FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. NYPPEX, LLC (CRD No. 47654), Laurence Allen (CRD No. 1063970), and Michael Schunk (CRD No. 732595), Respondents.	Disciplinary Proceeding No. 2019064813801 Hearing Officer–DRS **EXTENDED HEARING PANEL DECISION** August 26, 2022

NYPPEX, LLC is expelled from FINRA membership and Laurence Allen is barred from associating with any FINRA member firm in any capacity for responding untimely and incompletely to FINRA requests for information and documents.

In light of the expulsion, no further sanctions are imposed against NYPPEX for its other violations: permitting Allen, a statutorily disqualified person, to remain associated with NYPPEX; making misrepresentations and omissions of material fact to prospective investors in connection with a securities offering; violating FINRA's advertising standards in communications to prospective investors and in material posted on NYPPEX's website; violating just and equitable principles of trade by making false or misleading statements on NYPPEX's website; failing to reasonably supervise Allen; and making false or misleading statements in response to FINRA information requests.

In light of the bar, no further sanctions are imposed against Allen for his other violations: remaining associated with NYPPEX after he became statutorily disqualified; making misrepresentations and omissions of material fact to prospective investors in connection with a securities offering; violating FINRA's advertising standards in communications to prospective investors and in material posted on NYPPEX's website; violating just and equitable principles of trade by making false or misleading statements on NYPPEX's website, to a court, and to FINRA; and making false or misleading statements in response to FINRA information requests.

Michael Schunk is fined $70,000 and suspended in all capacities from associating with any FINRA member firm for 18 months for permitting a statutorily disqualified person to remain associated with NYPPEX; barred from acting in any principal or supervisory capacity with any FINRA member firm for failing to supervise Allen; and fined $50,000 and suspended in all capacities from associating with any FINRA member firm for two years for making false or misleading statements in response to FINRA information requests. Schunk's all-capacities suspensions are imposed concurrently.

Appearances

For the Complainant: Robert Kennedy, Jr., Esq., Karen C. Daly, Esq., Payne Templeton, Esq., and Kevin Hartzell, Esq., Financial Industry Regulatory Authority

For the Respondents: Jonathan E. Neuman, Esq.

DECISION

I. Introduction

The Department of Enforcement charged FINRA member firm NYPPEX, LLC ("NYPPEX" or "Firm"), its former Chief Executive Officer ("CEO"), Laurence Allen, and its Chief Compliance Officer ("CCO") and current CEO, Michael Schunk, with numerous violations of FINRA rules. The charges stem from Respondents' conduct in the wake of a temporary restraining order issued by a New York state court against Allen and others. The order, obtained at the behest of the Office of the Attorney General for the State of New York ("NYAG"), enjoined Allen from engaging in securities fraud, violating New York's securities laws, and converting or otherwise disposing of or transferring funds from a private equity fund he controlled. The Complaint alleges that the order rendered Allen statutorily disqualified from continued association with a FINRA member firm. Even so, Allen could have remained associated with the Firm if it applied for, and received, FINRA's permission. But Allen's supervisor, Schunk, purportedly let Allen continue as an associated person at NYPPEX for over a year without seeking, let alone obtaining, that permission.

Meanwhile, according to the Complaint, while associated with the Firm, Allen engaged in misconduct to circumvent constraints imposed on him by the New York court order. Enforcement alleges that the order prevented Allen from continuing to siphon funds from the private equity fund into NYPPEX's parent company. Needing a new funding source for the parent company, Allen allegedly engineered an aggressive sales campaign to raise $10 million through the sale of the company's securities. In connection with that campaign, the Firm and Allen allegedly made misleading statements and omissions to prospective investors about, among other things, the parent company's valuation, its financial condition, and its management team.

The Firm and Allen also allegedly made communications to the public that violated FINRA's advertising rule. The Complaint alleges that these communications, made in connection with the Firm and Allen's solicitation efforts to raise funds for the parent company, were not fair and balanced, omitted material facts, contained false or misleading statements, and failed to disclose the risks and potential benefits in a balanced way.

Further, the Firm and Allen are charged with making false or misleading statements on the Firm's website, namely, that the NYAG's allegations conflicted with findings FINRA made based on its examination of the Firm and that FINRA did not find any violations during its examination warranting a fine, censure, or disciplinary action. According to the Complaint, the website also contained false or at least exaggerated statements about, among other things, Allen's and others' regulatory compliance record, which impermissibly implied FINRA's endorsement. Allen allegedly made similar false or misleading statements about the FINRA examination in an affidavit he filed in a New York state court and with FINRA.

Enforcement also alleged supervisory misconduct by the Firm and Schunk. The Complaint alleges that once the New York court issued the restraining order, Schunk knew the NYAG had alleged that Allen engaged in widespread securities fraud and misappropriation of investor funds. Yet, the Complaint continues, Schunk failed to take reasonable steps to ensure that Allen and the Firm's statements to Firm customers, prospective investors, the public, the New York court, and FINRA, complied with the federal securities laws and FINRA's rules.

Finally, the Complaint alleges that the Firm, Allen, and Schunk violated FINRA rules when responding to information and document requests issued by FINRA. FINRA's Advertising Regulation Department issued information requests to Respondents about the statements posted on the Firm's website. Respondents responded by allegedly providing false or misleading information. Also, the Firm and Allen allegedly failed to respond, or failed to timely and completely respond, to numerous information and document requests FINRA issued in connection with the investigation leading to this disciplinary action.

Respondents answered the Complaint and denied any wrongdoing. They also claimed that they relied on advice of counsel when engaging in the allegedly wrongful conduct. An Extended Hearing Panel held an 11-day hearing. Based on the evidence and the parties' arguments, the Panel concludes that Respondents engaged in the violations Enforcement alleged and imposes appropriately remedial sanctions, as discussed below.

II. Findings of Fact[1]

A. Respondents and Other Relevant Entities

1. NYPPEX and NYPPEX Holdings, LLC

NYPPEX has been a FINRA member firm since 1999.[2] Its business focuses on the secondary market for private equity funds.[3] During the period 2018 to 2020, NYPPEX had a branch office in Rye Brook, New York,[4] and, as of 2020, was also based there.[5] From December 2018 to at least December 2021, NYPPEX had between three and ten registered representatives.[6]

NYPPEX's parent company is NYPPEX Holdings, LLC ("NYPPEX Holdings"),[7] a financial technology firm[8] focusing on providing liquidity data and risk analytic services and products to participants in the alternative asset class.[9] From at least February 2020, NYPPEX was NYPPEX Holding's primary revenue source.[10] Allen controls and is majority owner of NYPPEX Holdings and NYPPEX.[11]

NYPPEX has a disciplinary history. In 2013, it entered into a Letter of Acceptance, Waiver, and Consent ("AWC") with FINRA consenting, without admitting or denying, to a censure and a $10,000 fine resulting from findings that it "failed to establish and maintain a supervisory system and written supervisory procedures reasonably designed to ensure that it conducted adequate due diligence into private offerings and the secondary sale of limited partnerships."[12] And on April 30, 2019, NYPPEX received a cautionary action letter from

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[1] While most of our findings of fact are in this section, we have made additional findings in other sections where necessary to address certain issues.

[2] Complaint ("Compl.") ¶ 11; Answer ("Ans.") ¶ 11; Stipulations ("Stip.") ¶ 5.

[3] Hearing Transcript ("Tr.") 116, 303–05; Compl. ¶ 11; Ans. ¶ 11; Stip. ¶ 5; Joint Exhibit ("JX-__") 28, at 4, ¶ 27 (Affidavit of Laurence Allen (the "affidavit"), *People v. Allen*, No. 452378/2019 (N.Y. Sup. Ct. Jan. 14, 2020)).

[4] Tr. 304; *see also* Stip. ¶ 6 (as of December 2021, the firm had a branch office in Rye Brook, NY).

[5] Tr. 1843.

[6] Tr. 116–17, 304; Stip. ¶ 6.

[7] Tr. 117, 304; Stip. ¶ 4.

[8] Tr. 304.

[9] Tr. 117, 305. "An alternative investment is a financial asset that does not fit into the conventional equity/income/cash categories. Private equity or venture capital, hedge funds, real property, commodities, and tangible assets are all examples of alternative investments." *Investopedia*, https://www.investopedia.com/terms/a/alternative_investment.asp#:~:text=Key%20Takeaways-,An%20alternative%20investment%20is%20a%20financial%20asset%20that%20does%20not,all%20examples%20of%20alternative%20investments.

[10] Tr. 118, 305.

[11] Complainant's Exhibit ("CX-__") 20, at 3, ¶ 11.

[12] Stip. ¶ 8.

FINRA staff based on exceptions the staff found when conducting its 2018 examination of the Firm.[13]

2. Laurence Allen

Allen first became registered as a General Securities Representative through his association with a FINRA member firm in 1982. He became registered as a General Securities Principal in 1999.[14] That year, Allen formed NYPPEX.[15] Since then, besides maintaining registrations as a General Securities Representative and General Securities Principal, he also obtained registrations as an Investment Banking Representative, Investment Banking Principal,[16] and Operations Professional.[17] He currently maintains those registrations through NYPPEX.[18] Allen is the managing member/CEO of NYPPEX Holdings and is the chairperson of its executive committee.[19] Since at least 2000, he has also been the managing member of NYPPEX[20] and was formerly its CEO.[21]

3. Michael Schunk

Schunk first became registered as a General Securities Representative through his association with a FINRA member firm in 1981. In 1989, he became registered as a General Securities Principal. Schunk is currently registered in those and other capacities through his association with NYPPEX,[22] where he is the CEO.[23] He has served as NYPPEX's CCO since at least 2010[24] and is the CCO for NYPPEX Holdings.[25] He also has compliance responsibilities for ACP X, LP ("ACP X"), a private equity partnership.[26]

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[13] JX-41. FINRA has jurisdiction over NYPPEX because it is a FINRA member. Compl. ¶ 12; Ans. ¶ 12; Stip. ¶ 7.

[14] Tr. 114; Stip. ¶ 9.

[15] Tr. 116, 303.

[16] Tr. 115.

[17] Tr. 115; Stip. ¶ 9.

[18] Tr. 115; *see also* Stip. ¶ 9 (as of December 2021).

[19] Tr. 117–18, 305.

[20] Tr. 116, 303. FINRA has jurisdiction over Allen because he is currently registered with FINRA through his association with NYPPEX, a FINRA member firm. Compl. ¶ 17; Ans. ¶ 17; Stip. ¶ 10.

[21] Tr. 2909.

[22] Stip. ¶ 13.

[23] Tr. 121, 303. Schunk became NYPPEX's CEO in the fourth quarter of 2021. Tr. 1439.

[24] Tr. 307; Compl. ¶ 18; Ans. ¶ 18; Stip. ¶ 11.

[25] Tr. 307–08.

[26] Compl. ¶ 18; Ans. ¶ 18; Stip. ¶ 11.

At all relevant times, NYPPEX's written supervisory procedures ("WSPs") designated Schunk as the principal responsible for supervising Allen's activities.[27] The WSPs also required Schunk to "review and approve, prior to use, all advertisements and sales literature to assure compliance with all applicable federal and state securities laws" and to consider whether any communications needed to be filed with FINRA prior to use.[28]

Like NYPPEX, Schunk has a disciplinary history. In April 2012, while associated with NYPPEX, Schunk entered into an AWC with FINRA in which he agreed to a $20,000 fine and a 30-day, principal-capacity suspension arising from various supervisory violations at another firm.[29] Under the AWC, he consented, without admitting or denying, to findings that he had engaged in supervisory, supervisory control, and anti-money laundering violations. As a result, in addition to the fine and suspension, Schunk was required to complete training on anti-money laundering, supervision, written supervisory procedures drafting, and/or supervisory controls.[30]

4. The ACP Entities—ACP X, LP; ACP Investment Group, LLC; and ACP Partners X, LLC

ACP X is a 2004 vintage private equity partnership[31] sponsored by ACP Investment Group, LLC[32] and controlled by Allen.[33] ACP Investment Group is an investment advisor[34] and a subsidiary of NYPPEX Holdings.[35] Since early 2020, ACP Investment Group earned investment advisory fees for its management of ACP X.[36] Allen manages, controls, and has a majority ownership interest (directly or indirectly) in ACP Investment Group and ACP Partners X, LLC, the general partner of ACP X.[37] Allen is a consultant to ACP Investment Group and its affiliates such as ACP Partners X.[38]

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[27] Compl. ¶¶ 19, 234; Ans. ¶¶ 19, 234; Stip. ¶ 12.

[28] Compl. ¶¶ 19, 235; Ans. ¶¶ 19, 235; Stip. ¶ 12. FINRA possesses jurisdiction over Schunk because he currently is registered with FINRA through an association with NYPPEX. Compl. ¶ 21; Ans. ¶ 21; Stip. ¶ 14.

[29] Stip. ¶ 15.

[30] JX-18.

[31] "The term 'vintage year' refers to the milestone year in which the first influx of investment capital is delivered to a project or company. This marks the moment when capital is committed by a venture capital fund, a private equity fund or a combination of sources. Investors may cite the vintage year in order to gauge a potential return on investment . . . ." *Investopedia*, https://www.investopedia.com/terms/v/vintage_year.asp.

[32] Tr. 306.

[33] Stip. ¶ 4.

[34] Tr. 118, 306.

[35] Tr. 306.

[36] Tr. 306; JX-28, at 4, ¶ 24.

[37] CX-20, at 2, ¶ 7; JX-28, at 4, ¶ 25.

[38] JX-28, at 2, ¶ 10.

B. The NYAG Obtains an Ex Parte Temporary Restraining Order Against Allen

The events leading to this disciplinary proceeding were triggered by an ex parte restraining order a New York state court issued against Allen and others at the end of 2018. Two years earlier, in 2016, the NYAG began investigating "whether Allen . . . misstated and/or manipulated the valuation of NYPPEX Holdings, and misrepresented other aspects of [ACP X's] management and operation, in disclosures and solicitations to [ACP X's] investors."[39] The investigation also concerned payments ACP X made, at the direction of ACP Partners X and ACP Investment Group, to Allen and entities he controlled. "These payments include[d] distributions of carried interest and the payment of operation expenses for" NYPPEX Holdings and ACP Investment Group.[40]

In December 2018, the NYAG "determined to commence an action" under Article 23-A of [New York's General Business Law], known as the Martin Act, against Allen and certain others.[41] The NYAG applied on an ex parte basis for preliminary injunctive relief against Allen, NYPPEX Holdings, and others under Section 354 of New York's General Business Law.[42] In seeking the preliminary relief, on December 26, 2018, the NYAG filed and served on Allen an Attorney Affirmation, a Memorandum of Law, and many attachments, in which the NYAG alleged "fraudulent and deceptive practices arising out of [Allen's and others'] management and operation" of ACP X.[43]

The NYAG also alleged that Allen had wrongfully transferred $6 million of investors' money out of ACP X and into NYPPEX Holdings and other entities that he owned or controlled. According to the NYAG, Allen also "systematically reported inflated and unsupported valuations of the company" to [ACP X's] limited partners to hide ACP X's true value.[44] The NYAG further stated that a preliminary injunction was warranted because of the allegations of fraud and fraudulent practices, and also because of "the extraordinary conduct of Allen and the entities that he owns and controls immediately" before the request for a preliminary injunction—including steps Allen took to keep enriching himself with ACP X funds after he refused to produce ACP X-related documents to the NYAG or to appear for testimony.[45]

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[39] CX-20, at 12–13, ¶¶ 67–68.

[40] CX-20, at 13, ¶ 69. The term "carried interest" refers to "a share of profits from a private equity, venture capital, or hedge fund, paid as incentive compensation to the fund's general partner." *Investopedia*, https://www.investopedia.com/terms/c/carriedinterest.asp#:~:text=Carried%20interest%20is%20a%20share%20of%20profits%20from%20a%20private,achieves%20a%20specified%20minimum%20return.

[41] Stip. ¶ 16; CX-21, at 7.

[42] CX-21, at 21, 24–27.

[43] Stip. ¶ 18; CX-21, at 5.

[44] Stip. ¶ 18; CX-21, at 5–6.

[45] Stip. ¶ 18; CX-21, at 25–26.

On December 28, 2018, the Supreme Court of the State of New York granted the NYAG's ex parte application for preliminary injunctive relief ("Order").[46] The New York court found, among other things, that the "alleged fraudulent practices of [Allen and others] threatened continued and immediate injury to the public."[47] As a result, the Order preliminarily enjoined and restrained Allen, NYPPEX Holdings, and other Allen-affiliated entities "from violating Article 23-A of [New York's General Business Law], and from engaging in fraudulent, deceptive, and illegal acts." It "further restrained and enjoined [them] from employing any device, scheme or artifice to defraud or to obtain money by means of false pretense, representation, or promise."[48] The Order also enjoined and restrained them from "[f]acilitating, allowing, or participating in, the purchase, sale or transfer of any limited partnership interest in" ACP X and from "withdrawing, converting, transferring, selling or otherwise disposing of funds and assets held by" ACP Investment Group, ACP X and ACP Partners X.[49] Allen was served with the Order in January 2019,[50] and Schunk learned about it that month.[51]

As a result of the Order, on January 24, 2019, Schunk filed an amended Uniform Application for Securities Industry Registration or Transfer (Form U4) for Allen; both of them signed it electronically.[52] The amendment disclosed the Order's existence,[53] describing it both as a temporary restraining order and an ex parte order.[54] Responding to a question requesting a description of the allegations, Allen stated in the amendment that the NYAG had "applied for a court order for . . . an ex parte preliminary injunction against a private equity investment firm of which I am the managing principal." "The NY AG," he continued, "alleges threatened fraudulent practices."[55] Allen failed to disclose that the Order preliminarily enjoined and restrained him, personally, from selling or transferring any limited partnership securities of ACP X and committing further acts of securities fraud.[56]

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[46] Stip. ¶ 4; JX-25.

[47] Stip. ¶ 19; JX-25, at 2.

[48] Stip. ¶¶ 4, 19; JX-25, at 4.

[49] JX-25, at 4–5.

[50] Compl. ¶ 30; Ans. ¶ 30; Stip. ¶ 20. Although Allen was not served with the Order until January, he received a copy on or about December 26, 2018. *See* JX-12, at 15 (Form U4) amendment.

[51] Compl. ¶ 31; Ans. ¶ 31; Stip. ¶ 21.

[52] JX-12, at 1, 14; Tr. 317–18, 417–18, 1520.

[53] JX-12, at 15–16, 19.

[54] JX-12, at 15.

[55] JX-12, at 16, 19.

[56] JX-25, at 4; JX-12, at 16, 19. Although Schunk filed an amended Form U4 for Allen, he did not increase his level of supervision over Allen, as we discuss below. Tr. 1527–29.

C. Allen Tries to Raise Capital for NYPPEX Holdings

On January 10, 2019, less than two weeks after the New York court issued the Order, Allen wrote urgently to the Firm's attorneys (copying Schunk) that "[i]t is important to raise capital now."[57] And over the next few months, he embarked upon a capital raising campaign to sell interests in NYPPEX Holdings to investors. Allen's first major step was to obtain a valuation report on NYPPEX Holdings from a consultant in February 2019.

The next month, Allen started his capital-raising efforts in earnest.[58] He created the offering and oversaw an aggressive sales campaign to solicit interest in it from prospective investors. Allen created the offering terms; personally solicited and instructed NYPPEX registered representatives to solicit investments; worked with NYPPEX employees to create the materials shared with prospective investors and personally approved those materials; created a voicemail script; drafted discussion points for registered representatives of the Firm to use with prospective investors; and offered NYPPEX registered representatives a sales incentive for pitching the investment.[59]

We discuss the capital-raising efforts in detail below, beginning with the valuation report.

1. Allen Obtains a Valuation Report on NYPPEX Holdings

In early 2019, acting on ACP Investment Group's behalf,[60] Allen retained CVA, a business appraisal company, to value NYPPEX Holdings as of December 31, 2018.[61] According to Allen, he engaged CVA because the NYAG was questioning NYPPEX Holdings' valuation.[62]

Allen supplied CVA with "base case" financial projections of net revenue for NYPPEX Holdings of $7,068,000 in 2019 and $27,640,000 in 2020.[63] This projection represented an increase of more than 2,400 percent from 2018 to 2020.[64] Allen also supplied "upside" projections forecasting net revenue for NYPPEX Holdings of $53,211,000 in 2019 and $55,177,000 in 2020. This projection represented an increase of 4,900 percent from 2018 to

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[57] JX-203, at 1.

[58] Enforcement alleges that the Order triggered the need for Allen to raise capital because it blocked him from moving money from ACP X into NYPPEX Holdings and the Firm. *See, e.g.*, Compl. ¶¶ 3, 37. Respondents dispute this allegation, pointing out that there was evidence Allen had contemplated a capital raise for NYPPEX Holdings six months before the New York court issued the Order. *See* Resp'ts Opening Br. 7 (citing Tr. 1208–10, 1250, 2929; JX-127 at 7). The parties' positions are not inconsistent; even if Allen had planned a capital raise before the court issued the Order, the need to raise capital likely became more acute afterward.

[59] Compl. ¶ 52; Ans. ¶ 52; Stip. ¶ 29.

[60] Tr. 419.

[61] Tr. 1282; Stip. ¶ 22.

[62] Tr. 434–37.

[63] Stip. ¶ 25; JX-67, at 27.

[64] Stip. ¶ 25.

2020.[65] Allen did not give CVA any "downside" projections.[66] Nor did Allen tell CVA's Managing Director JV—the author of the report—[67]about the NYAG's investigation or the Order.[68] Allen also failed to tell JV that he would use the valuation for any purpose other than "[m]anagement information."[69] CVA accepted as accurate the information Allen provided "without further independent verification."[70]

On February 25, 2019, CVA issued its valuation report for NYPPEX Holdings.[71] Based on Allen's projections, CVA calculated that NYPPEX Holdings' fair market value, as a going concern, was $108.7 million as of December 31, 2018.[72] According to the report, CVA understood "that the results of [its] valuation will be used in connection with management planning activities."[73] The report also contained numerous limitations and assumptions, including the following:

- The "intended users . . . are limited to NYPPEX and ACP Investment Group, LLC and their consultants";[74]
- The report and its conclusions were intended for the "exclusive use" of NYPPEX Holdings and "for the sole and specific purposes" noted in the report;
- "[T]he report and conclusions are not intended by the author, and should not be construed by the reader, to be investment advice in any matter whatsoever";
- "Neither all nor any part of the contents of this report (especially any conclusions as to value, . . .) should be disseminated to the public" without CVA's "prior written consent and approval";[75]
- "[T]he scope of this valuation relates to the total equity of NYPPEX [Holdings]. All current and long-term assets and liabilities are excluded from this valuation"; and

[65] Stip. ¶ 26.

[66] Stip. ¶ 27.

[67] JX-67, at 3, 28, 30.

[68] Tr. 1304–05.

[69] Tr. 1289–90.

[70] JX-67, at 27.

[71] JX-67, at 2.

[72] Stip. ¶ 28; JX-67, at 3.

[73] Stip. ¶ 23; JX-67, at 6. The report's cover letter contained the same statement. JX-67, at 2.

[74] JX-67, at 6.

[75] Stip. ¶ 24; JX-67, at 27.

- "[T]he conclusions of value are based upon the assumption that the current level of management expertise and effectiveness would continue to be maintained and," it continued, "that the character and integrity of the enterprise through any . . . diminution of the owner's participation would not be materially or significantly changed."[76]

Soon after receiving the valuation report, Allen devised and implemented a campaign to sell interests in NYPPEX Holdings.

2. Allen Drafts and Directs the Distribution of a New Investor Solicitation Email with a Link to a Corporate Overview

a. New Investor Solicitation Email

After receiving the valuation report, Allen drafted an email to solicit new investors to purchase NYPPEX Holdings units ("New Investor Solicitation Email").[77] On March 3, 2019, he sent a draft of the New Investor Solicitation Email to NYPPEX registered representatives.[78] The next day, and continuing throughout the month, Allen and NYPPEX registered representatives, acting at Allen's direction, sent the email, or variations of it, to over 200 prospective new investors to solicit them to invest in NYPPEX Holdings.[79]

The New Investor Solicitation Email contained the subject line "$10MM NYPPEX HOLDINGS SERIES E PFD - NEXT GENERATION ONLINE BROKERAGE" and described a private offering totaling $10 million with an initial targeted closing date of March 19, 2019.[80] The email stated that the purpose of the capital raise was to "help finance a 3 year plan to IPO or to be acquired" and that it provided investors with an opportunity for liquidity through a near term exit.[81] NYPPEX and Allen advised prospective investors in the email that "[t]his round will be the first opportunity for outside parties to invest in NYPPEX since 2008." Continuing, it claimed that the offering price of $1.00 per unit was "attractive," based, in part, on the valuation of the company's equity "at **approx. $106 million** [sic] as of 12-31-18 by an independent valuation firm" (emphasis in original).[82] The emails also identified "key management" for NYPPEX Holdings, including AS, who purportedly held the role of "Head, Software/AI Development."[83]

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[76] Stip. ¶ 24; JX-67, at 6.

[77] Compl. ¶ 53; Ans. ¶ 53; Stip. ¶ 30.

[78] Stip. ¶ 31; JX-70.

[79] Stip. ¶ 32; CX-5.

[80] Stip. ¶ 33; *see also, e.g.*, JX-98, at 4.

[81] Stip. ¶ 33.

[82] Stip. ¶ 34; *see, e.g.*, JX-81, at 1–3.

[83] *See, e.g.*, JX-86, at 3.

Allen also offered NYPPEX registered representatives a sales incentive for pitching the investment.[84] On March 3, he set for each NYPPEX registered representative a fundraising "goal," typically to "sell $100,000 per month of Units starting in" March.[85] In his emails to registered representatives, Allen referred to certain information as "key terms and marketing points" and told them that a "Powerpoint, Subscription etc. are in final review and will be forthcoming."[86]

The New Investor Solicitation Emails did not disclose:

- Any of the limiting factors and assumptions in the valuation report or that CVA relied on unverified projections Allen had created;
- The NYAG's ongoing investigation of NYPPEX Holdings and Allen;
- The resulting Order restraining and enjoining NYPPEX Holdings and Allen from committing fraud and from participating in certain financial transactions;
- That NYPPEX and Allen had given NYPPEX registered representatives sales goals for the offering and provided incentives for meeting those goals;
- That NYPPEX Holdings had operated at a net loss of more than $1.25 million according to its most current 2018 financial information;[87] and
- That even though AS held the position of "Head, Software/AI Development" for NYPPEX Holdings, he had only agreed to become an independent contractor for NYPPEX Holdings on March 4, 2019, after emailing Allen in January 2019 that he sought "part time work."[88]

b. The Corporate Overview

The New Investor Solicitation Email included an invitation link enabling prospective investors to request more information. Investors who clicked on the link and completed a non-disclosure agreement received a corporate overview PowerPoint about NYPPEX Holdings.[89] In March 2019, Allen and, at his direction, NYPPEX registered representatives, sent certain prospective investors the NYPPEX Holdings' corporate overview that Allen had created.[90] The

[84] Stip. ¶ 29.

