FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. WORDEN CAPITAL MANAGEMENT LLC (CRD No. 148366), Respondent.	Disciplinary Proceeding No. 2019064746502 Hearing Officer–MC **DEFAULT DECISION** June 27, 2022

Respondent Worden Capital Management LLC is expelled from FINRA and ordered to disgorge ill-gotten gains for fraudulently omitting material information in connection with the sales of securities, failing to fulfill its supervisory responsibilities in the sale of securities, recommending investments without a reasonable basis to believe them suitable for at least some investors, and failing to submit to FINRA the offering materials it used in recommending the investments.

Appearances

For the Complainant: Roger Kiley, Esq., and Michael Manley, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: No appearance

DECISION

I. Introduction

From January 2019 through March 2020, Respondent Worden Capital Management LLC ("WCM") raised more than $10 million from a series of private placement offerings, receiving approximately $1 million in commissions for its role as placement agent. The firm disclosed those commissions to investors in offering materials. However, WCM also received more than $600,000 that it failed to disclose to its investors, in violation of federal securities laws and FINRA rules, from a compensation agreement it secretly reached with the entity that created and managed the offerings.

The Department of Enforcement twice properly served the Complaint and Notice of Complaint on WCM and on its chief executive officer at the firm's address listed in the Central

Registration Depository ("CRD"). When WCM did not file an Answer or otherwise respond to the Complaint, Enforcement filed a motion for entry of a default decision ("Default Motion") with supporting documents, including a memorandum of law ("Enforcement's Memorandum"), the declaration of Enforcement's counsel ("Kiley Decl."), and exhibits. WCM has not responded to the Default Motion.

As explained below, I find WCM in default, deem the allegations in the Complaint admitted, and grant the Default Motion. After considering the facts, Enforcement's recommendations, and applying FINRA's Sanction Guidelines, I find it appropriate to expel WCM from FINRA membership and order the firm to disgorge the ill-gotten gains it derived from its fraudulent secret fee agreement.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

WCM was a FINRA member firm from February 2009 until November 2021 when its registration was cancelled for failing to pay fees owed to FINRA. The firm was headquartered in Garden City, New York. It derived most of its revenues from commissions and other charges to its retail customer accounts.[1] Despite no longer being registered with FINRA, WCM is subject to FINRA's jurisdiction for the purposes of this proceeding because Enforcement issued the Complaint less than two years after FINRA canceled WCM's registration and it alleged that the misconduct occurred while WCM was a FINRA member.[2]

B. Origin of the Investigation

FINRA's Department of Member Supervision staff discovered potential sales practice and supervision violations during a review of WCM's private placement offerings. In its follow-up investigation, the staff gathered documents and written responses to requests for information from the firm. These prompted the staff to take on-the-record testimony from WCM employees. After reviewing the investigative findings, the staff referred suspected sales practice violations to Enforcement. Further investigation led Enforcement to file the Complaint.[3]

C. Respondent's Default

Enforcement served the Complaint and Notice of Complaint on WCM on February 28, 2022. As required by FINRA Rules 9131 and 9134, Enforcement sent the documents to the firm in care of its chief executive officer, Jamie Worden, at WCM's business address listed in CRD.[4] Enforcement also separately served Worden at his business and personal email addresses.[5] He

[1] Complaint ("Compl.") ¶ 7.

[2] Compl. ¶ 8; Complainant's Exhibit ("CX-") 1, at 10, 19.

[3] Kiley Decl. ¶ 4.

[4] *Id.* ¶ 8.

