

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MATTHEW EVAN ECKSTEIN
(CRD No. 2997245),

Respondent.

Disciplinary Proceeding
No. 2017054146302

Hearing Officer–LOM

DEFAULT DECISION

August 28, 2018

Respondent made false and misleading statements in connection with purchases and sales of securities in willful violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, as well as FINRA Rules 2020 and 2010. For this misconduct, Respondent is barred from association in any capacity with any FINRA member and ordered to pay restitution to four customers in a total amount of \$961,781, plus interest.

Respondent made unsuitable recommendations to his customers, in violation of FINRA Rules 2111 and 2010. For this misconduct, he is separately barred from association in any capacity with any FINRA member. He also would be separately ordered to pay restitution to the four customers in a total amount of \$961,781, plus interest, if restitution were not already ordered for his first violation.

While employed by and registered with a FINRA member firm, Respondent violated NASD Rule 3040 and FINRA Rule 2010 when he participated in private securities transactions or “selling away” from his firm without providing the required notice. For this misconduct, he would be suspended for 18 months and fined \$50,000. In light of the bars imposed for other violations, however, these sanctions are not imposed.

After Respondent started his own broker-dealer firm, he caused the firm to be in violation of its books and records obligations under FINRA Rule 4511. This misconduct also violated FINRA Rule 2010. For these violations, he would be suspended for two years. In light of the bars imposed for other violations, however, this sanction is not imposed.

On multiple occasions, Respondent failed to comply with his duty under FINRA Rule 8210 to provide information and documents. Respondent provided an untimely and incomplete response to a Rule 8210 request. Then he delayed responding to two more Rule 8210 requests until he was suspended for failure to respond. Finally, he failed to respond at all to two additional Rule 8210 requests. This misconduct violated FINRA Rules 8210 and 2010. Respondent is therefore barred from association in any capacity with any FINRA member.

Appearances

For the Complainant: Robin W. Sardegna, Esq., and Perry C. Hubbard, Esq., Rockville, Maryland

For the Respondent: No appearance

DECISION

I. Introduction

FINRA's Department of Enforcement ("Enforcement" or "Complainant") brought this proceeding against Matthew Evan Eckstein ("Respondent"), a registered securities representative, based upon an investigation that began with a customer complaint to FINRA's Senior Helpline. The Complaint contains five causes of action.

Enforcement twice served the Complaint in compliance with its obligations under FINRA Rules 9131 and 9134, and Respondent twice failed to file an Answer or otherwise respond. Pursuant to FINRA Rules 9215(f) and 9269, Enforcement filed a motion for entry of default decision ("Default Motion"), supported by counsel's declaration ("Declaration") and exhibits. Respondent did not respond to the Default Motion.

For the reasons set forth below, I find Respondent in default and grant Enforcement's Default Motion. As authorized by FINRA Rule 9269(a)(2), I deem the factual allegations in the Complaint against Respondent admitted. Based on the facts deemed admitted and the additional information provided under penalty of perjury in the Declaration, along with the exhibits accompanying the Declaration, I find that Respondent committed the violations alleged in the Complaint and, as set forth below, impose sanctions consistent with FINRA's Sanction Guidelines.

II. Summary of Violations

First, in reliance on Respondent's recommendations, four customers invested a total of \$1.36 million in a company (the "Issuer") run by one of Respondent's close friends, KB. Respondent gave the customers no written materials describing the investment or any note or

other agreement memorializing the customers' purchases. Rather, the undocumented transactions appear to have been part of a spurious investment scheme run by KB.

In recommending that his customers make the investment, Respondent knowingly, or at a minimum, recklessly, made false and misleading statements regarding the investment—saying, for example, that it was “fully guaranteed,” when it was not, and describing it as comparable to a certificate of deposit with a bank (“CD”), when it was not. Respondent also persuaded one of his customers to liquidate close to \$300,000 in mutual fund holdings in order to invest in the Issuer, representing that the investment would be sufficient to fund her retirement while the mutual fund investments would not. He had no basis, however, for urging the customer to replace her mutual funds with an investment in the Issuer. He had conducted no due diligence on the investment. Moreover, he never disclosed to his customers his lack of a basis for his representations and recommendations, and his lack of due diligence—material information to any reasonable investor.

Respondent also failed to disclose financial connections to KB that would have caused a reasonable investor to question Respondent's objectivity and the safety of his or her money. He did not disclose that nearly all of the money that his customers gave him to invest in the Issuer was deposited into a bank account in the name of an affiliate of the Issuer, and that Respondent had access to those investor funds as a signatory on the bank account. Respondent also did not disclose that KB had given him over \$100,000, purportedly as a “loan” that KB then “forgave.”

By this conduct, Respondent willfully violated Section 10(b) of the Securities Exchange Act and Exchange Act Rule 10b-5(b), and also violated FINRA Rules 2020 and 2010.

Second, Respondent conducted no due diligence regarding the investment. Rather, he relied on what his friend, KB, told him. Thus, he had no reasonable basis for thinking the investment in his friend's company suitable for anyone. And, given the customers' circumstances—they all had little to no investment experience and had highly conservative investment objectives and risk tolerance—the investment was unsuitable for these customers in particular. The unsuitable recommendations violated FINRA Rules 2111(a) and 2010.

Third, while Respondent was employed by and registered with his long-time firm, he engaged in many of the transactions outside the regular scope and course of his work without giving the firm the prior written notice to which it was entitled. This “selling away” from his firm violated NASD Rule 3040 and FINRA Rule 2010.

Fourth, after Respondent left the employ of his long-time firm and started his own broker-dealer firm, he caused his broker-dealer firm to violate the applicable books and records rules by failing to preserve customer emails, text messages, facsimiles, and account summaries that he created for and sent to some customers. As a result, he violated FINRA Rules 4511 and 2010.

Fifth, while investigating Respondent’s conduct, FINRA staff sent Respondent several different requests for information pursuant to FINRA Rule 8210. Respondent failed to respond timely and completely to one request, failed to respond timely to two subsequent requests, and then failed to provide any information at all in response to two more requests. This misconduct violated FINRA Rules 8210 and 2010.

