of the responsible party in any and all capacities for up to 30 business days.[71] In egregious cases, the Guidelines recommend an increased fine of $10,000 to $100,000, and a longer suspension of up to two years, or a bar.[72] When assessing sanctions for recordkeeping violations, the Guidelines direct adjudicators to consider the nature and materiality of the inaccurate information.[73]

The record demonstrates that Shultz did not route any documentation concerning the sales of Midwest Investment Partners' membership interests to Brookstone Securities between July and October 2009. In so doing, Shultz intentionally failed to provide the firm with any information concerning the sales for three months.[74] Shultz's misconduct deprived Brookstone Securities of basic information that the firm needed to maintain its books and records. Shultz also prevented the firm from supervising its representatives' sales of the membership interests.

On appeal, Shultz argues that he reasonably relied on the advice of counsel regarding the handling of sales documentation.[75] To establish that advice of counsel is mitigating for purposes of sanctions under the Guidelines, Shultz must demonstrate "reasonable reliance on competent

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

71 *See id.*

72 *See id.*

73 *See id.*

74 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

75 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 7).

legal . . . advice." *Dep't of Enforcement v. Fergus*, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3, at *48 (NASD NAC May 17, 2001). Shultz fails to meet this standard. Shultz not only failed to demonstrate that he sought and followed the advice of counsel in failing to provide Brookstone Securities with the sales documentation, but the record also supports that Shultz's purported reliance would not be reasonable under the circumstances presented. *See id.* at *46-47 (rejecting respondent's argument that his reliance on counsel was a mitigating factor because the reliance was not reasonable). As an initial matter, the transmission of documentation to a firm's main office for processing and recording in the firm's books and records is a matter of due course, which falls squarely within a registered representative's compliance obligations. In addition, in this specific instance, Brookstone Securities' Written Supervisory Procedures required the recording of all approved private securities transactions in the firm's books and records. Shultz offers no reasonable explanation for his failure to send the sales documentation to Brookstone Securities.[76]

In assessing sanctions for Shultz's recordkeeping violation, we consider the length of time that the misconduct occurred (three months),[77] the number of transactions involved (nine),[78] and the fact that Brookstone Securities already had approved its representatives' sales of the membership interests when Shultz's misconduct occurred. Based on the totality of the evidence presented, we conclude the Shultz's recordkeeping violation is egregious, and we fine him $10,000 and suspend him in all capacities for one year for the violation.[79] We, however, decline to impose these sanctions in light of the bars we impose for Shultz's other misconduct.

C. Misstatements on Compliance Questionnaires – Mielke and Shultz

Although there are no specific Guidelines concerning misstatements on firm compliance questionnaires, we find that the Guidelines related to the falsification of records are sufficiently

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[76] Shultz asserts that Brookstone Securities' selling agreement with Midwest Investment Partners did not direct him to route the sales documentation to the firm's main office, and that the firm's lack of direction concerning the handling of the documentation lessens the seriousness of his misconduct. It does not. As explained above, Shultz had sufficient notice of his compliance obligations with regard to the handling of Midwest Investment Partners' sales documentation.

[77] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 9).

[78] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 18).

[79] Shultz asserts that he accepted responsibility for his misconduct as soon as he realized that he was required to direct the sales documentation to Brookstone Securities' main office. To the extent Shultz presents his acceptance of responsibility as evidence of mitigation, it fails to satisfy the standards articulated in the Guidelines. While the Guidelines contemplate situations in which an individual accepts responsibility for and acknowledges the misconduct, these actions must occur "*prior to* [the firm's or regulator's] detection and intervention." *Id.* at 6 (emphasis added). Shultz's post hoc acceptance of responsibility has no bearing on our analysis of sanctions.

analogous under the circumstances.[80] Specifically, Mielke's and Shultz's false statements about their activities with Midwest Investment Partners and Harvest Holding Company on Brookstone Securities' Outside Business Interests Schedules caused the firm's records to contain false information concerning Mielke's and Shultz's activities. We therefore find that the Guidelines related to the falsification of records are helpful and the most analogous under the facts presented. *See Dep't of Enforcement v. Braff*, Complaint No. 2007011937001, 2011 FINRA Discip. LEXIS 15, at *26-27 (FINRA NAC May 13, 2011) (applying the Guidelines related to the falsification of records where the respondent made false statements on firm compliance questionnaires concerning outside brokerage accounts), *aff'd*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *1 (Feb. 24, 2012); *Dep't of Enforcement v. Duma*, Complaint No. C8A030099, 2005 NASD Discip. LEXIS 46, at *27 n.15 (NASD NAC Oct. 27, 2005) (same).