[5] *Id.* ¶ 9.

then contacted the Office of Hearing Officers' Case Administrator assigned to this matter by email and asked when an Answer had to be filed.[6]

On March 29, 2022, after WCM failed to file an Answer or other response to the Complaint, Enforcement again properly served the firm with the Complaint, sending it and a Second Notice of Complaint to the firm's CRD address.[7] The certified mailings of the Complaint and Notice of Complaint were returned.[8] However, copies of the Complaint sent by first-class mail to WCM were not returned and copies sent to Worden's personal and WCM email addresses were not rejected.[9]

As these facts show, the Complaint and Notices of Complaint were served on WCM in accord with FINRA Rules 9131 and 9134. Because WCM did not file an answer or otherwise respond to the Complaint, the firm defaulted.[10]

D. Securities Fraud Violations

The Complaint's first cause of action charges that WCM, through its chief executive officer and brokers, committed securities fraud. The charge arose from WCM's recommendations and sales of membership interests in five private investment funds ("Funds").[11] As noted above, WCM's fraudulent conduct, in essence, was its failure to inform investors of a secret compensation agreement by which it received more than half a million dollars in commissions.[12]

1. The Private Placement Offerings

The Funds invested in private companies planning to go public by launching initial public offerings, or IPOs. For their investments, the Funds received equity interests called pre-IPO shares, their sole assets.[13]

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[6] Kiley Decl. ¶ 10.

[7] *Id.* ¶ 12.

[8] *Id.* ¶¶ 14, 16.

[9] *Id.* ¶ 17. Somewhat imprecisely, the Kiley Declaration states that the documents were served on WCM by "U.S. Postal Service first class certified mail, return receipt requested." Kiley Decl. ¶¶ 8, 12. The Declaration goes on to state that the Postal Service returned "the first class certified mailing" of both Notices of Complaint as undeliverable. Kiley Decl. ¶¶ 14, 16. It then states that the "first class mailings" of both notices were not returned, and Enforcement's Memorandum states the same. Kiley Decl. ¶ 17; Enforcement's Memorandum 10. I interpret this to mean that Enforcement served the Complaint and Notices of Complaint by both U.S. Postal Service certified mail and first-class mail. In any event, Enforcement satisfied the requirements of FINRA Rule 9134(b)(2) by mailing the documents to WCM at its CRD address in care of its chief executive officer.

[10] WCM is notified that it may move to set aside the default pursuant to FINRA Rule 9269(c) upon a showing of good cause.

[11] Compl. ¶¶ 9–10.

[12] Compl. ¶ 1.

[13] Compl. ¶ 11.

But the Funds did not buy the pre-IPO shares directly from the issuers. StraightPath Venture Partners, LLC, a non-registered company, created and managed the offerings.[14] StraightPath purchased the pre-IPO shares from the private companies and then sold them to the Funds after adding markups ranging from 10 to 34 percent. When the companies went public through an IPO, StraightPath either sold the offerings' shares and provided the proceeds to investors or distributed the shares directly to the investors who could then hold or sell them.[15]

In total, the Funds issued 22 separate offerings. From January 2019 through March 2020, WCM sold membership interests in the Funds to approximately 121 investors.[16]

The securities sold through the offerings were not registered. The Funds offered them under a safe harbor exemption of Regulation D of the Securities Act of 1933.[17]

StraightPath prepared the offering documents used in selling the investments in the Funds. Either StraightPath or WCM provided the offering documents to investors. The offering documents included five private placement memoranda ("PPMs"), one for each Fund; 22 supplemental PPMs, one for each series the Funds offered; a subscription agreement; and a "welcome letter" that, among other things, disclosed that the only fee investors would be charged was a ten percent "Broker's concession" paid by StraightPath to WCM for acting as placement agent.[18]

2. The Secret Commissions

Worden first explored involving WCM in private placements of Pre-IPO offerings sometime around December 2018. His interest led him to a meeting with a StraightPath representative and to his decision to announce WCM's participation in the offerings by Christmas.[19] At some time before January 2019, StraightPath and Worden secretly agreed that StraightPath would add an eight percent commission to the ten percent placement fee paid to WCM for each investment it sold. This was not disclosed to investors. Consequently, investors were unaware that StraightPath actually paid WCM an 18 percent commission on sales of most of the investments.[20] WCM received undisclosed commissions totaling $609,500 in addition to the $1.052 million in disclosed placement fees.[21]

Worden kept WCM brokers ignorant of the secret commissions. He distributed some of the money to the brokers who had referred StraightPath to WCM, some to WCM's compliance

[14] Compl. ¶ 3; Enforcement's Memorandum 8.