[85] JX-70, at 1; Tr. 1331.

[86] *See, e.g.*, JX-70, at 27.

[87] JX-66, at 15, 46.

[88] CX-32, at 1, 4.

[89] Stip. ¶ 35.

[90] *See, e.g.*, JX-93, at 1; JX-94, at 1; JX-98, at 1; JX-118; *see also* Tr. 1360.

overview included a page entitled "Offering Summary" that identified NYPPEX Holdings as the issuer, the security being offered as a "unit," and included information such as the price per unit.[91]

Like the New Investor Solicitation Emails, the overview did not disclose: the NYAG's ongoing investigation; the Order; sales incentives given to registered representatives; NYPPEX Holdings' negative financial results for 2018; CVA's limiting factors and reliance on unverified projections Allen created; or that AS had signed on as an independent contractor earlier the same month,[92] even though the overview identified him as part of the "Executive team" with an eight-year tenure at NYPPEX Holdings.[93] It also contained a slide titled "Numerous secondary transactions – with Qualified Investors," that identified a specific prominent pension fund, foundation, and trust.[94]

Schunk reviewed the March 2019 corporate overview before its dissemination to prospective investors. But he never insisted that it mention the Order.[95] Indeed, he did not recall making any additions, corrections, or revisions to it.[96]

3. Allen Drafts Existing Shareholder Solicitation Email

Besides the New Investor Solicitation Email, Allen also drafted a separate solicitation email to existing NYPPEX Holdings shareholders ("Existing Shareholder Solicitation Email"). On March 18, 2019, at Allen's direction, a NYPPEX registered representative emailed the Existing Shareholder Solicitation Email to around 100 shareholders of NYPPEX Holdings.[97] The email, whose subject line was "NYPPEX Exit Opportunity to Publicly-Listed Shares," included a letter from Allen to current shareholders. The title of the letter was "Discount Investment Round for Current Shareholders."[98]

Allen's letter to shareholders began by touting the $108 million valuation. "Recently, we received a valuation of approx. $108 million for shares of NYPPEX Holdings or $.83 per share from an independent valuation firm," he wrote. Allen then claimed that there was a window of opportunity for NYPPEX Holdings to publicly list its shares, which, in turn, would provide liquidity for existing shareholders.[99] The email then stated that NYPPEX Holdings was offering

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[91] *See, e.g.*, JX-98, at 41.

[92] *See* CX-32, at 1, 6–15.

[93] *See, e.g.*, JX-98, at 39.

[94] *See, e.g.*, JX-93, at 24; JX-94, at 25; JX-98, at 22.

[95] Tr. 1562–64.

[96] Tr. 1564.

[97] Stip. ¶ 36.

[98] Stip. ¶ 37.

[99] Stip. ¶ 37.

current shareholders a "special discount investment opportunity" for up to $2.5 million of units in NYPPEX Holdings. Each unit contained one share of Series E preferred stock, plus two warrants exercisable into two shares of Series E preferred stock at $1.00 per share.[100]

The Existing Shareholder Solicitation Email also invited shareholders to participate in a webinar scheduled for March 22, 2019, to discuss this investment opportunity.[101] As with the New Investor Solicitation Emails and the corporate overview, the Existing Shareholder Solicitation Emails did not disclose the limiting factors and assumptions that qualified the valuation, the NYAG's investigation or the Order, the sales incentives, or NYPPEX's Holdings' actual financial condition, namely, that it had operated at a net loss in its most recent fiscal year. On March 20, at Allen's instruction, one of NYPPEX's registered representatives again sent the email to shareholders along with an invitation reminder for a webinar that would discuss the "investment opportunity."[102]

4. NYPPEX Conducts a Webinar

On March 22, 2019, NYPPEX held a webinar with current shareholders of NYPPEX Holdings.[103] The webinar served as the annual NYPPEX Holdings shareholders' meeting for 2017 (not 2018). Both Allen and Schunk participated.[104] The webinar took the form of an oral presentation by Allen and others at NYPPEX during which they displayed on screen a PowerPoint slide deck much like the corporate overview.[105]

Allen started the webinar by again referencing the $108 million "independent valuation" of NYPPEX Holdings.[106] He also discussed the valuation later in the webinar while showing two PowerPoint slides about the CVA valuation: the report's cover page and the page showing the bottom-line $108.7 million valuation.[107] During the webinar, Allen advised existing shareholders that NYPPEX Holdings had already "started a $10 million Series E round."[108] He described the deal structure—each unit to be sold contained one share of Series E preferred stock plus a warrant to purchase common stock at $1 per share—and said that the warrant had value.[109]

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[100] Stip. ¶ 38; JX-113, at 2; *see also, e.g.*, JX-105, at 7.

[101] Stip. ¶ 39.

[102] *See* JX-113, at 1; JX-116.

[103] Stip. ¶ 40; JX-119; JX-120; JX-255.

[104] Stip. ¶ 40.

[105] Tr. 1371; Stip. ¶ 40; JX-255.

[106] Stip. ¶ 41; *see also* JX-120, at 2 (Webinar Tr. 3).

[107] Stip. ¶ 41; JX-255, at 14–15.

[108] Stip. ¶ 41; JX-120, at 8 (Webinar Tr. 26).

[109] Stip. ¶ 41.

During the webinar Allen claimed that certain major financial institutions "route all of their secondary transfers" through NYPPEX and that NYPPEX was "the only player that handles it for them."[110] Allen also claimed that certain named prominent pension funds, foundations, and trusts were "customers of NYPPEX,"[111] and had "done transactions with" the Firm.[112] The PowerPoint slides included one entitled "Numerous secondary transactions – with Qualified Investors."[113] Another was headed "Numerous secondary transactions – with Buyout Funds."[114] Together, the two slides referenced six entities.

The PowerPoint presentation highlighted NYPPEX Holdings "key talent," including AS, identified as a "former chief architect for information technology" at two major international financial institutions. Allen claimed AS was, at that time, NYPPEX Holdings' head of "software and artificial intelligence development."[115] The PowerPoint shown during the webinar stated that AS had held that role for eight years and also was a member of NYPPEX's executive team.[116]

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[110] JX-120, at 6 (Webinar Tr. 18).

[111] JX-120, at 4 (Webinar Tr. 10).

[112] JX-120, at 4 (Webinar Tr. 10–11); JX-93, at 24–26. The Complaint alleges that the corporate overview contained a slide titled "Numerous secondary transactions – with Qualified Investors," which identified a specific prominent pension fund, foundation, and trust, but misleadingly failed to disclose that none of those named entities were current clients of NYPPEX or had been for years. Compl. ¶ 62(c). Likewise, the Complaint alleges that at the webinar, Allen "claimed that certain named prominent pension funds, foundations, and trusts were 'customers of NYPPEX,' and that these entities and others had engaged in 'numerous secondary transactions' with the firm." Compl. ¶ 72(a). According to the Complaint, this webinar statement was misleading because "[n]one of those named entities were current clients of NYPPEX or had been for years." Compl. ¶ 72(a). In its post-hearing brief, Enforcement argues that "Respondents later admitted that the named entities had, at most, engaged in one-off transactions with NYPPEX years earlier." In support of that argument, Enforcement cites a list of transactions for certain entities entitled "Evidence of 'Numerous Secondary Transactions' with various entities. Response to April 10, 2020 Request Item #10." Enf. Opening Br. 19 (citing JX-186). Request Item #10 sought documents evidencing "[n]umerous secondary transactions" with certain specified entities. JX-83, at 4. The response listed nine transactions between 2013 and 2019—six of which occurred between 2017 and 2019. Allen disputed that the webinar statement was false or misleading. He testified that the slide he showed at the webinar just gave examples of NYPPEX customer transactions and was not meant to imply that each customer had generated numerous transactions. Tr. 678, 1193. According to Allen, the Firm had "probably done those types of transactions with dozens if not hundreds of buyout funds." Tr. 1194; *see also* Tr. 1195–96. Even without crediting Allen's testimony, whether the list qualifies as "numerous transactions" with customers is arguable and not clearly false or misleading. We therefore find that the evidence does not support Enforcement's allegation regarding "numerous secondary transactions." We also find that the evidence does not support the allegation that the listed customers had not been customers for years.

[113] JX-255, at 9.

[114] JX-255, at 10.

[115] JX-120, at 8 (Webinar Tr. 29).

[116] JX-119; JX-255, at 25. According to Enforcement, Allen and NYPPEX inflated AS's position with NYPPEX Holdings. Enf. Opening Br. 71; Compl. ¶¶ 61, 62(b), 72(b). AS did not testify at the hearing. But Allen testified that AS had an eight-year tenure with NYPPEX. More specifically, Allen stated that for eight years, AS had been the President of a NYPPEX Holdings subsidiary as well as head of software before assuming the new artificial intelligence title. Tr. 594–95, 1202–03. Enforcement did not rebut Allen's testimony. While we do not generally find

Allen's webinar presentation (both the oral presentation and the accompanying PowerPoint slides) focused on NYPPEX Holdings' 2017 financial results.[117] Allen omitted from his presentation negative financial information about NYPPEX Holdings' more recent and less favorable 2018 performance numbers then available; the valuation's limiting factors and reliance on the Allen-created and unverified projections; the NYAG's investigation; the Order; and the sales incentives.

As with the corporate overview, Schunk reviewed and approved the PowerPoint slides shown during the March 22, 2019 webinar. And while these slides disclosed nothing about the Order and its injunction against Allen and NYPPEX Holdings, Schunk never suggested that Allen revise the slides to mention the Order.[118]

5. NYPPEX has Additional Communications with Investors About the Offering

Following the webinar, in March and April 2019, Allen and Frank Nunziato, a NYPPEX registered representative, communicated with several NYPPEX Holdings' investors about the offering. One shareholder asked Nunziato to send him the valuation report.[119] Nunziato, in turn, forwarded the request to Allen.[120] Afterward, Nunziato informed the shareholder that "[w]e've asked our legal counsel if we can share the valuation report at this time and are waiting to hear back."[121]

Nunziato later sent the shareholder a summary of the report. The shareholder complained that all he received was "a statement of total valuation, without any data to understand where this number came from." As a result, the shareholder requested "the basis upon which [CVA] made this determination."[122] Nunziato again turned to Allen and asked how he should respond. After not getting a response from Nunziato, the shareholder renewed his request for "the information [CVA] used to base their evaluation," adding: "I don't necessarily need their entire report, but something which substantiates the conclusion they've drawn." Again, Nunziato sought direction from Allen.[123]

Afterward, Nunziato denied the shareholder's request, explaining that they "aren't sharing further details about the valuation report," but assuring him that more "financial

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Allen a credible witness (*see* p. 58 n.417, below), Enforcement failed to prove that the statements about AS were false.

[117] JX-120, at 4–5 (Webinar Tr. 12–14); JX-119; JX-255, at 13.

[118] Tr. 1571–72.

[119] JX-139, at 3–4.

[120] JX-124, at 1.

[121] JX-139, at 3.

[122] JX-139, at 2.

[123] JX-139, at 1.

information will likely become available" later, as they "move closer to a public listing." Justifying his refusal to provide the requested information, Nunziato wrote to the shareholder "to the best of [his] knowledge most private companies don't get an independent valuation of their shares done nor do they share that valuation report at all." Continuing, Nunziato told the shareholder that he "wanted to at least summarize the value we received with current shareholders based on requests" received from some investors.[124]

Another shareholder and potential investor requested information from Nunziato about the intended capital raise and other subjects. Nunziato responded to his questions with information that did not include NYPPEX Holding's 2018 financial condition.[125] The response, which included the 2017 annual report, stated that "2018 won't be available until later in 2019," pointed to the "corporate overview presentation," and explained regarding the valuation report, "[a]t this time we are sharing just the cover pages . . . ."[126] And when another investor sought information about his prior investment, the new offering, and the financial condition of NYPPEX Holdings, Nunziato made a limited response that omitted information about NYPPEX Holdings' 2018 financial condition.[127]

Allen also wrote to a potential investor about the offering. "Lots of money to be made here," he wrote, "both from increasing the valuation of NYPPEX [Holdings] for shareholders and from our ACP funds (as our ACP funds have already proven)."[128] The potential investor responded, asking Allen for "some financials," as he was "[t]rying to understand approximately what [NYPPEX Holding's] annual revenues and EBITA are."[129] Allen emailed the investor a 2017 annual report and discussed the Firm's 2020 expected revenue and other topics.[130] But Allen included no 2018 financial information, including the revenue and EBITA figures he had given to CVA.[131]

As for Schunk's involvement, he permitted Allen to direct NYPPEX registered representatives to send excerpts of the CVA report to NYPPEX Holdings' shareholders and other potential investors in the offering. He did so even though the CVA report excerpts did not

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[124] JX-140, at 1.

[125] JX-127, at 1–2.

[126] JX-127, at 1.

[127] *See* JX-127, at 1.

[128] JX-136, at 2.

[129] JX-136, at 2. The term "EBITA" means "Earnings before interest, taxes, and amortization" and "is a measure of company profitability used by investors." *Investopia*, https://www.investopedia.com/terms/e/ebita.asp#:~:text=Earnings%20before%20interest%2C%20taxes%2C%20and%20amortization%20(EBITA)%20is,company's%20real%20performance%20over%20time.

[130] JX-136, at 1–2.

[131] JX-136, at 1.

include the limiting factors in the valuation report and omitted other important information in the full CVA valuation report.[132]

* * *

Meanwhile, beginning in Spring 2019 and continuing over the next few months, developments impacting Respondents occurred on two fronts: FINRA completed its 2018 cycle examination of NYPPEX, and the NYAG filed a complaint against Allen and his affiliated entities. We turn next to those events and the aftermath.

D. FINRA Conducts a Cycle Examination of NYPPEX and Issues a Cautionary Action Letter

In 2018, and continuing into 2019, FINRA staff conducted a routine examination of NYPPEX. The review period for the exam was January 1, 2017, through March 31, 2018.[133] On April 30, 2019, FINRA staff sent an Examination Disposition Letter to NYPPEX, addressed to Allen as the CEO, concluding the 2018 examination of NYPPEX.[134] The letter specifically identified the subject of the examination as NYPPEX, the FINRA member firm. The letter stated that during the 2018 examination, FINRA "reviewed selected aspects of your firm's business and operations."[135] And as a result of the examination, according to the Examination Disposition Letter, FINRA "elected to take" what it termed "Cautionary Action" against the Firm.[136] The Examination Disposition Letter explained that regarding seven "exceptions" set forth in an attached "Examination Report," "we hereby caution you concerning these violations of securities rules and regulations."[137]

Two of the violations pertained to facts relevant to the NYAG's action:

- FINRA's third exception found that NYPPEX had not complied with certain recordkeeping provisions of the Securities Exchange Act of 1934 ("Exchange Act") because NYPPEX was "unable to demonstrate it was entitled to receive payment for carried interest for $324,338" from ACP X. FINRA's report noted

[132] *See* JX-133; JX-134; Tr. 1575–85. Schunk knew that neither the CVA report excerpts (JX-127, at 17–21), nor the full CVA report (JX-67), disclosed anything about the Order and its injunction provisions against Allen and NYPPEX Holdings. Despite these omissions, however, according to Schunk's prehearing on-the-record interview ("OTR"), Schunk was concerned that the full report was not sent to potential investors. At the hearing he denied having these concerns. Tr. 1585–91. But we credit his closer-in-time OTR testimony over his later, self-serving hearing testimony.

[133] Stip. ¶ 42.

[134] Stip. ¶ 43; JX-41.

[135] Stip. ¶ 44; JX-41, at 1.

[136] JX-41, at 1.

[137] Stip. ¶ 45; JX-41, at 1.

that NYPPEX provided documentation showing the receipt of this amount from ACP X, "but did not indicate a basis for the allocation."[138]

- FINRA's fourth exception stated that NYPPEX failed to comply with the Exchange Act's recordkeeping provisions and specified that the "deficiencies" concerned the Firm's affiliate service agreement ("ASA"). These deficiencies included a failure to update the ASA since 2012, misallocation of professional fees in a manner inconsistent with the ASA, and misidentification of NYPPEX, a brokerage firm, as a registered investment advisor.[139]

The Examination Disposition Letter also advised NYPPEX and Allen that the letter "pertains only to the specific reviews conducted by Member Regulation during this examination, and does not address, limit, or in any way impact any other matter(s) being reviewed" by FINRA "or other regulatory agencies or any findings made in connection with any such matters."[140]

E. The NYAG Files a Complaint Against Allen and his Affiliated Entities

Eight months later, on December 4, 2019, the NYAG filed a complaint in the Supreme Court of the State of New York, New York County, against Allen, NYPPEX Holdings, and three additional entities related to ACP X. The complaint also named five entities owned by Allen as relief defendants, including NYPPEX.[141] The 53-page complaint asserted five causes of action, including securities fraud, other forms of fraud (violations of New York state law), and breach of fiduciary duty. The complaint, which charged Allen in every cause of action,[142] alleged that NYPPEX Holdings and NYPPEX are "effectively the same company" and that Allen controlled and was "responsible for every aspect of their operations."[143]

F. Allen Posts a Response to the NYAG's Complaint on the NYPPEX Website

Allen decided to issue a public response to the NYAG's complaint. Over the next few days, he sent drafts of a response to the Firm's attorney, LB,[144] and Schunk for their review.[145] The drafts were titled either "NYPPEX Statement to Clients Regarding the New York Attorney General Complaint"[146] or "NYPPEX Statement to the Media Regarding New York Attorney

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[138] Stip. ¶ 46; JX-41, at 6.

[139] Stip. ¶ 46; JX-41, at 7.

[140] Stip. ¶ 47; JX-41, at 1.

[141] Stip. ¶ 48; JX-27. "A relief defendant . . . has no ownership interest in the property that is the subject of litigation but may be joined in the lawsuit to aid the recovery of relief." *Janvey v. Adams*, 588 F.3d 831, 834 (5th Cir. 2009).

[142] Stip. ¶ 49.

[143] Stip. ¶ 50.

[144] JX-142, at 1.

[145] JX-146, at 1.

[146] JX-141.

General Civil Complaint."[147] They were printed on "NYPPEX Private Markets" letterhead, with the name "NYPPEX Holdings, LLC" and its address appearing at the top right corner of the first page.[148]

Later in December, Allen also sent a document entitled "NYPPEX Statement Regarding New York Attorney General Civil Complaint"[149] to a software company.[150] Allen asked the company to "create a link to our statement regarding the nyag."[151] In a follow-up email, Allen gave more specific instructions: "Please create a hyper link to www.nyppex.com with the attached NYPPEX Statement." He also suggested a name for the site link—www.nyppex.com/nyag—so that "when someone does a search for nyppex, hopefully this statement will appear with a high ranking." And he directly asked that they try to "accomplish this high ranking."[152] Schunk reviewed the statement on or around December 20, 2019, and provided conditional, oral approval to Allen.[153] Schunk made no revisions, corrections, or additions to it.[154]

Three days later, on December 23, 2019, the NYPPEX Statement was first posted at www.nyppex.com/nyag[155]—the address Allen had suggested. A version of the statement, dated January 2, 2020, appeared online at that same address.[156] And the same version, dated January 3, 2020, also appeared at that address as recently as during the hearing.[157] The statement, which could be found via Google and accessed without restriction,[158] included these false and misleading assertions:

- "Professionals at NYPPEX Holdings, LLC and its subsidiaries have years of exemplary regulatory compliance . . . ."[159] This statement was false and misleading because Allen was subject to a temporary restraining order enjoining him from engaging in securities fraud and other activities. Also, as discussed

[147] JX-142, at 7–9; JX-146, at 3–6.

[148] JX-141, at 1; JX-142, at 7; JX-146, at 3.

[149] JX-148, at 4–10.

[150] JX-148, at 1, 4.

[151] JX-148, at 2.

[152] JX-148, at 1.

[153] Compl. ¶ 93; Ans. ¶ 93.

[154] Tr. 1643–45.

[155] Stip. ¶ 51; JX-160, at 5.

[156] JX-151. The January 2 statement was much like the one Allen had sent to the software company, noted above. JX-148, at 1.

[157] CX-49, at 2 (screenshots of nyppex.com/nyag as of Mar. 16, 2022).

[158] Tr. 2008–09.

[159] JX-151, at 1.

above, in 2012, while associated with NYPPEX, Schunk entered into an AWC.[160] And finally, as discussed above, the subsidiary itself—NYPPEX—has a disciplinary history.

- "On April 30, 2019, FINRA concluded its latest year-long exam of NYPPEX and its Affiliates."[161] In fact, FINRA limited its 2018 examination to the member firm, NYPPEX, as noted in communications FINRA sent to Allen after completing the examination; it did not examine NYPPEX's affiliates.[162]

- FINRA's examination "did not find any violation of applicable securities regulations to warrant a fine, censure or disciplinary action of the Company."[163] This statement was false. The examination resulted in disciplinary action: FINRA issued a Cautionary Action against the Firm based on seven violations of the securities rules and regulations.[164] As FINRA explained to its members in a 2009 Regulatory Notice, a Cautionary Action is a type of informal disciplinary action.[165] The statement was misleading also because it suggested that FINRA found no issues with NYPPEX or otherwise gave NYPPEX a clean bill of health.[166]

- "The NYAG's allegations are in conflict with the facts concluded by FINRA."[167] This sentence was false and misleading; there was no conflict between FINRA's findings and the NYAG's allegations.[168] FINRA's investigation found that NYPPEX could not show it had a right to receive $324,338 in "carried interest" taken from ACP X's investors' funds.[169] In the same vein, NYAG's complaint alleged that starting in 2013, Allen "unlawfully distributed" at least $3.4 million in "what he characterized as carried interest . . . to himself and entities under his control."[170]

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[160] Stip. ¶ 15.

[161] JX-151, at 1.

[162] *See* JX-41 at 1, 3, 5; Tr. 2626, 2655–56.

[163] JX-151, at 2.

[164] JX-41, at 1.

[165] *See* FINRA Regulatory Notice Number 09-17 (Mar. 2009), http://www.finra.org/industry/notices/09-17.

[166] Respondents argue that this statement was "at worst a misunderstanding" by Allen and attorney LB. Respondents emphasized that LB testified he believed the statement was true when made and was still true. Resp'ts Opening Br. 44 (citing Tr. 913–16, 2812–13).

[167] JX-151, at 2.

[168] *See* Tr. 2660–63.

[169] *See* JX-41, at 6; Tr. 2648.

[170] JX-27, at 5 (NYAG Complaint ¶ 11).

- NYPPEX's "ASA has been reviewed and approved by FINRA throughout its periodic examinations of the Company for over 15 years."[171] This statement was false; FINRA does not "approve" such agreements.[172] Moreover, during the 2018 examination, FINRA found that two iterations of the ASA violated the Exchange Act.[173]

Taken as a whole, the NYPPEX Statement presented a misleading and false narrative; it portrayed Respondents as having spotless disciplinary histories and FINRA as having examined and blessed the conduct complained of by the NYAG, when neither was the case.[174]

G. Allen Files an Affidavit in the NYAG Action

On January 13, 2020, several weeks after posting the NYPPEX Statement, Allen signed an affidavit in the NYAG action that he filed with the New York court the next day.[175] The affidavit contained several representations like those in the NYPPEX Statement that were false and misleading:

- "NYAG IS IGNORING SIMULTANEOUS GOVERNMENT REVIEWS"—"NYAG's speculative allegations conflict with FINRA's April 30, 2019 conclusions, after its latest year-long examination of NYPPEX and Affiliates, that ***did not find any violation*** of applicable securities regulations to warrant a fine, censure or disciplinary action of the NYPPEX or Allen."[176]

- "Operating expenses were properly and consistently allocated for over 14 years among Affiliates pursuant to the Company's [ASA], which is required by FINRA, and which was reviewed and approved by FINRA during periodic examinations for over 14 years."[177]

These statements were false and misleading. As discussed above, FINRA did not examine any of NYPPEX's affiliates in 2018 or any other year;[178] FINRA did not "approve" agreements like the ASA and actually noted several deficiencies with NYPPEX's ASA;[179] FINRA's examination found seven violations of securities rules and regulations that led to an informal disciplinary action against NYPPEX; and FINRA's findings were consistent, and not in

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[171] JX-151, at 3.

[172] Tr. 2658.

[173] *See also, e.g.*, JX-41, at 7; Tr. 2649–51.

[174] Tr. 2446–48.

[175] Compl. ¶ 226; Ans. ¶ 226; Stip. ¶ 66; JX-28.

[176] Stip. ¶ 67; JX-28, at 12, ¶ 56 (emphasis in original).

[177] Stip. ¶ 68; JX-28, at 15, ¶ 76.

[178] *See* JX-41 at 1; *see also* Tr. 2626, 2655–56.

[179] JX-41, at 7; Tr. 2649–51, 2658.

conflict, with the allegations in the NYAG's complaint.[180] Also, FINRA's and NYAG's matters were not "simultaneous." Rather, FINRA's examination was limited to 2017 and 2018[181] and to the broker-dealer, while the NYAG's allegations covered misconduct spanning from 2008 through March 2019 that involved various entities affiliated with NYPPEX.[182]

H. The New York Court Issues Its Decision, Order, and Preliminary Injunction

In January and February 2020, the New York Supreme Court held a five-day evidentiary hearing, during which Allen and Schunk both testified and attended every day of the proceedings. Afterward, on February 4, 2020, the court issued a "Decision + Order on Motion" granting the NYAG's application for a preliminary injunction.[183] In the NY decision, the court found that "[t]he evidence adduced at the preliminary injunction hearing revealed a shocking level of self-dealing, breaches of fiduciary duty, misappropriation of enormous sums of ACP capital, and outright fraud."[184] As the court explained, ACP Partners X "was essentially utilized as a piggy bank to fund a failing broker-dealer [NYPPEX], its failing parent [NYPPEX Holdings], and Mr. Allen."[185]

As part of the NY decision, the court granted a preliminary injunction enjoining Allen, NYPPEX Holdings, and other named defendants, as well as relief defendants, including NYPPEX,[186] from:

- "[f]acilitating, allowing or participating in the purchase, sale or transfer of any limited partnership interest in ACP X, LP";[187]
- "[v]iolating Article 23-A of [New York's General Business Law], and from engaging in fraudulent, deceptive and illegal acts";

[180] Tr. 2660–63. Respondents claim that this statement was "undoubtedly true and approved by outside counsel." Resp'ts Opening Br. 44. Specifically, Respondents assert that the NYAG's allegation that "Allen had engaged in a years-long fraud" conflicted with FINRA's finding "seven exceptions not sufficient to warrant anything beyond, at best, an 'informal' warning." Resp'ts Opening Br. 44. We reject this argument. While the NYAG's allegations and FINRA's findings were not identical, they did not conflict.