The Guidelines for the falsification of records recommend a fine between $5,000 to $100,000 and a suspension in any and all capacities for up to two years, if mitigation exists.[81] In egregious cases, the Guidelines suggest a bar.[82] In assessing sanctions, the Guidelines advise adjudicators to consider the nature of the falsified documents and whether the respondent had a good-faith, but mistaken, belief of express or implied authority.[83]

1. Mielke

Mielke made material misstatements on the Outside Business Interests Schedules that he submitted to Brookstone Securities in April 2008 and April 2009. Mielke's misstatements intentionally minimized his activities with Midwest Investment Partners while he and Brookstone Securities negotiated whether he could sell the company's membership interests through the firm.[84] Mielke's misstatements concerning his activities with Midwest Investment Partners and Harvest Holding Company not only were important, but also prevented Brookstone Securities from properly monitoring Mielke's outside activities, particularly as it related to his participation in Midwest Investment Partners' offering. Mielke's misconduct was egregious, and his "dishonesty to his firm reflects directly on his ability to abide by his firm's policies, many of which are designed to protect the public and the firm, and to deal responsibly with the public." *Davenport*, 2003 NASD Discip. LEXIS 4, at *10. We conclude that a bar is the appropriate sanction under the circumstances presented.

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80 *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 id.* at 37 (Forgery and/or Falsification of Records). The Hearing Panel also consulted the Guidelines concerning the falsification of records in its sanctions analysis.

81 *See Guidelines*, at 37.

82 *See id.*

83 *See id.*

84 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

2. Shultz

We find that Shultz, similar to Mielke, made intentionally deceptive misstatements on the Outside Business Interests Schedule that he submitted to Brookstone Securities in April 2009. The information that the schedule sought to obtain was important, and Shultz's misstatements on the schedule hindered Brookstone Securities' ability to monitor Shultz's relationship with Midwest Investment Partners and Harvest Holding Company. Indeed, more accurate disclosure from Shultz may have prevented some of the other missteps that Shultz encountered in this case, such as the poor accounting that led to his misuse of the investors' funds or his mishandling of the sales documentation, which resulted in Brookstone Securities maintaining inaccurate books and records. As we consider the evidence in the record, we find that Shultz's misstatements are egregious, and we conclude that his relative lack of securities experience, his following of Mielke's direction,[85] and his misstatements on a single schedule (as opposed to two schedules) are not mitigating. Shultz, a retired mathematician, had sufficient securities industry experience to differentiate between true and false statements, and he intentionally chose to input false information on the compliance questionnaire at issue here. Consequently, we have decided to bar Shultz for his misstatements on Brookstone Securities' Outside Business Interests Schedule.

D. Misuse of Customer Funds – Shultz

For cases involving the improper use of customer funds, the Guidelines advise adjudicators to consider a bar.[86] The Guidelines, however, also explain that where the improper use results from the respondent's misunderstanding of the customer's intended use of the funds, or other mitigation exists, adjudicators should consider a fine of $2,500 to $50,000, and a suspension in any or all capacities for a period of six months to two years.[87]

The record demonstrates that Shultz failed to invest funds in Vestium Equity Fund, as the investors intended, and that he improperly distributed the investors' funds as profits to Harvest Midwest Group. In determining sanctions for Shultz's misconduct, the Hearing Panel found that Shultz credibly testified that his misuse of the funds was a "mistake," and that Shultz did not "intentionally and knowingly exercise[] authority over customer funds" We defer to the Hearing Panel's credibility determination on this issue.

While we are willing to consider Shultz's misallocation and distribution of the investors' funds as an accounting error, we are nevertheless troubled with Shultz's apparent lack of attention to the funding source of Midwest Investment Partners' "profits." We also find it

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85 *See generally Dep't of Enforcement v. Epstein*, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *97 (FINRA NAC Dec. 20, 2007) (rejecting argument that respondent's misconduct resulted from instructions he received from the firm), *aff'd*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *1 (Jan. 30, 2009).

86 *See Guidelines*, at 36 (Improper Use of Funds).

87 *See id.*

troubling that it took the intervention of a third-party accountant and nine months,[88] from September 2009 through June 2010, to discover the accounting error. In light of these factors, and the significant amount of funds involved ($45,000),[89] we find that a fine of $10,000 and a one-year suspension in all capacities are the appropriate level of sanctions to deter Shultz, and other similarly situated individuals, from misusing customer funds in this manner. We decline to impose these sanctions in light of the bars that we have imposed for Shultz's other violations.