[15] Compl. ¶¶ 12–13.

[16] Compl. ¶¶ 9–10.

[17] Compl. ¶ 17.

[18] Compl. ¶¶ 15–16, 18; CX-10.

[19] Compl. ¶¶ 32, 35.

[20] Compl. ¶¶ 18–20.

[21] Compl. ¶ 21.

staff, and deposited the rest into WCM's general fund, from which he withdrew his own compensation.[22]

3. The Applicable Laws and Rules

Section 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act") prohibits fraud in connection with the purchase or sale of any security. Under the authority of the Exchange Act, the Securities and Exchange Commission issued Rule 10b-5. Section 10(b) and Rule 10b-5 prohibit, among other false practices, failing to disclose a material fact in connection with a securities transaction.[23] A material fact is one that must be disclosed because there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to invest. Disclosure is required because without it the representations made about the transaction would be misleading.[24]

To prove that WCM violated the provisions of Exchange Act Section 10(b) and SEC Rule 10b-5, Enforcement must establish that: (i) WCM's wrongful conduct occurred in connection with the purchase or sale of securities; (ii) WCM used the means and instrumentalities of interstate commerce in making the sales; (iii) WCM omitted a material fact from its representations to investors; (iv) the omission made WCM's representations about the securities misleading; and (v) WCM did so knowingly,[25] acting with scienter, defined as "an intent to deceive, manipulate, or defraud."[26]

FINRA Rule 2020 prohibits members from fraudulently inducing a purchase of a security. It has been described as FINRA's "anti-fraud rule" and "the equivalent of SEC Rule 10b-5,"[27] which prohibits members from fraudulently inducing a sale or purchase of a security using a "manipulative, deceptive or other fraudulent device or contrivance." Rule 2010 forbids members from engaging in conduct that is inconsistent with just and equitable principles of trade. A violation of Rule 2020 is also a violation of Rule 2010.[28]

4. WCM's Fraud Violations

Because the membership interests in the offerings WCM sold were securities, the firm's failure to disclose the secret compensation agreement occurred in connection with purchases of

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[22] Compl. ¶ 25.

[23] *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1466 (2d Cir. 1996).

[24] *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988).

[25] *SEC v. Wolfson*, 539 F.3d 1249, at 1256 (10th Cir. 2008) (citing *Geman v. SEC*, 334 F.3d 1183, 1191 (10th Cir. 2003)).

[26] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

[27] *Market Reg. Comm. v. Shaughnessy*, CMS950087, 1997 NASD Discip. LEXIS 46, at *24 (NBCC June 5, 1997), *aff'd*, Exchange Act Release No. 40244, 1998 SEC LEXIS 1507 (July 22, 1998) (referring to former NASD Rule 2120, identical to FINRA Rule 2020, which superseded it).

[28] *Gopi Krishna Vungarala*, Exchange Act Release No. 90476, 2020 SEC LEXIS 4938, at *17 (Nov. 20, 2020).

securities.[29] Furthermore, when recommending and selling the offerings to investors, WCM's brokers used instrumentalities of interstate commerce, including telephones and emails.[30]

It has long been established that a firm's self-interest in receiving compensation in addition to a standard commission for making a recommendation is a material fact requiring disclosure to a customer.[31] Its materiality derives from the recognition that there is a substantial likelihood a reasonable investor would consider the additional compensation important in evaluating the reliability of a firm's recommendation, since its monetary interest has "the potential to influence" the recommendation.[32] WCM's misleading omission left investors with the false impression they were only charged the ten percent placement fee StraightPath described in the welcome letter's fee disclosure.

