FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JIM JINKOOK SEOL (CRD No. 2876279), Respondent.	Disciplinary Proceeding No. 2014039839101 Hearing Officer–DW **HEARING PANEL DECISION** May 30, 2017

Respondent Jim Seol is barred from associating with any member firm in any capacity for participating in private securities transactions and engaging in outside business activities without prior written notice to his member firm employer.

Appearances

For the Complainant: Richard B. Margolies, Esq., Joseph E. Strauss, Esq. and Tiffany A. Buxton, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Christopher Robertson, Esq. and Lisa K. Haines, Esq., Seyfarth Shaw, LLP.

DECISION

I. Introduction

In September 2011, Respondent Jim Seol formed a new business to market U.S. investments to overseas investors through the U.S. government's EB-5 program. The EB-5 program permits foreign investors to obtain a U.S. visa in exchange for investing in projects that create U.S. jobs. But while spending years building his new business, Seol never told the FINRA member firm he was associated with about his outside activities.

Disclosure was required. NASD Rule 3040 and FINRA Rule 3270 together require associated persons to provide prior written notice to their member firm before entering into any private securities transaction away from the firm, or engaging in any outside business activity. These advance requirements are necessary "so that the member's objections, if any, to such

activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law."[1]

On May 31, 2016, the Department of Enforcement ("Enforcement") filed a three-cause Complaint against Seol, alleging that he violated both rules by participating in securities transactions away from his firm and engaging in outside business activities while associated with FINRA member firm Ameriprise Financial Services, Inc. ("Ameriprise") without prior written notice to the firm. The Complaint also alleges that Seol affirmatively concealed his outside involvement from his firm in compliance certifications.

Seol filed an Answer denying he violated the relevant rules and asserting that during the relevant period he did not believe that his outside activities required disclosure, nor did his EB-5 investments involve "securities." Prior to the hearing, this Hearing Panel granted Enforcement's motion for partial summary disposition, concluding on the undisputed facts that Seol engaged in undisclosed outside business activities and made misrepresentations to his firm in compliance certifications. A hearing was held in Los Angeles, California, on the remaining allegation, which charged Seol with engaging in undisclosed securities transactions away from his firm, and on appropriate sanctions in light of the violations already established.

II. Findings of Fact

A. Seol's Background

Seol began as a registered representative with Ameriprise in June 1997.[2] He holds Series 7 and 63 licenses.[3] Seol worked as an Ameriprise financial advisor in an Irvine, California branch office.[4] Seol operated his branch office as a franchise, and ran the office with responsibility for servicing his clients, making staffing decisions, and paying office expenses.[5] Seol offered a broad variety of financial products to the firm's customers.[6] Ameriprise supervised Seol's operation by, among other things, conducting regular in-person reviews of the branch office's operations.[7]

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[1] *Dep't of Enforcement v. Weinstock*, No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *27 (NAC July 21, 2016) (predecessor to FINRA Rule 3270) (citation omitted); *see Dep't of Enforcement v. Fox Fin. Mgmt. Corp.*, No. 2012030724101, 2015 FINRA Discip. LEXIS 8, at *29 (OHO Mar. 9, 2015) ("The purpose of NASD Conduct Rule 3040 is to protect investors from unsupervised sales and securities firms from exposure to loss and litigation from transactions by associated persons outside the scope of their employment.") (quotation omitted), *aff'd*, 2017 FINRA Discip. LEXIS 3 (NAC Jan. 6, 2017).

[2] Complaint ("Compl.") ¶ 6; Answer ("Ans.") ¶ 1.

[3] Hearing Transcript ("Tr.") 371 (Seol).

[4] Tr. 56 (Tetmeir).

[5] Tr. 372-73 (Seol).

[6] Tr. 57 (Tetmeir).

[7] Tr. 57-68 (Tetmeir).

B. Seol Launches His New Business

During his time with Ameriprise, Seol learned of a U.S. government-sponsored investment program called "EB-5."[8] Congress "created the Immigrant Investor Program, also known as 'EB-5,' in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors."[9] Through the program, foreign investors are eligible to receive a permanent visa to live and work in the U.S. in exchange for making a capital investment that satisfies certain conditions over a two-year period, including the creation of U.S. jobs.[10]

The program is administered by the United States Citizenship and Immigration Services ("USCIS").[11] Under the program, a foreign national may qualify for an EB-5 visa by first investing $1 million (or $500,000 if in a targeted employment area) in a USCIS-approved U.S. commercial enterprise.[12] After making the investment, a foreign applicant can then apply for a conditional green card good for two years. If during that two-year period the investment creates or preserves at least 10 full time jobs, the foreign applicant may then apply to have the conditions removed from the green card and live and work in the U.S. permanently. [13]

Under the program, investors must put "the required amount of capital at risk for the purpose of generating a return."[14] EB-5 investments—i.e., projects eligible for investment—are sometimes administered by entities called "regional centers."[15] A regional center is "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment."[16]

In September 2011, Seol formed his new business, Western Regional Center, Incorporated ("WRCI"), to promote EB-5 progam investments.[17] Seol named himself Secretary,

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[8] Tr. 227-29 (Seol).