[181] Stip. ¶ 42.

[182] *See, e.g.*, JX-27, at 16–18 (NYAG complaint ¶¶ 59, 61–67, 71).

[183] Stip. ¶ 69.

[184] Stip. ¶ 70.

[185] Stip. ¶ 71.

[186] Stip. ¶ 74.

[187] JX-29, at 6.

- "[w]ithdrawing, converting, transferring, selling or otherwise disposing of funds and assets held by ACP Investment Group, LLC, ACP X, LP, and ACP Partners X, LLC"; and

- "employing any device, scheme or artifice to defraud or to obtain money by means of false pretense, representation or promise."[188]

I. The Firm Files An MC-400 and MC-400A Application Based on the Preliminary Injunction

As explained below,[189] to continue its association with a statutorily disqualified person, a firm must file an MC-400 application with FINRA seeking permission. NYPPEX, however, never filed an MC-400 application based on the Order for permission to continue to associate with Allen.[190] But on February 14, 2020, ten days after the New York court issued the preliminary injunction, Schunk filed an MC-400 and MC-400A application (collectively "MC-400 application") with FINRA.[191] The application, which Schunk filed on behalf of Allen and at his direction, sought permission for NYPPEX to remain associated with a disqualified person (Allen).[192]

Allen signed the application. In doing so, he certified that each response was "true and complete," and that he had taken "appropriate steps to verify the accurateness and completeness of the information contained" in the application.[193] Allen also affirmed "that the answers (including attachments) are true and complete to the best of my knowledge."[194] At Allen's direction, Schunk added the affidavit filed in the New York court as one of the application's

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[188] Stip. ¶ 72; JX-29, at 6. About a year later, the New York court held a four-day bench trial from January 11 through 14, 2021, on the NYAG's complaint. On February 4, 2021, the court issued its opinion finding that Allen and the Allen-controlled entity defendants committed fraud and violated the Martin Act (which grants the NYAG broad powers to investigate and enforce the state's securities laws under N.Y. Gen. Bus. Law Art. 23-A) through false and misleading statements and by "fraudulently [taking] carried interest to which they were not entitled." The court also entered a permanent injunction against Allen, NYPPEX Holdings, the other defendants, and the Relief Defendants (including NYPPEX) and ordered Allen and the other defendants to disgorge more than $7 million. *People v. Allen*, No. 452378/2019, 2021 N.Y. Misc. LEXIS 468, at *17, 18–25 (N.Y. Sup. Ct. Feb. 4, 2021), *aff'd*, 198 A.D.3d 531, 2021 N.Y. App. Div. Lexis 5842 (N.Y. Sup. Ct. Oct. 21, 2021), *appellants' appeal dismissed and motion for leave to appeal dismissed*, 38 N.Y.3d 996, 2022 N.Y. LEXIS 866 (N.Y. Apr. 26, 2022). The court explained that "through a maze of entities owned and/or controlled by defendant Allen, a significant portion of" the investor funds managed by Allen were "substantially diverted by a hopelessly conflicted Allen toward funding NYPPEX – the broker-dealer entity controlled by Allen. NYPPEX, in turn, utilized these funds to pay Allen exorbitant NYPPEX annual salaries totaling approximately $6 million . . . . " 2021 N.Y. Misc. LEXIS 468, at *8.

[189] *See* pp. 37–38, below.

[190] Compl. ¶ 187; Ans. ¶ 187.

[191] Compl. ¶ 187; Ans. ¶ 187; JX-48.

[192] Compl. ¶ 33; Ans. ¶ 33; Compl. ¶ 136; Ans. ¶ 136; Stip. ¶ 75.

[193] Compl. ¶ 139; Ans. ¶ 139; Stip. ¶ 78.

[194] Compl. ¶ 140; Ans. ¶ 140; Stip. ¶ 79.

attachments.[195] Schunk reviewed the affidavit but took no steps to independently verify any facts in it before submitting it to FINRA.[196]

According to the application, the disqualifying event that prompted its filing was the NY decision, which "continued a prior temporary injunction issued by the NYAG in December 2018," *i.e.*, the Order.[197] The application proposed that Allen "would continue to serve in his current capacities," and Schunk would provide heightened supervision.[198]

* * *

Meanwhile, by the next month, the NYPPEX Statement posted on the Firm's website had caught the attention of FINRA's Advertising Regulation Department ("Advertising Regulation"). This set in motion a new set of events to which we now turn.

J. Advertising Regulation Conducts an Inquiry

On March 5, 2020, Advertising Regulation sent NYPPEX a letter expressing "serious concerns with the FINRA-related content" on the NYPPEX Statement ("Advertising Letter").[199] The Advertising Letter, signed by an analyst in Advertising Regulation,[200] notified the Firm that the NYPPEX Statement failed to comply with FINRA Rule 2210, which governs member firms' communications with the public. As a result, the Advertising Letter directed the Firm "to cease using the material immediately."[201] Besides explaining why specific aspects of the NYPPEX Statement violated FINRA Rule 2210, the Advertising Letter also asked the Firm to provide a written, signed response to five separate request items relating to the preapproval of the NYPPEX Statement, the scope of its distribution, and other subjects.[202] Advertising Regulation requested that the Firm respond by March 19, 2020.[203]

The next day, March 6, 2020, Schunk and Allen called the analyst about the Advertising Letter.[204] Later that day, Allen emailed her that "[w]e have instructed our tech team to delete

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[195] Compl. ¶¶ 140, 227; Ans. ¶¶ 140, 227; Stip. ¶ 79; Tr. 1605; JX-48, at 14–38.

[196] Tr. 1605–06.

[197] Stip. ¶ 76.

[198] Stip. ¶ 77.

[199] JX-154, at 1.

[200] JX-154, at 3.

[201] Stip. ¶ 52; JX-154, at 1.

[202] Stip. ¶ 53; JX-154, at 2–3.

[203] Stip. ¶ 54. Advertising Regulation addressed the letter (and a second request) to Schunk, as CCO for The New York Private Placement Exchange, LLC at 55 Old Field Point Road, Greenwich, CT. The analyst explained that their system had not been updated at this point to reflect the Firm's new name (NYPPEX). Tr. 2452–53. In any event, Advertising Regulation sent the letters electronically, not by mail, according to the analyst. Tr. 2453; JX-159, at 1.

[204] Tr. 1660.

reference to our recent FINRA exam on or before 6pm ET Tuesday, March 10."[205] On March 9, Allen emailed the analyst notifying her that "[w]e have removed the text about the Finra exam on the web," and suggesting, "[h]ow about unless we hear otherwise, we will understand we have fulfilled your instruction." The email also included a link to "nyppex.com/nyag/ [nyppex.com]" and informed the analyst that she "can verify by clicking on the link . . . ."[206]

Notwithstanding Allen's assurances, the NYPPEX Statement still referred to the FINRA exam through at least the end of April 2020.[207] But Advertising Regulation never notified Respondents that the NYPPEX Statement remained on the Firm's website with the violative language still in it, and Advertising Regulation's later communications with the Firm did not mention this concern, either.[208]

When NYPPEX failed to respond to the March 5 advertising letter by March 19, 2020, Advertising Regulation sent a second request for the same information on March 30. Unlike the first request, Advertising Regulation made this one under FINRA Rule 8210, and included a response date of April 6, 2020.[209] Again, NYPPEX failed to respond. So Advertising Regulation sent a third request on April 8 for the same information, also under FINRA Rule 8210, with a response date of April 15, 2020.[210] The third request notified Schunk that by not having requested or received an extension of time to reply, the Firm had violated FINRA Rule 8210. The letter also warned the Firm that its "continued failure to respond to this request will be considered a serious violation of this Rule," which could result in the imposition of sanctions, including a censure, fine, suspension, or bar.[211] At Allen's request, Advertising Regulation extended the response deadline to April 24, 2020."[212]

On April 23, 2020, the day before the deadline, NYPPEX responded to the Advertising Letter in a letter signed by Allen and Schunk ("NYPPEX Advertising Response").[213] The response contained these statements that are false and misleading:

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[205] JX-155, at 1.

[206] JX-156, at 1.

[207] Tr. 2462–63, 2604–05.

[208] Respondents' Exhibit ("RX-__") 27; JX-157; JX-158; JX-159; Tr. 1800–08, 2997, 3001, 3003–05.

[209] Stip. ¶ 55; JX-157. The second request also identified the firm and address the same way as the first request.

[210] Stip. ¶ 56; JX-158. The third request was also addressed to Schunk. This time, the request letter correctly identified the Firm's name and address.

[211] JX-158, at 1.

[212] Stip. ¶ 57. In an April 20 email to the analyst, Allen claimed that "[l]ast week, was the first time we saw your letter requesting answers to your advertising question." JX-159, at 2. In her email that day extending the deadline, the analyst informed Allen that Advertising Regulation had submitted the three request letters "through Request Manager, via Firm Gateway and [were] immediately available. Advertising Regulation does not send hard copy letters by mail." She also commented: "I am sure you are familiar with Firm Gateway and Request Manager given that it is used for all regulatory and compliance filings/reports, etc." JX-159, at 1.

[213] Stip. ¶ 58; JX-160.

- The NYPPEX Statement was "a press release that was provided to members of the media."[214] This statement was false and misleading and understates the NYPPEX Statement's distribution. It was viewable by anyone who looked at the nyppex.com/nyag web page, which could be found by anyone entering the terms "nyppex" and "nyag" in a search engine.[215]

- "After the Staff notified the Firm that the Staff had a concern regarding the press release, the Firm promptly removed it."[216] This statement was false and misleading. The Firm never removed the NYPPEX Statement, and the FINRA references remained in it through April 2020.[217]

- The first requested item in Advertising Regulation's letter asked whether a Firm principal had pre-approved the NYPPEX Statement in writing. The response was: "Yes. Please see Exhibit 1. As stated previously, the NYPPEX Legal and Compliance Committee approved the communication. . . . The Committee's approval occurred on or about December 20, 2019."[218] Exhibit 1 was an unsigned and undated document entitled "Review and Approval of the NYPPEX Statement Regarding the New York Attorney General Civil Complaint." The exhibit represented that the NYPPEX Statement was "reviewed and approved by the NYPPEX Legal and Compliance Committee on or about December 20, 2019. (See attached Statement). Michael J. Schunk, Chief Compliance Officer."[219] "The communication was pre-approved as stated above."[220] Yet Schunk was not aware of any document created in December 2019 showing his prior written approval;[221] Respondents introduced no written evidence of approval; and at the hearing, Schunk admitted that "yes" was an untruthful answer.[222] Based on this evidence, the statements about approval were false and misleading.

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[214] Stip. ¶ 59; JX-160, at 3.

[215] CX-35; CX-48; Tr. 875, 877, 2464–65.

[216] Stip. ¶ 60; JX-160, at 5.

[217] Tr. 2462–63, 2604–05. By as late as the last day of the hearing (March 16, 2022), an amended version of the NYPPEX Statement was still available at nyppex.com/nyag. CX-49.

[218] Stip. ¶ 61; JX-160, at 4–5.

[219] Stip. ¶ 62; JX-160, at 10. The evidence is inconsistent as to the committee's membership. The parties stipulated that as of December 2019, Allen and Schunk were its only members. Stip. ¶ 62. On the other hand, although it is unclear when SS joined or left the Firm, there was testimony that she was also on the committee and served as its co-head when she was with the Firm (Tr. 574–75, 684 –85, 1175, 1584, 2866–67); that she was general counsel at least during the period 2018 to 2020 (Tr. 2916); and that she was on the committee during those years. Tr. 2885. There was also testimony that, from time to time, outside attorneys served on the committee. Tr. 684–85.

[220] Stip. ¶ 63; JX-160, at 5.

[221] Tr. 1700.

[222] Tr. 1702.

- The NYPPEX Statement "was only available at https://nyppex.nyag, a page that was not available to the public at www.nyppex.com." But, it continued, "[t]his URL was provided to reporters that request our comments in connection with the NYAG press release," adding that, "[u]pon request by a reporter, we provided that URL which showed the NYPPEX Statement Regarding the New York Attorney General Civil Complaint."[223] This statement was misleading because the NYPPEX Statement was available to the public, simply by entering certain search words into an internet search engine,[224] as discussed above.

* * *

Advertising Regulation was not the only FINRA department looking into NYPPEX's conduct in the winter and spring of 2020. The NYAG's action prompted FINRA's Department of Member Supervision ("Member Supervision") to begin its own investigation. That investigation focused on conduct after the New York court issued the Order.[225] In particular, Member Supervision was concerned about: (1) the NYPPEX Holdings' alleged offering in March 2019;[226] (2) money movements between Allen and NYPPEX Holdings' entities;[227] and (3) the Firm's supervision of the "inter dealings between entities Mr. Allen owned or controlled."[228] Respondents' alleged failure to produce documents and information, and their alleged untimely production, in response to Member Supervision's investigative requests, led to certain charges in this case, as we discuss below.

K. Member Supervision Issues FINRA Rule 8210 Requests to NYPPEX and Allen

1. The February Rule 8210 Requests (First Requests)

a. February 10 Request

On February 10, 2020, Member Supervision sent a document and information request under FINRA Rule 8210 to NYPPEX and Allen, care of Schunk.[229] The February 10 request included the following:

- Copies of "all account statements for all bank accounts" in the name of NYPPEX and/or NYPPEX Holdings from January 1, 2018, to December 31, 2019;

[223] Stip. ¶ 65; JX-160, at 5.

[224] Tr. 887–88, 2452.

[225] Tr. 2341–42.

[226] Tr. 2038.

[227] Tr. 2128.

[228] Tr. 2042.

[229] Stip. ¶ 80; JX-161.

- Bank account statements for the same period for "all bank accounts in the name of Laurence Allen and/or for which Laurence Allen had signatory authority;" [230] and

- "[A] current listing" of Allen's outside business activities ("OBAs") and private securities transactions ("PSTs"), along with evidence of approval and supervision of those OBAs and PSTs in 2018 and 2019.[231]

The February 10 request stated that if any requested information or documents were in the possession, custody, or control of Allen rather than NYPPEX, then Allen had to provide such information or documents to FINRA.[232] The request included an Addendum A with standard instructions, including a request to provide passwords for any encrypted documents via a separate email.[233] It also set a response date of February 24, 2020, which FINRA staff later extended to March 2, 2020, at Allen's written request.[234]

b. February 20 Request

On February 20, 2020, before the extended response deadline for the February 10 request, FINRA sent another request to NYPPEX, care of Schunk.[235] This request sought, among other things, for the period January 1, 2019 to February 20, 2020:

- "[A] listing of all loans made from Allen to the firm, [NYPPEX Holdings], or any other company in which Allen has any ownership interest;"

- "All loans made to Allen from the firm, [NYPPEX] Holdings, or any other company in which Allen has any ownership interest;" and

- "[F]or all loans listed," the request sought "the loan agreement, any other documentation and evidence of all payments."[236]

The February 20 request, issued under FINRA Rule 8210, set a response deadline of February 27, 2020. The request also stated that if any information or documents sought were in

[230] Stip. ¶ 81; JX-161, at 1.

[231] Stip. ¶ 82; JX-161, at 2.

[232] Stip. ¶ 83; JX-161, at 1.

[233] Stip. ¶ 84; JX-161, at 4.

[234] Compl. ¶ 150; Ans. ¶ 150; Stip. ¶ 85; JX-163, at 1.

[235] Stip. ¶ 86; JX-162. Although addressed to Schunk, the salutation read: "Dear Mr. Schunk & Mr. Allen." JX-162, at 1.

[236] Stip. ¶ 87; JX-162, at 1.

the possession, custody, or control of Allen rather than NYPPEX, then Allen had to provide such information or documents to FINRA.[237]

In early March, the Firm produced certain responsive documents.[238] But by the production deadlines, it had not produced all items sought by the February 10 and 20 requests.[239] For example, the Firm failed to produce the NYPPEX Holdings' 2019 bank statements.[240] As discussed below, over the next several months, Member Supervision and NYPPEX wrangled over the requests. FINRA tried unsuccessfully to obtain full production of the requested information and documents. During that period, the parties exchanged emails in which FINRA asserted that various requested items remained outstanding. And NYPPEX and Allen, through counsel, assured FINRA that—except for certain bank statements—they were trying to complete their production.[241]

2. The March 13 Request (Second Request)

Member Supervision did not receive a timely and complete response to its February requests. So on March 13, 2020, the staff wrote to NYPPEX's attorney and copied Allen and Schunk, informing them that "[d]ue to this lack of timely and complete response to FINRA's [February] requests pursuant to FINRA Rule 8210, NYPPEX and Mr. Allen personally are in violation of FINRA Rule 8210."[242] The letter made a second request under FINRA Rule 8210 for the information and documents the February requests sought, and warned that "[i]f FINRA does not receive the requested information by March 20, 2020, Mr. Allen and/or NYPPEX may be subject to the institution of an expedited or formal disciplinary proceeding leading to sanctions, including a bar of Mr. Allen and/or expulsion of the firm."[243] The second request appended the February requests.[244] At the request of NYPPEX's attorney, FINRA extended the deadline to produce information and documents sought by the second request to March 24, 2020.[245]

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[237] Stip. ¶ 88; JX-162, at 1.

[238] JX-165; Tr. 2083–84.

[239] JX-166, at 1.

[240] Tr. 2086–87.

[241] As part of Member Supervision's investigation, it conducted an OTR of Allen on March 10, 2020. At the end of the OTR, FINRA staff served on Allen, by hand, a letter under FINRA Rule 8210 seeking 29 additional items of information and documents from NYPPEX. The due date for certain items was March 20, while the remainder were due on March 27. JX-177, at 2–3, 22–27. On March 31, Schunk requested an extension to respond until April 13, which FINRA granted. JX-177, at 3, 16.

[242] JX-166, at 1.

[243] Stip. ¶¶ 89–90; JX-166, at 1.

[244] Stip. ¶ 89; JX-166, at 3–10.

[245] Compl. ¶ 157; Ans. ¶ 157; Stip. ¶ 91; JX-174.

On March 21, 2020, NYPPEX produced, through counsel, four loan agreements purportedly responding to FINRA's request.[246] Three of the four loan agreements produced were "amended and restated." The production, however, did not include the original loan agreements.[247]

NYPPEX failed to complete its production by the March 24 deadline. As a result, three days later, FINRA emailed NYPPEX's attorney informing him that it had not received "certain items, including Mr. Allen's bank statements." On March 30, FINRA followed up with a more extensive email to NYPPEX's attorney, detailing the extent of the non-production, and noting that despite the extension to March 24, FINRA had not received the requested responses.[248] FINRA granted another extension to April 6 for the February requests.[249] And again, FINRA warned that if the Firm and/or Allen did not complete the response to FINRA's 8210 requests by the extended date, they may be subjected to a disciplinary proceeding that could result in sanctions.[250]

That same day, March 30, Schunk, on behalf of NYPPEX, produced certain documents and information in response to the outstanding FINRA Rule 8210 requests. The production purportedly included statements for four of Allen's personal accounts and a response about Allen's OBA and PST activities and the Firm's supervision of those activities.[251] These items—nine documents in all—were each password-protected.[252] The production, however, did not include the passwords.[253]

3. April 15 Request (Third Request)

On April 15, 2020, FINRA sent a third FINRA Rule 8210 request to the Firm and Allen, care of the Firm's attorney, seeking complete production under the February requests.[254] The request notified NYPPEX and Allen they had violated FINRA Rule 8210 by failing to respond to multiple FINRA Rule 8210 requests.[255] The third request listed the documents and information

[246] JX-169, at 1, 12–15; JX-173.

[247] Tr. 2064–66; JX-169, at 12–14.

[248] JX-174.

[249] Compl. ¶ 162; Ans. ¶ 162; JX-174.

[250] JX-174.

[251] Compl. ¶ 163; Ans. ¶ 163; Stip. ¶ 92.

[252] Stip. ¶ 92; CX-8 (reflecting nine password-protected files); *but see* JX-172 (reflecting ten password-protected files); Tr. 2110–11.

[253] Tr. 2112–26.

[254] JX-177. The third request also informed the Firm and Allen that FINRA had not received a response to the March 10 request.

[255] JX-177, at 1.

still outstanding from the February 10[256] and 20 requests.[257] The request directed the Firm and Allen to advise FINRA by April 17 if they would provide the documents and information responsive to the February requests.[258] It also warned that if NYPPEX did not deliver the requested information to FINRA by April 28, 2020, "FINRA may commence against NYPPEX a proceeding that could lead to sanctions, including an expulsion, suspension, censure and/or fine."[259]

Six days later, on April 21, JH, the attorney for the Firm and Allen, notified FINRA that it no longer "represented NYPPEX with respect to any production matters" and that "all correspondence in the future" should be sent to Schunk.[260] That day, JH forwarded the third request to Allen, who emailed back that he would review the request and respond to FINRA.[261] Also that day, Allen emailed JH making it clear that he would not produce the outstanding bank records simply based on a FINRA Rule 8210 request. "[I]f FINRA gets a court subpoena requiring me to turn over those bank account records then I will do so," he wrote.[262]

4. FINRA Makes Additional Efforts to Obtain the Outstanding Requested Items

On April 24, Allen wrote to FINRA stating that "[a]ttached is our response to your letter dated March 10, 2020 et al.," adding that "[t]oday, we will be submitting additional documents via Request Manager."[263] The attached April 24 letter, however, did not include additional responsive information or documents.[264] Instead, Allen provided what he called "context" for the staff. For the most part, this consisted of a long list of reasons why the Firm had not fully complied with the requests.

Allen complained that he had a misunderstanding with his lawyer, which led him to believe that the lawyer had responded to the requests and had worked out revised due dates with the staff; he blamed disruptions caused by COVID-19;[265] he noted the Firm's limited

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[256] JX-177, at 1 (stating that FINRA had not received a response to item numbers 2, 6, and 7 or a request for a further extension).

[257] JX-177, at 2 (stating that FINRA had not received a complete response to item numbers 1 and 2 or a request for further extension).

[258] JX-177, at 2.

[259] JX-177, at 3.

[260] JX-178.

[261] JX-218, at 1.

[262] Tr. 2368–69.

[263] JX-183, at 1–2.

[264] JX-181.

[265] JX-181, at 1.

resources;[266] he complained that the staff and the NYAG had requested many documents in multiple requests;[267] he pointed out that Schunk had prepared for and recuperated from surgery; he blamed FINRA for first sending letters only to JH, which led to the Firm not timely receiving copies; he noted that the Firm had needed to spend time fulfilling its year-end reporting responsibilities to shareholders and regulators and to deal with the NYAG proceedings;[268] and he accused the staff of allowing a password to expire that would have granted the staff access to any emails.[269]

Allen did not contend that the Firm had completed its production. Rather, after providing his litany of excuses, Allen stated his understanding that JH—who had told FINRA he was no longer handling the production—would communicate with the staff to discuss revised dates for "the remaining documents to be produced" as well as for Allen and Schunk's OTRs.[270] FINRA responded on April 27.[271] The staff wrote, among other things, that it would soon send "a detailed list of items that remain outstanding;" requested that Allen "provide passwords for encrypted documents previously produced at your earliest convenience;" and asserted that the requests made on February 10 and 20 remained outstanding.[272]

By May 1, 2020, NYPPEX had apparently produced additional documents, as FINRA wrote to Allen on that date thanking him and the attorney for "the continued production on outstanding items." FINRA reiterated that certain documents produced previously were password protected and requested that Allen send "the password for the encrypted documents at your earliest convenience." Minutes later, Allen emailed FINRA: "Will do asap."[273]

After six days Allen had still not produced the password. This prompted the FINRA examiner to send an email on May 7 to JH (copying Allen and Schunk). "[M]ultiple items from the staff's prior requests for information pursuant to FINRA Rule 8210 remain outstanding," the examiner reminded them. "These requests were made in February, March and April and the staff has issued second requests and in some cases third requests for the outstanding items." And, again, the examiner requested "that you or your clients please provide the password for the encrypted documents as soon as possible." Minutes later, JH responded that he, NYPPEX, Allen,

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[266] JX-181, at 2.

[267] JX-181, at 1–2.

[268] JX-181, at 2.

[269] JX-181, at 4.

[270] JX-181, at 4.

[271] JX-183, at 1.

[272] On April 10, 2020, FINRA had sent Schunk (although the salutation is to Schunk and Allen) a FINRA Rule 8210 request with a response date of April 24. JX-183, at 3–7. In FINRA's April 27 response, it noted the April 24 deadline and stated that so far nothing had been produced; so it attached another request for that information. JX-183, at 1.

[273] JX-185, at 1.

and Schunk, were "currently working on the production requests and anticipate providing the requested information in the designated time."[274]

Following up on May 11, the examiner wrote to JH and listed the ten password protected documents.[275] The next day, May 12, JH emailed a letter to the FINRA staff purporting to address NYPPEX's recent production.[276] "NYPPEX . . . has now produced . . . those certain Documents remaining to be produced in this matter," he wrote. But, JH admitted, he had not produced "certain bank accounts maintained by [Allen] in which he has signatory authority that have been requested in paragraph (2) of the February 10, 2020 request." The attorney explained that "we" do not believe these documents are "relevant to this matter." Continuing, he claimed that FINRA staff "agreed to make a discrete review of these accounts to determine their relevance to this matter," and that "[w]e are currently discussing with the Staff the arrangements for this review."[277]

FINRA staff did not respond for 17 days. Then, on May 29, the examiner emailed JH (copying Allen and Schunk and others).[278] The examiner stated that Allen and the Firm had "failed to respond to many of the staff's requests—regarding which we have sent detailed second (and sometimes third) request letters." He then listed "the most pressing items that remain outstanding" from the February requests and another request.[279] The specified outstanding items included passwords; a list of all loans; complete loan documentation; NYPPEX Holdings' bank statements for 2019; and, under February 10 request item no. 2, "Allen bank account statements, including for accounts where he is a signatory." The examiner noted that "for the few [Allen bank] accounts where statements have been produced, Mr. Allen failed to provide the password."[280]

JH emailed a few minutes later that he "will follow-up on this immediately," copying Allen, Schunk, and others.[281] About an hour later, Schunk emailed JH (blind copying Allen) that they had the NYPPEX Holdings bank statements for 2019 responsive to request number 1. "It appears that they were not downloaded to Request Manager along with the rest," he wrote,

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[274] JX-188, at 1.

[275] JX-191.

[276] JX-194, at 1.

[277] JX-194, at 2.

[278] JX-196.

[279] The examiner also listed the outstanding items due from the April 10 request.

[280] JX-196. The examiner's email did not address the purported agreement referenced in JH's May 12 email. During his hearing testimony, the examiner denied entering into any agreement as claimed by JH. Tr. 2138–39. We find the evidence on this issue inconclusive. But whether they had an agreement is immaterial; the examiner's email response made it clear to JH that at that point, FINRA contended NYPPEX had not produced all requested documents and information and still expected them to be produced. When JH responded to the examiner's email, he did not mention the agreement he had referenced earlier.