Finally, WCM acted with knowledge. Through Worden, WCM made the agreement to receive an additional fee and chose not to disclose its existence to the brokers making the recommendations. Ignorant of the secret compensation, its brokers could not and did not disclose it to customers.[33]

These facts establish the elements necessary to prove that WCM engaged in fraudulent conduct when recommending and selling interests in the Funds, in violation of Exchange Act Section 10(b) and Rule 10b-5, as well as FINRA Rules 2020 and 2010, as charged in the Complaint's first cause of action.

E. Supervision Violations

The Complaint's second cause of action charges WCM with failing to fulfill its supervisory responsibilities in its sales of investments in the Funds.

1. WCM's Relevant Written Supervisory Procedures for Private Placements

In a section titled "Private Placement Due Diligence," WCM's written supervisory procedures contained a detailed description of the firm's protocols for proper supervision of private placements.[34] They placed the responsibility for overseeing due diligence reviews on a "Designated Supervisor" mandated "to require Firm personnel to conduct due diligence of all

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[29] Compl. ¶ 17; CX-15, at 1 ¶ 1.

[30] Compl. ¶ 53; CX-9 (email exchanges between WCM senior vice president, an investor, and StraightPath director, with offering subscription book attached).

[31] *Kevin D. Kunz*, Exchange Act Release No. 45290, 2002 SEC LEXIS 105, at *17 (Jan. 16, 2002).

[32] *United States v. Nouri*, 711 F.3d 129, at 142 (2d Cir. 2013) (issuer's offer to pay broker a "bribe" to sell a security to customers is material and broker's failure to disclose it when recommending is "as a matter of law" omission of material fact). *See also Shaughnessy*, 1997 NASD Discip. LEXIS 46, at *26 (broker's failure to inform customers of outside compensation from stock promoters to solicit sales "was a material omission made 'in connection with' the sales of securities").

[33] Compl. ¶¶ 18, 22, 23.

[34] CX-11, at 6, 14–18.

potential private placement offerings." Among other responsibilities, this supervisor was to fill out a Private Placement Due Diligence Checklist ("Checklist") and sign and date it upon completion.[35] In the period relevant here, the designated supervisor for the firm's private placements activity was WCM's chief operating officer.[36] The procedures called for him to ensure that WCM maintained a complete file of documents relating to each offering, including a copy of the PPM, the placement agent agreement, sample subscription agreements, and correspondence received from the issuer.[37] The procedures also required the firm to file a copy of the offering documents with FINRA within 15 calendar days of a sale made during an offering.[38]

2. The Applicable Rules

FINRA Rule 3110(a) mandates that firms establish and maintain systems for supervising their employees reasonably designed to ensure compliance with securities laws and regulations and FINRA rules. Rule 3110(b) requires that firms "establish, maintain, and enforce written procedures" for supervising their various types of business "reasonably designed" to ensure that those conducting the business do so in compliance with those laws, regulations, and FINRA rules. Failing to do so violates Rule 3110, and thereby Rule 2010 as well.[39]

3. WCM's Supervision Failures

After Worden's December 2018 meeting with StraightPath, he directed WCM to begin a due diligence review of StraightPath and its private placement offerings.[40] The due diligence review was just in its initial stages when, on December 18, 2018, Worden convened a meeting with the designated supervisor for private placement offerings, the chief compliance officer, and assistant chief compliance officer. Worden told them he wanted the due diligence review finished to enable him to announce WCM's participation in the new private placement offerings at the firm's annual Christmas party.[41]

However, the Checklist for the review of StraightPath and its offerings was incomplete, reflecting the inadequacy of the due diligence performed. WCM had not gathered much of the information its written supervisory procedures required. Among other deficiencies, WCM had no documented information relating to the issuer's history, objectives, and business plan; had not obtained financial information from StraightPath or the Funds; did not understand how

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[35] Compl. ¶¶ 26, 27; CX-11, at 16, 17.