[9] *Mark A. Ivener*, Exchange Act Release No. 78657, 2016 SEC LEXIS 3128, at *3 (Aug. 24, 2016). The program is known as "EB-5" for the name of the employment-based fifth preference visa that participants receive.

[10] Compl. ¶¶ 17-18; Ans. ¶¶ 17-18.

[11] Joint Exhibit ("JX-") 35, at 1.

[12] JX-35, at 3-4.

[13] *See* Compl. ¶¶ 16-19; Ans. ¶¶ 16-19; *Ireeco, LLC*, Exchange Act Release No. 75268, 2015 SEC LEXIS 2614, at *3-4 (June 23, 2015).

[14] 8 C.F.R. § 204.6(j)(2).

[15] Tr. 229 (Seol).

[16] 8 C.F.R. § 204.6(e).

[17] Tr. 214-17, 227 (Seol).

Chief Executive Officer, and Chief Financial Officer of WRCI, as well as its sole director and president.[18]

Seol identified a potential investment opportunity for his newly formed company involving a solar energy power plant under development in Riverside, California. Under a June 2012 agreement negotiated and signed by Seol, WRCI investors were to provide capital to the plant to fund its development.[19] The structure of the agreement provided that investment capital from WRCI's foreign investors would be pooled through a newly created for-profit limited partnership, which would in turn loan funds to the power plant to be repaid at a fixed rate of interest.[20] The interest payments would generate investment returns for the limited partners, WRCI's investors.[21] As general partner of the limited partnership, WRCI was entitled to receive management fees paid from the investment returns of the partnership.[22]

After negotiating the agreement with the power plant, Seol brought in investors. Between June 2012 and December 2013, he personally traveled to South Korea and China to market partnership investments to foreign migration companies and attorneys.[23] These intermediaries then acted as agents who recruited foreign nationals for participation in WRCI investments.[24] WRCI produced and provided an offering memorandum to prospective purchasers of the limited partnership interests.[25]

The offering memorandum described the arrangement whereby the limited partnership loaned money to the power plant to fund construction and operational costs.[26] The offering stated that the limited partnership would be repaid at a fixed rate of interest by the firm constructing the power plant.[27] The amount of the loan was $100 million, to be repaid at an annual interest rate of 0.736%, or $736,000 per year.[28] The memorandum provided for certain fees and costs, including a "management fee" paid to WRCI as the general partner of the limited partnership.[29] The management fee was $4,000 per investor (above and beyond WRCI's costs), for an annual total

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[18] Compl. ¶ 12; Ans. ¶ 12.

[19] Compl. ¶¶ 20-21; Ans. ¶¶ 20-21; JX-23, at 76.

[20] Compl. ¶ 22; Ans. ¶ 22.

[21] Tr. 292-93, 440 (Seol).

[22] Compl. ¶ 23; Ans. ¶ 23.

[23] Compl. ¶¶ 30-32; Ans. ¶¶ 30-32.

[24] Tr. 375-76 (Seol).

[25] Compl. ¶ 24; Ans. ¶ 24.

[26] JX-23, at 35. The partnership technically loaned the funds to the parent company of the power plant, who then advanced the funds for use in the project. Tr. 230-31 (Seol).

[27] JX-23.

[28] Ans. ¶ 21.

[29] JX-23.

of $800,000.[30] So each limited partner investor would ultimately be repaid the principal amount of their original $500,000 investment as proceeds from the loan repayment came back into the partnership, though in all likelihood the annual interest received from the investment would be consumed by WRCI's "management fee."[31]

The offering memorandum described the partnership units as securities, explaining that the unregistered offering was being "offered and sold under the exemption provided by Section 4(2) of the Securities Act" along with other regulations promulgated pursuant to the statutory exemption.[32] The memorandum stated that the units "may not be transferred or resold except as permitted under the Securities Act" or other provisions governing sales of securities.[33] The memorandum explained that it did not solicit the purchase of "any security *other* than the units offered."[34]

The memorandum also detailed WRCI's responsibility for the day-to-day management of the partnership as its general partner, including its duty to (1) determine that the actions of the limited partnerships were consistent with the EB-5 program and WRCI's fiduciary duties to the limited partners; (2) determine that the loan to the power plant would be a qualifying investment under the program; (3) collect and distribute investment proceeds; (4) maintain the partnership's books and records; (5) ensure that all the conditions and requirements of the agreement with the power plant were carried out; and (6) recommend the project to the limited partners.[35]

By December 2013, the offering was fully subscribed with all partnership units sold to 200 different investors contributing $500,000 each, totaling $100 million.[36] The partnership transmitted the $100 million loan in three tranches between March and December 2013, to the power plant development project.[37]

C. Seol Hid His New Business from Ameriprise

In March 2014, shortly after project funding began, both the U.S. Securities and Exchange Commission and FINRA's Department of Enforcement contacted Seol as part of separate investigations into WRCI.[38] FINRA sent a courtesy copy of its written inquiry to the

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[30] JX-23, at 33; Tr. 334-36 (Seol). The management fee assumed 200 investors.

[31] Tr. 334-36 (Seol). The management fee was limited as a practical matter to $736,000, as the fee was not permitted to exceed the rate of interest paid on the loan. Tr. 335-36 (Seol).

[32] JX-23, at 5-6.