III. Findings of Fact and Conclusions of Law

A. Respondent’s Background

Respondent was first registered with Gould, Ambrosion & Associates LTD (“Gould”) in 1998, where he was a principal of the firm and served as its chief compliance officer. He remained registered with Gould until September 16, 2015. Since September 16, 2015, Respondent has been registered at his own broker-dealer firm, Sisk Investment Services, Inc. (“Sisk”), where he is chief executive officer and chief compliance officer. He has held Series 7, 24, and 63 licenses since 1998.¹

B. Jurisdiction

FINRA has jurisdiction to bring this proceeding against Respondent because at the time of the alleged misconduct, and at the time of the filing of the Complaint, he was registered with a FINRA member firm. Respondent also is currently registered.² A registered person agrees to subject himself to FINRA jurisdiction. Article V, Section 2 of FINRA’s By-Laws requires any person who applies for registration to agree to comply with the federal securities laws, FINRA’s By-Laws, and FINRA’s Rules, as well as all rulings, orders, directions, and decisions issued and sanctions imposed pursuant to FINRA’s Rules. FINRA Rule 0140 specifies that FINRA’s Rules shall apply to all members and their associated persons. Under Article V, Section 4, FINRA retains jurisdiction for two years after a person’s registration has been terminated, revoked, or canceled.

C. Origin of the Disciplinary Proceeding

One of the four customers who invested in KB’s company based upon Respondent’s recommendation, JS, called FINRA’s Senior Helpline on May 3, 2017 after she was unable to recover the \$385,000 in principal that she had invested. The Office of the Whistleblower (“OWB”) initiated an investigation. The matter was then referred to Enforcement, which conducted its own investigation and instituted this proceeding.³

¹ Complaint (“Compl.”) ¶¶ 11-14; Declaration (“Decl.”) ¶ 4.

² Decl. ¶¶ 4-5; Complainant’s Exhibit (“CX-”) 1. Respondent’s registration with Sisk was interrupted by a suspension pursuant to FINRA Rule 9552, lasting from September 11, 2017, through November 24, 2017. Decl. ¶ 4, n.1; CX-1; Compl. ¶ 13 n.1.

³ Decl. ¶ 3; Compl. ¶¶ 133-38.

D. Respondent's Default

As permitted by FINRA Rule 9134, on April 27, 2018, Enforcement served Respondent with the Complaint and Notice of Complaint by certified mail addressed to him at Respondent's last-known residential address as recorded in the Central Registration Depository ("Respondent's CRD Address").⁴ That was sufficient for constructive notice, but there also is evidence that Respondent actually received the Complaint and Notice of Complaint—the copy sent by certified mail to Respondent's CRD address was delivered and signed for on May 9, 2018.⁵ In addition, Enforcement sent the Complaint and Notice of Complaint to Respondent's email address, and received a delivery notification for that email.⁶ Enforcement received no response from Respondent, and Respondent filed no Answer with the Office of Hearing Officers.⁷

On May 29, 2018, Enforcement served Respondent with the Complaint and a Second Notice of Complaint by first-class and certified mail addressed to Respondent's CRD Address. Again, there is evidence that he received actual notice—that certified mailing was delivered and signed for on May 31, 2018.⁸ In addition, Enforcement sent the Complaint and Notice of complaint to Respondent's email address, and received a delivery notification for that email.⁹ Again, Enforcement received no response, and Respondent filed no Answer with the Office of Hearing Officers.¹⁰

The Second Notice of Complaint advised Respondent that, in accordance with FINRA Rule 9215, his failure to file an Answer or otherwise respond to the Complaint by June 15, 2018, would allow the Hearing Officer to treat the allegations in the Complaint as admitted by Respondent and to enter a default decision against him pursuant to FINRA Rule 9269.¹¹

The Complaint and both Notices of Complaint were served in compliance with FINRA Rules 9131 and 9134, and there is evidence that Respondent actually received the documents. Although he received both constructive and actual notice of the proceeding, along with the warning that a failure to respond could lead to a default decision imposing sanctions, he chose not to file an Answer or otherwise respond. I find that Respondent has defaulted and, pursuant to FINRA Rule 9269, deem the factual allegations in the Complaint admitted.

⁴ Decl. ¶ 6; CX-1, at 1.

⁵ Decl. ¶¶ 6-7; CX-2, at 1, 5.

⁶ Decl. ¶¶ 6-7; CX-2, at 7-8.

⁷ Decl. ¶ 11.

⁸ Decl. ¶¶ 8-9; CX-3, at 1, 4. CX-3, at 4.

⁹ CX-3, at 6-7.

¹⁰ Decl. ¶ 11.

¹¹ Decl. ¶ 10.

E. The Four Customers' Purchases and Sales

Between December 2014 and December 2015, Respondent recommended that four customers make substantial investments totaling more than \$1.36 million in the Issuer, a company owned and operated by his long-time friend, KB. Respondent provided the customers with no written materials describing the investment. The Issuer described itself on its website as a “premium finance company that specializes in financing both commercial and personal insurance policies.”¹²

What little Respondent knew about the Issuer, he gathered from statements made to him by KB. He never conducted any investigation of the Issuer, or its existing business, or its sources of funding, or its financial condition. Respondent never reviewed the Issuer’s books or financial statements and did not know the sources of the Issuer’s funds, the identity of its customers, the amount of its outstanding loans, the terms of its loans, the default rate on its loans, its overhead, or the number of its employees.¹³

Respondent did not disclose to his customers that he had a financial interest in the funds they thought they were investing in the Issuer. Three of Respondent’s four customers did not write their investment checks to the Issuer. Instead, they wrote checks to another company, an affiliate of the Issuer (the “Affiliate”), which was also controlled by KB. Respondent had signature and withdrawal authority on the Affiliate’s bank account, and, thus, had access to the investor funds deposited in that account, which he did not disclose to his customers.¹⁴ In fact, Respondent admitted in testimony given in an on-the-record interview (“OTR”) that he had withdrawn funds from the Affiliate’s bank account.¹⁵

Respondent also did not disclose his financial ties to KB, which could have made his customers skeptical of his objectivity. KB had “loaned” Respondent over \$100,000 and then “forgiven” the purported loan.¹⁶

Respondent provided the customers no documentation memorializing their investments in the Issuer. Rather, he directed them to check the status of their investment by checking the Issuer’s website.¹⁷

Furthermore, Respondent recommended that the four customers invest in the Issuer even though, as discussed below, they had little to no investment experience and their circumstances led them to have highly conservative investment objectives and low risk tolerance. He made

¹² Compl. ¶¶ 1, 5, 16-18.

¹³ Compl. ¶¶ 1-2, 4, 16-18, 22-25.

¹⁴ Compl. ¶¶ 4, 33, 49, 68, 79.

¹⁵ Decl. ¶ 14.

¹⁶ Compl. ¶ 5.

¹⁷ Compl. ¶¶ 1, 34-35, 51, 69, 80.

false and misleading statements to the customers that appeared designed to reassure them that the investment was consistent with their conservative objectives and low risk tolerance, when, in fact, it was not.