[36] Compl. ¶ 31.

[37] Compl. ¶ 29.

[38] Compl. ¶ 30; CX-11, at 14.

[39] *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *19 n.29 (July 2, 2013), *aff'd sub nom., Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014) (a violation of any FINRA rule also violates Rule 2010); *Dep't of Enforcement v. Merrimac Corp. Sec., Inc.*, No. 2011027666902, 2017 FINRA Discip. LEXIS 16, *11 (NAC May 26, 2017).

[40] Compl. ¶ 33.

[41] Compl. ¶ 34–35.

StraightPath or the Funds operated; had not reviewed any information about StraightPath's prior offerings; and had no documentation of the source or authenticity of the shares in the offerings. In addition, the section of the Checklist referring to "References" was marked "provided by issuer," but there was no evidence of any references obtained.[42]

Because the due diligence was so incomplete and did not comply with the requirements of WCM's supervisory procedures, the designated supervisor and the other WCM officers present at the meeting refused to sign the Checklist on December 18.[43] Instead, Worden signed it. He also signed the placement agreement between StraightPath and WCM. [44] After that, WCM did not conduct any more due diligence, did not complete the Checklist for its review of StraightPath, and did not complete a Checklist for any of the 22 offerings it recommended and sold to investors, despite WCM's written procedures requirement that it do so for each offering.[45]

WCM's written supervisory procedures did not cause the firm's supervision violations. The procedures pertaining to the firm's conduct of private placements were consistent with FINRA Rule 3110(a) and contained detailed provisions requiring the designated principal to oversee the offerings. The procedures were reasonably designed to ensure that WCM conducted appropriate due diligence reviews of each private placement. The problem was that WCM, through Worden, did not implement or enforce the procedures, as Rule 3110(b)(1) required. WCM simply ignored them.

Consequently, from January 2019 through March 2020, WCM solicited approximately 121 individuals to invest a total of $10 million in securities with no assurance that the firm understood how the Funds operated, no confirmation of the authenticity or source of the shares sold, no knowledge of the finances of StraightPath or the Funds, or other information a properly conducted due diligence review required WCM to obtain. In this manner, WCM violated FINRA Rules 3110(a) and (b), and thereby Rule 2010, as charged in the Complaint's second cause of action.

F. Reasonable Basis Suitability Violations

Because of WCM's deficient due diligence, the Firm failed to fulfill its responsibility, under FINRA's suitability rule, to acquire a reasonable basis for recommending the offerings to investors.

1. The Suitability Rule

FINRA Rule 2111(a) states that a member "must have a reasonable basis to believe that a recommended transaction . . . is suitable for the customer, based on the information obtained

[42] Compl. ¶ 36.

[43] Compl. ¶ 37.

[44] Compl. ¶¶ 36–38; CX-15, at 8.

[45] Compl. ¶ 42.

through the reasonable diligence of the member." Supplementary Material .05 describes the components of suitability. The first, applicable here, requires the member to possess "a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least *some* investors." Reasonable diligence "must provide the member . . . with an understanding of the potential risks and rewards associated with the recommended security."

The National Adjudicatory Council has held that to develop a reasonable basis for recommending investing in private placement offerings, due diligence should entail, among other things, review of "the issuer's purported business and prospects; the assets the issuer claims to hold or intends to acquire . . . and the handling and use of the offering's proceeds."[46] The nature of the securities here—pre-IPO securities—required WCM to make particularly thorough inquiries in its due diligence. WCM needed "to vet fully the promoters of the offering," conduct research into the promoters' "history or news of any fraudulent or criminal" activity, and "understand what individuals or firms will handle investment monies, and verify the terms and legitimacy of the investment."[47] As FINRA warned in a 2011 investor alert, pre-IPO offerings "can be fraught with risk" as they range from "risky deals to outright frauds" involving "unlicensed individuals selling unregistered securities."[48]