[281] JX-196.

assuring JH that he would "down load them as soon as FINRA" opened its portal, "which is currently closed." Further, Schunk wrote that the February 10 request numbers 2 and 8 require passwords and Allen would provide them. As for request number 1 in the February 20 request, according to Schunk's email, "it appears they want a list plus complete documentation including source of funds for each loan. The original request," he said, "did not ask for source of funds."[282]

5. NYPPEX and Allen Never Produce Certain Information and Documents

Despite Respondents' assurances that they would provide the outstanding documents and information, they did not do so—even up to the time of the hearing. The categories of non-produced documents and information are bank statements, PSTs and OBAs, loans and password-protected documents.[283] We discuss each category below.

a. Bank Statements

FINRA requested bank statements for NYPPEX Holdings, NYPPEX, and Allen, from January 2018 through December 2019, for 13 accounts. NYPPEX and Allen made a complete production for only one of those 13 accounts (a NYPPEX account). For the others, they failed to produce account statements for many of the requested months. NYPPEX and Allen produced no more than 50 percent of the requested monthly account statements for any of the other accounts. And for one account, they produced only one monthly statement. All told, of the 312 months of account statements requested, NYPPEX and Allen failed to produce 184 statements—59 percent of the requested monthly account statements.[284]

FINRA also requested bank statements for accounts in which Allen was a signatory. FINRA identified six such accounts, and it appeared that an additional unspecified number also existed. Allen produced no statements for these accounts.[285]

b. Documents and Information About PSTs and OBAs.

FINRA requested information evidencing Allen's PSTs and OBAs, his disclosures to the Firm about them, and the Firm's supervision of them. Allen responded by only providing documents relating to the OBA list on his Form U4. Additional documents existed.[286] But the only other document Allen produced was a password-protected file labeled to indicate that it pertained to certain "Personal Private Transactions."[287] NYPPEX and Allen failed to provide the

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[282] JX-197.

[283] CX-7, at 1.

[284] CX-7, at 1. The requests sought statements for five NYPPEX Holdings accounts, two NYPPEX accounts, and six Allen accounts.

[285] CX-7, at 2; JX-194, at 2; Tr. 2175–76.

[286] JX-170, at 1.

[287] JX-172.

password to that document.[288] In sum, NYPPEX and Allen failed to provide any documents or information related to Allen's PSTs or evidence of approval and supervision of his PSTs or OBAs.[289]

c. Documents and Information Regarding Loans

As noted above, Respondents failed to produce three of four original loan agreements to FINRA as requested. Allen also failed to produce loan agreements for either loan identified in Allen's MC-400 application.[290] Finally, NYPPEX and Allen failed to produce a list of loans entered into from January 2019 forward and failed to provide the requested "evidence of all payments" made to fund the loans and repayments.[291]

d. Password-Protected Documents

NYPPEX never provided the passwords for the password-protected PDF documents, even though FINRA requested them repeatedly.[292]

III. Conclusions of Law

A. Statutory Disqualification Violations (First Cause of Action)

1. The Regulatory Framework Governing Statutory Disqualification

Under certain circumstances, a person is deemed disqualified from continued association with a FINRA member firm. If that occurs, the disqualified person may not continue to be associated with a member firm, nor may a firm allow that to occur. FINRA's by-laws and rules and the Exchange Act, together, provide the regulatory framework governing disqualification. Article III, Section 3(b) of FINRA's By-Laws provides that "[n]o person shall . . . continue to be associated with a member . . . if such person . . . becomes subject to a disqualification under Section 4 . . . ." Article III, Section 4 of the By-Laws defines "disqualification" to include a "statutory disqualification," as defined in Section 3(a)(39) of the Exchange Act.[293] Under Section 3(a)(39)(F), a person is subject to a "statutory disqualification" if, among other things, such person "is enjoined from any action, conduct, or practice" specified in Section 15(b)(4)(C) of the

[288] *See, e.g.*, JX-183; JX-188; JX-191; JX-196.

[289] Tr. 2069.

[290] JX-49, at 8. According to the MC-400 application, Allen made both loans to NYPPEX Holdings, one in 2019 in the amount of $125,000 and one in 2020 in the amount of $100,000. *See* JX-49, at 8. None of the four loan agreements produced, however, match the descriptions of the loans in the MC-400 application. *Compare* JX-49, at 8 (MC-400 application) *with* JX-169, at 12–15.

[291] Tr. 2050; JX-162, at 1.

[292] Tr. 2111–26, 2132–33, 2140; Stip. ¶ 92; CX-8; JX-183; JX-188, at 1; JX-191; JX-196.

[293] FINRA By-Laws Article III, Section 4.

Exchange Act.[294] That section, in turn, includes a situation in which a person "is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from . . . engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security."[295]

FINRA Rule 8311 prohibits a firm from allowing a disqualified "person to be associated with it in any capacity that is inconsistent with the . . . disqualified status, including a clerical or ministerial capacity." Further, Article III, Section 3(b) of FINRA's By-Laws precludes a firm from continued membership "if any person associated with it is ineligible to be an associated person under" that subsection.

Despite the above prohibitions, FINRA's by-laws and rules provide a mechanism permitting a firm's continued association with a disqualified person. Under Article III, Section 3(d), "[a]ny member that is ineligible for continuance in membership may file with the Board an application requesting relief from the ineligibility pursuant to" FINRA's rules. "A member may file such application on its own behalf and on behalf of a current or prospective associated person." Afterward, "[t]he Board may, in its discretion, approve the" firm's continued membership. Also, the Board may permit any person to associate, or continue to associate, with the firm, if it "determines that such approval is consistent with the public interest and the protection of investors."

The procedures for a statutorily disqualified "person to become or remain associated with a member . . . and for a current member or person associated with a member to obtain relief from the eligibility or qualification requirements of the FINRA By-Laws and FINRA rules" are set forth in FINRA Rules 9520 through 9527 ("Eligibility Proceedings"). FINRA Rule 9522(a) states that "[i]f FINRA staff has reason to believe that a disqualification exists . . . [it] shall issue a written notice to the member or applicant for membership . . . . The notice shall specify the grounds for such disqualification or ineligibility." That said, FINRA Rule 9522(b)(1)(B) requires a member to file an MC-400 application if it determines that a person associated with it "has become a disqualified person" before receiving a notice from FINRA "that a disqualification exists." As used in the series, the term "Application" includes a FINRA Form MC-400 for individuals.[296]

To help members and associated persons understand the regulatory scheme governing statutory disqualification, FINRA posted on its website a plain-English summary entitled "General Information on Statutory Disqualification and FINRA's Eligibility Proceedings."[297] The summary explains that persons are subject to a disqualification if they are statutorily disqualified. It lists the events that trigger statutory disqualification. Among the triggering events

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[294] 15 U.S.C. § 78c(a)(39)(F).

[295] 15 U.S.C. § 78o(b)(4)(C).

[296] FINRA Rule 9521(b)(1).

[297] https://www.finra.org/rules-guidance/guidance/eligibility-requirements.

are "temporary and permanent injunctions (regardless of their age) issued by a court of competent jurisdiction involving a broad range of unlawful investment activities." The summary also informs members and associated persons that "[g]enerally speaking, a person who is subject to disqualification may not associate with a FINRA member in any capacity unless and until approved in an Eligibility Proceeding as set forth in Article III, Section 3(d) of FINRA's By-Laws and FINRA Rules 9520 through 9527."

According to the FINRA website, this process contains an exception permitting continued association before approval. If the person is currently associated with a FINRA member when the disqualifying event occurs, then that person "may be permitted to continue to work in limited circumstances provided the member promptly files FINRA's Form MC-400 Application . . . and the disqualifying event does not involve a licensing sanction, such as a bar, revocation or suspension." A similar process applies for a disqualified firm to continue its membership until approval.

Continuing, FINRA's website informs members that "[o]nce a member becomes aware that one of its associated persons is subject to a disqualification, the member is obligated to report the event to FINRA. The member must amend the Form U4 within 10 days of learning of a statutory disqualifying event."[298] It also explains that "[t]he member may either file a Form U5 if it wishes to terminate the individual's association or file an MC-400 Application if the member wishes to sponsor the association of the disqualified person."[299] The Application "requests information about the terms and conditions of the proposed employment, with special emphasis on the supervision to be accorded to the disqualified person." Finally, the website states that if the member firm neither terminates the individual nor submits an MC-400 Application, the member is "ineligible to continue in FINRA membership."[300]

Because of the alleged statutory disqualification violations, Enforcement also charged Respondents with violating FINRA Rule 2010—FINRA's general ethics rule.[301] That rule provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." FINRA Rule 2010 applies to associated persons through FINRA Rule 0140(a), which provides that the rules "shall apply to all members and persons associated with a member" and that "[p]ersons associated with a member

[298] *See* Article V, Section 2(c) of FINRA's By-Laws.

[299] "FINRA, other self-regulatory organizations (SROs) and jurisdictions use Form U5 (Uniform Termination Notice for Securities Industry Registration) to terminate registration and, if relevant, details why an individual left the firm." https://www.finra.org/registration-exams-ce/broker-dealers/registration-forms/form-u5.

[300] *See* Article III, Section 3(a) of the FINRA By-Laws.

[301] *Dep't of Enforcement v. Jones*, No. 2015044782401, 2020 FINRA Discip. LEXIS 45, at *25–26 (NAC Dec. 17, 2020), *appeal docketed*, No. 3-20209 (SEC Jan. 19, 2021).

shall have the same duties and obligations as a member under the Rules." A violation of another FINRA rule violates FINRA Rule 2010.[302]

2. Discussion

The facts relevant to the statutory disqualification charges are largely undisputed. The Order was issued by a court of competent jurisdiction. The Order enjoined Allen from violating the Martin Act (Article 23-A of New York's General Business Law), a securities fraud statute. The Order also enjoined Allen from engaging in fraudulent, deceptive, and illegal acts, and from employing any device, scheme, or artifice to defraud, or to obtain money by means of false pretense, representation, or promise. The Order specifically enjoined Allen from undertaking activities in connection with the purchase or sale of securities, including investments, loans or lines of credits, and most distributions involving ACP X.

Respondents argue that the Order did not trigger a statutory disqualification and that they fulfilled their duties under FINRA Rule 9522.[303] According to Respondents, the Order was similar to a subpoena and a temporary restraining order, rather than a preliminary injunction. They contend that the relevant statutory provisions do not specifically identify a temporary restraining order—let alone an ex parte temporary restraining order—as a disqualifying event. As a result, Respondents submit, the Panel should not consider that type of order a disqualifying event. They also argue that it only makes senses that the statute does not include ex parte temporary restraining orders because the statutory scheme contemplates notice and opportunity to be heard.[304] In support of their position, Respondents invoke the canon of statutory construction that when Congress intends for something to be included in a statute, it knows how to do so. And, conversely, when something is not included, Congress meant to exclude it. Thus, they argue, the failure to specify ex parte temporary restraining orders as statutorily disqualifying events means they are not such events.[305]

Respondents make several additional arguments. First, they claim that FINRA's actions here show that it did not consider the Order a basis for statutory disqualification. And, in any event, Respondents contend that they complied with the rule.[306] FINRA was on notice of the Order because Respondents filed a Form U4 amendment disclosing it.[307] Yet FINRA did not issue the FINRA Rule 9522(a)(1) notice until after the New York court issued a superseding

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[302] *See, e.g.*, *Merrimac Corp. Sec.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, at *5 (July 17, 2019). FINRA's "rules" are defined in the Exchange Act to include its by-laws. *See* 15 U.S.C. § 78c(a)(27), (28).

[303] Resp'ts Opening Br. 18–27.

[304] Resp'ts Opening Br. 22.

[305] Resp'ts Opening Br. 20–22.

[306] Resp'ts Opening Br. 26–27.

[307] JX-12.

preliminary injunction—and did so on that basis. Afterward, Respondents filed the MC-400 application.

Second, according to Respondents, they complied with FINRA 9522(b)(1)(B). Respondents maintain that they relied in good faith on in-house and outside counsel, who determined that Allen was not statutorily disqualified. Thus, Respondents contend, they did what the rule required of them. Respondents claim that they received legal advice from outside counsel RR and in-house counsel SS that the only thing they had to do in response to the Order was file a Form U4 Amendment disclosing the Order, which they did.[308] Moreover, Respondents state that the advice Allen received from counsel was that he was not statutorily disqualified as a result of the Order.[309]

Third, Respondents submit that the statute only applies to an injunction enjoining certain conduct if the person is enjoined from acting in capacities such as an investment advisor, underwriter, broker, dealer, among other capacities. The Order, they point out, did not enjoin Allen from acting in any of the specified capacities.[310]

Finally, Respondents argue that the Order should not be deemed a statutorily disqualifying event because the New York court issued the Order without providing Allen notice and an opportunity to be heard. They maintain that "the entire statutory scheme contemplates 'notice and opportunity for hearing,' which obviously is antithetical to the concept of an ex parte order, which is an order granted without notice or hearing."[311]

* * *

Whether an ex parte temporary restraining order triggers a statutory disqualification appears to be an issue of first impression. The parties presented no legal authority directly on point; Enforcement cited no cases in which statutory disqualifications occurred without notice and opportunity to be heard; and Respondents brought to our attention no cases that declined to find a statutory disqualification because the person lacked such notice and opportunity.

After analyzing the issue, we find no basis to exclude ex parte temporary restraining orders from the statute's ambit. "In interpreting a statute, a court should always turn first to one, cardinal canon before all others," according to the United States Supreme Court. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . When the words of a statute are unambiguous, then this

[308] Resp'ts Opening Br. 54 (citing Tr. 2922–26; RX-4).

[309] Resp'ts Opening Br. 54 (citing Tr. 1458–59, 1501–03, 2863–66, 2914–17). *See also* Resp'ts Opening Br. 54 (stating that Respondents confirmed this advice a few months later with attorney CK, citing Tr. 2986–89; RX-16, at 5).

[310] Resp'ts Opening Br. 27.

[311] Resp'ts Opening Br. 22.

first canon is also the last: judicial inquiry is complete."[312] In other words, "there is no need to invoke other principles of statutory construction '[w]hen the words of a statute are unambiguous.'"[313] Further, the Supreme Court stressed, "[i]t would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation."[314] We decline to do so here.

Contrary to Respondents' argument, the Order is a type of preliminary injunction. It explicitly stated that Allen and certain others "are hereby preliminarily restrained" from engaging in certain conduct. Additionally, federal courts view ex parte temporary restraining orders they issue as preliminary injunctions temporarily enjoining conduct.[315] We find it unlikely that Congress meant to exclude ex parte temporary restraining orders when it included orders that temporarily restrain conduct as a disqualifying event.

Although the statute does not reference ex parte temporary restraining orders explicitly, it is still clear and unambiguous—orders that permanently or temporarily enjoin certain conduct trigger a statutory disqualification. The determinative factor is what the order enjoins, not what type of order it is. So even if a temporary restraining order is not a preliminary injunction, as Respondents contend, that is a distinction that makes no difference.

Respondents also misread Exchange Act Section 15(b)(4)(C) to require a showing that the person was enjoined from acting in a certain capacity, e.g., as an investment advisor. The section contains no such requirement. Section 3(a)(39)(F) provides that a person is subject to statutory disqualification whenever that person "is enjoined from any action, conduct, or practice" described in Section 15(b)(4)(C). That section, in turn, applies whenever an associated person is "permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from . . . engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security." That is what happened here.

We also reject Respondents' argument that the Order cannot serve as a statutorily disqualifying event because the court entered it without giving Allen notice and an opportunity to be heard. The language of Sections 3(a)(39)(F) and 15(b)(4)(C) does not require notice and opportunity to be heard before an event is disqualifying. And we find no basis to impose that requirement. The statutory scheme to which Respondents refer in arguing for this requirement is

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[312] *Victor Teicher*, Exchange Act Release No. 40010, 1998 SEC LEXIS 980, at *7 (May 20, 1998) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

[313] *S. Brent Farhang*, Exchange Act Release No. 83494, 2018 SEC LEXIS 1491, at *13 (June 21, 2018) (quoting *Conn. Nat'l Bank,* 503 U.S. at 253–54 (internal citations omitted)).

[314] *Conn. Nat'l Bank,* 503 U.S. at 254 (quoting *Sturges v. Crowninshield*, 17 U.S. 122, 202 (1819)) (internal citations omitted).

[315] *See, e.g.*, *Goldic Electrical Inc. v. Loto Corp. U.S.A.*, 27 F. App'x 71, 74 (2d Cir. 2001) (citations omitted) ("Although Rule 65 as a whole is entitled 'Preliminary Injunctions,' it seems plain that Rule 65(d) describes the permissible form and scope of [any type of] injunction, whether it be a preliminary, permanent, or a temporary restraining order."); *Sogefi USA, v. Interplex*, 535 F. Supp. 3d 548, 555 (S.D. W.Va. 2021) (granting motion for temporary restraining order and ordering defendant "temporarily enjoined" from certain conduct).

inapplicable. It addresses the Securities and Exchange Commission's ("Commission") authority to sanction a broker-dealer or person associated with a broker-dealer for certain acts, practices, or conduct that fall under Section 15(b)(4), and requires the Commission, in that context, to provide notice and opportunity to be heard before doing so.[316] Nor is statutory disqualification a FINRA-imposed sanction. Rather, a person is subject to statutory disqualification by operation of the Exchange Act.[317]

In sum, there is no basis to conclude that Congress meant to exclude an ex parte temporary restraining order from the operative provision.[318] We also find it irrelevant—and not a defense—that FINRA staff failed to send Allen a notice under FINRA Rule 9522(a)(1) notifying him that he was statutorily disqualified because of the Order.[319] As discussed above, "a person subject to statutory disqualification cannot become or remain associated with a FINRA member firm unless the person's member firm applies for, and is granted, in FINRA's discretion, relief from the statutory disqualification."[320] The prohibition on continued association does not turn on FINRA notifying persons that they are statutorily disqualified. Member firms and registered persons cannot shift responsibility to FINRA for their compliance with an applicable requirement.[321]

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[316] 15 U.S.C. §78o(b)(4). Respondents' reliance on this provision undercuts their argument for excluding an ex parte temporary restraining order as a disqualifying event. By Respondents' reasoning, if Congress had wanted to include a notice and opportunity to be heard requirement, it could have done so—just at it did in the section upon which they rely. The Panel notes, however, that the Commission has construed another triggering event as requiring notice and opportunity to be heard. Under Exchange Act Section 15(b)(4)(H) (ii), a statutorily disqualifying event includes a final order of a state securities commission based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct. In *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 5100, at *16 (June 26, 2014), the Commission construed "final order" . . . "to mean a written directive or declaratory statement issued by a state agency under statutory authority that provides for notice and opportunity for a hearing." *Savva*, however, is distinguishable, as it dealt with final orders of a state securities commission, not temporary orders issued by a court, as here.

[317] *Richard Allen Riemer*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022, at *28 (Oct. 31, 2018).

[318] We appreciate Allen's concern about being subject to a disqualification without having had a chance to be heard beforehand. But any purported unfairness was mitigated because the New York statutory scheme provided him with a procedure, afterwards, to move for an order (including on an ex parte basis) vacating the Order. *See* N.Y. C.P.L.R. § 6314 (permitting motions to vacate or modify preliminary injunctions and temporary restraining orders). Allen, however, chose not to avail himself of this option, even though his attorney emailed him just days after Order was issued that it "should be vacated." *See* JX-204, at 4.

[319] The record does not reflect why FINRA staff failed to send the notice.

[320] *Savva*, 2014 SEC LEXIS 5100, at *3.

[321] *See, e.g.*, *Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334, at *42 (Feb. 20, 2007) ("a broker-dealer cannot shift its responsibility for compliance with applicable requirements to the NASD"); *Dep't of Enforcement v. The Dratel Group*, No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *82 n.57 (NAC May 2, 2014) ("Member firms and registered persons are charged with knowing the applicable regulations and cannot shift their responsibility for rule compliance to FINRA."), *aff'd*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035 (Mar. 17, 2016).

Finally, we reject Respondents' reliance on the advice-of-counsel defense.[322] Reliance on advice of counsel is not relevant to liability if scienter is not an element of the violation.[323] In this case, the only alleged violation requiring a showing of scienter is the FINRA Rule 2010 charge based on a violation of Section 17(a)(1) of the Securities Act of 1933 ("Securities Act"), as discussed below. So we discuss that defense in connection with liability for that charge. Although reliance on advice of counsel is "not relevant to liability" when scienter is not an element of the violation, it may be relevant "as to sanctions."[324] Accordingly, for all other charges, we considered reliance on advice of counsel as possible mitigation of sanctions.

* * *

Accordingly, Allen became subject to statutory disqualification on December 28, 2018, as a result of the Order. Despite his statutory disqualification, Allen continued to associate with NYPPEX even though neither he nor the Firm filed an MC-400 application seeking FINRA's approval for his continued association. Likewise, NYPPEX and Schunk, Allen's supervisor, permitted Allen to continue to associate with the Firm despite his statutory disqualification and without seeking approval from FINRA by filing an MC-400 application. NYPPEX did not file the MC-400 application until February 14, 2020, after the New York court issued a superseding preliminary injunction on February 4, 2020, against Allen and NYPPEX, and others. Thus, from December 28, 2018, until February 14, 2020, Allen remained associated with NYPPEX despite his statutory disqualification and without filing an MC-400 application. As discussed above, Schunk was responsible for ensuring that the Firm complied with the disqualification provisions and was aware of the conduct that served as a basis for Allen's statutory disqualification.

As a result of the foregoing conduct, we conclude that by permitting Allen, a statutorily disqualified person, to remain associated with the Firm, NYPPEX and Schunk violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rules 8311 and 2010. Further, by remaining associated with the Firm after he became statutorily disqualified, Allen violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rule 2010.

B. Violations for Making Misrepresentations and Omissions in Connection with a Securities Offering (Second Cause of Action)

1. Legal Standard

The Complaint charges NYPPEX and Allen with violating FINRA Rule 2010, both independently and by virtue of violating Sections 17(a)(1) and 17(a)(3) of the Securities

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[322] In their Answer, Respondents asserted as an affirmative defense that "[a]t all times" they "relied upon advice of legal counsel that their actions were appropriate and in accordance with FINRA's rules." Ans. 21, ¶ 5.

[323] *See Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *39 (Nov. 14, 2008) (internal quotations omitted), *aff'd*, 347 F. App'x 692 (2d. Cir. 2009); *Dep't of Enforcement v. Murphy*, No. 2012030731802, 2018 FINRA Discip. LEXIS 24, at *65–66 (NAC Oct. 11, 2018), *remanded in part on other grounds,* Exchange Act Release No. 90759, 2020 SEC LEXIS 5218, at *31 (Dec. 21, 2020).

[324] *See Rani T. Jarkas,* Exchange Act Release No. 77503, 2016 SEC LEXIS 1285, at *41 n.56 (Apr. 1, 2016).

Act. The basis for this charge is that these Respondents allegedly made misrepresentations and omissions of material fact to prospective investors in connection with a securities offering.

FINRA's disciplinary authority under FINRA Rule 2010 is "broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade . . . . "[325] FINRA may impose discipline for a violation of FINA Rule 2010 "based on any conduct, not simply conduct that violates the Exchange Act, because the rule appropriately encompasses the myriad types of misconduct that may injure public investors and the marketplace."[326] Making misstatements or omissions of material fact constitutes an independent violation of FINRA Rule 2010 because it is unethical conduct.[327] "Neither a showing of scienter nor harm is required to establish a violation of Rule 2010."[328] For example, negligent misrepresentations violate FINRA Rule 2010.[329]

"To determine whether a respondent's conduct amounts to an independent violation of Rule 2010, we must determine whether the respondent has acted unethically or in bad faith." "Unethical conduct is that which is not in conformity with moral norms or standards of professional conduct, while bad faith means dishonesty of belief or purpose."[330] "Unethical

[325] *Daniel D. Manoff*, Exchange Act Release No. 46708, 2002 SEC LEXIS 2684, at *12 (Oct. 23, 2002) (quoting *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996)); *see also William F. Rembert*, Exchange Act Release No. 33202, 1993 SEC LEXIS 3146, at *3 (1993) ("We have repeatedly held that a self-regulatory organization's disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security.").

[326] *Bradley C. Reifler*, Exchange Act Release No. 94026, 2022 SEC LEXIS 167, at *16–17 (Jan. 21, 2022), *aff'd in relevant part and remanded in part*, *docketed*, No. 2016050924601r (NAC Jan. 24, 2022).

[327] *See Dep't of Enforcement v. Meyers*, No. C3A040023, 2007 NASD Discip. LEXIS 4, at *18 n.6 (NAC Jan. 23, 2007) ("Misrepresentations and omissions . . . are inconsistent with just and equitable principles of trade and therefore are a violation of NASD Conduct Rule 2110 [now known as FINRA Rule 2010]."); *see also Ramiro Jose Sugranes*, Exchange Act Release No. 35311, 1995 SEC LEXIS 234, at *1–2 (Feb. 1, 1995) (falsely representing to a customer that Euro CDs were backed by letters of credit was a misrepresentation in violation of NASD rule requiring high standards commercial honor).

[328] *Dep't of Enforcement v. North*, No. 2018058286901, 2021 FINRA Discip. LEXIS 7, at *23 (NAC May 26, 2021) (citing *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *50 (May 27, 2015) (stating that scienter is not required), *aff'd,* Exchange Act Release No. 79018, 2016 SEC LEXIS 3773 (Sept. 30, 2016)); *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *22 (Dec. 11, 2014) (stating that harm is not an element).

[329] *Dep't of Enforcement v. Cantone*, No. 2013035130101, 2019 FINRA Discip. LEXIS 5, at *60 (NAC Jan. 16, 2019), *appeal docketed*, No. 3-18999 (SEC Feb. 14, 2019).

[330] *North*, 2021 FINRA Discip. LEXIS 7, at *22 (citing *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 SEC LEXIS 2684, at *28 (Feb. 7, 2020), *pet. dismissed in part, denied in part*, 989 F.3d 4, (D.C. Cir. 2021)) (internal quotations omitted).

behavior, even if not undertaken in bad faith, is sufficient to establish liability under FINRA Rule 2010."[331]

"Whether misconduct is within Rule 2010's scope is ultimately a question of whether the conduct raises concerns that the associated person will not comply with the regulatory requirements of the securities business and will not fulfill [his or her] fiduciary duties in handling other people's money."[332] Put a bit differently, "[t]he principal consideration is whether the misconduct reflects on an associated person's ability to comply with the regulatory requirements necessary to the proper functioning of the securities industry and investor protection."[333] A violation of the federal securities laws or another FINRA rule also violates FINRA Rule 2010.[334] And, in particular, a violation of the Securities Act violates FINRA Rule 2010.[335]

Section 17(a) of the Securities Act makes it

> unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly— . . . (1) to employ any device, scheme, or artifice to defraud, or . . . (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 17(a)(1) encompasses "all scienter-based misstatement-related misconduct."[336] A misstatement qualifies as "a 'device' or 'artifice' to defraud."[337] Thus, anyone who, with scienter, makes, drafts, or devises a material misstatement in the offer or

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[331] *Dep't of Enforcement v. Kielczewski*, No. 2017054405401, 2021 FINRA Discip. LEXIS 22, at *26 (NAC Sept. 30, 2021) (quotations omitted), *appeal docketed*, No. 3-20647 (SEC Nov. 2, 2021).