E. Failing to Respond Timely to FINRA's Requests Made Pursuant to FINRA Rule 8210 – Mielke and Shultz

When an associated person does not respond in any manner to a request made pursuant to FINRA Rule 8210, the Guidelines state that a bar should be standard.[90] A partial, but incomplete, response to FINRA's request for information, documents, or testimony presents the functional equivalent of a failure to respond in any manner because individuals have selectively kept certain information from FINRA. *See Dep't of Enforcement v. Gallagher*, Complaint No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *48 (Dec. 12, 2012). Under such circumstances, the Guidelines state that "a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request."[91] Where mitigation exists, or the person did not respond in a timely manner, the Guidelines suggest a fine of $2,500 to $25,000, and a suspension of the individual in any or all capacities for up to two years.[92]

The Guidelines advise adjudicators to consider several factors to determine the appropriate sanctions for a violation of FINRA Rule 8210, including: (1) the importance of the information requested that was not provided as viewed from FINRA's perspective; (2) whether the information that was provided was relevant and responsive to the request; (3) the number of requests made; (4) the time the respondent took to respond; (5) the degree of regulatory pressure required to obtain a response; and (6) whether the respondent thoroughly explained valid reasons for the deficiencies in the response.[93]

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88 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 9).

89 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 18).

90 *See id.* at 33 (Requests Made Pursuant to FINRA Rule 8210).

91 *Id.* Where there is a partial, but incomplete, response to FINRA's request for information, documents, or testimony, the Guidelines also recommend a fine of $10,000 to $50,000.

92 *See id.*

93 *See id.*

1. Mielke

Mielke timely appeared for testimony, provided some documents timely in response to the FINRA examiner's request for information and documents, and responded with additional information and documents in an untimely manner. In light of these facts, we apply the Guidelines for a partial, but incomplete, response to a request made pursuant to FINRA Rule 8210.[94] Specifically, we review the record to determine whether Mielke substantially complied with all aspects of FINRA's request and whether there is any evidence of mitigation.[95] After a careful analysis of the evidence presented, we conclude that Mielke did not substantially comply with all aspects of FINRA's request for information and documents.

As an initial matter, we find that Mielke's response to FINRA's request for information and documents was seriously deficient, and that Mielke failed to comply with the majority of FINRA's request. In response to the FINRA examiner's request in January 2010, Mielke initially provided only his tax returns. Then, for two years, Mielke provided nothing. As the hearing in this case neared, however, Mielke realized that Enforcement had brought disciplinary action against him for his incomplete response and decided to provide additional information and documents in response to the examiner's original request. In a series of piecemeal emails between January 2012 and February 2012, Mielke provided some information and produced some documents that were responsive to the examiner's request. In most respects, however, the request for information and documents remains unfulfilled. To date, Mielke still has not produced the correspondence between his attorney and Brookstone Securities, check registers, copies of interest payment checks to the investors, or documents pertaining to his compensation for selling the membership interests.

We also note that the information and documents that FINRA requested not only were important to determine whether FINRA should proceed with formal disciplinary action against Mielke, but also to assist FINRA's investigation of Midwest Investment Partners, Harvest Holding Company, and the offering. During his on-the-record testimony, Mielke asserted that there were documents that substantiated his claims that he had provided Brookstone Securities with notice of his participation in the private securities transactions, and supported his assertion that the firm had approved his involvement in the transactions. Mielke's failure to provide the requested information and documents frustrated FINRA's investigation and curtailed FINRA's ability to verify his claims, particularly as it related to the notice and approval of Mielke's participation in the private securities transactions. *See Elliott M. Hershberg*, 58 S.E.C. 1184, 1190 (2006) ("Failure to comply is a serious violation justifying stringent sanctions because it subverts NASD's ability to execute its regulatory functions.").

On appeal, Mielke points to health issues to explain his delayed and deficient response. While we acknowledge that Mielke has faced significant health problems, he failed to establish that those problems interfered with his ability to respond completely and timely to FINRA's request for information and documents. *See generally Michael David Borth*, 51 S.E.C. 178,

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94 *See id.*

95 *See id.*

181(1992) (stating that failure to provide information fully and promptly undermines FINRA's ability to carry out its regulatory mandate). In addition, if Mielke was unable to meet the FINRA examiner's deadline to respond because of his health issues, he was obligated to contact the examiner, explain and document the cause for the delay or partial response, and propose alternate deadlines and arrangements to ensure his complete compliance with the request. *See Fawcett*, 2007 SEC LEXIS 2598, at *18 ("As we have often noted, recipients of requests under FINRA Rule 8210 must promptly respond to the requests or explain why they cannot."). In short, Mielke's health issues are not mitigating.