[33] JX-23, at 6-7.

[34] JX-23, at 7 (emphasis supplied).

[35] JX-23, at 12-13.

[36] Compl. ¶ 34; Ans. ¶ 34.

[37] Tr. 441 (Seol); Ans. ¶ 35.

[38] Tr. 358-59 (Seol).

compliance department at Ameriprise.[39] Shortly thereafter, Seol met with his compliance manager at Ameriprise and disclosed, for the first time, his WRCI-related activities.[40]

Prior to these regulator inquiries,[41] Seol concealed his WRCI activities from Ameriprise. Despite starting WRCI in September 2011, and traveling to Asia between June 2012 and December 2013 on multiple occasions to solicit business, Seol concealed his outside business on Annual Compliance Questionnaires he provided to Ameriprise in February 2012, February 2013, and February 2014.[42] Under Ameriprise policy, Seol was required to disclose and obtain prior approval from the firm before commencing any outside business activities,[43] including any business ownership or business appointment, regardless of whether compensation was being received.[44] Firm policy separately prohibited, without exception, any participation by an Ameriprise advisor in the sale of any security outside of the course of Ameriprise's business.[45]

Beginning in at least 2011, Seol's supervisor at Ameriprise conducted annual site inspections of Seol's office.[46] These in-person site inspections included a detailed review of the operation, function, and management of Seol's office.[47] During each site inspection, the supervisor conducted an extended interview with Seol to understand his business and any issues that may have impacted the operation of the branch.[48]

During the interviews, the supervisor reviewed with Seol the annual attestations he submitted to Ameriprise.[49] Among the attestations reviewed was Seol's representation that he had no outside business activities.[50] The supervisor made sure Seol had "a good understanding" of what the question called for, and confirmed that the representation was accurate.[51] The supervisor "educate[d]" Seol, ensuring that he was "familiar with what needs to be disclosed—if you have any businesses, if you have any outside activities like being on a board."[52] During the

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[39] JX-51.

[40] JX-55.

[41] The FINRA inquiry led to the present action. To date, no action has resulted from the SEC inquiry.

[42] Compl. ¶¶ 63-64; Ans. ¶¶ 63-64.

[43] JX-16.

[44] JX-16.

[45] JX-6; Tr. 42-44 (Tetmeir).

[46] Tr. 57-60 (Tetmeir).

[47] Tr. 69-77 (Tetmeir).

[48] Tr. 77-78 (Tetmeir).

[49] Tr. 61-62 (Tetmeir).

[50] Tr. 61-62 (Tetmeir)

[51] Tr. 62 (Tetmeir).

[52] Tr. 81-82 (Tetmeir).

interview the supervisor "would not only ask if he was involved in any kind of outside [activities]," he would also inquire as to "how [he] was making his money, what's he doing, is he focusing in on his practice, has he been out of the office."[53] In face-to-face interviews in August 2012 and again in April 2013, Seol concealed his WRCI activities, falsely representing that he had no outside business activities, no outside employment, no outside board memberships, and no ownership interest in any legal entities.[54]

The firm's compliance department also routinely inspected Seol's Ameriprise branch office. On June 26, 2012, March 5, 2013, and again on February 10, 2014, a compliance inspector traveled to Seol's office for an in-person review.[55] These reviews, some unannounced, included a detailed and careful review of all aspects of the operation and function of Seol's office.[56] During these inspections, there was no indication of Seol's WRCI work or business activity.[57] In her interviews with Seol, the compliance inspector confirmed that Seol had access to the firm's compliance manual and was familiar with the firm's policies.[58] The inspector confirmed that Seol understood that an outside business activity was required to be disclosed whether or not Seol was being compensated for that activity.[59] She explained that both Ameriprise policy and FINRA rules required Seol to disclose and obtain prior approval for all outside business activities.[60] She also reminded Seol about his obligation to update his Form U4 to include any outside business activities.[61] Seol nevertheless falsely represented to the compliance inspector during interviews in June 2012, March 2013, and February 2014, that he had no outside business activities.[62]

D. Seol Is Confronted by Ameriprise

Having repeatedly concealed his role in WRCI to his supervisor and compliance examiner over several years, Seol was confronted by senior members of Ameriprise in an April 2014 interview after the firm received the inquiry from FINRA.[63] During this interview, Seol explained the EB-5 program and how he formed WRCI in 2011, but claimed it had not generated

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[53] Tr. 81 (Tetmeir).

[54] JX-27; JX-29; Tr. 65-66, 83, 89-95 (Tetmeir). Seol did disclose that he conducted independent brokering of certain outside insurance products.

[55] Tr. 149-51 (Peterson-Hall).

[56] Tr. 152-65 (Peterson-Hall).

[57] Tr. 191-93 (Peterson-Hall).

[58] Tr. 167-69 (Peterson-Hall).

[59] Tr. 169-70 (Peterson-Hall).

[60] Tr. 170-71 (Peterson-Hall).

[61] Tr. 171-72 (Peterson-Hall).

[62] Tr. 174-76, 184-85, 189-90 (Peterson-Hall); JX-10; JX-29; JX-49.