[332] *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *17 (Mar. 29, 2016) (internal quotations omitted).

[333] *North*, 2021 FINRA Discip. LEXIS 7, at *22–23 (citing *James A. Goetz*, Exchange Act Release No. 39796, 1998 SEC LEXIS 499, at *10–11 (Mar. 25, 1998)).

[334] *Dep't of Enforcement v. Luo*, No. 2011026346206, 2017 FINRA Discip. Lexis 4, at *20–21 (NAC Jan. 13, 2017).

[335] *See, e.g.*, *Murphy*, 2020 SEC LEXIS 5218, at *31 ("we have found repeatedly that a violation of the Securities Act . . . violates Rule 2010"); *Scottsdale Capital Advisors Corp.*, Exchange Act Release No. 83783, 2018 SEC LEXIS 1946, at *1 (Aug. 6, 2018).

[336] *John P. Flannery*, Exchange Act Release No. 73840, 2014 SEC LEXIS 4981, at *39 (Dec. 15, 2014), *pet. granted and vacated on other grounds*, 810 F.3d 1 (1st Cir. 2015).

[337] *See Dennis J. Malouf*, Exchange Act Release No. 78429, 2016 SEC LEXIS 2644, at *27 (July 27, 2016), *aff'd*, 933 F.3d 1248 (10th Cir. 2019).

sale of a security violates Section 17(a)(1).[338] "Section 17(a) also prohibits half-truths—literally true statements that create a materially misleading impression."[339]

A violation of Section 17(a)(1) does not require the sale of a security. The section states that it applies to "the offer *or* sale of any securities" (emphasis added). By statute, "[t]he term 'offer to sell', 'offer for sale', or 'offer' shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value."[340] The term "offer to sell" has been interpreted broadly.[341] It includes a communication "designed to procure orders for a security" or a communication "designed to awaken an interest in the security."[342]

Whether information is material "depends on the significance the reasonable investor would place on the withheld or misrepresented information."[343] Information is material if it is substantially likely "that a reasonable [investor] would consider it important in deciding how to [invest] . . . [and] the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[344] "Likewise, whether a statement is misleading is judged from the point of view of an objective investor and determined based on the facts of a case."[345] Information relating to financial condition, solvency, and profitability is material.[346]

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[338] *Flannery,* 2014 SEC LEXIS 4981, at *39.

[339] *Dep't of Enforcement v. C.L. King*, No. 2014040476901, 2019 FINRA Discip. LEXIS 43, at *30 (NAC Oct. 2, 2019) (quoting *SEC v. Gabelli*, 653 F.3d 49, 57 (2d Cir. 2011), *rev'd on other grounds*, 568 U.S. 442 (2013)) (internal quotations omitted).

[340] 15 U.S.C. § 77b(a)(3).

[341] *Murphy*, 2020 SEC LEXIS 5218, at *19–20.

[342] *Id*.; *see also SEC v Tourre*, 10 Civ. 3229, 2013 U.S. Dist. LEXIS 78297, at *37–38 (S.D.N.Y. June 4, 2013) (finding an offer of securities where defendant had "primary responsibility" for creating an allegedly false term sheet and flip book and participated in marketing the transaction to individuals by emailing the term sheet and flip book to them); *SEC v. Arvida Corp*., 169 F. Supp. 211, 215 (S.D.N.Y. 1958) (finding an offer to sell where defendant held a press conference and the issuer's spokesperson answered questions about the proposed offering's price per share and provided written and oral communications about the forthcoming public offering).

[343] *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988).

[344] *Id*. at 231–32 (citing *TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976)); *see also King*, 2019 FINRA Discip. LEXIS 43, at *30 ("Whether information is material depends on the significance the reasonable investor would place on the . . . information.") (internal quotation marks omitted).

[345] *King*, 2019 FINRA Discip. LEXIS 43, at *30.

[346] *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) ("[T]he materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge."); *SEC v. Tecumseh Holdings Corp*., 765 F. Supp. 2d 340, 354 (S.D.N.Y. 2011) (finding that omission that company was "operating at a loss at the time" it was projecting profits over a three-year period was "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality."); *see also Donner*, 2007 SEC LEXIS 334, at *27 ("[N]egative financial information . . . constitute[d] material facts.").

Besides materiality, proving a violation of Section 17(a)(1) requires a showing of scienter, defined as "a mental state embracing intent to deceive, manipulate or defraud."[347] Scienter is established if a respondent acted intentionally or recklessly.[348] Recklessness is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is "so obvious that any reasonable [person] would be legally bound as knowing."[349] Scienter may be inferred from circumstantial evidence.[350] "[W]hen the fraud involves an omission, the element of scienter is satisfied by proof that the respondent had actual knowledge of the omitted material information."[351]

While a showing of scienter is necessary to establish a violation of Section 17(a)(1), a showing of negligence suffices under Section 17(a)(3).[352] "Negligent conduct under [Section 17(a)(3)] is a failure to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation."[353] "A negligent misrepresentation or omission arises when a financial advisor or broker reveals some information about an investment to an investor, but fails to speak the full truth about the investment or misrepresents information."[354] Multiple or repeated misstatements may constitute a "fraudulent practice" or "course of business" resulting in a violation of Section 17(a)(3).[355]

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[347] *Dep't of Enforcement v. Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *33 (NAC Dec. 29, 2015) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)), *aff'd*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016).

[348] *Id.* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007)).

[349] *Dep't of Enforcement v. Faber*, No. CAF010009, 2003 NASD Discip LEXIS 3, at *25 (NAC May 7, 2003) (*quoting Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990)), *aff'd,* Exchange Act Release No. 49216, 2004 SEC LEXIS 277 (Feb. 10, 2004).

[350] *Dep't of Enforcement v. Brookstone*, No. 200701141301, 2015 FINRA Discip. LEXIS 3, at *78 (NAC April 16, 2015) (citing *Gebhart v. SEC*, 595 F.3d 1034, 1041 (9th Cir. 2010)), *appeal docketed*, No. 3-19594 (SEC Nov. 1, 2019).

[351] *Dep't of Enforcement v. Thompson*, No. 2011025785602, 2015 FINRA Discip. LEXIS 9, at *31 (OHO Mar. 30, 2015) (citing *GSC Partner CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004)).

[352] *Flannery*, 2014 SEC LEXIS 4981, at *24; *Dep't of Enforcement v. Tweed*, No. 2015046631101, 2019 FINRA Discip. LEXIS 53, at *32 (NAC Dec. 11, 2019) ("Section 17(a)(3) does not require a showing of scienter; negligence is sufficient.") (citing *Aaron v. SEC*, 446 U.S. 680, 686–87, n.6 (1980)).

[353] *Cantone*, 2019 FINRA Discip. LEXIS 5, at *59 (internal quotations omitted) (quoting *SEC v. True North Fin. Corp*., 909 F. Supp. 2d 1073, 1122 (D. Minn. 2012)).

[354] *See, e.g.*, *SEC v. Morgan Keegan & Co*., 1:09-cv-1965-WSD, 2013 U.S. Dist. LEXIS 189843, at *143 (N.D. Ga. Feb. 15, 2013).

[355] *Flannery*, 2014 SEC LEXIS 4981, at *41–42 ("Of course, one who repeatedly makes or drafts such misstatements over a period of time may well have engaged in a fraudulent 'practice' or 'course of business' [under 17(a)(3)], but not every isolated act will qualify."); *see also Michael W. Crow*, Initial Decision Release No. 953, 2016 SEC LEXIS 475, at *127 (Feb. 8, 2016) ("one may violate Section 17(a)(3) by making multiple misstatements").

2. Discussion

The evidence shows that NYPPEX and Allen committed the violations charged. Respondents engaged in an offering. In March 2019, NYPPEX and Allen solicited existing shareholders in NYPPEX Holdings and other prospective investors to purchase units in NYPPEX Holdings, each of which contained a combination of preferred stock and warrants exercisable into common or preferred stock. Both stock and warrants in NYPPEX Holdings are securities under the Securities Act.[356] As discussed above, the solicitation efforts included the New Investor Solicitation Email, the Existing Shareholder Solicitation Email, the corporate overview, the webinar presentation, and various other email communications with potential investors.

The solicitation efforts constituted an offering because they were made to obtain orders and awaken interest in the capital raise. NYPPEX and Allen argue, however, that they did not violate Section 17(a) because their efforts did not rise to the level of an offering; they only solicited indications of interest by sending out feelers.[357] This argument misses the mark. NYPPEX and Allen cite no legal authority holding that preliminary efforts such as those here do not constitute an offering under Section 17(a). And we have found none.

In arguing that their solicitation efforts did not constitute an offering, NYPPEX and Allen point out that the emails sent to prospective investors contained several disclaimers and limitations. For example, "this invitation does not constitute a solicitation, an offering, or an offering document"; "[a]n offering may only be made through the offering documents provided by the issuer and in jurisdictions when permissible"; and prospective investors should look at important details in the offering documents.[358] Also, offering documents were never created because there was insufficient interest in the potential capital raise.[359] These boilerplate disclaimers, however, are not enough to overcome the other conduct designed to awaken interest in the capital raise and to obtain orders for a security. Thus, NYPPEX and Allen engaged in an offering.[360]

In connection with the March 2019 solicitations for investments in NYPPEX Holdings, NYPPEX and Allen employed a device, scheme, or artifice to defraud and engaged in a

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[356] Section 2(a) of the Securities Act defines "security" as including "stock." 15 U.S.C. § 77b(a)(1). The offering consisted of "units" in NYPPEX Holdings, which included "preferred stock." Stip. ¶ 38.

[357] *See, e.g.*, Resp'ts Reply Br. 12.

[358] Tr. 1220–21; JX-73, at 6–9; JX-70; JX-74; JX-77; JX-82; JX-87; JX-88; JX-91; JX-93; JX-98; JX-136.

[359] Tr. 1136, 1143–44, 1386, 2938.

[360] *Cf. Bernerd E. Young*, Exchange Act Release No. 10060, 2016 SEC LEXIS 1123, at *35 (Mar. 24, 2016) (finding that including boilerplate disclaimers was not sufficient to overcome other specific misstatements); *Kenneth R. Ward*, Exchange Act Release No. 47535, 2003 SEC LEXIS 3175, at *27 n.47 (Mar. 19, 2003) (holding that "boilerplate" disclosures in promotional materials disclaiming any accuracy of the information about securities "in no way overrode" a broker's unqualified recommendations about such securities), *aff'd*, 75 F. App'x 320 (5th Cir. 2003) (Table).

transaction, practice, or course of business which operated or would operate as a fraud or deceit upon the purchaser.[361] As described above, during a month-long solicitation campaign, NYPPEX and Allen made numerous misrepresentations and omissions to prospective investors. These misrepresentations and omissions were material as a reasonable person would want to have known the truth about the misstated facts and omitted information when making an investment decision. A reasonable investor would want to know, for example, that Allen was under investigation by the NYAG for securities fraud and misappropriation of investor funds[362] and that he was preliminarily enjoined by the Order from engaging in securities fraud.[363]

Likewise, because NYPPEX Holdings had historically generated revenue from payments made by ACP X, a reasonable investor would want to know how the Order impacted that revenue stream. Also, NYPPEX and Allen's failure to reveal the existence of the sales incentive Allen offered to NYPPEX's representatives was a material omission because a reasonable investor would want to know this to evaluate the statements made about the investment.[364]

Additionally, Allen and NYPPEX's omissions about NYPPEX Holding's 2018 negative financial results and the CVA valuation's limiting factors were material, as they left prospective investors with an overly rosy view of the holding company's financial picture.[365] The omissions

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[361] NYPPEX Holdings' offer to purchase stock and warrants was made using the means and instrumentalities of interstate commerce, as it utilized email and an online webinar presentation.

[362] *See SEC v. Merkin*, No. 11-23585-CIV-GRAHAM/GOODMAN, 2012 U.S. Dist. LEXIS 155679, at *21 (S.D. Fla. Oct. 3, 2012) ("Clearly, there is a substantial likelihood that a reasonable investor would consider the fact that the SEC was investigating StratoComm for violation of securities laws and the details of the investigation important in deciding whether to buy or sell StratoComm stock."); *ZPR Inv. Mgt.*, Advisers Act Release No. 4249, 2015 SEC LEXIS 4474, at *54 (Oct. 30, 2015) (finding that "[a] reasonable investor would have found it significant to its decision whether to entrust money to [a company] for management that [the company] was under investigation by Commission staff.").

[363] *See SEC v. Merch. Cap., LLC*, 483 F.3d 747, 770–71 (11th Cir. 2007) (holding that failing to disclose, among other things, management's previous cease-and-desist order prohibiting the sale of unregistered securities was a material omission), *aff'd*, 486 F. App'x 93 (11th Cir. 2012); *SEC v. Kirkland*, 521 F. Supp. 2d 1281, 1303 (M.D. Fla. 2007) (holding that failing to disclose "[d]esist and [r]efrain" orders entered against management was a material omission).

[364] *See, e.g.*, *Meyers*, 2007 NASD Discip. LEXIS 4, at *27 (probable receipt of incentive payment on sale of stock had to be disclosed); *Dep't of Enforcement v. DaCruz*, No. C3A040001, 2007 NASD Discip. LEXIS 1, at *25 (NAC Jan. 3, 2007) ("If a representative fails to disclose extra compensation that he anticipates earning from a sale, a customer cannot weigh whether the representative may be recommending the stock for the representative's own financial interest, rather than based on the investment value of the security.") (citing *Richard H. Morrow*, Exchange Act Release No. 40392, 1998 SEC LEXIS 1863, at *18–20 (1998)).

[365] *See SEC v. Todd*, 642 F.3d 1207, 1221 (9th Cir. 2011) (finding that information regarding a company's financial condition is material to investments, and "how officers and directors of a public corporation describe revenue growth to investors is important.") (citations omitted); *SEC v. USA Real Estate Fund 1, Inc.*, 30 F. Supp. 3d 1026, 1034 (E.D. Wash. 2014) ("False claims of substantial unearned revenue, or the substantial overstatement of revenue, are 'material' to reasonable investors.") (citations omitted).

about the CVA report deprived prospective investors from evaluating the weight that they should place on the valuation.[366]

NYPPEX and Allen argue that they never tried to hide the existence of the Order or the NYAG investigation, citing Nunziato and Allen's testimony.[367] But Nunziato testified only that he believed Allen sent out a notification to the shareholders about the Order and the investigation, and that they were public knowledge. He then qualified that testimony by adding that he could not remember when Allen sent out the notification.[368] For his part, Allen testified that Nunziato's testimony was accurate.[369] NYPPEX and Allen, however, offered no documentary support for their position. And, in any event, Nunziato's testimony was too vague for us to give it much weight.

NYPPEX and Allen also argued that they relied on advice from the Firm's in-house general counsel, SS, and a bevy of outside lawyers to guide them in connection with the conduct relating to the capital raise.[370] They claim that:

- In early 2019, the Firm's then-general counsel, SS,[371] and outside counsel, RR, reviewed and approved the documents that were sent out to all prospective investors and existing shareholders about NYPPEX Holdings and the offering,[372] and SS reviewed and approved the slides displayed in the webinar.[373]

- They had extensive conversations with SS and outside counsel about what they needed to disclose and when; counsel advised them they did not need to disclose the existence of the Order or the NYAG investigation until some later point in the offering process (i.e., in the private placement memorandum and annual report); and counsel told them they did not have to make these disclosures when they were simply soliciting interest in the upcoming offering.[374]

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[366] *See Marx v. Comput. Sci. Corp.*, 507 F.2d 485, 489 (9th Cir. 1974) ("[G]enerally earnings projections of a company constitute a prime factor in estimating the worth of its stock."); *see also Crow,* 2016 SEC LEXIS 475, at *138 (finding that the use of projections that doubled prior projections without justification was material because "a reasonable investor would want to know that the projection had been doubled, without any additional support.").

[367] Resp'ts Opening Br. 31 (citing Tr. 1388–93, 3213–15).

[368] Tr. 1388–93.

[369] Tr. 3213.

[370] Resp'ts Opening Br. 31.

[371] Tr. 490–91.

[372] Resp'ts Opening Br. 31, 54 (citing Tr. 2957–65; RX-6; RX-7); *see, e.g.*, Tr. 509–511, 549, 552, 573, 684–85, 782–83.

[373] *See* Tr. 684–85.

[374] Resp'ts Opening Br. 31 (citing Tr. 572–74).

- Attorneys RR and JVL advised that the Order and NYAG investigation would have to be disclosed in final offering documents.[375]

- Attorneys at the law firm A & P "were helping out behind the scenes" and "gave advice" about the March 2019 communications.[376]

- Attorney AD gave Allen "help" on the corporate presentation during the webinar,[377] met with him about the offering,[378] and "reviewed" an email and the corporate overview.[379]

- Attorney LB reviewed the PowerPoint presented to the NYPPEX Holdings shareholders.[380]

Reliance on legal advice is a "relevant consideration in evaluating a defendant's scienter."[381] As discussed above, an advice-of-counsel defense is relevant to liability for the FINRA Rule 2010 charge based on a violation of section 17(a)(1), as the underlying violation requires a showing of scienter. To establish a reliance-on-counsel claim, NYPPEX and Allen "must demonstrate that they: (1) made complete disclosure of the relevant facts of the intended conduct to counsel; (2) sought advice on the legality of the intended conduct; (3) received advice that the intended conduct was legal; and (4) relied in good faith on counsel's advice."[382]

"It isn't possible to make out an advice-of-counsel claim without producing the actual advice from an actual lawyer," according to the Commission.[383] As a result, supporting a reliance on advice-of-counsel defense with no more than the respondent's "say so" cannot

[375] Resp'ts Opening Br. 54–55 (citing Tr. 2917).

[376] Tr. 3188–89.

[377] Tr. 2938–39.

[378] Tr. 2942.

[379] Tr. 2942–45.

[380] Tr. 685.

[381] *Dep't of Enforcement v. Scholander*, No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *72 (NAC Dec. 29, 2014) (internal quotations omitted) (quoting *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (holding that reliance on legal advice "is simply evidence of good faith")) *aff'd*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209 (Mar. 31, 2016), *pet. for review denied sub nom.*, *Harris v. SEC*, 712 F. App'x 46 (2d Cir. 2017).

[382] *Cantone*, 2019 FINRA Discip. LEXIS 5, at *107.

[383] *Berger*, 2008 SEC LEXIS 3141, at *40.

establish the defense.[384] Nor is a respondent's testimony and scant documentary evidence sufficient.[385]

Further, a respondent cannot establish a reliance on advice-of-counsel defense where the record did not show with any specificity what advice was received from counsel.[386] The defense also fails without evidence that the respondent fully informed the attorney of his or her intended conduct.[387] Even when a respondent establishes the defense, the respondent's reliance is not a complete defense, but only one factor to consider.[388]

NYPPEX and Allen failed to prove the elements of the defense. They merely relied on Allen's testimony and scant documentary evidence that included Allen's fragmented handwritten notes from conversations with counsel, a few attorney invoices, and email communications with counsel. None of the documentary evidence, however, showed that NYPPEX and Allen made full disclosure to all the lawyers of the facts serving as the basis for any advice that the attorneys purportedly rendered. They produced no letter from a securities lawyer giving advice reflecting knowledge of all material facts; they did not produce any opinion letter; and they offered no testimony from any securities lawyer,[389] other than LB. And LB made it clear that he gave no advice about the offering; indeed, he and Allen first met months later, in November or December 2019, and he gave no legal advice until then.[390] As a result, we reject the reliance on advice-of-counsel defense.[391]

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[384] *Dep't of Enforcement v. Kesner*, No. 2005001729501, 2010 FINRA Discip. LEXIS 2, at *43 (NAC Feb. 26, 2010) (citing *SEC v. McNamee*, 481 F.3d 451, 455–56 (7th Cir. 2007) (rejecting defendant's argument that reliance on advice of counsel exculpates his conduct because the defendant "offered nothing other than his say-so.")).

[385] *Cantone*, 2019 FINRA Discip. LEXIS 5, at *107 ("Cantone's testimony and scant documentary evidence are insufficient to establish reliance on counsel defense.").

[386] *Eugene T. Ichinose*, Exchange Act Release No. 17381, 1980 SEC LEXIS 105, at *5 (Dec. 16, 1980).

[387] *Dep't of Enforcement v. Reifler*, No. 2016050924601, 2019 FINRA Discip. LEXIS 44, at *24 n.16 (NAC Sept. 30, 2019), *aff'd in relevant part*, 2022 SEC LEXIS 167.

[388] *Dep't of Enforcement v. Holeman*, No. 2014043001601, 2018 FINRA Discip. LEXIS 12, at *22 (NAC May 21, 2018) (citing *Berger*, 2008 SEC LEXIS 3141, at *40), *aff'd*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903 (July 31, 2019).

[389] *See Berger*, 2008 SEC LEXIS 3141, at *40–41 (internal quotations omitted) (observing that in *McNamee*, 481 F.3d at 456, the court noted that "[h]e did not produce any letter from a securities lawyer giving advice that reflected knowledge of all material facts; he did not produce any opinion letter, period. Nor did [he] offer the live testimony of any securities lawyer.").

[390] Tr. 2815–17, 3176–77.

[391] Respondents also point out that the potential investors were not retail investors, but were venture funds, accredited investors, or qualified purchasers with years of experience in the private market. Resp'ts Opening Br. 7. This argument is of no avail. "The protection of the antifraud provisions of the securities laws extends to sophisticated investors as well as those less sophisticated." *Dep't of Enforcement v. Clements*, No. 2015044960501, 2018 FINRA Discip. LEXIS 11, at *66 (NAC May 17, 2018) (quoting *Dolphin and Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 SEC LEXIS 1592, at *25 (Jul. 13, 2006)).

Having rejected this defense, and having considered the totality of the evidence, we conclude that NYPPEX and Allen made the above misstatements and omissions with scienter, as Allen made them intentionally or at least recklessly, and with the intent to deceive investors.[392]

* * *

In March 2019, NYPPEX and Allen, directly and indirectly, in the offer of securities in NYPPEX Holdings: (1) intentionally or, at a minimum recklessly, employed devices, schemes, or artifices to defraud; and (2) intentionally or, at a minimum, recklessly engaged in transactions, practices, and courses of business which operated or would operate as a fraud upon purchasers of securities. We also find that their conduct was unethical; it did not conform to moral norms or standards of professional conduct. It also reflected on their ability to comply with the regulatory requirements necessary to the proper functioning of the securities industry and investor protection.

As a result of the conduct above, Allen violated FINRA Rule 2010, both independently and by virtue of violating Sections 17(a)(1) and 17(a)(3) of the Securities Act. NYPPEX is also liable for these violations because we impute Allen's misconduct to it.[393]

C. Violations of FINRA's Advertising Standards in Communications to Prospective Investors (Third Cause of Action)

"FINRA Rule 2210 imposes standards on the use and content of the public communications of FINRA members and their associated persons."[394] These standards are meant to protect investors.[395] Several of these standards are relevant here.

FINRA Rule 2210(d)(1)(A) provides that "[A]ll member communications with the public must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service." Communications may not "omit any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communications to be misleading." An omitted fact is considered "material" under

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[392] In concluding that Allen acted with scienter, we considered his lengthy experience in the industry. *See Scholander*, 2014 FINRA Discip. LEXIS 33, at *65–66 (holding that an individual's significant industry experience bolsters a finding of recklessness).

[393] "It is well-established that a firm may be held accountable for the misconduct of its associated persons because it is through such persons that a firm acts." *SIG Specialists, Inc*., Exchange Act Release No. 51867, 2005 SEC LEXIS 1428, at *31 (June 17, 2005). Firms have been held responsible for the conduct of those who control it. *See, e.g.*, *Crow*, 2016 SEC LEXIS 475, at *147–48 (imputing scienter to entity that respondents co-owned and controlled in its day-to-day operations as managers); *Cantone*, 2019 FINRA Discip. LEXIS 5, at *119 (affirming, among other things, firm's liability under 17(a)(2) and (3) for negligent misrepresentations and omissions made by firm's CEO).

[394] *Dep't of Enforcement v. Reyes*, No. 2016051493704, 2021 FINRA Discip. LEXIS 29, at *38 (NAC Oct. 7, 2021).

[395] *Id.* at *69.

Rule 2210(d)(1)(A) if it is "substantially likely to be considered important by a reasonable person reading the communication."[396]

FINRA Rule 2210(d)(1)(B) prohibits member firms from making "any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication." Also, "[n]o member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading."

FINRA Rule 2210(d)(1)(D) requires member firms to "ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits."

In applying the above content standards, the following interconnecting definitions are pertinent: "'Communications' consist of correspondence, retail communications and institutional communications."[397] '"Correspondence' means any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period."[398] A "[r]etail communication" is "any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period."[399] The term "retail investor" is defined in relation to whether the person is an "institutional customer." A "retail investor" is any person that is not "an institutional investor, regardless of whether the person has an account with a member."[400] The rule identifies various categories of persons and entities that are considered institutional investors.[401]

According to Allen and Nunziato's undisputed testimony, the potential investors were mainly, if not exclusively, venture funds, accredited investors, or qualified purchasers with years of experience in the private market, and were not retail investors.[402] The record, however, is not sufficiently developed for us to determine whether all or some of the potential investors met the definition of institutional investors, as that term is used in the rule, or whether some or all were retail investors under the rule. But this distinction does not impact our analysis. The statements at issue fell into one or more of the following categories: they were made in correspondence; retail communications; or institutional communications; or orally at the webinar, a public appearance

[396] *Meyers Associates,* Exchange Act Release No. 86497, 2019 SEC LEXIS 1869, at *13–14 (July 26, 2019).

[397] FINRA Rule 2210(a)(1).

[398] FINRA Rule 2210(a)(2).

[399] FINRA Rule 2210(a)(5).

[400] FINRA Rule 2210(a)(6).

[401] FINRA Rule 2210(a)(4).

[402] Tr. 1121–22, 1204–06, 1378–80, 1387–88.

(i.e., a seminar or forum for investors).[403] Thus, all of the statements were subject to the content standards of FINRA Rule 2210(d).