2. WCM's Suitability Rule Violations

WCM's incomplete due diligence review of StraightPath and its offerings was glaringly inadequate. In documents WCM obtained from StraightPath in its brief initial review, the firm did not notice until it ceased selling the offerings that FINRA had barred one of StraightPath's employees.[49] As noted above, the Funds' sole assets were the pre-IPO shares, but WCM made no determination of their source or authenticity,[50] and did not have StraightPath or the Funds' financial information.[51] WCM had no knowledge of the number or amounts of the markups StraightPath applied to the pre-IPO shares it bought and then sold to the funds,[52] and conducted no due diligence on any of the 22 StraightPath offerings.[53]

The StraightPath private placements that WCM recommended and sold, by their nature, possessed significant risks to investors, risks that FINRA had publicly identified, for example, in Regulatory Notice 10-22, cited above. In addition, these securities were Pre-IPO shares, which present additional risks. Yet for more than a year, WCM recommended and sold the shares in 22

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[46] *Dep't of Enforcement v. Gomez*, No. 201130293503, 2018 FINRA Discip. LEXIS 10, at *34 (NAC March 28, 2018) (citing FINRA Regulatory Notice 10-22, 2010 FINRA LEXIS 43, at *12–13 (Apr. 2010)).

[47] *Id.* at *35.

[48] *FINRA Investor Alerts: Pre-IPO Offerings—These Scammers Are Not Your Friends* (Mar. 15, 2011), https://www.finra.org/investors/alerts/pre-ipo-offerings-these-scammers-are-not-your-friends.

[49] Compl. ¶ 36(e).

[50] Compl. ¶ 36(i).

[51] Compl. ¶ 36(c).

[52] Compl. ¶¶ 39–41.

[53] Compl. ¶ 42.

offerings to more than 100 investors for more than $10 million. WCM did so after making only a brief, cursory due diligence review of StraightPath, without carefully examining the few documents it obtained, and without conducting due diligence reviews of any of the individual offerings. WCM never understood the financial condition of StraightPath or the Funds.

Without understanding the offerings, how they worked, and their risks, WCM and its brokers never acquired a reasonable basis to believe the offerings' securities were suitable for any investor. For these reasons, WCM violated FINRA Rules 2111 and 2010, as charged in the Complaint's third cause of action.

G. Required Filing Violations

The fourth cause of action focuses on WCM's failure to submit to FINRA a copy of the offering documents it used in connection with sales of the offerings.

1. The Applicable Rule

FINRA Rule 5123 imposes filing requirements upon FINRA members who engage in private placement offerings that rely on an exemption from registration, such as those at issue here. Rule 5123(a) requires firms to submit a copy of any PPM and other offering documents and any "retail communication" promoting or recommending the private placement used in connection with a sale, within 15 calendar days of the first sale date or, alternatively, notify FINRA that it did not use any offering documents. The purpose is to promote the interests of oversight and investor protection by providing FINRA timely information about a firm's private placement activities.[54]

2. WCM's Filing Violations

WCM's written supervisory procedures included a provision mirroring the filing requirements of Rule 5123(a), stating that the "Firm will file with FINRA a copy of any private memorandum, term sheet or other offering document the firm used within 15 calendar days of the sale, or indicate that it did not use any such offering documents."[55] Nonetheless, WCM did not comply with Rule 5123 and its own written supervisory procedures. Over the fifteen months that WCM recommended and sold the StraightPath-managed private placement offerings, the firm did not file any of the PPMs, supplemental PPMs, or other offering documents it used in the sales. By failing to do so, WCM violated FINRA Rules 5123 and 2010, as charged in the Complaint's fourth cause of action.

[54] Regulatory Notice 12-40 (Dec. 3, 2012) | FINRA.org.

[55] CX-11, at 14.