[63] Tr. 98-99 (Tetmeir).

any business until the end of 2013.[64] Seol claimed that he had received no compensation, had not solicited any Ameriprise clients, and did not think he had to disclose the outside business activity because he had received no compensation.[65] Seol claimed that after speaking to counsel he realized that he was wrong about not disclosing his activities and was eager to fix the situation.[66]

Shortly after Seol's belated revelation of his WRCI activities, Ameriprise terminated him on May 28, 2014, for violating the firm's policy regarding disclosure of outside business activities.[67] Then in July of 2014, Seol began receiving a salary from WRCI.[68] Seol has not been associated with another FINRA member firm since his termination from Ameriprise.[69]

E. Seol Intentionally and Deceptively Concealed WRCI

We do not credit Seol's claim that his failure to disclose was inadvertent or a result of a mistaken understanding of his obligations. His concealment of his WRCI activities from Ameriprise was intentional.

His deception included withholding information regarding WRCI when asked directly by both his supervisor and compliance examiner about outside business activities based upon his purported "belief … that if you weren't being compensated, you didn't have to disclose it."[70] He had no basis for such a belief.[71] As early as April 2012, Seol and WRCI represented to the power plant that it had already lined up investors necessary to provide funding for the project;[72] by August 2012, Seol traveled overseas to market the investment and entered into finder's agreements with migration companies to identify investors;[73] he raised $250,000 from an investor during 2012 to fund operating costs;[74] by the end of 2013, Seol had raised $100 million from investors and completed the process of transferring money to the power plant, triggering interest on the loan;[75] and the loan interest would be entirely consumed by a "management fee" for WRCI (above and beyond the company's actual costs associated with the offering) that

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[64] JX-55; Tr. 114 (Tetmeir).

[65] JX-55.

[66] JX-55.

[67] JX-58.

[68] Compl. ¶ 36; Ans. ¶ 36.

[69] Compl. ¶ 9; Ans. ¶ 9.

[70] CX-1; Tr. 309-14, 321-23 (Seol).

[71] Tr. 314-15 (Seol).

[72] JX-19, at 4; JX-22, at 4; Tr. 247-48, 257-59 (Seol).

[73] Tr. 347-48 (Seol).

[74] Tr. 392-93 (Seol).

[75] Tr. 441-42 (Seol).

would generate for Seol's company approximately $736,000 per year.[76] Yet, as of February 2014, Seol was still hiding his business from Ameriprise.[77] We find it less likely that Seol's nondisclosure stemmed from some misunderstanding of his obligations than from his desire to conceal his ongoing, substantial, and soon-to-be lucrative business from Ameriprise, lest his employer require him to cease his activities.[78]

Seol's claim that his lack of compensation justified his concealment is particularly disingenuous in light of WRCI's assets and earnings, given that as the principal of the company Seol at all times had the power to direct compensation to himself. Indeed, he did just that after Ameriprise terminated him.[79] When asked why he decided to pay himself a salary of $6,000 per month in June 2014—in light of his claim that there remained "uncertainty" with the investment transaction—Seol admitted "[w]e had enough money in our WRC account to do so. And, I mean, personally speaking, I had no other income, source of income. I have a family to support, so …."[80] Later, Seol gave himself a raise, to $9,000 per month.[81] The only reason Seol was not being compensated by WRCI when misrepresenting his outside work to Ameriprise was because he chose not to be.[82]

Seol also claimed at the hearing that he did not believe that Ameriprise's policy against outside securities transactions applied to his solicitations through WRCI because he did not understand the limited partnership interests sold to WRCI investors to be securities.[83] We find this claim equally incredible. In fact, Seol had discussions with a business partner in November 2012 when both recognized that the limited partnership interests *were* securities "in the general sense that one is investing in something managed by others for purposes of a return."[84] Seol has acknowledged that he *knew* he was not permitted to market securities without disclosure to Ameriprise.[85] He did so anyway.

Seol deceived Ameriprise for years. When he began soliciting business for WRCI in 2012, Seol used an email address from a law firm with which he had no association to avoid transacting business through his Ameriprise email, thereby concealing his activitites from his

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[76] Tr. 334-36, 429-30, 447 (Seol).

[77] JX-19.

[78] We find that by the end of 2012, Seol had a reasonable expectation that he would be compensated by WRCI.

[79] Tr. 430 (Seol).

[80] Tr. 444-45 (Seol).

[81] Tr. 449 (Seol).

[82] Seol lied to Ameriprise in the April 2014 meeting when he said that he "cannot take any compensation" from WRCI. *See* JX-55, at 2.

[83] Tr. 305-07 (Seol).

[84] CX-1; Tr. 321-22 (Seol).

[85] Tr. 304-05 (Seol).

employer.[86] The deception continued even through his purported disclosure of his WRCI business in the April 2014 meeting. At that meeting with senior members of Ameriprise, Seol disclosed the details of the particular EB-5 project involving the power plant that was the subject of FINRA's inquiry (and the present action), but he concealed *another* of WRCI's EB-5 projects.[87] Months earlier, in October 2013, Seol had executed a consulting agreement on WRCI's behalf with a company called Yogurtland to raise money for franchise development.[88] Yet, Seol hid this transaction from Ameriprise during the April 2014 meeting even though WRCI had received a $20,000 "consulting fee" from Yogurtland at the time of the meeting.[89]

And while affirmatively concealing his activities from Ameriprise, Seol touted his connection to the firm in materials promoting his undisclosed business. He approved marketing materials promoting the limited partnership to investors highlighting WRCI's role as "an EB-5 investor asset management and servicing company" that would "oversee the EB-5 investor's funds and disbursement of funds to the Borrower," and touting Seol's expertise derived from "15 years as a licenced Financial Advisor for large financial institutions, including … Ameriprise Financial."[90] Seol invoked the name of his employer to bolster his own credibility with his investors as he lied to Ameriprise about the existence of these investments.