Respondent made some recommendations of the Issuer to these four customers while he was registered with Gould, but he never provided Gould with written notice of the transactions.¹⁸ Respondent made additional recommendations to invest in the Issuer after he started his own broker-dealer firm, Sisk, but he failed to preserve customer emails, text messages, facsimiles, and account summaries he created for and sent to customer JS and others.¹⁹

1. Customer LS

In December 2014, while he was registered with Gould, Respondent recommended that LS invest in the Issuer. LS was then a 57-year-old former receptionist, who had retired on disability due to injuries suffered in an automobile accident. She had available for investment a lump-sum settlement that she had received from a lawsuit connected to the accident, but she had no prior investment experience. She was a conservative investor whose investment objective was the preservation of capital.²⁰

Respondent described the investment to LS as an investment contract purporting to have a two-year maturity, with 6 percent annual interest paid quarterly. He told LS the investment was “similar to a CD” and “fully guaranteed.” He described the Issuer as a “premium finance company” that was “approved by the banking industry.” Respondent knew that he had no basis for making such statements since he had done no due diligence on the Issuer and had merely relied on what his friend KB, an interested party, told him. In fact, it appeared that KB was running a spurious investment scheme. The investment was not similar to a CD or fully guaranteed, nor was the Issuer a premium finance company or approved by the banking industry.²¹

On or about December 11, 2014, LS agreed to invest \$500,000 in the Issuer pursuant to the terms Respondent described to her. She wrote a check to the Affiliate. She received no contract or note to memorialize her investment.²²

2. Customer JS

In January 2015, while he was registered with Gould, Respondent recommended that JS invest in the Issuer. JS was then a 79-year-old learning specialist, who worked with children suffering from dyslexia and attention deficit/hyperactivity disorder and the teachers who taught

¹⁸ Compl. ¶¶ 28-29, 32, 46, 49, 66-68, 77-78, 121-23.

¹⁹ Compl. ¶¶ 52-55, 129.

²⁰ Compl. ¶¶ 26-28.

²¹ Compl. ¶¶ 1, 22-24, 29-32.

²² Compl. ¶¶ 32-35.

them. JS was on the point of retiring. Prior to her investment in the Issuer, she had invested exclusively in mutual funds, and she was a conservative investor.²³

Respondent told JS that the investment would pay 4 percent interest and mature after two years, in January 2017.²⁴

Respondent told JS that she should sell some of her mutual fund holdings and use the funds to invest in the Issuer because she otherwise would not have enough for her retirement. Respondent did not tell her that he had conducted no due diligence on the Issuer and had no basis for saying that an investment in the Issuer would be better for her retirement future than her mutual fund investments.²⁵

Based on Respondent's recommendations, JS liquidated more than \$298,000 in mutual fund holdings to finance her investment in the Issuer. Respondent effected the mutual fund liquidations on her behalf. On or about January 21, 2015, JS wrote a check for \$300,000 to the Affiliate, intending it as an investment in the Issuer, and gave the check to Respondent.²⁶

After Respondent opened his own broker-dealer firm, Sisk, he recommended that JS invest more money in the Issuer. On or about November 20, 2015, JS invested another \$65,000 by writing a check to the Affiliate, and on or about December 7, 2015, she invested another \$20,000 via an electronic transfer to the Affiliate. She liquidated additional mutual fund holdings to finance this third investment in the Issuer. JS received no contract or note to memorialize her investments.²⁷

3. Customer BV

In March 2015, while he was registered with Gould, Respondent recommended that BV invest in the Issuer. BV was then a 66-year-old unemployed administrative assistant with a conservative risk tolerance whose investment objective was the preservation of capital.²⁸

Respondent told BV that the investment was a CD from the Issuer that would pay 4 percent interest and mature in two years. She agreed to invest on these terms and mailed a check to Respondent for \$100,000, payable to the Issuer. In September 2015, while still at Gould, Respondent recommended that BV invest an additional \$80,000 on the same terms, which she did by means of a check made payable to the Affiliate. At Respondent's request, she mailed the

²³ Compl. ¶¶ 45-46.

²⁴ Compl. ¶ 47.

²⁵ Compl. ¶¶ 45-46, 48.

²⁶ Compl. ¶¶ 49-50.

²⁷ Compl. ¶¶ 13, 51-56.

²⁸ Compl. ¶¶ 65-66.

check on or about September 9, 2015, to the Issuer. She received no contract or note to memorialize her investment.²⁹

4. Customer LM

Sometime in spring or summer 2015, Respondent recommended that LM use some of the proceeds from the 2015 sale of her house to invest in the Issuer. LM was a 52-year-old bookkeeper with a conservative risk tolerance.³⁰

Respondent described the investment to LM as a 12-month “loan,” with annual interest of 10 percent paid quarterly. She agreed to invest \$300,000 on those terms, and on or about July 3, 2015, she wrote a check for that amount to the Affiliate, which she mailed to Respondent. She received no contract or note to memorialize her investment.³¹

F. The Four Customers’ Financial Losses

All four of Respondent’s customers lost money, and Respondent offered little or no assistance to them when they attempted to recover their funds. Rather, he appeared to evade their pleas for the return of their money.

1. Customer LS

The purported maturity date for the \$500,000 investment by LS was December 2016. A few months before, in September 2016, LS told Respondent that she needed to withdraw \$70,000 to pay for her daughter’s wedding. In January 2017, after the ostensible maturity date for her investment, LS received the \$70,000 she had requested the previous September. She did not, however, receive the remainder of the principal owing to her. After various inquiries to KB and Respondent, Respondent promised he would pay her \$50,000 of her principal and one-third of the remaining principal every 30 days. He never did. After an attorney contacted Respondent on LS’s behalf, she received an additional \$50,000 from the Issuer. However, she was owed much more. LS recovered only \$120,000 of her \$500,000 principal investment and received just under \$73,000 in interest payments.³²

2. Customer JS

The purported maturity date for the initial \$300,000 investment by JS was January 2017. She contacted Respondent in January 2017 to obtain her principal and the accrued interest on it. He told her that the Issuer would pay her the accrued interest right away but would only pay back her principal investment over time. On or about January 26, 2017, she received \$26,699 from the

²⁹ Compl. ¶¶ 66-69.

³⁰ Compl. ¶¶ 75-77.

³¹ Compl. ¶¶ 78-80.

³² Compl. ¶¶ 36-44.