As we consider the importance of the information requested, the length of time it took Mielke to respond, and the degree of regulatory pressure required to obtain Mielke's response, we conclude that Mielke's failure to respond to FINRA's request for information and documents was egregious, and we bar him for the misconduct.

2. Shultz

Regarding Shultz's failure to appear timely to provide on-the-record testimony, we note that Shultz did not provide testimony until February 2012, nearly one year after Enforcement filed the complaint in this matter. When a respondent does not respond to a FINRA Rule 8210 request until after FINRA files a complaint, the Guidelines instruct adjudicators to apply the presumption that the respondent's failure constitutes a complete failure to respond.[96] Because Shultz's violation constitutes a complete failure to respond, we highlight the Guidelines' mandate, which states that a bar is standard.[97] We therefore review the record to determine whether Shultz has proffered any evidence of mitigation that persuades us to impose sanctions of less than a bar. He has not.

On appeal, Shultz asserts that he delayed in providing the testimony because he was confronted with serious healthcare concerns for his wife and disabled daughter. Similar to Mielke, however, Shultz failed to demonstrate that his wife's and daughter's medical conditions interfered with his ability to provide testimony. The record also supports that Shultz made no attempt to comply with FINRA's request for testimony by rescheduling his appearance or collaborating with the FINRA examiner to make alternate arrangements to obtain his testimony.[98] *See Fawcett*, 2007 SEC LEXIS 2598, at *9. To the contrary, the record supports that Shultz made a deliberate decision to "surrender" his FINRA registration, ignore FINRA's request for on-the-record testimony in March 2010, and appear two years later when he realized the consequences of his failure to appear, i.e., that he may be barred.

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96 *See Guidelines*, at 33.

97 *See id.*

98 The FINRA examiner originally ordered Shultz to appear to provide testimony in FINRA's district office in Chicago, which is approximately five hours away from Shultz's residence. The examiner rescheduled Shultz's testimony, and relocated it to Louisville, to accommodate Shultz because Louisville was less than two hours from his home.

Consequently, as we determine the appropriate sanctions for Shultz's misconduct, we consider that Shultz's delay stonewalled FINRA's investigation of Midwest Investment Partners, Harvest Holding Company, and the offering, that it took two years (and the filing of Enforcement's complaint) for Shultz to appear, and that Shultz did not offer any valid reason for his delayed appearance. In the face of such an obstinate disregard for FINRA's rules and regulatory functions, we have decided to bar Shultz.

V. Conclusion

We affirm the Hearing Panel's findings that Mielke: (1) participated in undisclosed private securities transactions, in violation of NASD Rules 3040 and 2110 and FINRA Rule 2010; (2) engaged in undisclosed outside business activities, in violation of NASD Rules 3030 and 2110 and FINRA Rule 2010; (3) made misstatements on his firm's compliance questionnaires, in violation of NASD Rule 2110 and FINRA Rule 2010; and (4) failed to respond completely and timely to FINRA's requests for information and documents, in violation of FINRA Rules 8210 and 2010. We impose three separate bars on Mielke for this misconduct, one for private securities transactions and outside business activities, one for the misstatements on the compliance questionnaire, and one for the failure to respond completely and timely to the information and document requests.

We affirm the Hearing Panel's findings that Shultz: (1) participated in undisclosed private securities transactions, in violation of NASD Rules 3040 and 2110 and FINRA Rule 2010; (2) engaged in undisclosed outside business activities, in violation of NASD Rule 3030 and FINRA Rule 2010; (3) caused his firm to maintain inaccurate books and records, in violation of NASD Rule 3110 and FINRA Rule 2010; (4) made misstatements on a firm compliance questionnaire, in violation of FINRA Rule 2010; (5) misused customer funds, in violation of FINRA Rules 2150 and 2010; and (6) failed to appear timely for on-the-record testimony, in violation of FINRA Rules 8210 and 2010.

We bar Shultz for participating in undisclosed private securities transactions and outside business activities, impose a second bar for his misstatements on Brookstone Securities' compliance questionnaire, and assess a third bar for his failure to appear timely for his on-the-record testimony. We conclude that Shultz's violation for causing Brookstone Securities to maintain inaccurate books and records, and his misuse of customer funds, each merit a $10,000 fine and one-year suspension in any and all capacities, but we decline to impose these fines or suspensions in light of the three bars that we already have imposed on him.

Finally, we order Mielke and Shultz to pay, jointly and severally, appeal costs of $2,468.85.[99] We have considered and reject without discussion all other arguments of the parties.

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[99] The bars are effective as of the date of this decision.

On behalf of the National Adjudicatory Council,

Marcia E. Asquith,
Senior Vice President and Corporate Secretary