III. Conclusions of Law

A. Seol Engaged in Undisclosed Private Securities Transactions

Before the hearing we granted Enforcement's motion for partial summary disposition,[91] determining that the undisputed facts established as a matter of law that Seol engaged in outside business activities in violation of FINRA Rule 3270 and made misrepresentations to his firm in compliance certifications in violation of FINRA Rule 2010. The only claim remaining for our determination is whether Seol improperly engaged in undisclosed private securities transactions in violation of NASD Rule 3040 as alleged in the first cause of the Complaint.

NASD Rule 3040 requires that an associated person who intends to participate in a private securities transaction, prior to the transaction, must "provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction."

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[86] JX-20; Tr. 249-51 (Seol).

[87] Tr. 453-57 (Seol).

[88] JX-42.

[89] Tr. 453-57 (Seol).

[90] JX-21, at 8-9; Tr. 282-85 (Seol).

[91] *See* OHO Order 16-29 (2014039839101) (Nov. 4, 2016), http://www.finra.org/sites/default/files/OHO_Order-16-29_201403983101.pdf

The rule ensures that member firms adequately supervise the suitability and due diligence responsibilities of their associated persons and protects investors from being misled as to employing firms' sponsorship of transactions that are conducted away from the firms.[92] It also serves to protect employers against investor claims arising from associated persons' private securities transactions.[93] To achieve these purposes, its reach is construed broadly, encompassing the activities of associated persons who participate in any manner in a transaction.[94] Scienter need not be proven to establish a violation.[95]

Here, there is no dispute that Seol solicited investors through WRCI to purchase interests in the limited partnership that invested in the development of the California power plant. It is equally undisputed that Seol failed to provide advance notice to Ameriprise prior to soliciting these investments. The only question raised by Seol as to his liability is whether the limited partnership interests he marketed through WRCI to its investors were "securities."[96]

1. The Limited Partnership Interests Were Securities

Although a "security" is broadly defined under the federal securities laws,[97] not every loan arrangement is a security. Seol argues that "the [project] is best equated to a loan participation agreement, and therefore does not constitute a 'security' as defined under the applicable statutes and case law."[98] He maintains that the structure of the transaction, where WRCI's "management fees" exceeded the rate of return on the loan, "created a loan participation agreement [where] there was no expectation of 'profit,'" an arrangement motivated solely by the participants' desire to obtain a U.S. visa through the EB-5 program.[99]

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[92] *Dep't of Enforcement v. Carcaterra*, No. C10000165, 2001 NASD Discip. LEXIS 39, at *8-9 (NAC Dec. 13, 2001).

[93] *Id.*

[94] *See Stephen J. Gluckman*, 54 S.E.C. 175, 183 (1999).

[95] *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93, at *54-55 (Jan. 18, 2006).

[96] *See* Respondent's Pre-Hearing Brief, at 10-20.

[97] Section 3(a)(10) of the Securities Exchange Act of 1934 ("Exchange Act") defines a security to include "any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing." The definition found in Section 2(1) of the Securities Act of 1933 ("Securities Act") is substantially similar.

[98] Respondent's Pre-Hearing Brief, at 10.

[99] *Id.* at 10-11.

But WRCI investors did not advance funds to the power plant through a loan participation agreement[100]—WRCI instead directed its investors to purchase units of a limited partnership. It was the limited partnership, and not individual investors, that advanced the loan to the power plant for the purpose of generating a return.[101] The question is whether the limited partnership interests marketed and sold by WRCI were investment contracts.[102] Both the Securities Act and the Exchange Act include investment contracts within the definition of a security.[103] In *SEC v. W. J. Howey Company*, the Supreme Court defined an investment contract as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party ...."[104] By this standard, "a limited partnership generally is a security, because, by definition, it involves investment in a common enterprise with profits to come solely from the efforts of others."[105]

We hold that the limited partnership interests marketed by WRCI were investment contracts, and thus securities. WRCI investors invested their funds in the limited partnership. Their investments were pooled into the partnership's common enterprise, the funding of a loan

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[100] Loan participation agreements are commercial contractual arrangements where multiple financial institutions "share the risk of loss, for a specified time and to a specified extent, on a loan made to a single borrower." *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1213 (5th Cir. 1988). The investors here are not large financial institutions, but individual investors who have not been shown to be sophisticated, or even proficient in the English language used to describe the transaction in the offering documents. Loan participation agreements typically involve sophisticated commercial actors responsible for substantial due diligence associated with the loan transactions, and not investors relying upon the efforts of third parties to ensure the viability of the transaction. *See NBI Mort. Inv. Corp. v. Chemical Bank*, 1976 U.S. Dist. LEXIS 14422, at *4-5 (S.D.N.Y. June 25, 1976) (A loan participation agreement may be a security where "plaintiff had no managerial responsibility under the participation ... . While this court is not stating that any loan participation is perforce a security transaction, it cannot say that such a participation, coupled with the necessary indicia under the *Howey* test, cannot be a security.").