III. Sanctions

Enforcement argues that a unitary sanction for the Complaint's several violations should be imposed: expulsion of WCM and an order for it to disgorge its ill-gotten gains.[56]

In support of a unitary sanction, Enforcement points out that the violations of securities laws and regulations charged in the Complaint's four causes of action all arose from a single course of conduct: WCM's participation in the StraightPath private placement offerings of pre-IPO shares with a secret compensation agreement and without conducting proper due diligence.[57] This makes a unitary, or aggregated, sanction appropriate. The Sanction Guidelines approve of applying "sanctions in the aggregate for similar types of violations" arising from a single cause.[58] Consistent with this principle, the National Adjudicatory Council has approved of imposing a unitary sanction for "related violations" when the sanction imposed is "designed and tailored to deter the same underlying misconduct."[59] That is the purpose of the sanction here.

A. Expulsion

The presence of multiple aggravating factors, and the absence of mitigating factors, support the sanction of expulsion as appropriately remedial to protect investors and deter future misconduct by WCM and other firms that may be similarly situated.

First, WCM's principal violation, charged in the first cause of action, was intentional fraud: recommending and selling securities while failing to disclose the secret compensation agreement, in violation of Exchange Act Section 10(b), SEC Rule 10b-5, and FINRA Rules 2020 and 2010. The Guidelines state clearly that a member firm's intentional fraudulent misconduct, when other aggravating factors predominate, requires adjudicators to "strongly consider expelling the firm."[60] Long-established precedent holds that, in the universe of misconduct, violation of "the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions."[61] Comparably, when an individual respondent made fraudulent misrepresentations and omissions concealing commissions that substantially increased his compensation, the misconduct was held to be egregious, involving a breach of trust to clients, and meriting the most serious sanction available for an individual—a bar—to protect investors.[62]

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[56] Enforcement's Memorandum 25.

[57] *Id*.

[58] FINRA Sanction Guidelines ("Guidelines") at 4 (Oct. 2021) (General Principle No. 4), http://www.finra.org/sanctionguidelines.

[59] *Dep't of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *55–56 (NAC July 18, 2014), *aff'd*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927 (Sept. 24, 2015).

[60] Guidelines at 90.

[61] *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *29–30 (July 25, 2003).

[62] *See Dep't of Enforcement v. Vungarala*, No. 2014042291901, 2018 FINRA Discip. LEXIS 26, at *113–16 (NAC Oct. 2, 2018), *aff'd*, 2020 SEC LEXIS 4938.

Turning to WCM's failure to supervise its sales of the private placement offerings, in violation of FINRA Rules 3110 and 2010, the Guidelines also call for suspension or expulsion to be considered when aggravating factors predominate. The aggravating factors recognized in the Guidelines present here include WCM's significant failure to implement its own supervisory procedures. This failure allowed the firm's fraudulent conduct to escape detection, and impact many investors with numerous transactions, totaling millions of dollars, occurring over a lengthy period.[63]

Additionally, WCM's failure to implement its supervisory procedures for conducting private placements directly resulted in serious reasonable basis suitability violations. Having conducted almost none of the due diligence required by WCM's written supervisory procedures, the firm and its brokers never determined whether there was a reasonable basis to believe the investments were suitable for at least some investors. For such egregious suitability violations, in contravention of FINRA Rules 2111 and 2010, the Guidelines call for strong consideration of a lengthy suspension or expulsion. [64]

The Guidelines also direct adjudicators to take into consideration a firm's relevant disciplinary history.[65] In a December 2020 Letter of Acceptance, Waiver, and Consent ("AWC"), WCM, through Worden, accepted a censure, a fine of $350,000, and a restitution order to repay customers more than $1.2 million.[66] The similarity of some of the violative conduct outlined in the AWC to the conduct charged in the Complaint constitutes an aggravating factor for consideration of the sanctions here.[67] The AWC described WCM and Worden's failures to supervise, in violation of FINRA Rules 3110 and 2010, resulting in unsuitable recommendations and excessive trading in customer accounts, and customers paying more than $1 million for excessive commissions.[68]

In sum, aggravating factors predominate in this case. The number and dollar value of the sales of the offerings are aggravating factors[69] and in this case are significant: WCM recommended and sold 22 offerings from the Funds, to 121 individuals who invested more than $10 million in securities that WCM failed to determine were suitable.[70] WCM's misconduct entailed numerous acts constituting a pattern of misconduct over an extended period.[71] Finally, it is an aggravating factor that WCM's motive was monetary gain received in commissions

[63] Guidelines at 106–07.