Issuer. She emailed KB on January 28 and 29, 2017, inquiring about her money. KB said he would consult Respondent. JS sent numerous text messages to Respondent and called him many times. He did not return her calls and ignored most of her text messages. When he did respond to her text messages, he gave her a series of excuses for not obtaining the return of her money, including holidays and the supposed death of his father. He stopped responding to her text messages after April 2017. JS has received no further interest or principal payments on her initial \$300,000 investment, or any interest or principal payments on the additional \$85,000 she invested in late 2015.³³

3. Customer BV

BV's initial investment of \$100,000 had a purported maturity date in March 2017. She received the principal and interest on that investment within 30 days of the maturity date. Her second investment of \$80,000 had a purported maturity date in September 2017. When she did not receive any principal or interest on the second investment, she contacted Respondent by text message. Initially, Respondent responded with a series of excuses such as being on conference calls, being too busy with his tax business, and having health issues. After September 2017, Respondent stopped responding to BV's text messages. She turned to KB, contacting him by telephone and email. He told her she needed to speak to Respondent. When she did reach Respondent, he said he was having "family issues." BV has not received any principal or interest on her second investment of \$80,000.³⁴

4. Customer LM

LM's \$300,000 investment in July 2015 was supposed to be a one-year loan with quarterly interest payments. LM stopped receiving any interest payments after April 2016. At maturity, Respondent purportedly renewed the loan for another 12 months without informing LM that he had done so. LM contacted Respondent in an attempt to obtain the interest payments she had been promised and the return of her principal. He was mostly unresponsive, but when he did respond he offered various excuses, such as the need to catch up from tax season, various emergencies, a funeral, personal and family medical issues, doctor visits, a sick friend, internet and phone service issues, and work overload. In June and August of 2016, LM received payments totaling \$37,500 that were characterized as interest payments. When these were added to earlier payments, she received a total of \$58,548 in interest. In August 2017, she received a payment of \$25,000 denominated as a return of principal. Since that time, she has received no further payments of any kind, and she is still owed \$275,000 of her principal.³⁵

³³ Compl. ¶¶ 47, 58-64.

³⁴ Compl. ¶¶ 66-67, 70-72, 74.

³⁵ Compl. ¶¶ 78, 81-87.

G. Respondent's Handling of Requests for Information

After JS complained to FINRA's Senior Helpline, FINRA began an investigation. OWB issued a request to Respondent for documents and information pursuant to FINRA Rule 8210, which asked for, among other things, "[a] list of the last four numbers of each personal, business, bank, and brokerage account that you owned, controlled, or in which you had a beneficial interest [between January 1, 2014 and March 31, 2017] ..." and a copy of all monthly statements during that period for each account identified.³⁶

Respondent's response to OWB's initial request was both late and incomplete. His response was due on May 26, 2017, but it was not received until June 2, 2017. He failed to include in the response information for the Affiliate's bank account on which Respondent had signature and withdrawal authority.³⁷

Respondent was untimely in responding to two additional OWB requests for information. On July 20, 2017, OWB issued another request for documents and information pursuant to Rule 8210. When Respondent failed to respond by the August 3, 2017 deadline, OWB issued a second Rule 8210 request. The second request, issued on August 7, 2017, required a response by August 14, 2017. Respondent still did not respond. In fact, Respondent only responded some three months after the last due date, on November 16, 2017; and he only provided a response after FINRA had instituted an expedited proceeding against him pursuant to FINRA Rule 9552, and had suspended him from associating with any FINRA member firm as part of that expedited proceeding.³⁸

Respondent did not respond at all to two additional Rule 8210 requests for information Enforcement issued on January 25, 2018, and February 2, 2018.³⁹

H. Respondent's Violations

1. Securities Fraud

Enforcement charged Respondent with violating Section 10(b) of the Exchange Act⁴⁰ and Exchange Act Rule 10b-5(b) thereunder,⁴¹ by making materially false and misleading statements

³⁶ Compl. ¶¶ 132-33.

³⁷ Compl. ¶ 135.

³⁸ Compl. ¶¶ 136-38.

³⁹ Compl. ¶¶ 139-41.

⁴⁰ 15 U.S.C. § 78j(b).

⁴¹ 17 C.F.R. § 240.10b-5(b).

in connection with the sale of the investments to the four customers.⁴² Enforcement requests a finding that this violation of federal securities law was willful.

Section 10(b) of the Exchange Act broadly prohibits manipulative or deceptive conduct in violation of rules promulgated by the Securities and Exchange Commission (“SEC”) to protect investors. The statute provides, “It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails ... [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”⁴³

Rule 10b-5 is an investor protection rule promulgated by the SEC.⁴⁴ In pertinent part, in connection with any purchase or sale of a security, Rule 10b-5(b) prohibits the making of any false statement of material fact or the omission of a material fact where its disclosure is necessary to prevent what is said from being misleading. This portion of the Rule provides that a person shall not “mak[e] any untrue statement of a material fact” or “omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading ... in connection with the purchase or sale of any security.”⁴⁵

In general terms, a broker who recommends a security has a duty to be truthful in what he or she says. It is not enough that affirmative representations be true, however, if omitted facts are necessary to avoid a misleading impression. Where a broker recommends an investment, he or she must disclose adverse facts about the investment,⁴⁶ and other facts that might cast doubt on the objectivity and trustworthiness of the recommendation, such as where the broker has a

⁴² Enforcement also charged in the first cause of action that Respondent violated FINRA Rules 2020 and 2010. Rule 2020 proscribes fraud in language similar to Section 10(b), and Rule 2010 requires members and their associated persons to “observe high standards of commercial honor and just and equitable principles of trade” in the conduct of their business.

Because I conclude that Respondent violated Section 10(b) and Rule 10b-5, it is unnecessary to discuss separately Respondent’s violation of FINRA Rules 2020 and 2010 by the same misconduct. Conduct in violation of Section 10(b) and Rule 10b-5 violates both Rules. *Dep’t of Enforcement v. Casas*, No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *25 n.14 (NAC Jan. 13, 2017) (citing *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *15 (Mar. 31, 2016) (finding that omissions of material fact that violate Section 10(b) of the Exchange Act also violate FINRA Rules 2020 and 2010)).

⁴³ 15 U.S.C. § 78j(b).

⁴⁴ 17 C.F.R. 240.10b-5.