[101] The business plan for the limited partnership provided that "[t]he EB-5 Immigrant Investors will invest into [the limited partnership], who will then loan the funds to the [power plant development]." JX-21, at 10.

[102] Generally, loan arrangements constitute securities when they fit within the Supreme Court's definition of either a "note" (*see Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990)) or an "investment contract" (*see SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946)). Because Enforcement does not contend in this case that the loan extended by the limited partnership to the power plant was a "note" under the federal securities laws, we do not consider that question.

[103] *See* Section 2(1) of the Securities Act; Section 3(a)(10) of the Exchange Act.

[104] 328 U.S. 293, 298-99. In *Howey*, the Court held that in order to find that an investment contract exists, there must be (1) an investment of money; (2) in a common enterprise; and (3) an expectation of profits derived solely from the efforts of a third party. 328 U.S. at 298-99.

[105] *SEC v. Murphy*, 626 F.2d 633, 640-41 (9th Cir. 1980); *accord, e.g., Mayer v. Oil Field Systems Corp.*, 721 F.2d 59, 65 (2d Cir. 1983) (A limited partnership interest "generally is a security because such an interest involves investment in a common enterprise with profits to come solely from the efforts of others.") (quotation omitted); *Goodman v. Epstein*, 582 F.2d 388, 406-07 (7th Cir. 1978) ("[T]he very legal requirements for a limited partnership necessitate its including all of the attributes of a 'security' in the interest bestowed upon one of limited partners.").

instrument. And WRCI investors played no role in the management of the enterprise. In return for their investment, WRCI investors expected to earn profits through the efforts of others.

a. There was an "Investment" in the Limited Partnership Interests

Seol disputes a number of our conclusions. He first claims there was no "investment" of funds because the substance of the transaction was a loan.[106] However, the relevant transaction was not the loan, it was the sale of limited partnership units.[107] Seol structured the transaction so the WRCI investors did not directly loan money to the power plant or anyone else. He presumably structured the deal in this manner because loans are not qualifying investments under the EB-5 program.[108] The program expressly requires that investors put "the required amount of capital at risk for the purpose of generating a return."[109] The offering memorandum for the limited partnership interests reflects that the partnership interests were structured to comport with the requirements of the EB-5 program and the offering required WRCI investors to put their capital at risk for purposes of generating a return.[110] The purchase of these units was an investment.

b. The Limited Partnership Investors Expected a Profit

Seol also contends that investors had no expectation of profits because the rate of return generated by the loan transaction was always less than the management fee allocated to WRCI.[111] He claims the economic reality of the transaction was that the purchasers of the partnership units had no real prospect of receiving any profit from the transaction—they were interested only in the return of their principal and receiving a U.S. visa through the EB-5 program.[112]

We do not doubt that WRCI's investors were motivated in significant part by their desire to obtain a U.S. visa. But in order to obtain a visa through the EB-5 program, they were required to put "the required amount of capital at risk for the purpose of generating a return."[113] In other

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[106] *See* Respondent's Pre-Hearing Brief, at 12-13.

[107] Tr. 399 (Seol).

[108] 8 C.F.R. § 204.6(e) ("Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for purposes of this part.")

[109] 8 C.F.R. § 204.6(j)(2).

[110] *See* JX-23, at 3 (noting that the offering was structured to comply with, among other things, the requirements of 8 C.F.R. § 204.6); at 8 (noting that "a potential investor's investment in the units must be derived wholly from his or her personal assets and are entirely at risk.").

[111] *See* Respondent's Pre-Hearing Brief, at 12-13.

[112] *Id.* We note that Seol admitted that under certain circumstances, including a potential default on the loan where the terms of the loan agreement required an increase to the interest rate, the profits generated from the investment could well exceed the amount of management and other fees. Tr. 339-41 (Seol).

[113] 8 C.F.R. § 204.6(j)(2).

words, they were *required* to have an expectation of profits from their investment.[114] And there is no question that the investments here were expected to generate profits, in the form of interest on the loan the power plant repaid to the partnership.[115]

And we do not believe that this profit expectation is negated where the anticipated profits are consumed by administrative fees. "An investor who pays a fee to purchase securities has nonetheless purchased securities. The question here is not whether some combination of EB-5 shares and fees are profitable securities, but whether the shares themselves … qualify as investment contracts."[116] Where, as here, "administrative fees are not proceeds of the EB-5 offering, … [c]onflating fees paid to administer an offering with the proceeds of the offering itself makes little sense when determining whether the proceeds of the offering were expected to be profitable."[117] We hold that the investors' expectation of profits is not negated by the fact that their profits are subsequently confiscated by the "management fees" charged by their fudiciary, WRCI.[118]

c. Limited Partnership Profits Came from Third-Party Efforts

Seol finally claims that any profits the limited partnership generated were not the result of managerial efforts by WRCI, but flow as a natural consequence of the loan. Seol maintains that "[t]he principal and interest owed by [the power plant] on the loan are fixed, and will not fluctuate depending on the efforts of WRCI."[119] But the offering memorandum describing the investment makes clear that as the limited partnership's general partner, WRCI was solely responsible for the day-to-day management of the partnership and had numerous obligations significant to the success of the investment.[120] Its responsibilities include ensuring that the loan

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[114] Tr. 328-29 (Seol).