* * *

NYPPEX and Allen made several material misrepresentations and omissions to prospective investors in the above communications and at the webinar. At a minimum, the communications and webinar statements were not fair and balanced. As we have found, those misrepresentations and omissions concerned, among other things, NYPPEX Holdings' valuation and its financial condition. NYPPEX and Allen also failed to disclose that Allen and NYPPEX Holdings were under investigation by the NYAG for securities fraud and misappropriation of investor funds and preliminarily enjoined from engaging in securities fraud and other conduct. As a result, those communications and webinar statements failed to meet the content standards of FINRA Rule 2210. We therefore conclude that NYPPEX and Allen violated FINRA Rules 2210(d) and 2010.[404]

D. Violations of FINRA's Advertising Standards in Material Posted on the Firm's Website and Violations of Just and Equitable Principles of Trade by Making False or Misleading Statements on the Firm's Website (Fourth and Fifth Causes of Action)

On or around January 2, 2020, in response to the NYAG's complaint, Allen directed the posting of the NYPPEX Statement on NYPPEX's website. The statement was an electronic communication made available to the public meaning it was available to more than 25 retail investors within any 30 calendar-day period. Thus, it was a communication subject to the content standards of FINRA Rule 2210(d).[405] As we found above, the statement contained statements and omissions that were false or misleading. At a minimum, they were not fair and balanced. The NYPPEX Statement therefore violated FINRA Rule 2210(d).

Additionally, FINRA Rule 2210 restricts the use of FINRA's name in firm communications. FINRA Rule 2210(e)(1) prohibits communications from implying "that FINRA . . . or any other regulatory organization endorses, indemnifies, or guarantees, the member's business practices, selling methods, the class or type of securities offered, or any specific

[403] FINRA Rule 2210(f)(1) provides that: "[w]hen sponsoring or participating in a seminar, forum, radio or television interview, or when otherwise engaged in public appearances or speaking activities that are unscripted and do not constitute retail communications, institutional communications or correspondence ('public appearance'), persons associated with members must follow the standards of paragraph (d)(1)."

[404] *See Dep't of Enforcement v. Meyers Associates*., No. 2010020954501, 2018 FINRA Discip. LEXIS 1, at *13 n.13 (NAC Jan. 4, 2018) (finding that a violation of the predecessor to FINRA Rule 2210 also violated FINRA Rule 2010), *aff'd*, 2019 SEC LEXIS 1869.

[405] FINRA Rule 2210(a)(1), (5), and (6).

security."[406] Two statements violated these prohibitions by implying that FINRA endorsed NYPPEX's business practices: (1) "NYAG's allegations are in conflict with the facts concluded by FINRA" in its most recent examination of NYPPEX; and (2) operating expenses between and among NYPPEX-affiliated entities were allocated under an ASA, which "has been reviewed and approved by FINRA throughout its periodic examinations of the Company for over 15 years."[407]

For their defense, Respondents argue that because Advertising Regulation never informed them that the NYPPEX Statement still contained problematic language, they "justifiably believed that they had resolved all of FINRA's issues with the media statement, and did not violate [Rule 2210](e)(1)."[408] This argument is meritless. Although Advertising Regulation failed to alert Respondents to the continued problem with the NYPPEX Statement, it was Respondents' obligation to comply with FINRA rules. As we noted above in connection with the statutory disqualification charges, Respondents cannot shift responsibility to FINRA for their compliance with an applicable requirement.[409]

In sum, NYPPEX and Allen created and posted on the NYPPEX website a communication that in several respects failed to comport with the content standards that apply to the public communications of FINRA members and their associated persons. This conduct was also contrary to high standards of commercial honor and just and equitable principles of trade; it was unethical and did not conform to moral norms or standards of professional conduct. It also reflected on NYPPEX and Allen's ability to comply with the regulatory requirements necessary to the proper functioning of the securities industry and investor protection. We therefore find that they violated FINRA Rules 2210(d), 2210(e), and 2010.[410]

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[406] *See, e.g.*, *Reyes*, 2021 FINRA Discip. LEXIS 29, at *42 (Respondent violated FINRA Rule 2210(e)(1) by falsely implying, in marketing materials, that several regulatory organizations, including FINRA, endorsed a product recommended and sold to customers).

[407] The Complaint also alleged that the NYPPEX Statement violated FINRA Rule 2210(e)(1) by representing that "[p]rofessionals at NYPPEX Holdings and its subsidiaries have years of exemplary compliance." Compl. ¶ 218. As discussed above, we found that this statement was false or misleading, but we do not agree that it constituted an endorsement, indemnification, or guarantee of NYPPEX's business practices.

[408] Resp'ts Opening Br. 47.

[409] *See* p. 42, above.

[410] *Cf. Dep't of Enforcement v. Donner Corp., Int'l*, No. CAF020048, 2006 NASD Discip. LEXIS 4, at *39 n.30 (NAC Mar. 9, 2006) (finding that by downplaying or ignoring negative information in research reports and providing readers with an unbalanced view of the issuer's prospects, respondent's conduct violated not only FINRA Rule 2210 but also independently violated just and equitable principles of trade), *aff'd*, 2007 SEC LEXIS 334.

E. Violations Based on False or Misleading Statements to the New York Court and FINRA (Sixth Cause of Action)

FINRA Rule 2010 prohibits providing false information to FINRA.[411] Signing affidavits that contain false and misleading statements violates FINRA Rule 2010, even if an attorney prepared them during litigation.[412] Likewise, making false statements in written material submitted to another regulator violates FINRA Rule 2010.[413] Making false or misleading statements to a court or to FINRA is conduct inconsistent with just and equitable principles of trade and violates FINRA Rule 2010.

On January 13, 2020, Allen executed the affidavit, which he filed with the New York court the next day. Then, on February 14, 2020, he submitted the affidavit to FINRA in support of his MC-400 application. Allen knowingly, or at a minimum recklessly, made false and misleading statements in the affidavit, as described above. By submitting to the New York court and FINRA a signed affidavit containing false and misleading statements, Allen violated FINRA Rule 2010.

F. Supervision Violations (Seventh Cause of Action)

1. Legal Standard

"Assuring proper supervision is a critical component of broker-dealer operations."[414] FINRA Rule 3110(a) requires member firms to "establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules." The rule also provides that "[f]inal responsibility for proper supervision shall rest with the member." "[T]he duty of supervision includes the responsibility to investigate 'red flags' that suggest misconduct may be occurring and to act upon the results of such investigation."[415] One element of a reasonably designed supervisory system, set forth in FINRA Rule 3110(a)(5), is "[t]he

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[411] *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23–24 (Aug. 22, 2008) ("providing false information to NASD is an independent violation of NASD Rule 2110," predecessor to FINRA Rule 2010).

[412] *See Dep't of Enforcement v. Furman*, No. C07990033, 2000 NASD Discip. LEXIS 30, at *24–26 (OHO Jun. 8, 2000) (finding that respondent violated NASD Rule 2110 by signing false and misleading affidavits for use in an NASD arbitration proceeding, noting that respondent "signed the affidavits under oath and should have recognized the importance of ensuring they were accurate and not misleading.").

[413] *See Dep't of Enforcement v. Taylor*, No. C8A050027, 2007 NASD Discip. LEXIS 11, at *25 (NAC Feb. 27, 2007) (holding that respondent violated NASD Rule 2110 . . . by falsifying a document she submitted to the Ohio state insurance regulator).

[414] *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 SEC LEXIS 1407, at *27 (June 29, 2007); *see also Brookstone,* 2015 FINRA Discip. LEXIS 3, at *145 (stating that proper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and FINRA Rules).

[415] *Dep't of Enforcement v. Wilson-Davis & Co*., No. 2012032731802, 2019 FINRA Discip. LEXIS 54, at *36 (NAC Dec. 19, 2019) (quoting *Michael T. Studer*, Exchange Act Release No. 50543A, 204 SEC LEXIS 3157, at *22 (Nov. 30, 2004), *aff'd*, 148 F. App'x 58 (2d Cir. 2005)), *appeal docketed*, No. 3-19666 (SEC Dec. 31, 2019).

assignment of each registered person to an appropriately registered representative[] or principal[] who shall be responsible for supervising that person's activities."

2. Evidence Regarding Supervision

The evidence about Schunk's supervision consisted mainly of testimony from him[416] and Allen.[417] Schunk explained that the office was small (a five-person office), he sat only five feet away from Allen, and that as a result, "there's enhanced supervision always."[418] Schunk described the enhanced or heightened supervision as consisting of meeting with Allen each morning. At those meetings, according to Schunk, they discussed any items for the day, and Allen discussed with him any actions Allen planned to take. And then, during the day, Schunk claimed, he talked with Allen and was "in constant contact since we're right next to each other. And," Schunk added, "if he has any questions or anything that he proposes to do he discusses [it] with me."[419]

Stated slightly differently, Schunk also testified that he supervised Allen mostly by meeting with him each morning to discuss current issues and items, especially those related to the legal and compliance committee; Schunk then made recommendations to Allen about how to proceed or handle these items.[420] Continuing, Schunk testified that part of his daily discussions with Allen included whether Allen expected to engage in any activity that might require enhanced supervision. Further, according to Schunk, his ongoing enhanced supervision consisted of Allen sending him any items reflecting activities that Schunk needed to review.[421]

More specifically, Schunk described his supervisory efforts in connection with the Order, emails sent by NYPPEX employees about the capital raise, and the NYPPEX Statement. Schunk recalled that when he received the Order, he passed it along to Allen, SS, and maybe other

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[416] We did not make an overall credibility finding about Schunk. On some issues we found him credible, such as whether the NYPPEX Statement was pre-approved in writing before posting. He admitted, against his interest, that his "Yes" response to Advertising Regulation's request about preapproval of the statement was not truthful. This testimony bolstered his overall credibility. But on certain other subjects we did not find him credible—such as his purported reliance on advice of counsel and his so-called enhanced supervision of Allen—because his testimony appeared self-serving and either conflicted with, or was not supported by, other evidence.

[417] We did not find Allen generally credible. During his testimony, Allen was often defensive, evasive, and argumentative. *See, e.g.*, Tr. 385–90, 474, 717– 25, 728–29, 731–36, 814–19, 901–04, 998–1000, 2377–78, 3124–27. He also gave testimony that was impeached by his prior OTR testimony. Tr. 465–71 At other times his testimony directly conflicted with other indisputable evidence. For example, he denied offering a NYPPEX Holdings' Senior Vice President a financial incentive for selling NYPPEX Holdings' units when the evidence showed that he had done so. *See* Tr. 499–502; JX-70, at 1. And he claimed receiving advice from the Firm's attorney, LB, months before LB had ever met him. *See* Tr. 685, 2816–17, 3176–77. Taken as a whole, this undercut Allen's overall credibility and caused us to disregard much of his testimony on key issues unless it was corroborated by other credible evidence.

[418] Tr. 1523–24, 2896.

[419] Tr. 1788–89.

[420] Tr. 2896, 2905.

[421] Tr. 1523–26.

attorneys.[422] He testified that he then notified the people who were involved and the general counsel.[423] Schunk said he also wrote to the attorneys for their feedback as to what additional steps he needed to take and what procedures to follow, and he followed their advice, including filing an amended Form U4 for Allen.[424] But, Schunk emphasized, after entry of the Order, he saw no need to increase his level of supervision of Allen because it was already sufficient.[425]

Schunk was adamant that his supervision was reasonable and enhanced and that he could not have increased it in response to the Order. "[S]upervision of Mr. Allen and everyone else in the firm, for that matter, was ongoing on a daily basis. And I'm not sure what else could have been done to conduct enhanced supervision."[426] "What else could I have done other than sit next to him at his desk, I don't know," Schunk asked rhetorically.[427] According to Schunk, "there was no necessity to change anything, because it was ongoing on a regular daily basis even before the order."[428]

Turning to his supervision of the emails sent out by NYPPEX employees about the intended capital raise, Schunk testified that he reviewed them and passed them along. "They weren't offerings," he said. "They didn't include some of the information that we normally included in an offering, such as a PPM [i.e. a private placement memorandum]."[429] They were complete for their purposes, he concluded.[430] Schunk said he followed the normal process, which he described as follows: first, Allen drafted the emails; then lawyers reviewed them; after which he reviewed them; and then he would send them back to Allen with an approval.[431] As for the document review and approval process of advertising materials, Schunk testified that normally he would receive a document from Allen; review and approve it; save a copy to the Firm's advertising and approval file; and return it to Allen with the approval attached.[432]

Finally, Schunk addressed his supervision of Allen after filing the MC-400 application. In the application, he proposed that Allen "would continue to serve in his current capacities" and that Schunk would provide heightened supervision.[433] To that end, according to

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[422] Tr. 1752.

[423] Tr. 1753.

[424] Tr. 1754.

[425] Tr. 1522–29.

[426] Tr. 1526–27.

[427] Tr. 1526.

[428] Tr. 1528.

[429] Tr. 1755.

[430] Tr. 1756.

[431] Tr. 1760.

[432] Tr. 1761.

[433] Stip. ¶ 77.

Schunk, he exercised enhanced supervision over Allen.[434] For his part, Allen testified that the heightened plan of supervision included a written memo established by legal and compliance.[435] Besides the morning meetings, Allen claimed, Schunk and his department periodically reviewed emails, opened and reviewed all mail communications, and financial statements were sent to the compliance department for Allen's accounts and they were reviewed.[436] The evidence, however, did not reflect any increased supervision after the MC-400 application was filed, or any increased emphasis on supervising Allen's communications with NYPPEX Holdings shareholders or other potential investors.[437]

3. Discussion

Respondents argue that "Schunk appropriately supervised each of Allen's actions and increased the supervision after the entry of the TRO and then preliminary injunction."[438] These arguments ring hollow. Schunk was the principal who, under NYPPEX's WSPs, was responsible for supervising Allen's activities. NYPPEX's WSPs also required Schunk to "review and approve, prior to use, all advertisements and sales literature to assure compliance with all applicable federal and state securities laws" and to consider whether any communications needed to be filed with FINRA prior to use. Schunk does not dispute that he knew about Allen's actions that led to this disciplinary proceeding.[439] But he abdicated his supervisory responsibilities and rubber-stamped Allen's misconduct. Schunk knew about the Order within a month after the court issued it. Yet, after learning about the Order, which rested on the NYAG's allegations that Allen was committing fraud and misappropriation of investor funds, Schunk failed to change the way he supervised Allen.

Additionally, Schunk failed to reasonably respond to red flags that Allen was engaged in conduct violating applicable securities laws, regulations, and FINRA rules; he also failed to take reasonable steps to ensure the Firm's communications complied with all applicable federal and state securities laws and regulations. In particular, Schunk participated in the webinar; reviewed the corporate overview before it was distributed to prospective investors; was copied on emails to investors attaching the summary of the CVA valuation report; reviewed the NYPPEX Statement before it was posted online; and filed an MC-400 application that attached Allen's affidavit. These communications were rife with misrepresentations and omissions that Schunk saw or recklessly disregarded. In the face of these red flags, he failed to take reasonable steps to ensure that Allen's communications and his affidavit complied with all applicable securities laws

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[434] Tr. 1788.

[435] Tr. 3253. See discussion above at p. 27 n.219, regarding the composition of the committee.

[436] Tr. 3255.

[437] Notably, Respondents failed to show that Schunk "evidenced in writing" his FINRA Rule 3110(b)(4)-mandated "[r]eviews of correspondence and internal communications.

[438] Resp'ts Opening Br. 50.

[439] Resp'ts Opening Br. 49–50.

and regulations and with applicable FINRA rules by not making false statements or omitting material information.

Finally, Schunk claimed that he relied on advice of counsel in all matters relating to Allen's actions and Schunk's supervision of them.[440] This claim fails because, as discussed above, it is only a defense to a scienter-based offense. We do consider it, below, however, as potential mitigation for sanctions.

* * *

The record demonstrates that NYPPEX and Schunk failed to implement the Firm's WSPs, and, in so doing, failed to maintain a supervisory system reasonably designed to prevent NYPPEX's and Allen's misconduct. We therefore find that NYPPEX and Schunk violated FINRA Rules 3110(a) and 2010.[441]

G. Violations Based on False or Misleading Statements in Response to Information Requests (Eighth Cause of Action)

"FINRA Rule 8210 is the principal means by which FINRA obtains information from its member firms and their associated persons."[442] FINRA Rule 8210(a)(1) authorizes FINRA staff to "require a . . . person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically . . . with respect to any matter involved in [an] investigation, ..." FINRA Rule 8210(a)(2) provides that FINRA "shall have the right to . . . inspect and copy the books, records, and accounts" of any member or associated person "with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such member's or person's possession, custody, or control." FINRA Rule 8210(c) states that "[n]o member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule." "A member or associated person violates both FINRA Rules 8210 and 2010 by providing false or misleading information in response to a FINRA Rule 8210 request."[443]

On April 23, 2020, NYPPEX submitted a response to requests for information made by Advertising Regulation under FINRA Rule 8210 that contained false or misleading statements, as discussed above. Allen and Schunk co-signed the NYPPEX Advertising Response. The response also attached a document, Exhibit 1, which purported to evidence a principal's preapproval of the NYPPEX Statement in December 2019. Exhibit 1 was itself false or, at a

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[440] Resp'ts Opening Br. 55; Resp'ts Reply Br. 18; *see also* Ans. 21 ¶ 5.

[441] A violation of FINRA Rule 3110 also violates FINRA Rule 2010. *See Merrimac*, 2019 SEC LEXIS 1771, at *39 n.106.

[442] *Id.* at *4.

[443] *Id.* at *5; *see also Dep't of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *16 (NAC Mar. 9, 2015) (citing *Ortiz*, 2008 SEC LEXIS 2401, at *23) ("An associated person violates FINRA Rule 2010 when he or she violates any other FINRA rule, including FINRA Rule 8210.").

minimum, misleading; it was not created by Schunk until March or April 2020. Advertising Regulation sought this information to determine whether NYPPEX, Schunk, and/or Allen had violated FINRA's advertising rules in connection with the NYPPEX Statement. Both Schunk and Allen knew, or recklessly disregarded the fact, that the NYPPEX Advertising Response contained false information.

Respondents assert reliance on advice of counsel as their defense. We reject this defense because "scienter is not an element of a Rule 8210 violation" [444] and "advice of counsel is not a defense to liability under Rule 8210."[445] That said, it may be relevant to the issue of mitigation of sanctions,[446] and we consider it, below, for that purpose.

Based on the conduct above, NYPPEX, Allen, and Schunk violated FINRA Rules 8210 and 2010.

H. Violations Based on Providing Untimely and Incomplete Information in Response to Information and Document Requests (Ninth Cause of Action)

We set forth above the basic principles governing member firms and associated persons' obligations relating to FINRA Rule 8210 requests. Certain additional principles are especially relevant to the Ninth Cause of Action. FINRA Rule 8210 applies to information and documents within the possession, custody, or control of an associated person or member firm, including documents such as bank account statements.[447] The obligation to comply with FINRA's requests for information is "unequivocal."[448] Thus, "individuals may not second-guess a Rule 8210 request or set conditions for their compliance. Nor can they unilaterally decide when to respond to requests for information depending on their personal view of the merits of FINRA's investigation." Further, "[a] belief that FINRA does not need the requested information provides no excuse for the failure to provide it. Nor does a belief that the information might be available from other sources."[449]

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[444] *Berger*, 2008 SEC LEXIS 3141, at *39.

[445] *Dep't of Enforcement v. Escobio*, No. 2018059545201, 2021 FINRA Discip. LEXIS 3, at *26 n.27 (NAC Mar. 10, 2021) (citing *Berger*, 2008 SEC LEXIS 3141, at *38; *Toni Valentino*, Exchange Act Release No. 49255, 2004 SEC LEXIS 330, at *13 (Feb. 13, 2004)); *cf. Li-Lin Hsu*, Exchange Act Release No. 78899, 2016 SEC LEXIS 3585, at *12 (Sept. 21, 2016) ("[A] recipient of a Rule 8210 request cannot avoid compliance based on the advice of counsel.")

[446] *Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *16 (NAC Feb. 25, 2014) (internal quotes omitted) ("While reasonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions, a respondent's reliance on an attorney's legal advice is immaterial to an associated person's obligation to supply requested information to FINRA.") (citing *Michael Markowski*, Exchange Act Release No. 32562, at *11 (June 30, 1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994)).

[447] *See Dep't of Enforcement v. Vedovino,* No. 2015048362402, 2019 FINRA Discip. LEXIS 20, at *8, 20–21 (NAC May 15, 2019).

[448] *Reifler*, 2022 SEC LEXIS 167, at *13.

[449] *Id.* at *19 (internal quotations omitted).

"Member firms and associated persons may be found in violation of Rule 8210 when they fail to provide full and prompt cooperation to FINRA."[450] And, specifically, failing to completely and timely respond to FINRA 8210 requests seeking bank account statements violates FINRA Rule 8210 and 2010.[451]

On February 10, February 20, and March 13, 2020, FINRA sent NYPPEX and Allen letters, under FINRA Rule 8210, requesting that NYPPEX and Allen provide: (1) bank account records for NYPPEX, NYPPEX Holdings, and Allen; (2) a list of Allen's OBAs and PSTs and all related documents; and (3) loan agreements between Allen and NYPPEX, NYPPEX Holdings, or any other entity in which Allen had any ownership interest.

Although FINRA properly served NYPPEX and Allen with the February 10, February 20, and March 13 requests, these Respondents failed to provide FINRA with all of the requested information and documents, as discussed above. The information and documents FINRA sought were material to the investigation. They concerned Allen's potential participation in, and NYPPEX's supervision of, any OBAs and PSTs; whether anyone invested in NYPPEX Holdings; and the legitimacy of any money movements between and among Allen, NYPPEX, NYPPEX Holdings, and other entities controlled by Allen.

As for the documents and information NYPPEX and Allen did produce, the productions were untimely. While the Firm and Allen explained to FINRA during the investigation that they faced challenges complying with the FINRA Rule 8210 requests during the COVID-19 pandemic—explanations which we credit to some extent—they do not justify the continued untimely productions. FINRA had to send many requests identifying the outstanding items and threaten disciplinary action for noncompliance. Not only did FINRA repeatedly remind NYPPEX and Allen that they needed to comply with the requests, but counsel for NYPPEX and Allen also explained to Allen that he and the Firm could face regulatory exposure if they did not comply.[452] But even these efforts did not elicit full production.

Allen and NYPPEX assert reliance on advice of counsel, claiming that they relied on counsel to respond to FINRA's requests. This defense fails for two reasons. First, reliance on advice of counsel is not a defense to a FINRA Rule 8210 charge, as discussed above in connection with the Eighth Cause of Action. Second, "a member or an associated person cannot satisfy his obligation to respond to an information request by simply referring the matter to a

[450] *Dep't of Enforcement v. Saliba*, Exchange Act Release No. 91527, 2021 SEC LEXIS 865, at *32 (Apr. 9, 2021).

[451] *See Vedovino,* 2019 FINRA Discip. LEXIS 20, at *8, 20–21 (affirming that respondent's failure to completely and timely respond to FINRA 8210 request seeking bank account and credit card statements violated FINRA Rules 8210 and 2010).

[452] Tr. 2374–75; JX-215, at 1.

lawyer, particularly where, as here, the member or person fails to act to ensure that the lawyer had provided the requested information."[453]

As a result of the conduct above, NYPPEX and Allen violated FINRA Rules 8210 and 2010 by making untimely and incomplete responses to requests for information and documents.

IV. Sanctions

A. Overview

In considering the appropriate sanctions to impose on Respondents, we begin our analysis with FINRA's Sanction Guidelines[454] ("Guidelines") as a benchmark.[455] The Guidelines contain: (1) General Principles Applicable to All Sanction Determinations ("General Principles") "that should be considered in connection with the imposition of sanctions in all cases"; (2) a list of Principal Considerations in Determining Sanctions ("Principal Considerations") "which enumerates generic factors for consideration in all cases"; and (3) guidelines applicable to specific violations ("Specific Considerations"), which "identify potential principal considerations that are specific to the described violation."[456]

The General Principles explain that "sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct." Adjudicators are therefore instructed to "design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct." Further, sanctions should "reflect the seriousness of the misconduct at issue,"[457] and should be "tailored to address the misconduct involved in each particular case."[458] The sanctions we impose here are appropriate, proportionally measured to address Respondents' misconduct, and designed to protect and further the interests of the investing public, the industry, and the regulatory system.

For each of the charges, we considered aggravating that neither Allen nor Schunk showed any remorse for their misconduct.[459] These Respondents' "refusal to acknowledge [their] misconduct and attempts to deflect blame increase the likelihood that [they] would engage in

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[453] *Dennis A. Pearson*, Exchange Act Release No. 54913, 2006 SEC LEXIS 2871, at *14 (Dec. 11, 2006); *see also Walblay*, 2014 FINRA Discip. LEXIS 3, at *16–17.

[454] Guidelines (Oct. 2021), https://www.finra.org/sanctionguidelines.

[455] *See, e.g.*, *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *56 (Sept. 28, 2017) (finding that a sanctions analysis should begin with the Guidelines as a benchmark).

[456] Guidelines at 1.

[457] *Id.* at 2 (General Principle No. 1).

[458] *Id.* at 3 (General Principle No. 3).

[459] *Id.* at 7 (Principal Consideration No. 2.) ("Whether an individual or member firm respondent accepted responsibility for and acknowledged the misconduct to his or her employer (in the case of an individual) or a regulator prior to detection and intervention by the firm (in the case of an individual) or a regulator.").

similar misconduct in the future."[460] Allen, in particular, went beyond failing to show remorse—he displayed a contemptuous and cavalier attitude for the disciplinary process. "[H]ere we are at this hearing talking about issues that I personally think are not worth anyone's time here," he complained, adding, later, "this entire process is highly insulting to someone like me."[461] Allen's "cavalier attitude raises serious concerns about the likelihood of future misconduct."[462] Also, a respondent's disciplinary history is an aggravating factor in assessing sanctions.[463] In determining the appropriate sanctions to impose against NYPPEX and Schunk for each violation they committed, we considered their disciplinary histories as aggravating, as discussed above.[464]

For mitigation purposes, we considered reliance on advice of counsel for each violation for each Respondent. According to Respondents, they "did nothing wrong, and reasonably relied on advice of counsel each and every step of the way."[465] They claim that Allen relied on the advice of both the Firm's general counsel and outside counsel for every single proposed action that raised legal concerns.[466] They also assert that SS, in particular, as in-house counsel, gave them advice about "the events underlying every single cause of action." Further, they argue that Allen and the other Respondents relied on attorneys in good faith because the attorneys were all competent and specialized in this field.[467] Beyond these broad representations, Respondents also offered evidence relating to advice of counsel focused on each cause of action. We evaluated this evidence and discuss it below.

As directed by the Guidelines, we considered whether to take into account the Firm's size "with a view toward ensuring that the sanctions imposed are remedial and designed to deter

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[460] *Fillet*, 2016 SEC LEXIS 3773, at *18; *see also Reyes*, 2021 FINRA Discip. LEXIS 29, at *60–61; *cf. Mission Sec. Corp*., Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *51 (Dec. 7, 2010) (holding that respondents' continued refusal to acknowledge wrongdoing reveals a fundamental misunderstanding of their regulatory obligations or that they hold such obligations in contempt).