⁴⁵ *Id.*

⁴⁶ *Dep’t of Enforcement v. Luo*, No. 2011026346206, 2017 FINRA Discip. LEXIS 4, at *17-19 (NAC Jan. 13, 2017) (citing *De Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293, 1302 (2d Cir. 2002)); *Dep’t of Mkt. Regulation v. Burch*, No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *23 (NAC July 28, 2011) (“A registered representative owes such a duty to his clients to disclose material information fully and completely when recommending an investment.”).

personal interest in the recommended transaction or financial ties to the issuer.⁴⁷ “When making affirmative representations with respect to the purchase or sale of a security there is an ever-present duty not to mislead.”⁴⁸

The widely recognized elements of a civil enforcement action for violation of Section 10(b) and Rule 10b-5(b) are the following: (i) use of the so-called “jurisdictional means,” an instrumentality of interstate commerce; (ii) in connection with the purchase or sale of a security; (iii) and the making of false statements and/or misleading omissions; (iv) of material fact; (v) with scienter.⁴⁹ Each of the elements has been established here.

First, Respondent used the tools of interstate commerce. LM and BV mailed their investment checks to Respondent, and Respondent provided all four investors with logins and passcodes to access a portal on the Issuer’s website to view the status of their investments. Respondent also used the telephone to effect the liquidations of JS’s mutual fund assets to obtain the funds to invest in the Issuer.⁵⁰

Second, the misconduct was “in connection with” the purchase of securities. Although Respondent provided no documentation to his customers, and some of the checks were written to the Affiliate and not the Issuer, it is plain that Respondent led his customers to believe that their funds were going to be used to purchase a security—either an investment contract or a loan note purchased as an investment. This is sufficient to establish the “in connection with” element of the claim.

⁴⁷ See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153 (1972) (holding that securities holders “had the right to know that the defendants were in a position to gain financially from their sales”); *Dep’t of Enforcement v. The Dratel Group*, No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *63-64 (NAC May 2, 2014) (“A reasonable investor surely would find material [the respondent’s] subordination of discretionary customers’ interests to his personal interests.”).

⁴⁸ *Luo*, 2017 FINRA Discip. LEXIS 4, at *17-19 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 241 n.18 (1988)).

⁴⁹ Sometimes materiality is combined in a single element with false and misleading statements. See *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244, 1248 (11th Cir. 2012); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996); *SEC v. PIMCO Advisors Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 463-64 (S.D.N.Y. 2004).

⁵⁰ Compl. ¶ 99.

Courts have held that even fictitious securities trading satisfies the “in connection with” requirement.⁵¹ These decisions rely on the Supreme Court’s decision in *SEC v. Zandford*,⁵² where the Court held that conduct is “in connection with” a purchase or sale of a security if the fraudulent activity “touches” or “coincides” with a securities transaction.⁵³ As the Court of Appeals for the Seventh Circuit wryly observed in *SEC v. Lauer*, where the defendant promoted a non-existent security, “It would be a considerable paradox if the worse the securities fraud, the less applicable the securities laws.”⁵⁴

Moreover, when Respondent recommended to JS that she sell a large portion of her mutual fund holdings in order to invest in the Issuer, his false and misleading statements were in connection with the sale of those securities.

Third, as described above, Respondent made false statements of fact to his customers regarding the risks associated with the investment, such as comparing the investment to a CD and saying it was guaranteed and approved by the banking industry. His false statements were designed to create the impression that investment in the Issuer was a conservative, low-risk proposition, when it was not.

Respondent also misled his customers into thinking that his recommendation was trustworthy and disinterested by failing to disclose that he had access to their funds through the Affiliate’s bank account, and failing to disclose that KB had given him more than \$100,000 as a purported loan, which KB then forgave.

Fourth, the facts that Respondent either falsely stated or misleadingly omitted were material. Materiality “depends on the significance the reasonable investor would place on the ...

⁵¹ *In re J.P. Jeanneret Associates, Inc. (Securities Actions)*, 769 F. Supp. 2d 340, at *361-63 (S.D.N.Y. 2011) (collecting cases). In *Jeanneret*, a case related to the Madoff Ponzi scheme, the court noted that “all of my colleagues who have encountered this issue in Madoff-related cases have concluded that, in the context of his Ponzi scheme, the ‘in connection with’ requirement is satisfied by his phony purchases and sales.” *Id.* at 363.

See also Instituto de Prevision Militar v. Merrill Lynch, 546 F.3d 1340 (11th Cir. 2008) (actual purchase of securities not necessary where money had been deposited for purpose of investing in securities); *Grippio v. Perazzo*, 357 F.3d 1218 (11th Cir. 2004) (investor sufficiently alleged securities fraud where he alleged broker had accepted money for the purchase of securities even though broker never purchased securities); *Schnorr v. Schubert*, 2005 U.S. Dist. LEXIS 45757 (W.D. Okla. Aug. 18, 2005) (plaintiffs’ claim was for securities fraud where they had deposited money in non-existent trading accounts and defendants stole the money).

⁵² *SEC v. Zandford*, 535 U.S. 813, 819-21 (2002).

⁵³ *Id.* In *Zandford*, the Supreme Court gave deference to the SEC’s interpretation of the “in connection with” requirement in *In re Bauer*, 26 S.E.C. 770 (1947). In *Bauer*, the SEC had concluded that the “in connection with” requirement could be satisfied even if securities were never actually purchased or sold, where an investor agreed to purchase securities and handed over funds for that purpose, but the broker simply pocketed the money.

⁵⁴ *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (solicitation to sell prime bank instrument that did not exist constituted securities fraud).

information.”⁵⁵ “A fact is considered material if there is a substantial likelihood that a reasonable investor would have considered the misrepresentation important in making an investment decision and disclosure of the misstated fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.”⁵⁶ “Material facts include those facts that may affect the desires of investors to buy, sell or hold a particular security.”⁵⁷

In this case, Respondent’s false descriptions of the investment as guaranteed, comparable to a CD, and approved by the banking industry were material to his customers. They were inexperienced and conservative investors with low risk tolerance. The truth would have made a difference to them had they known it. Any reasonable investor would find it material that the impression Respondent created—of a conservative, low-risk investment—was false. Similarly, Respondent’s failure to disclose that he had access to the money his customers gave him to invest in the Issuer, and his failure to disclose his financial connection to KB, were material. His customers would have wanted to know that information so that they could better evaluate Respondent’s objectivity and independence when he recommended that they invest in his friend KB’s company. Any reasonable investor would want to know facts bearing on the objectivity and independence of the person recommending an investment.