[115] We also reject Seol's contention that there was no expectation of profits because "[t]he participants' rate of return consisted solely of a fixed rate of interest, parallel to a commercial transaction." *See* Respondent's Pre-Hearing Brief, at 13. Although Seol cites authorities supporting this proposition, they all precede the Supreme Court's decision in *SEC v. Edwards*, where the Court clarified that "an investment scheme promising a fixed rate of return can be an 'investment contract' and thus a 'security' subject to the federal securities laws." 540 U.S. 389, 397 (2004). The expected returns generated by the limited partnership here are fairly regarded as "profits."

[116] *SEC v. Liu*, 2016 U.S. Dist. LEXIS 181536, at *12-13 (C.D. Cal. Aug. 17, 2016) (rejecting the argument that limited partnership interests sold to EB-5 investors were not securities because administrative fees negated any expected profits).

[117] *Id.*

[118] *See Dep't of Enforcement v. Rooney*, No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *51 (NAC July 23, 2015) (rejecting the argument that transaction and management costs must be netted against realized profits in determining whether there was an expectation of profit). WRCI investors were presumably willing to incur costs to participate in the EB-5 program, given their motivation to obtain a U.S. visa. Their willingness to devote their investment profits to that end does not alter the nature of the investment.

[119] *See* Respondent's Pre-Hearing Brief, at 14.

[120] JX-23, at 12-13. Given that WRCI assigned to itself *every penny* of the profits of the limited partnership, it presumably added value in exchange for its "management fee."

to the power plant would be a qualifying investment under the EB-5 program; collecting and distributing investment proceeds; ensuring that all the conditions and requirements of the agreement with the power plant are carried out; and recommending the project to the limited partners.[121] Given the entirely passive role of the limited partners, along with WRCI's responsibility to first identify a suitable investment, determine that the investment qualifies for the EB-5 program, and then ensure that the investment produces adequate returns, we find that the success of the venture was entirely dependent on third party efforts as contemplated by *Howey*.[122] The limited partnership interests were securities.[123]

Accordingly, we conclude that by soliciting the purchase of $100 million of limited partnership interests by WRCI investors, Seol participated in private securities transactions without prior disclosure to Ameriprise. In so doing, he violated NASD Rule 3040. As a consequence of his violation, he also violated FINRA Rule 2010.[124]

IV. Sanctions

FINRA's Sanction Guidelines ("Guidelines") provide a number of considerations for adjudicators in determining the appropriate sanction for misconduct involving outside business activities and selling away. For selling away, the Guidelines recommend a fine of $5,000 to $73,000 and a suspension or a bar depending on the dollar amount of the sales.[125] For outside business activities, the Guidelines recommend a fine of $2,500 to $73,000 and a suspension of up to one year depending on the existence of aggravating factors.[126] In egregious cases, a bar may be appropriate.

There is no Guideline specifically addressing Seol's misstatements to his employer on compliance questionnaires. Guidelines for recordkeeping deficiencies and falsification of records

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[121] JX-23, at 12-13.

[122] *SEC v. Radical Bunny, LLC*, 2011 U.S. Dist LEXIS 45470, at *9 (D. Ariz. Apr. 12, 2011) ("[P]articipants in Radical Bunny's loans were passive and relied entirely on the efforts of the individual Defendants to receive a return on their investment, satisfying the third element of the *Howey* test. ... [because] [p]articipants ... did not exercise any control over the loans; only the individual Defendants had managing authority."), *aff'd*, 2013 U.S. App. LEXIS 13953 (9th Cir. July 10, 2013); *see also SEC v. Mutual Benefits*, 408 F.3d 737, 743-44 (11th Cir. 2005) ("[I]nvestment schemes may often involve a combination of both pre- and post-purchase managerial activities, both of which should be taken into consideration in determining whether *Howey's* test is satisfied."), *cert. denied*, 128 S. Ct. 17 (2007).

[123] Our conclusion is reinforced by the fact that WRCI specifically describes the limited partnership interests as securities in the offering documents. *See SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53 (1943) (determination of whether an instrument is a security depends on "what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.").

[124] A violation of NASD Rule 3040 also constitutes a violation of FINRA Rule 2010. *Joseph Abbondante*, Exchange Act Release No. 53066, 2006 SEC LEXIS 23, at *36 (Jan. 6, 2006).

[125] FINRA Sanction Guidelines at 14 (2017), http://www.finra.org/industry/sanction-guidelines.