[461] Tr. 463, 730.

[462] *Thomas C. Gonnella*, Exchange Act Release No. 78532, 2016 SEC LEXIS 2786, at *47 (Aug. 10, 2016).

[463] Guidelines at 2 (General Principle No. 1) ("Adjudicators should always consider a respondent's relevant disciplinary history in determining sanctions and should ordinarily impose progressively escalating sanctions on recidivists."); *Id.* at 7 (Principal Consideration No. 1) ("An individual respondent's Disciplinary and Arbitration History, or a respondent firm's relevant disciplinary history"); *see also Dep't of Enforcement v. Laverty*, No. 2016050205901, 2020 FINRA Discip. LEXIS 47, at *31 (NAC Dec. 22, 2020) (finding that FINRA member's disciplinary history may serve as an aggravating factor for the purpose of sanctions).

[464] The NAC has considered AWCs as part of a respondent's disciplinary history and an aggravating factor in assessing sanctions. *See, e.g.*, *Dep't of Enforcement v. Newport Coast Sec*., No. 2012030564701, 2018 FINRA Discip. LEXIS 14, at *179 (NAC May 23, 2018), *aff'd*, Exchange Act Release No. 88548, 2020 SEC LEXIS 917 (Apr. 3, 2020). Likewise, the NAC has considered letters of caution in that manner as well. *See, e.g.*, *Dep't of Enforcement v. North Woodward Fin. Corp*., No. E8A2005014902, 2008 FINRA Discip. LEXIS 47, at *28–29 (NAC Dec. 10, 2008).

[465] Resp'ts Opening Br. 1.

[466] Resp'ts Opening Br. 54 (citing Tr. 2910–12).

[467] Resp'ts Opening Br. 56 (citing Tr. 3093–99).

future misconduct but are not punitive."[468] We may "consider a firm's small size in connection with the imposition of sanctions with respect to rule violations involving negligence." But "if the violations involve fraudulent, willful or reckless misconduct," we "should consider whether, given the totality of the circumstances involved, it is appropriate to consider a firm's small size." In those situations, we "may determine that, given the egregious nature of the fraudulent activity, firm size will not be considered in connection with the sanctions."[469]

Respondents request that we consider that the Firm is tiny, consisting only of Allen and Schunk and no other registered persons.[470] But there was no evidence presented that the Firm is currently that small, although Schunk testified that "we're a very small firm."[471] The evidence did show, however, that from 2018 to 2020, the Firm always had fewer than ten registered representatives,[472] and there was no evidence that it had expanded at the time of the hearing. Even so, under the totality of the circumstances—which involved wide-ranging wrongful conduct by the Firm, including fraud and other intentional and reckless violations—we only considered its small size in connection with the violations committed negligently, namely, the statutory disqualification violations.[473]

B. Discussion

1. Sanctions for Statutory Disqualification Violations (First Cause of Action).

For a disqualified person who associates with a firm prior to FINRA approval, the Guidelines recommend that adjudicators impose a fine of $5,000 to $77,000, and in egregious cases, consider a bar. For firms and supervisory principals, the Guidelines also recommend a fine of $5,000 to $77,000. In egregious cases they recommend the adjudicators "consider suspending the firm with respect to any or all activities or functions for up to two years." Also, in egregious cases, they recommend suspending "the supervisory principal in any or all capacities for up to two years or barring the supervisory principal, particularly where he or she knowingly allowed a disqualified person to become associated." The principal considerations are: (1) the nature and extent of the disqualified person's

[468] Guidelines at 2 (General Principle No. 1).

[469] *Id.* at 2 n.2.

[470] Resp'ts Reply Br. 23.

[471] Tr. 1788.

[472] Tr. 116–17, 304.

[473] Respondents point out that Enforcement never proved that the alleged misconduct harmed any customers. Resp'ts Opening Br. 1; Resp'ts Reply Br. 2–3. Although that is correct, we do not give it any weight because lack of customer harm is not a mitigating factor for sanctions. *See, e.g.*, *Saliba*, 2021 SEC LEXIS 865, at *60; *King*, 2019 FINRA Discip. LEXIS 43, at *135.

activities and responsibilities; (2) whether a Form MC-400 application was pending; and (3) whether disqualification resulted from financial and/or securities misconduct.[474]

Respondents' violations were accompanied by several aggravating factors. Allen had significant responsibilities as the managing member of NYPPEX; a Form MC-400 was never filed based on the Order; and the disqualification resulted from a restraining order based on allegations of financial and/or securities misconduct. Further, rather than file an MC-400 application, Allen and Schunk filed a Form U4 amendment that failed to accurately describe the Order, thereby concealing that Allen had been enjoined and restrained from selling certain securities.[475] Also, Respondents knew about the statutorily disqualifying event, namely, the Order. And during Allen's continued association with the Firm while statutorily disqualified, he engaged in securities fraud in connection with the NYPPEX Holdings capital raise and committed the other violations addressed above.

On the other hand, the evidence did not prove that Respondents knew the Order rendered Allen statutorily disqualified. Instead, it appeared that Allen and Schunk genuinely, but mistakenly, believed that all they needed to do as a result of the Order was disclose it to FINRA in an amendment to Allen's Form U4. Significantly, later, after the New York court entered a preliminary injunction, Allen and Schunk did file the MC-400 application. This led us to conclude that they simply failed to appreciate that an ex parte temporary restraining order—rather than a preliminary injunction entered after an evidentiary hearing—triggered a statutory disqualification. We find that Respondents' misconduct resulted from negligence,[476] and that their violations were serious, but not egregious.

Without conceding liability, Respondents urge this Panel, if it finds any violations, to mitigate any sanctions it might impose based on reliance on advice of counsel.[477] While "reasonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions,"[478] "the claim must have sufficient content and sufficient supporting evidence."[479] We

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[474] Guidelines at 43.

[475] *Id.* at 7 (Principal Consideration No. 10) ("Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated.").

[476] *Id.* at 8 (Principal Consideration No. 13) ("Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence."). For sanctions purposes, negligence is the failure to use ordinary care—i.e., the degree of care that a reasonably careful person would use under like circumstances. *Dep't of Enforcement v. McNamara*, No. 2016049085401, 2019 FINRA Discip. LEXIS 29, at *23 (NAC July 30, 2019).

[477] Resp'ts Opening Br. 56; Guidelines at 7 (Principal Consideration No. 7) ("Whether the respondent demonstrated reasonable reliance on competent legal or accounting advice.").

[478] *Dep't of Enforcement v. Tysk*, No. 2010022977801r, 2019 FINRA Discip. LEXIS 10, at *39–40 (NAC Mar. 11, 2019), *aff'd*, Exchange Act Release No. 91268, 2021 SEC LEXIS 534 (Mar. 5, 2021); *Berge*r, 2008 SEC LEXIS 3141, at *38 (stating that a valid claim of reliance on counsel could mitigate sanctions), *aff'd*, 347 F. App'x 692 (2d Cir. 2009).

[479] *Kesner*, 2010 FINRA Discip. LEXIS 2, at *42–43 (quoting *Berger*, 2008 SEC LEXIS 3141, at *38).

set forth above the requirements for proving reliance on advice of counsel. Respondents failed to satisfy those requirements. Citing Allen's testimony, they claim to have received legal advice from RR and SS that in response to the Order, they only needed to file a Form U4 amendment disclosing the Order, which they did.[480] Respondents also contend, based on Allen's testimony, that they confirmed this advice a few months later with attorney CK.[481]

Even so, Allen testified that in discussions with counsel, they did not use the term "statutory disqualification," although he claims to have discussed how the Order impacted him.[482] And neither RR, SS, nor CK testified. The only other evidence supporting this purported mitigation is Schunk's uncorroborated testimony that an attorney stated in an email that the Order was not a statutorily disqualifying event.[483] Respondents, however, never offered this alleged email into evidence. And Schunk could not recall the name of the attorney who purportedly said that they only needed to file an amended Form U4 for Allen.[484] This failure fit with Schunk's testimony that he was unaware of any documents produced to FINRA showing any advice given by RR or SS in early 2019 about whether the Order was a statutorily disqualifying event for Allen.[485]

In sum, other than Allen and Schunk's testimony—which was vague, at best—Respondents offered no evidence showing that they made full disclosure of all relevant facts to any attorney who then specifically advised them that the Order did not constitute a statutorily disqualifying event. As a result, we give no mitigative weight to the reliance-on-advice-of-counsel claim.[486]

Based on the foregoing, we find that Respondents' misconduct was serious and warrants sanctions near the high end of the Guidelines. NYPPEX is therefore fined $50,000; Schunk is fined $70,000 and suspended in all capacities from associating with any FINRA member firm for 18 months; and Allen is fined $50,000 and suspended in all capacities from associating with any FINRA member firm for 18 months.

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[480] Resp's Opening Br. 54 (citing Tr. 2922–26; RX-4).

[481] Resp's Opening Br. 54 (citing Tr. 2986–89; RX-16).

[482] Tr. 388, 1101–02.

[483] Tr. 1458–59, 1502–04.

[484] Tr. 1458–59.

[485] Tr. 1506.

[486] We also note that as "professionals registered as principals in a highly regulated industry," Allen and Schunk "are expected to be familiar with basic requirements, such as the rules applicable to statutorily disqualified persons." *DBCC for District No. 2 v. Deltavest Financial*, No. C02930042, 1994 NASD Discip. LEXIS 221, at *44 (NBCC June 27, 1994); *see generally DBCC For Dist. No. 1 v. Higley*, No. C01950034, 1997 NASD Discip. LEXIS 5, at *10 (Mar. 5, 1997) ("As an individual who had been an associated person in a highly regulated industry, Higley was required to be familiar with the NASD's rules and requirements.").

2. Sanctions for Making Misrepresentations and Omissions in Connection with a Securities Offering (Second Cause of Action).

The risk posed to the investing public by associated persons who engage in fraud is profound and obvious.[487] Fraud is serious misconduct and should be subject to significant sanctions.[488] The Guidelines reflect the seriousness of this violation. They recommend that for intentional or reckless misrepresentations or omissions of material fact, the adjudicator should impose a fine of $10,000 to $155,000. They also recommend strongly considering barring an individual unless mitigating factors predominate. For firm misconduct, the Guidelines recommend suspending a firm with respect to any or all activities for up to two years, but where aggravating factors predominate, it recommends strongly considering expelling the firm. The Guidelines instruct adjudicators to consider the Principal Considerations in determining sanctions.[489]

NYPPEX and Allen's fraudulent conduct evidenced aggravating factors. They engaged in numerous instances[490] of intentional or, at a minimum, reckless[491] misrepresentations and omissions[492] aimed at misleading and deceiving potential investors.[493] The misconduct also had the potential to benefit NYPPEX and Allen monetarily.[494] NYPPEX and Allen assert reliance on advice of counsel in connection with the conduct that served as the basis for these violations. But for the reasons we explained when rejecting this as a defense to liability for these violations, we also accord it no weight for mitigation purposes.[495]

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[487] *Dep't of Enforcement v. Larson*, No. 2014039174202, 2020 FINRA Discip. LEXIS 44, at *109 (NAC Sept. 21, 2020).

[488] *Dep't of Enforcement v. Ottimo*, No. 2009017440201, 2017 FINRA Discip. LEXIS 10, at *34–36 (NAC Mar. 15, 2017), *aff'd in relevant part*, Exchange Act Release No. 83555, 2018 SEC LEXIS 1588, at *49–51 (June 28, 2018) ("[C]onduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws.") (citing *Moshe Marc Cohen*, Exchange Act Release No. 78797, 2016 SEC LEXIS 3413, at *52 (Sept. 9, 2016)) (internal quotations omitted).

[489] Guidelines at 90.

[490] *Id.* at 7 (Principal Consideration No. 8) ("Whether the respondent engaged in numerous acts and/or a pattern of misconduct.").

[491] For sanctions purposes, recklessness is an extreme departure from the standards of ordinary care, and which presents a danger that is either known to the actor or is so obvious that the actor must have been aware of it. *See Lek Sec. Corp*., Exchange Act Release No. 82981, 2018 SEC LEXIS 830, at *38 (Apr. 2, 2018); *see also Dep't of Enforcement v. Titan Sec.*, No. 2013035345701, 2021 FINRA Discip. LEXIS 5, at *79 (NAC June 2, 2021), *appeal docketed*, No. 3-20387, (SEC June 29, 2021).

[492] Guidelines at 8 (Principal Consideration No. 13).

[493] *Id.* at 7 (Principal Consideration No. 10).

[494] *Id.* at 8 (Principal Consideration No. 16) ("Whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain.").

[495] *See* p. 52, above.

Given the seriousness of the violations, especially considering the aggravating circumstances, severe sanctions are warranted. As a result, we considered expelling NYPPEX and barring Allen as directed by the Guidelines. But we concluded that an expulsion and bar were not appropriately remedial, given that the offering never progressed beyond its earliest stages; no offering documents were prepared or distributed; the offering never led to the sale of any securities; and the prospective investors were sophisticated.[496]

Accordingly, for violating FINRA Rule 2010 by making misrepresentations and omissions in connection with a securities offering, NYPPEX and Allen are jointly and severally fined $100,000[497] and Allen is suspended in all capacities from associating with any FINRA member firm for two years.

3. Sanctions for Violating FINRA's Advertising Standards in Communications to Prospective Investors and in Material Posted on the Firm's Website, and Violating Just and Equitable Principles of Trade by Making False or Misleading Statements on the Firm's Website (Third, Fourth, and Fifth Causes of Action).

NYPPEX and Allen committed their advertising violations intentionally or, at a minimum, recklessly. For intentional or reckless use of misleading communications with the public, the Guidelines recommend we consider suspending the Firm with respect to any or all activities or functions for up to two years and suspending the responsible person in any or all capacities for up to two years. The Guidelines also recommend a fine of $10,000 to $155,000. In cases involving numerous acts of intentional or reckless misconduct over an extended period of time, we are directed to consider suspending the firm with respect to any or all activities or functions for up to two years, suspending the responsible person in any or all capacities for up to two years, expelling the firm, and/or barring the responsible individual. The only principal consideration specific to misleading communications is whether the violative communications were circulated widely.[498] We took that consideration into account, as well as the Principal Considerations.[499]

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[496] Guidelines at 8 (Principal Considerations No. 18) ("The level of sophistication of the injured or affected customer."). While we did not consider the sophistication of the potential investors relevant to our liability analysis (see p. 54 & n.402) we considered it for possible mitigation of sanctions.

[497] *See id.* at 9 (Technical Matters—Fines) ("Fines may be imposed individually as to each respondent in a case, or jointly and severally as to two or more respondents."). We impose joint and several fines on NYPPEX and Allen because it was through Allen that the misconduct for which NYPPEX is liable occurred. *See Cantone*, 2019 FINRA Discip. LEXIS 5, at *114 n.34 ("We impose joint and several fines on CRI and Cantone because it was through Cantone that the misconduct for which CRI is liable occurred.").

[498] Guidelines at 81.

[499] There are no Guidelines for making false or misleading statements on a firm's website in violation of FINRA Rule 2010 (Fourth Cause of Action). So, as directed by the Guidelines, we used the most analogous Guidelines, namely, the Guidelines set forth above pertaining to the advertising violations. *See* Guidelines at 1 ("For violations that are not addressed specifically, adjudicators are encouraged to look to the guidelines for analogous violations."); *see also Wedbush Sec., Inc*., Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *44 (Aug. 12, 2016)

Multiple aggravating factors exist here. Allen and NYPPEX made their misrepresentations and omissions in emails, the Corporate Overview, and at the webinar to many prospective investors;[500] the misconduct was intentional, or, at a minimum, reckless;[501] it created the potential for monetary gain;[502] the NYPPEX Statement remained widely and publicly available[503] on the Firm's website in its original form for several months, and, in fact, remained available, in modified form (and still containing statements identified as violative by FINRA), even on the final day of the hearing,[504] although Advertising Regulation directed the Firm not to keep using the violative statements appearing on the website.[505] On the other hand, as discussed above, the communications relating to the capital raise were made in connection with an offering that never progressed past its earliest stages, and the NYPPEX Holdings shareholders who received solicitation emails and the Corporate Overview, and who attended the webinar, were a sophisticated group of potential investors.[506]

Finally, we considered, but rejected, NYPPEX and Allen's claim of reliance on advice of counsel. Allen testified that attorney AD advised him about what information the Firm should include in the shareholder deck/corporate presentation.[507] He also maintained that he had "extensive conversations" with attorneys SS and LB about various versions of the NYPPEX Statement and that they reviewed and approved them.[508] Respondents claim, based on LB and Allen's testimony, that LB drafted and/or approved the language included in the NYPPEX Statement (and the affidavit filed with the New York court and FINRA).[509]

NYPPEX and Allen failed to establish the elements of a reliance on advice of counsel claim. Respondents offered no evidence that attorney SS reviewed or gave advice about the NYPPEX Statement. As for LB, the evidence showed that he reviewed and edited a draft of the

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(agreeing with FINRA's use of analogous Guidelines when misconduct at issue is not specifically addressed in the Guidelines), *aff'd*, 719 F. App'x 724 (9th Cir. 2018).

[500] Guidelines at 81 (Specific Consideration No. 1).

[501] *Id.* at 8 (Principal Consideration No. 13).

[502] *Id.* (Principal Consideration No. 16).

[503] *Id.* at 81 (Specific Consideration No. 1).

[504] *See* CX-48 (Google search results for "nyppex and nyag"); CX-49 (screenshots of nyppex.com/nyag as of Mar. 16, 2022); Tr. 3137–40; *see William H. Gerhauser*, Exchange Act Release No. 40639, 1998 SEC LEXIS 2402, at *32 (Nov. 4, 1998) (finding that the long duration of continuing violation aggravates the offense); Guidelines at 7 (Principal Consideration No. 9) ("Whether the respondent engaged in the misconduct over an extended period of time.").

[505] Guidelines at 8 (Principal Consideration No. 14.) ("Whether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA, another regulator or a supervisor (in the case of an individual respondent) that the conduct violated FINRA rules or applicable securities laws or regulations.").

[506] *Id.* (Principal Consideration No. 18).

[507] Resp'ts Opening Br. 55 (citing Tr. 2938–40, 2942–47; RX-5).

[508] *See* Tr. 864, 880–81.

[509] Resp'ts Opening Br. 55 (citing Tr. 2799–2808, 2837, 2989–97; RX-24).

NYPPEX Statement in early December 2019;[510] discussed edits with Allen;[511] and made suggestions to him for items to include in it.[512] In fact, a redlined version of the draft reflects that LB added the words "years of" into the draft language "NYPPEX Holdings, LLC and its subsidiaries are managed by officers with years of exemplary records of regulatory compliance."[513] He also made a redline change to the following sentence, changing the word "during" to "throughout": "The ASA has been reviewed and approved by FINRA throughout its periodic examinations of the Company for over 15 years."[514]

The evidence about LB's review of a draft NYPPEX Statement, however, does not show if he approved the final version.[515] Indeed, the posted NYPPEX Statement differed significantly from the draft LB reviewed. Except for two sentences noted above that LB edited, the alleged false and misleading statements in the posted NYPPEX Statement were not contained in the draft that LB reviewed. There was also no evidence that Respondents fully disclosed to LB all facts relevant to the statements in the NYPPEX Statement draft he reviewed.

In any event, Allen knew, or recklessly disregarded the fact, that the final, posted version of the NYPPEX Statement contained false and misleading statements. So any reliance on counsel that such statements were permissible was unreasonable. As a result, NYPPEX and Allen's purported reliance on advice of counsel is not mitigative.

* * *

After considering the relevant considerations, we find that sanctions at the higher (but not the highest) end of the Guidelines range are necessary and appropriate to serve a remedial purpose. Also, in determining the appropriate sanctions, we have decided to impose unitary aggregated sanctions for the violations alleged in the Third, Fourth, and Fifth causes of action. The Guidelines provide that batching violations may be appropriate for determining sanctions if the violations resulted from a single underlying problem.[516] Likewise, according to the National Adjudicatory Counsel ("NAC"), when multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be appropriate.[517] Put slightly differently, the

[510] RX-20; RX-22; RX-23.

[511] Tr. 2799.

[512] Tr. 2800.

[513] Tr. 2803; RX-23, at 1.

[514] RX-23, at 2.

[515] Allen sent a later version to LB on December 21, stating that he had revised the statement in several respects and "will provide it unless we hear otherwise." Tr. 2805; JX-160, at 8. But the record does not reflect if LB reviewed or approved this version.

[516] *See* Guidelines at 4 (General Principles Applicable to All Sanction Determinations No. 4) (providing that batching of violations may be appropriate for determining sanctions if the violations resulted from a single underlying problem).

[517] *Dep't of Enforcement v. Orlando*, No. 2014043863001, 2020 FINRA Discip. LEXIS 26, at *44–45 (NAC Mar. 16, 2020); *see also Blaire C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *42 (Sept. 24,

NAC has stated that the imposition of a unitary sanction may be appropriate where the respondent's violations are based on the same course of conduct,[518] or related misconduct.[519] We conclude that Allen's misconduct met these standards, as these violations involve statements to the public in various forms that failed to comply with the advertising rule's content standards. As a result, we impose a unitary sanction on Allen and NYPPEX for the violations in the Third, Fourth, and Fifth, causes of action. Finally, we impose the fines jointly and severally on NYPPEX and Allen because NYPPEX's liability derives from Allen's wrongdoing.

Accordingly, based on the above, for violating FINRA's advertising standards in communications to prospective investors and in material posted on the Firm's website, and for making false or misleading statements on the Firm's website in violation of FINRA Rule 2010, NYPPEX and Allen are jointly and severally fined $100,000; NYPPEX is suspended as a FINRA member firm for one year; and Allen is suspended in all capacities from associating with any FINRA member firm for one year.

4. Sanctions for False or Misleading Statements to the New York Court and FINRA (Sixth Cause of Action).

There is no specific Guideline for Allen's violation of FINRA Rule 2010 by filing a false and misleading affidavit with the New York court and FINRA. In assessing the appropriate sanctions, we consider the nature of Allen's misconduct and the Principal Considerations.[520] His misconduct was serious—he tried to improperly influence the outcome of two legal/regulatory processes involving him. He intentionally or, at a minimum, recklessly[521] tried to mislead the New York court and those at FINRA involved in the MC-400 application review process so that he might keep engaging in his business activities.[522]

2015) (sustaining FINRA's decision to impose a unitary sanction for violations that "result[ed] from a single systemic problem or cause").

[518] *Dep't of Mkt. Regulation v. Naby*, No. 20120320803-01, 2017 FINRA Discip. LEXIS 27, at *28 (NAC July 24, 2017).

[519] *Dep't of Enforcement v. Milberger*, No. 2015047303901, 2020 FINRA Discip. LEXIS 24, at *19 (Mar. 27, 2020); *Riemer*, 2017 FINRA Discip. LEXIS 38, at *21 n.6 ("We agree with the [h]earing [p]anel's imposition of a unitary sanction for [respondent's] violations given that they are based on related misconduct.").

[520] The closest analogy is the Guideline for providing false information in response to a FINRA Rule 8210 request. We chose, however, not to apply that Guideline, as we found the approach the NAC used in *Dep't of Enforcement v. Elgart*, No. 2013035211801, 2017 FINRA Discip. LEXIS 9, at *43 (NAC Mar. 16, 2017) more analogous to the situation presented here. In *Elgart*, the NAC affirmed sanctions imposed on a respondent for providing a false answer on a FINRA questionnaire not issued under FINRA Rule 8210. The NAC, however, did not apply the Guideline for FINRA Rule 8210 violations. Instead, it considered the nature of the misconduct and the Principal Considerations. We adopted that approach because, as in *Elgart*, Allen provided false information to FINRA, but not in response to a FINRA Rule 8210 request.

[521] Guidelines at 7–8 (Principal Consideration Nos. 10, 13).

[522] *Id.* (Principal Consideration No. 16).

We found no mitigation. Respondents assert reliance on advice of counsel. As noted above, they claim that LB drafted and/or approved the allegedly violative language in the affidavit and they reasonably relied on his advice in that regard.[523] According to Respondents, LB admitted drafting the language in the affidavit that Enforcement alleges is false and misleading.[524] Respondents' characterization overstates LB's testimony. LB admitted only that he "drafted a lot of" the affidavit, but not every word;[525] he could not point to the specific parts he drafted; and, in particular, he did not know if he drafted the final version.[526] That said, LB was clear that he would have approved the affidavit before it was submitted to the court.[527]

Regardless, Allen knew, or recklessly disregarded the fact, that the affidavit contained false and misleading statements. So, to the extent that Allen relied on LB's approval of the affidavit as an endorsement of the false and misleading statements, his reliance was unreasonable. Finally, there is no evidence that Allen made a complete disclosure to LB of all relevant facts before he approved the affidavit. We thus give LB's purported approval no mitigative effect.

After considering the nature of the misconduct and the aggravating circumstances, and finding no mitigation, we conclude that for making false and misleading statements to the New York court and FINRA in violation of FINRA Rule 2010, Allen should be fined $50,000 and suspended in all capacities from associating with any FINRA member firm for six months.

5. Sanctions for Supervision Violations (Seventh Cause of Action).

The Guideline for failure to supervise recommends that adjudicators consider suspending the responsible individual in all supervisory capacities for up to 30 business days along with a fine of $5,000 to $77,000. In egregious cases, adjudicators should consider suspending the responsible individual in any or all capacities for up to two years or barring the person. For firms, the Guidelines recommend considering limiting the activities of the branch office or department of the firm for up to 30 business days, a fine of $5,000 to $77,000, and, in egregious cases, limiting the activities of the branch office or department for a longer period, or suspending the firm with respect to any or all activities for up to 30 business days. We are also instructed to consider independent (rather than joint and several) monetary sanctions for the firm and responsible individual(s).[528]

Together with the general Principal Considerations, the Guidelines identify three Specific Considerations: (1) whether the respondent ignored red flag warnings that should have resulted

[523] Resp'ts Opening Br. 54–55.

[524] Resp'ts Opening Br. 45 (citing Tr. 2799–2802, 2803–08, 2837, 2989–97; RX-24).

[525] Tr. 2806–07.

[526] Tr. 2807.

[527] Tr. 2807–08.