Fifth, Respondent acted with scienter, which is “a mental state embracing intent to deceive, manipulate, or defraud.”⁵⁸ Scienter includes both intentional and reckless conduct.⁵⁹ Conduct is reckless if it represents “an extreme departure from the standards of ordinary care” such that the [respondent] knew or “must have been aware of” the “danger of misleading” investors.⁶⁰

The false assurances that the investment was guaranteed and comparable to a CD, the failure to disclose Respondent’s access to the investors’ funds, and the failure to disclose Respondent’s financial connection to KB, were all extreme departures from the standards of ordinary care such that Respondent had to be aware of the danger of misleading investors. At a

⁵⁵ *Dep’t of Enforcement v. Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *32 (NAC Dec. 29, 2015) (quoting *Basic Inc.*, 485 U.S. at 240), *aff’d*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016).

⁵⁶ *Morgan Keegan*, 678 F.3d at 1245-47; *Dep’t of Enforcement v. Escarcega*, No. 2012034936005, 2017 FINRA Discip. LEXIS 32, at *30 (NAC July 20, 2017) (citing *Basic Inc.*, 485 U.S. at 231-32).

⁵⁷ *Escarcega*, 2017 FINRA Discip. LEXIS 32, at *30 (citing *Dep’t of Enforcement v. Apgar*, No. C9B020046, 2004 NASD Discip. LEXIS 9, at *13 (NAC May 18, 2004) (citing *SEC v. Hasho*, 784 F. Supp. 1059 (S.D.N.Y. 1992)).

⁵⁸ *Dep’t of Enforcement v. Meyers Assoc.*, No. 2013035533701, 2017 FINRA Discip. LEXIS 47, at *27 (Bd. of Gov. Dec. 22, 2017) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)).

⁵⁹ *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 SEC LEXIS 3142, at *26 (Nov. 14, 2008), *aff’d*, 595 F.3d 1034 (9th Cir. 2009); *Dep’t of Enforcement v. Ahmed*, No. 2012034211301, 2015 FINRA Discip. LEXIS 45, at *77 n.78 (NAC Sept. 25, 2015) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007)), *aff’d*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078 (Sept. 28, 2017).

⁶⁰ *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *26-29 (May 27, 2015).

minimum, his false statements and misleading omissions counted as reckless, if not intentional, misconduct.

Even more fundamental, Respondent appears to have sold the customers a phony investment that was really part of a fraudulent scheme run by KB. He did so without conducting any due diligence, and without providing his customers any documentation to support the recommendation or to memorialize the terms of their investment. Respondent knowingly prevented his customers from verifying anything he told them and provided them no means of asserting, protecting, or vindicating their rights. In the circumstances of this case, Respondent's behavior constituted intentional deception and fraud.

Respondent's behavior when his customers sought to recover the money owed to them bolsters the conclusion that he knowingly and intentionally deceived them. Instead of vigorously investigating why they had not received the money that was owed to them and assisting them in vindicating their rights, he evaded their pleas for assistance. In at least one instance, Respondent told his customer that he would repay her principal over time, apparently to lull her into inaction. He never did repay her.

I find not only that Respondent committed securities fraud, but that he also did so willfully. Misconduct is willful in the context of the securities laws if the person "intentionally commit[ted] the act" that constitutes the violation, regardless of whether he understood that he was violating a particular rule.⁶¹ Willful acts are voluntary, in contrast to acts that are inadvertent or coerced. All that is necessary is that the person intentionally commits the act that constitutes the violation.⁶² Respondent in this case acted willfully because he "intentionally commit[ted] the act which constitutes the violation."⁶³ Pursuant to Sections 3(a)(39)(F) and 15(b)(4)(D) of the Exchange Act, the finding that Respondent willfully violated federal securities laws subjects him to statutory disqualification.⁶⁴

2. Suitability

FINRA Rule 2111 states that an associated person "must have a reasonable basis to believe that a recommended transaction ... is suitable for the customer." The Rule's Supplementary material provides guidance and describes the suitability rule as rooted in concepts

⁶¹ *Mathis v. SEC*, 671 F.3d 210, 215 (2d Cir. 2012).

⁶² *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *15, *19-20 & nn.22-23 (Mar. 15, 2016). See also *Dep't of Enforcement v. Riemer*, No. 2013038986001, 2017 FINRA Discip. LEXIS 38, at *13-16 (NAC Oct. 5, 2017), *appeal docketed*, No. 3-18262 (Oct. 27, 2017).

⁶³ *David Adam Elgart*, Exchange Act Release No. 81779, 2017 SEC LEXIS 3097, at *13 (Sept. 29, 2017) (quoting *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)); see also *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *38 (Apr. 18, 2013) (noting, in making findings of willfulness, that respondent's conduct was neither "involuntary nor inadvertent"); *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *42 (Nov. 9, 2012) (same).

⁶⁴ See 15 U.S.C. § 78c(a)(39)(F); 15 U.S.C. § 78o(b)(4)(D).

of fairness. “Implicit in all member and associated person relationships with customers ... is the fundamental responsibility for fair dealing.” Sales efforts must be undertaken “only on a basis that can be judged as being within the ethical standards of FINRA rules”⁶⁵ The suitability rule “is intended to promote ethical sales practices and high standards of professional conduct.”⁶⁶

As pertinent here, suitability requires both reasonable-basis suitability and customer specific suitability. Reasonable-basis suitability requires that an associated person conduct “reasonable diligence” sufficient to provide him with “an understanding of the potential risks and rewards” associated with the recommended security.⁶⁷ The lack of such an understanding when recommending a security violates the suitability rule because understanding is a prerequisite for analyzing suitability.⁶⁸ As the SEC long ago declared, “[A] broker may violate the suitability rule if he fails so fundamentally to comprehend the consequences of his own recommendation that such recommendation is unsuitable for any investor”⁶⁹ Customer-specific suitability requires that an associated person have a reasonable basis to believe that the recommendation is suitable for the particular customer based on that customer’s investment profile.

In this case, Respondent conducted no meaningful investigation of the Issuer and relied almost entirely on what KB told him. He did not understand the potential risks and rewards inherent in the recommendation and had no reasonable basis for believing the investment suitable for any investor.

With respect to customer-specific suitability, it is plain that Respondent recommended the investment despite its unsuitability for the particular customers. All of them were inexperienced investors who had highly conservative investment objectives and low risk tolerance. As to three of them, there were additional reasons the investment was unsuitable. LS had retired on disability at a relatively young age,⁷⁰ which meant she had to make her money go farther. JS, an elderly person in the process of retiring, liquidated much of her mutual fund portfolio to invest more than 35 percent of her investment portfolio in the Issuer. This over-concentration added to the unsuitability of the investment.⁷¹ BV was elderly and unemployed,⁷² which added to her need for conservative, low-risk investments.

⁶⁵ Rule 2111, Supplementary Materials, .01 (General Principles).