[64] *Id*. at 96.

[65] *Id*. at 7 (Principal Consideration No. 1).

[66] Kiley Decl. ¶ 38; CX-22, at 8, 14 (AWC No. 2017056432601).

[67] Guidelines at 2–3 (General Principle No. 2).

[68] CX-22, at 3, 5–6.

[69] Guidelines at 8 (Principal Consideration No. 17).

[70] Kiley Decl. ¶¶ 39, 40.

[71] Guidelines at 7 (Principal Considerations Nos. 7, 8).

pursuant to the agreement with StraightPath that the firm hid from its customers.[72] These facts and circumstances, including WCM's disciplinary history, demonstrate WCM's unwillingness to conform its conduct to securities laws and regulations. Therefore, expulsion is the appropriately remedial sanction to impose in the public interest, to protect investors from future misconduct of this nature by WCM and other similarly situated FINRA members.[73]

B. Disgorgement

When a respondent gains financial benefit, including "commissions . . . profits . . . compensation . . . fees . . . or other benefits . . . directly or indirectly, as a result of the misconduct" the Guidelines direct adjudicators to consider requiring disgorgement.[74] The SEC has held that when FINRA orders disgorgement in an amount reasonably approximating a respondent's "ill-gotten gains causally connected to the violations," it is an appropriately remedial sanction, necessary "to prevent unjust enrichment."[75]

Enforcement has established, through its analysis of fee sheets StraightPath submitted to WCM, review of WCM's bank statements, and other information gathered in the investigation, that WCM's monetary gain from its secret compensation agreement with StraightPath was $609,500.[76] Therefore I find it appropriate to order WCM to disgorge its ill-gotten gains, in the amount of $609,500, plus pre-judgment interest.

IV. Order

Respondent Worden Capital Management LLC is expelled from FINRA for fraudulently omitting material information in connection with the sales of securities in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and FINRA Rules 2020 and 2010; failing to fulfill its supervisory responsibilities in the sale of securities, in violation of FINRA Rules 3110 and 2010; recommending investments without a reasonable basis to believe them suitable for at least some investors, in violation of FINRA Rules 2111 and 2010; and failing to submit to FINRA the offering materials it used in recommending the investments, in violation of FINRA Rules 5123 and 2010.

The expulsion shall become effective immediately if this Default Decision becomes the final disciplinary action of FINRA. WCM is also ordered to disgorge its ill-gotten gains, in the

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[72] *Id*. at 8 (Principal Consideration No. 16).

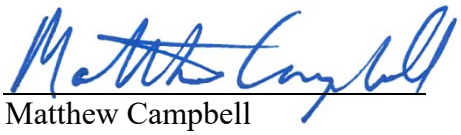
[73] *McCarthy v. SEC*, 406 F.3d 179, 188–89 (2d Cir. 2005) (expulsion appropriate not to penalize but to protect investors from future harm when necessary; both specific and general deterrence may be considered as part of remedial inquiry).

[74] Guidelines at 5, and n.5 (General Principle No. 6).

[75] *Vungarala*, 2020 SEC LEXIS 4938, at *37–38.

[76] Compl. ¶ 21; Kiley Decl. ¶45.

amount of $609,500, plus pre-judgment interest, from March 31, 2020, when it received its last secret compensation payment from StraightPath, until paid in full.[77]



Matthew Campbell
Hearing Officer

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[77] The pre-judgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), the same rate that is used for calculating interest on restitution awards. Guidelines at 11.