[528] Guidelines at 105.

in additional supervision, considering whether the individuals responsible for the underlying misconduct attempted to conceal misconduct from respondent; (2) the nature, extent, size, and character of the underlying misconduct; and (3) the quality and degree of the supervisor's implementation of the firm's supervisory procedures and controls.[529]

Aggravating factors predominate here. The record shows that for months,[530] Schunk repeatedly failed to exercise reasonable supervision over Allen, including in the face of numerous red flags of wrongdoing.[531] He adopted a lax approach to supervision that allowed Allen to act with impunity,[532] leading to serious infractions of the federal securities laws; at a minimum, it facilitated those violations. Schunk's hands-off approach and lack of remorse[533] demonstrate a complete failure to appreciate the responsibilities of his supervisory role, particularly his responsibility to identify and respond to red flags. Schunk's misconduct was at least reckless and exhibited a willful disinterest in regulatory responsibilities.[534]

We also find it troubling that Schunk—who had been in the securities industry for 40 years, a compliance officer for about 30 years, and a chief compliance officer at four firms[535]—thought that FINRA was a governmental entity; did not understand how FINRA's responsibilities differed from those of the SEC;[536] and thought that a cautionary action letter was not a type of disciplinary action.[537]

The record does not support or reflect any mitigating considerations. Schunk and Allen claim to have received legal advice from attorney SS on all matters relating to Allen's

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[529] *Id.*

[530] *Id.* at 7 (Principal Consideration No. 9) ("Whether the respondent engaged in the misconduct over an extended period of time.").

[531] *Id.* (Principal Consideration No. 8) ("Whether the respondent engaged in numerous acts and/or a pattern of misconduct.").

[532] *Cf. Dist. Bus. Conduct Comm. v. Black & Co.*, No. SEA-477, 1990 NASD Discip. LEXIS 11, at *25 (NASD Bd. of Governors, Jan. 9, 1990) ("The District Committee characterized the compliance supervision as a *laissez faire* arrangement which allowed Lewis to act with impunity, and stated that, had the firm supervised Lewis properly, this matter would never have come before the District Committee.").

[533] *See Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843, at *45 (Dec. 19, 2008) (quoting *Stephen J. Horning*, Exchange Act Release No. 56886, 2007 SEC LEXIS 2796, at *47 (Dec. 3, 2007)) (finding that respondent's "refusal to recognize his misconduct 'reveal[s] a fundamental misunderstanding of his supervisory duties' and is an aggravating factor that supports the definitive sanctions we impose.").

[534] *See* Guidelines at 8 (Principal Considerations in Determining Sanctions No. 13); *see William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *70–71 (July 2, 2013) ("Given Birkelbach's complete failure to take reasonable supervisory steps in the face of obvious red flags, we agree with FINRA that Birkelbach's supervisory failures appear to involve some degree of intent.").

[535] Tr. 1748–49.

[536] Tr. 1610–11, 1886–87. When pressed by Enforcement about whether he understood that FINRA was not a government regulatory agency, he pushed back, calling it just "a fine" point and quipping, "If they're not, what are they? They're not a country club." Tr. 1609.

[537] Tr. 1888–90.

supervision and his proposed actions.[538] But as noted above, SS did not testify at the hearing. And other than Allen's vague, uncorroborated testimony,[539] there is no evidence supporting the reliance on advice of counsel assertion regarding supervision. We do not credit the assertion.

In conclusion, we find that Schunk's supervisory failures are egregious and that he poses a risk to investors were he to act as a principal or supervisor again.[540] Schunk has demonstrated that he is unfit to act as a securities principal engaged in supervision, especially given that he has a disciplinary history for failure to supervise.

* * *

The record shows that NYPPEX failed to establish and maintain a system to supervise the activities of Allen, an associated person, reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. Given the egregiousness of the violations, we fine NYPPEX $77,000 and bar Schunk from acting in any principal, or supervisory, capacity with any FINRA member.[541] In light of the supervisory bar, we find that fining Schunk would not serve a remedial purpose and decline to impose one.[542]

6. Sanctions for Making False or Misleading Statements in Response to Information Requests (Eighth Cause of Action).

Because FINRA lacks subpoena power, FINRA Rule 8210 is "vitally important."[543] Indeed, the Commission has described it as "at the heart of the self-regulatory system for the securities industry."[544] "Truthful responses to FINRA Rule 8210 requests are critical to FINRA's ability to carry out its important regulatory functions."[545] Supplying false information to FINRA is serious, as it "misleads [FINRA] and can conceal wrongdoing and thereby subverts [FINRA's]

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[538] Resp'ts Opening Br. 55–56 (citing Tr. 2885–86, 2900–01, 3093–99).

[539] Tr. 3097–98.

[540] *See Dep't of Enforcement v. Lane*, No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *95 (NAC Dec. 26, 2013) ("[W]e find that Jeffrey Lane's supervisory failures were egregious and that he poses a risk to investors were he to act as a principal or supervisor again."), *aff'd*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558 (Feb. 13, 2015).

[541] *Pellegrino*, 2008 SEC LEXIS 2843, at *45 (quoting *Horning*, 2007 SEC LEXIS 2796, at *47) ("The principal bar will protect investors from dealing with securities professionals who are not adequately supervised.")) (internal quotation omitted).

[542] *Cf.* Guidelines at 10 (Monetary sanctions–Imposition and collection of monetary sanctions.) ("Adjudicators generally should not impose a fine if an individual is barred and there is no customer loss. . . . In all cases, [a]djudicators may exercise their discretion and, if a bar is imposed, refrain from imposing a fine . . . .).

[543] *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *23 (Nov. 8, 2007).

[544] *Berger*, 2008 SEC LEXIS 3141, at *13.

[545] *Harari*, 2015 FINRA Discip. LEXIS 2, at *31 (citing *Michael A. Rooms*, Exchange Act Release No. 51467, 2005 SEC LEXIS 728, at *15 (April 1, 2005)).

ability to perform its regulatory function and protect the public interest."[546] In fact, responding untruthfully to a FINRA Rule 8210 request is considered "as serious and harmful as a complete failure to respond, and comparable sanctions are appropriate." Hence, "[t]he Guidelines treat a failure to respond truthfully to a Rule 8210 request as equivalent to a complete failure to respond, and provide that a bar is standard for such violations."[547] The Guidelines also recommend imposing a fine of $25,000 to $77,000 for failing to respond truthfully.[548]

When mitigation exists, the Guidelines recommend the adjudicator consider suspending the individual in any or all capacities for up to two years. For a firm, in an egregious case, the Guidelines recommend an expulsion. Besides the Principal Considerations, the Guidelines recommend that, for failure to respond truthfully, the Specific Consideration is the importance of the information requested as viewed from FINRA's perspective.[549]

We find aggravating factors present here. The information Advertising Regulation sought about preapproval of the NYPPEX Statement was important to its assessment of Respondents' compliance with FINRA's advertising rule, especially given that it had expressed serious concerns about statements on the Firm's website.[550] In the NYPPEX Advertising Response, Respondents attempted to deceive Advertising Regulation into mistakenly believing, among other things, that they had complied with regulatory requirements and had implemented that department's "do not use" directive.[551] This misconduct also was part of a broader pattern of false, misleading, untimely, and incomplete responses to Rule 8210 requests from FINRA.[552]

As for possible mitigation, we considered Respondents' assertion of reliance on advice of counsel. Respondents argue that attorney SN drafted/modified and approved the NYPPEX Advertising Response, including specifically the exhibits and the statement that Enforcement contends was false or misleading.[553] Respondents also claim that they obtained legal advice and approval from attorney SW on the NYPPEX Advertising Response.[554]

For the reasons discussed above, advice of counsel is not a defense to a FINRA Rule 8210 charge. Nor does it mitigate a FINRA Rule 8210 violation "unless a respondent develops

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[546] *Ortiz*, 2008 SEC LEXIS 2401, at *32; *see also Laverty*, 2020 FINRA Discip. LEXIS 47, at *36 (finding that a violation of FINRA 8210 is serious and subverts FINRA's ability to carry out its responsibilities as a regulator, threatening both investors and the markets).

[547] *Harari*, 2015 FINRA Discip. LEXIS 2, at *31.

[548] Guidelines at 33.

[549] *Id.*

[550] Tr. 2456, 2459–61; Stip. ¶¶ 52–53; JX-154, at 11.

[551] Guidelines at 7–8 (Principal Consideration Nos. 10, 13).

[552] *Id.* at 7 (Principal Consideration No. 8).

[553] Resp'ts Opening Br. 55 (citing Tr. 3014–24, 3026–28, 3031–39; RX-36; RX-37; RX-38; RX-40; RX-43); *see also* Tr. 982.

[554] Resp'ts Opening Br. 55 (citing Tr. 3028–31; RX-39).

the record to show that he made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice."[555]

The evidence did not establish reliance on advice of counsel for mitigation purposes. Neither SN nor SW testified. Respondents also failed to prove that they made full disclosure to these attorneys about the allegedly violative portion of the NYPPEX Advertising Response. Allen did send SN a draft response.[556] And there is evidence that she suggested to Allen that he make certain edits to it.[557] But there is no evidence showing the scope of her review or what specific advice, if any, she gave about the allegedly false and misleading language. Likewise, there is some evidence that SW reviewed a draft response Allen sent to him and that SW gave comments about it to Allen.[558] Even so, as with SN, the evidence does not reflect the nature or scope of SW's review, what disclosure Allen made to him, and the specific advice, if any, he rendered about the proposed response.

In any event, even if SN and SW had approved the allegedly false and misleading response, Allen could not reasonably have relied on that advice because he knew the allegedly violative statements were false, or he recklessly disregarded their falsity. The evidence thus failed to establish reliance on advice of counsel as mitigation.

Respondents' violations are serious and warrant serious sanctions. We recognize that the Commission has stated that "[b]ecause of the risk of harm to investors and the markets posed by such misconduct, . . . the failure to provide truthful responses to requests for information renders the violator presumptively unfit for employment in the securities industry."[559] Nevertheless, the misconduct here was limited to false or misleading responses to four questions about a single communication (the NYPPEX Statement). Thus, we conclude that expelling the Firm and barring Allen and Schunk would exceed what is necessary to remediate the misconduct.

Accordingly, for making false or misleading statements in response to a FINRA Rule 8210 request issued by FINRA, NYPPEX and Allen are jointly and severally fined $50,000;[560] Allen is suspended in all capacities from associating with any FINRA member firm for two

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[555] *Escobio*, 2021 FINRA DISCIP. LEXIS 3, at 26 n.27 (quoting *Berger*, 2008 SEC LEXIS 3141, at *38) (internal quotations omitted), *appeal docketed*, No. 3-20260 (SEC Apr. 7, 2021).

[556] RX-36, at 1.

[557] RX-37, at 1.

[558] RX-39, at 1.

[559] *Ortiz*, 2008 SEC LEXIS 2401, at *32.

[560] We impose joint and several fines on NYPPEX and Allen because Allen engaged in the misconduct that gives rise to NYPPEX's liability. NYPPEX is also liable based on Schunk's misconduct. But we decline to also impose Schunk's fine jointly and severally on NYPPEX. We determined that because Schunk played a central role in the misconduct, he should be fined separately from Allen and the Firm. Also, making Schunk's fine joint and several with the Firm would have resulted in a total fine of $100,000 imposed on NYPPEX, and that is beyond what is necessary to remediate the misconduct.

years; and Schunk is fined $50,000 and suspended in all capacities from associating with any FINRA member firm for two years.

7. Sanctions for Providing Untimely and Incomplete Information in Response to Information and Document Requests (Ninth Cause of Action).

The Guidelines advise that for an individual who provides a partial but incomplete response to a FINRA Rule 8210 request, "a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request." But "[w]here mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any or all capacities for up to two years." The Guidelines also direct us to expel a firm in an egregious case. If mitigation exists, however, we should "consider suspending the firm with respect to any or all activities or functions for up to two years."[561] For a partial but incomplete response, the Guidelines recommend a fine of $10,000 to $77,000.

According to the Guidelines, "[i]n cases involving failure to respond in a timely manner," we should "consider suspending the responsible individual(s) in any or all capacities and/or suspending the firm with respect to any or all activities or functions for a period of up to 30 business days." For this type of FINRA rule violation, the Guidelines state that we should impose a fine of $2,500 to $39,000.

The Guidelines contain Specific Considerations, as noted above. For providing a partial but incomplete response, the Specific Considerations are: (1) the importance of the information requested and not provided as viewed from FINRA's perspective, and whether the information provided was relevant and responsive to the request; (2) the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and (3) whether the respondent thoroughly explains valid reasons for deficiencies in the response. For failing to respond in a timely manner, the Specific Considerations are similar: (1) the importance of the information requested as viewed from FINRA's perspective; (2) the number of requests made and the degree of regulatory pressure required to obtain a response; and (3) the length of time to respond. [562]

Many aggravating circumstances are present. First, NYPPEX and Allen failed to prove that the information they provided substantially complied with all aspects of the requests Member Services sent to them. To the contrary, the large number of monthly account statements that NYPPEX and Allen failed to produce—even after Enforcement filed the Complaint[563]—shows that their failure to comply was substantial.

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[561] Guidelines at 33.

[562] *Id*.

[563] Tr. 2180–81.

Second, the documents and information that FINRA sought were important to FINRA's investigation. "When an investigator seeks to verify the proper use of funds by an associated person, any missing documents can frustrate the investigation."[564] FINRA was investigating a potential securities fraud, among other things.[565] It would have used these documents and information to analyze NYPPEX's source of funds; trace money movements among Allen, the NYPPEX Holdings entities, and investors; and examine the way the Firm supervised Allen's business activities and transactions.[566]

Third, to obtain even partial untimely production, FINRA had to make multiple requests and send reminders over several months.[567]

Fourth, NYPPEX and Allen's failure to comply completely was intentional, and part of a lengthy pattern[568] throughout the investigation of flouting FINRA Rule 8210 requests. They repeatedly "stonewalled the investigation, ignoring certain requests, partially responding to others, while holding out the promise of cooperation that never materialized."[569]

Fifth, not only did Allen display general contempt for the regulatory process, as discussed above, but his attitude toward his FINRA Rule 8210 obligations, in particular, was especially troubling. When asked if he understood that the rule required him to respond to FINRA requests truthfully and thoroughly, Allen replied sarcastically: "My understanding of 8210 is that FINRA uses it to provide a record that's inaccurate so that, when you get to a hearing, they can accuse you of not providing documents. That's my new understanding of 8210."[570]

Allen then doubled down. He tried first to evade. When Enforcement asked if it was his "testimony before this hearing panel that you don't understand that FINRA Rule 8210 requires you to give truthful and accurate information to FINRA," he responded: "I'm not testifying one way or the other." He then tried to shift responsibility to his attorneys: "I'm not an expert at knowing what the rules are of FINRA," he explained. "That's what I rely on our legal counsel for."[571] Thus, even as late as the hearing, Allen failed to appreciate his FINRA Rule 8210 obligations, which raises a concern that he is unlikely to comply with them in the future.

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[564] *Dep't of Enforcement v Eplboim*, No. 2011025674101, 2014 FINRA Discip. LEXIS 8, at *34 (NAC May 14, 2014).

[565] Tr. 2341–42.

[566] Tr. 2063, 2126–31, 2179–80.

[567] Guidelines at 33 (Failure to Respond in a Timely Manner).

[568] *Id.* at 7 (Principal Consideration No. 8).

[569] *Dep't of Enforcement v. Ballard*, No. 2010025181001, 2015 FINRA Discip. LEXIS 52, at *25–26 (NAC Dec. 17, 2015).

[570] Tr. 474.

[571] Tr. 474.

We considered whether there was any mitigation to balance against these aggravating circumstances. For example, we considered the extent to which NYPPEX and Allen complied with other requests made in the same investigation.[572] We recognize that Allen and the Firm did produce large amounts of requested information and documents during the investigation and accord it some mitigative weight.

We also evaluated, for mitigation purposes, NYPPEX and Allen's purported reliance on advice of counsel assertion. Respondents argue that they received advice from attorneys JH and CK that FINRA had extended their deadline to respond to FINRA Rule 8210 requests and, eventually, that all documents had been produced or that the attorneys had reached some type of agreement with FINRA about production.[573] NYPPEX and Allen's advice-of-counsel claim fails. The record reflects that, at times, several attorneys represented these Respondents in responding to the requests. But that does not, by itself, prove a claim of reliance on advice of counsel for mitigation purposes. NYPPEX and Allen did not produce evidence of actual advice from attorneys that these Respondents had either (1) produced all requested documents and information (including all requested bank statements), or (2) had otherwise complied fully with their production obligations. Neither JH nor CK testified at the hearing, and NYPPEX and Allen presented no opinion letter from counsel reflecting such advice.

But even accepting NYPPEX and Allen's claim that they relied on advice of counsel, they could not reasonably have done so after June 23, 2020, without verifying that the advice was well founded. On that date, Enforcement issued a Wells notice[574] to Respondents informing them that it intended to seek authority to file a formal action that included failing to comply with FINRA Rule 8210 requests.[575] As a result, NYPPEX and Allen knew that Enforcement had concluded they had not fully complied with the outstanding requests. The only evidence, however, that Allen sought to confirm at that point that they had complied with their obligations was his testimony. He said that before Enforcement filed the Complaint, he "gathered up everybody," including outside counsel, and "asked some pointed questions" about whether they

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[572] *Jones*, 2020 FINRA Discip. LEXIS 45, at *33–34 (citing *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *55–56 (June 14, 2013) (holding that the determination of sanctions for a failure-to-respond violation must take into account the extent to which the respondent complied with other requests made in the same investigation), *aff'd*, Exchange Act Release No. 73124, 2014 SEC LEXIS 4588 (Sept. 16, 2014)).

[573] Resp'ts Opening Br. 56 (citing Tr. 3006–09, 3052–55; RX-30; RX-56; JX-194).

[574] "A Wells notice is a communication from a regulator or self-regulatory organization, such as FINRA, stating that it intends to recommend bringing an enforcement or disciplinary action against the recipient." *Dep't of Enforcement v. Kimberly Springsteen-Abbott*, No. 2011025675501r, 2017 FINRA Discip. LEXIS 23, at *9 n.4 (NAC July 20, 2017) (citing FINRA Regulatory Notice 09-17, 2009 FINRA LEXIS 45, at *5–6 (Mar. 2009) (explaining FINRA's Wells process)), *aff'd*, 2020 SEC LEXIS 2684.

[575] Tr. 3203–04. Afterward, Respondents made a Wells submission indicating why they believed Enforcement should not file charges against them. Tr. 3204. CK and JH drafted the Wells submission, with input from Allen and Schunk. Tr. 3211. Allen reviewed the submission before it was filed. Tr. 3209–10. The Wells submission addressed, among other things, the proposed FINRA Rule 8210 charge that served as the basis for the Ninth Cause of Action in the Complaint. RX-61, at 27–30. Tellingly, the Wells submission does not claim that Respondents received legal advice assuring them that they had made full production or had otherwise complied fully with the FINRA Rule 8210 requests. RX-61, at 27–28, 30.

agreed "with FINRA's 8210 accusations and they said no."[576] We do not find this testimony credible as it is uncorroborated and self-serving. But in any event, such minimal efforts—even if Allen made them—would have been inadequate for NYPPEX and Allen to have reasonably relied on counsel's advice. We therefore do not give any mitigative weight to the advice-of-counsel assertion.[577]

* * *

In light of the significant aggravating factors, and the limited mitigation, we find that Allen and the Firm are unfit to remain in the securities industry, and their continued presence would pose a substantial risk to the investing public.[578] We thus conclude that for the incomplete and untimely response violations, we bar Allen from associating with any FINRA member firm in all capacities and expel NYPPEX from FINRA membership.[579] Given the bar and expulsion, we impose no additional sanctions for NYPPEX and Allen's failure to provide complete responses to FINRA Rule 8210 requests. Also, in light of the bar and expulsion, we impose no other sanctions for these Respondents' failure to provide timely responses.[580]

V. Order

A. NYPPEX, LLC

NYPPEX, LLC is expelled from FINRA membership for failing to respond to FINRA Rule 8210 requests in a complete and timely manner, in violation of FINRA Rules 8210 and 2010. In light of the expulsion, we do not impose the sanctions listed above against NYPPEX, LLC for the other violations that we found:

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[576] Tr. 2410.

[577] Respondents argue, based on the examiner's testimony, that FINRA "had access to all of the documents that the NYAG had access to (which would have included every document that they were seeking from Respondents)." Resp'ts Opening Br. 57 (citing Tr. 2746–54, 2758–62, 2764). This argument misses the mark. It is not mitigative if FINRA could, or did, receive requested documents elsewhere. *See, e.g.*, *Vedovino,* 2019 FINRA Discip. LEXIS 20, at *31 (finding that the fact that FINRA ultimately obtained a portion of the requested the information elsewhere is not mitigating).

[578] *See Orlando*, 2020 FINRA Discip. LEXIS 26, at *49 (finding that respondent's continued presence in the securities industry posed a substantial risk to the investing public and was "best remediated by his exclusion from the securities industry."); *Reyes*, 2021 FINRA Discip. LEXIS 29, at *61–62, 65–66 (finding that a bar is appropriate where a respondent's continued presence in the securities industry poses a substantial risk to the investing public).

[579] We impose these sanctions not to punish Allen and the Firm, but to protect the public. *See John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216, at *7 (Aug. 3, 2019) ("A FINRA bar may be imposed, not as punishment, but as a means of protecting investors."), *aff'd*, 980 F.3d 103 (D.C. Cir. 2020); *Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 SEC LEXIS 819, at *62 (Apr. 11, 2008) (explaining that "the remedial purpose of a bar in egregious cases is to protect the investing public from a recurrence of the misconduct.").

[580] *See* Guidelines at 10 (Monetary Sanctions–Imposition and collection of monetary sanctions) ("Adjudicators generally should not impose a fine if an individual is barred and there is no customer loss" and "[i]n all cases, Adjudicators may exercise their discretion and, if a bar is imposed, refrain from imposing a fine").

1. permitting Laurence Allen, a statutorily disqualified person, to remain associated with NYPPEX, in violation of Article III, Section 3(b) of FINRA's By-Laws and FINRA Rules 8311 and 2010;

2. making misrepresentations and omissions of material fact to prospective investors in connection with a securities offering, in violation of FINRA Rule 2010;

3. violating FINRA's advertising standards in communications to prospective investors and in material posted on NYPPEX's website, and making false or misleading statements on the Firm's website, in violation of FINRA Rules 2210(d), 2210(e), and 2010;

4. failing to reasonably supervise Laurence Allen, in violation of FINRA Rules 3110(a) and 2010; and

5. making false or misleading statements in response to FINRA Rule 8210 requests, in violation of FINRA Rules 8210 and 2010.

B. Laurence Allen

Laurence Allen is barred from associating with any FINRA member firm in any capacity for failing to respond to FINRA Rule 8210 requests in a complete and timely manner, in violation of FINRA Rules 8210 and 2010. In light of the bar, we do not impose the sanctions listed above against Allen for the other violations that we found:

1. remaining associated with NYPPEX after he became statutorily disqualified, in violation of Article III, Section 3(b) of FINRA's By-Laws and FINRA Rule 2010;

2. making misrepresentations and omissions of material fact to prospective investors in connection with a securities offering, in violation of FINRA Rule 2010;

3. violating FINRA's advertising standards in communications to prospective investors and in material posted on NYPPEX's website, and making false or misleading statements on the Firm's website, in violation of FINRA Rules 2210(d), 2210(e), and 2010;

4. for making false or misleading statements to a New York state court and FINRA, in violation of FINRA Rule 2010; and

5. making false or misleading statements in response to FINRA Rule 8210 requests, in violation of FINRA Rules 8210 and 2010.

C. Michael Schunk

Michael Schunk is:

1. fined $70,000 and suspended in all capacities from associating with any FINRA member firm for 18 months for permitting a statutorily disqualified person to remain associated with NYPPEX, in violation of Article III, Section 3(b) of FINRA's By-Laws and FINRA Rules 8311 and 2010;

2. barred from acting in any principal or supervisory capacity with any FINRA member firm for failing to supervise Laurence Allen, in violation of FINRA Rules 3110(a) and 2010; and

3. fined $50,000 and suspended in all capacities from associating with any FINRA member firm for two years for making false or misleading statements in response to FINRA Rule 8210 requests, in violation of FINRA Rules 8210 and 2010.

Schunk's all-capacities suspensions are imposed concurrently.[581]

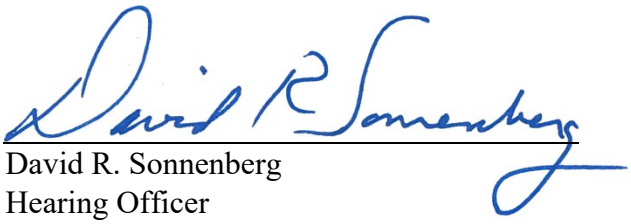
NYPPEX, Allen, and Schunk are ordered to pay, jointly and severally,[582] hearing costs in the amount of $28,054.03, which includes a $750 administrative fee and $27,304.03 for the cost of the transcript.

If this decision becomes FINRA's final disciplinary action: (1) NYPPEX's expulsion, Allen's bar, and Schunk's principal and supervisory bar shall become effective immediately; (2) Schunk's all-capacities suspensions shall become effective with the opening of business on Monday, October 17, 2022; and (3) Schunk's fine and the costs assessed against all Respondents

[581] In deciding whether to impose concurrent or consecutive suspensions, we are guided by *Dep't of Enforcement v. Siegel*, No. C05020055, 2007 NASD Discip. LEXIS 20, at *53 (NAC May 11, 2007), *aff'd*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459 (Oct. 6, 2008), *aff'd in relevant part*, 592 F.3d 147 (D.C. Cir. 2010). There, the NAC wrote that "in cases involving rule violations of fundamentally different natures, consecutive suspensions specifically discourage *all* types of additional misconduct at issue." That said, "consecutive suspensions might exceed what is needed to be remedial, depending on the facts and circumstances." Thus, a relevant consideration is "[t]he length it would take to serve consecutive suspensions." *Id.* at n.43. If we imposed the all-capacities suspensions consecutively, Schunk would be suspended for 42 months (3 ½ years). Under the Guidelines, the recommended upper limit for a suspension is two years, and misconduct warranting more than that should result in a bar. Guidelines at 11. A bar exceeds what is needed for remedial purposes here. We therefore decided to impose Schunk's suspensions concurrently.

[582] We find it fair and appropriate to impose the hearing costs jointly and severally on Respondents because we found each Respondent liable for substantial misconduct. *See generally, Newport Coast Sec.,* 2018 FINRA Discip. LEXIS 14, at *223 (finding joint and several liability for costs appropriate when multiple parties are found liable for misconduct).

shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.[583]



David R. Sonnenberg
Hearing Officer
For the Extended Hearing Panel

Copies to:

NYPPEX, LLC (via email, overnight courier, and first-class mail)
Laurence Allen (via email, overnight courier, and first-class mail)
Michael Schunk (via email, overnight courier, and first-class mail)
Jonathan E. Newman, Esq. (via email)
Robert Kennedy, Esq. (via email)
Karen C. Daly, Esq. (via email)
Payne Templeton, Esq. (via email)
Kevin Hartzell, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

[583] The Extended Hearing Panel has considered and rejects without discussion all other arguments of the parties.