⁶⁶ *Id.*

⁶⁷ Rule 2111, Supplementary Materials, .05(a) (Components of Suitability Obligations).

⁶⁸ *E.g., F.J. Kaufman and Co.*, Exchange Act Release No. 27535, 1989 SEC LEXIS 2376, at *10-11 & nn.16-18 (Dec. 13, 1989) (collecting cases).

⁶⁹ *Id.* at *11.

⁷⁰ Compl. ¶ 26.

⁷¹ Compl. ¶¶ 45-46, 57.

⁷² Compl. ¶ 65.

By failing to have a reasonable basis for recommending the investments, and by failing to have a reasonable basis for determining that they were suitable to these particular investors, Respondent violated FINRA Rule 2111. Moreover, a violation of FINRA Rule 2111 is inconsistent with the “high standards of commercial honor and just and equitable principles of trade” required by FINRA Rule 2010, and is therefore also violation of FINRA Rule 2010.⁷³

3. Selling Away

NASD Rule 3040 governs private securities transactions outside the regular course or scope of a broker’s employment with a securities firm, sometimes referred to as “selling away” from one’s firm.⁷⁴ NASD Rule 3040 prohibits an associated person from “participating” in any private securities transaction “in any manner” without providing prior written notice to the person’s firm and describing in detail the transaction and the nature of the person’s participation. NASD Rule 3040 further provides that, if compensation is involved, the person’s firm had to approve or disapprove participation in the transaction. If the firm approves such a transaction, it is required to supervise the transaction. Even if no compensation is involved, the firm is allowed to impose conditions on any participation in a private securities transaction. In this case, Respondent’s firm, Gould, prohibited “selling away.” The firm did not permit its associated persons to participate in *any* private securities transaction away from the firm, regardless of whether compensation was involved.

Respondent participated in five private securities transactions with the four customers while registered with Gould: LS, December 2014; JS, January 2015; BV, March 2015 and September 2015; and LM, July 2015. These five transactions generated \$1.28 million for the Issuer. They were all outside the regular course or scope of Respondent’s employment with the firm, and Respondent failed to provide the firm with written notice. Respondent’s conduct therefore violated NASD Rule 3040 and FINRA Rule 2010.⁷⁵

4. Books and Records

FINRA Rule 4511 provides, in pertinent part, “Members shall make and preserve books and records as required under FINRA rules, the Exchange Act and the applicable Exchange Act rules.” Exchange Act Rule 17a-4(b)(4) requires that every broker-dealer preserve for a period of not less than three years, the first two years in an accessible place, “originals of all communications received and copies of all communications sent by such member, broker or

⁷³ *E.g., Steven J. Gluckman*, 54 S.E.C. 175, 185 (1999) (“[A] violation of another Commission or [FINRA] rule or regulation constitutes a violation of [FINRA] Rule 2010.”).

⁷⁴ NASD Rule 3040 was in effect when Respondent engaged in the five transactions charged as selling away and the NASD Rule applies to his conduct. But NASD Rule 3040 was superseded by FINRA Rule 3280 on September 21, 2015. The FINRA Rule is substantially the same as the NASD Rule, however, and the Sanction Guidelines for selling away violations remained the same under FINRA Rule 3280 as they had been under NASD Rule 3040. For the sake of convenience, this decision speaks of NASD Rule 3040 in the present tense.

⁷⁵ Compl. ¶¶ 121-23.

dealer (including interoffice memoranda and communications) relating to his business as such.”⁷⁶

From September 2015 through January 2018, while registered with Sisk, Respondent caused Sisk to violate Exchange Act Rule 17a-4 and FINRA Rules 4511 and 2010 by failing to preserve customer emails, text messages, facsimiles, and account summaries that he created for and sent to JS and others.⁷⁷ By this conduct, he violated FINRA Rules 4511 and 2010.

5. FINRA Rule 8210

FINRA Rule 8210(a)(1) provides in relevant part that FINRA staff “shall have the right” to require a member, associated person, or other person subject to FINRA’s jurisdiction “to provide information orally, in writing, or electronically” or to testify under oath or affirmation “with respect to any matter involved in the investigation, examination, complaint, or proceeding.”⁷⁸ Rule 8210(a)(2) provides that FINRA staff shall have the right to “inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation.”

FINRA Rule 8210(c) requires compliance with any Rule 8210 request. Rule 8210(c) prohibits any member or associated person from failing to provide information or testimony or access to books, records, or accounts pursuant to a Rule 8210 inquiry. This provision contains no exceptions. The SEC describes the Rule as “‘unequivocal’ with respect to an associated person’s obligation to cooperate with [FINRA’s] information requests.”⁷⁹

Rule 8210 enables FINRA to conduct meaningful examinations and investigations in order to detect misconduct and protect the public interest. FINRA relies heavily on Rule 8210, and the SEC has “repeatedly stressed the importance of cooperation in NASD investigations ... [and] emphasized that the failure to provide information undermines NASD’s ability to carry out its self-regulatory functions.”⁸⁰ Indeed, Rule 8210 is widely accepted as FINRA’s most important tool for investigating potential wrongdoing primarily because FINRA lacks subpoena authority and has limited power to compel the production of evidence from its members.⁸¹ A failure to provide information requested pursuant to Rule 8210 is regarded as “a serious violation because it subverts NASD’s [and FINRA’s] ability to execute its regulatory

⁷⁶ Compl. ¶¶ 126-27.

⁷⁷ Compl. ¶ 129.

⁷⁸ Under FINRA Rule 0140, persons associated with a member have the same duties as the member.

⁷⁹ *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008).

⁸⁰ *Joseph Patrick Hannan*, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998) (citations omitted). NASD was FINRA’s predecessor.

⁸¹ See *John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *57 n.67 (Nov. 12, 2010), *petition for review denied*, 449 F. App’x. 886 (11th Cir. 2011).

responsibilities.”⁸²FINRA is therefore entitled to the “full and prompt cooperation” of all persons subject to its jurisdiction when investigative requests are made by members of its staff.⁸³

Respondent did not comply with his responsibility to provide documents and information pursuant to FINRA Rule 8210. His response to the initial OWB request was both untimely and incomplete. He only responded to OWB’s next two Rule 8210 requests months after a response was due, and only after FINRA instituted a proceeding against him pursuant to FINRA Rule 9552 and suspended him from associating with any FINRA member firm as part of that proceeding. Then Respondent completely failed to respond to two more Rule 8210 requests from Enforcement. By this conduct, he violated FINRA Rules 8210 and 2010.