[126] Guidelines at 13.

are analogous because Seol's failure to disclose his ongoing business activities caused his employer to maintain false books and records.[127] For recordkeeping violations, the Guidelines recommend a fine between $1,000 and $15,000 and a suspension in any or all capacities for up to three months. Where aggravating factors predominate, the Guidelines recommend a fine of $10,000 to $146,000 and a suspension of up to two years or a bar. Principal consideration should focus on the nature and materiality of the inaccurate or missing information.[128]

Because each of Seol's violations stem from the same cause, his failure to disclose his outside investment business, we assess the facts pertaining to his misconduct together.[129] Considering his overall course of conduct, we conclude that Seol's conduct was egregious. For selling away, the Guidelines provide that "the first step in determining sanctions is to assess the extent of the selling away activity, including the dollar amount of the sales, the number of customers and the length of time over which the selling away occurred."[130] Where the amount of sales exceeds $1 million, we should consider a suspension of 12 months to a bar.[131] Here, Seol engaged in a massive amount of selling away from his firm, raising $100 million from 200 investors. The sheer magnitude and volume of this undisclosed conduct merits a bar.

Seol's conduct was also aggravated in additional respects. Seol improperly used the name of his employer in an effort to market his undisclosed sales.[132] Seol's conduct went on for years, an extended period of time.[133] And he did not simply fail to check a box on his compliance questionaires—he affirmatively and repeatedly lied to his supervisor and compliance inspector at Ameriprise to conceal the details of his outside sales activity.[134]

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[127] *Dep't of Enforcement v. McGee*, No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *86-87 (NAC July 18, 2016) (applying Guidelines for recordkeeping violations and falsification of records for registered representative's false statements on firm compliance questionnaires) (citing *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *83 (Feb. 10, 2012) (applying Guidelines for recordkeeping violations for misstatements on firm compliance questionnaires)), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 27, 2017); *Dep't of Enforcement v. Braff*, No. 2007011937001, 2011 FINRA Discip. LEXIS 15, at *26-27 (NAC May 13, 2011) (applying Guideline for the falsification of records for false statements on firm compliance questionnaires), *aff'd*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620 (Feb. 24, 2012).

[128] Guidelines at 29.

[129] Guidelines at 4 (General Principle No. 4); *Blair C. Mielke*, 2015 SEC LEXIS 3927, at *59 (batching outside business activity and selling away violations for purposes of sanctions).

[130] Guidelines at 14.

[131] *Id.*

[132] Guidelines at 13 (Principal Consideration No. 4); Guidelines at 14 (Principal Consideration No. 6).

[133] Guidelines at 13 (Principal Consideration No. 3); Guidelines at 14 (Principal Consideration No. 3).

[134] Guidelines at 13 (Principal Consideration No. 5); Guidelines at 15 (Principal Consideration No. 13).

Seol's arguments regarding the presence of mitigating factors are without merit. He is wrong that his lack of any prior disciplinary history is mitigating.[135] And although Seol contends that his misconduct was an isolated incident,[136] we find that he engaged in an extended campaign of deceit that extended to his deceptive testimony at the hearing in this matter. For that reason, we reject his claim that he did not intend to mislead.[137] We also reject his contentions that he gave "complete cooperation" to regulators and his firm, that he has taken responsibility for his misconduct, or that he acted in "good faith."[138] Finally, while it is true that his conduct resulted in no apparent investor harm, "[i]t is well established that the absence of customer harm is not mitigating."[139] There are no mitigating factors.

The rules proscribing outside securities sales without disclosure are "designed to protect investors from unmonitored sales and to protect securities firms from exposure to loss and litigation in connection with sales made by persons associated with them."[140] In light of these concerns, the proscription plays "a crucial role in FINRA's regulatory scheme, and its abuse calls for significant sanctions."[141] Given Seol's egregious conduct, we have no confidence in his ability to comply with regulatory requirements fundamental to his participation in the securities industry going forward. Accordingly, and in order to effectuate the remedial purposes of the Sanction Guidelines, protect the public interest, improve overall business standards in the securities industry and deter others from engaging in similar misconduct, we conclude that the only appropriate sanction is a bar from association with any FINRA member firm in any capacity. In light of the bar, we do not impose a fine for the misconduct.[142]

V. Order

Respondent Jim Seol is barred from associating with any FINRA member firm in any capacity for engaging in undisclosed outside business activities, outside securies sales, and for making misrepresentations to his employer in compliance questionaires. The bar shall become effective immediately if this decision becomes FINRA's final action in this disciplinary proceeding.

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[135] *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008) ("We have held that a lack of disciplinary history is insufficient to mitigate sanctions.").

[136] Respondent's Pre-Hearing Brief, at 26.

[137] *See* Respondent's Pre-Hearing Brief, at 26-27.

[138] *See* Respondent's Pre-Hearing Brief, at 27-31.

[139] *Dep't of Enforcement v. Golonka*, No. 2009017439601, 2013 FINRA Discip. LEXIS 5, at *30, n.22 (NAC Mar. 4, 2013).

[140] *Fox Fin. Mgmt. Corp.*, 2017 FINRA Discip. LEXIS 3, at *24-25.

[141] *Id.* at *25.

[142] Guidelines at 10 ("Adjudicators generally should not impose a fine if an individual is barred and there is no customer loss.").

In addition, Seol is ordered to pay costs in the amount of $4,440.70, which includes a hearing transcript fee of $3,690.70 and an administrative fee of $750. The assessed costs 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.[143]

David Williams
Hearing Officer
For the Hearing Panel

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[143] The Hearing Panel considered and rejected without discussion all other arguments of the parties.