IV. Sanctions

In considering the appropriate sanction for a violation, adjudicators in FINRA disciplinary proceedings look to FINRA’s Sanction Guidelines (“Guidelines”),⁸⁴ which contain sanction recommendations for many specific violations. The Guidelines also contain overarching Principal Considerations and General Principles that are applicable in all cases. The Guidelines should be applied to protect investors, strengthen market integrity, and increase public confidence in the securities markets.⁸⁵

A. Securities Fraud

There are specific recommendations in the Guidelines for violations that involve fraud, misrepresentations, or omissions of material fact in violation of Section 10(b), Rule 10b-5, and FINRA Rules 2020 and 2010. Intentional or reckless misconduct may result in a fine ranging from \$10,000 to \$146,000. Disgorgement or restitution may also be ordered. And adjudicators should strongly consider barring an individual for intentional or reckless misconduct. Only if mitigating factors predominate should a suspension be imposed instead of a bar.⁸⁶

There are no mitigating factors in this case, so a bar is more appropriate than a suspension. Moreover, there are number of aggravating factors: the customers were inexperienced and unsophisticated,⁸⁷ the customers lost a substantial amount money as a result of Respondent’s misconduct,⁸⁸ and, as discussed below in connection with Respondent’s violation

⁸² *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *20-21 (Sept. 10, 2010) (“Without subpoena power, [FINRA] must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate.”).

⁸³ *Michael David Borth*, Exchange Act Release No. 31602, 1992 SEC LEXIS 3248, at *7 (Dec. 16, 1992).

⁸⁴ FINRA Sanction Guidelines (2018), <http://www.finra.org/industry/sanction-guidelines>.

⁸⁵ Guidelines at 1-2.

⁸⁶ Guidelines at 89.

⁸⁷ Guidelines at 8, Principal Consideration 18.

⁸⁸ Guidelines at 7, Principal Consideration 11.

of FINRA Rule 8210, he impeded the investigation.⁸⁹ Respondent also attempted to lull his customers into inaction and to conceal his misconduct by offering excuses for his failure to recover their money and evading their inquiries,⁹⁰ was intentional or reckless in his misconduct,⁹¹ and as a result of his misconduct, was able to access investor funds.⁹²

A bar is further supported by Enforcement's discovery since the conclusion of its investigation of similar uncharged conduct, which may be considered in imposing sanctions.⁹³ Enforcement has become aware of an additional fourteen customers who invested a total of more than \$4.5 million in the Issuer and who have not been repaid.⁹⁴ Most of them invested based on Respondent's recommendations.⁹⁵ These "investments" began in 2010 and continued through July 2017.⁹⁶

Finally, it is aggravating that Respondent has been arrested in connection with his activities connected with the Issuer. He was arraigned in a New York court on felony larceny and fraud charges on June 7, 2018. He is currently released on bond.⁹⁷

It is in the public interest and for the protection of investors to bar Respondent from associating in any capacity with any FINRA member firm.

It also is appropriate to order Respondent to pay the four customers restitution. They invested more than \$1.36 million and lost the majority of those funds. Respondent's misconduct was the proximate cause of these losses, because they invested based on his false and misleading statements. No reasonable investor would have invested in the Issuer if Respondent had disclosed the true facts. Enforcement calculated the amount of restitution by subtracting any money that one of the investors recovered, whether denominated principal or interest, from the amount that investor paid for the investment. Based on that calculation, Respondent should pay the four investors restitution in the total amount of \$961,781, plus interest.⁹⁸

⁸⁹ Guidelines at 8, Principal Consideration 12.

⁹⁰ Guidelines at 7, Principal Consideration 10.

⁹¹ Guidelines at 8, Principal Consideration 13.

⁹² Guidelines at 8, Principal Consideration 16.

⁹³ *Dep't of Enforcement v. McCrudden*, No. 2007008358101, 2009 FINRA Discip. LEXIS 41, at *37 (OHO Oct. 15, 2009) ("The SEC has consistently held that it is appropriate to consider uncharged misconduct that is related or similar to the conduct charged in the complaint in determining sanctions."), *aff'd*, 2010 FINRA Discip. LEXIS 25 (NAC Oct. 15, 2010).

⁹⁴ Decl. ¶ 17.

⁹⁵ Decl. ¶ 17.

⁹⁶ Decl. ¶ 17.

⁹⁷ Decl. ¶ 18 and nn.3-4.

⁹⁸ Compl. ¶¶ 44, 64, 68, 74, 86; Decl. ¶ 21. Enforcement provided a chart showing the amount of restitution that should be paid to each of the four customers. Enforcement requested the following amounts with respect to each

B. Suitability

The Guideline for suitability violations recommends a fine ranging from \$2,500 to \$110,000, and a suspension in any or all capacities for a period of 10 business days to two years. The Guideline recommends that adjudicators “strongly consider” barring an individual respondent where aggravating factors predominate.

As explained above in connection with Respondent’s securities fraud violation, aggravating factors predominate. There are no mitigating factors. For this misconduct, Respondent is barred from associating with any FINRA member firm in any capacity. He would also be ordered to pay restitution, if restitution were not already ordered for his first violation.

C. Selling Away

The Guideline for selling away recommends a fine of \$5,000 to \$73,000 and a range of suspension and bar sanctions that increase based on the dollar amount of the sales. In this case, the five transactions that constituted the selling away violation totaled \$1.28 million. The Guideline specifies that where the violation involves more than \$1 million in sales, adjudicators should consider a suspension for 12 months or more, or a bar.⁹⁹

Other specific factors to be considered include the number of customers involved, the period of time over which the selling away occurred; whether the product sold away has been found to involve a violation of federal or state securities laws or federal, state, or SRO rules; whether the respondent had a beneficial interest in the issuer or was affiliated in some way and failed to disclose that information to investors; and whether Respondent’s selling away activity resulted in injury to the investing public.¹⁰⁰

Here, the charged transactions involved four customers, and they occurred over the course of a year. These are not particularly aggravating factors, but they also are not mitigating. More significant is that the selling away appeared to facilitate a phony investment scheme run by KB, an extremely aggravating factor. Respondent also violated federal securities law and multiple FINRA rules in connection with these transactions, another aggravating factor.

customer, plus interest from the date of the customer’s investment: LS (\$307,028 on her only investment); JS (\$273,301 on her first investment, \$65,000 on her second, and \$20,000 on her third); LM (\$216,452 on her only investment); BV (\$80,000 on her second investment). Decl. ¶ 21.

⁹⁹ Guidelines at 14. I impose a unitary sanction for the five transactions because they all involve the same Issuer, inexperienced and unsophisticated customers, and multiple securities law violations, including securities fraud. *C.f.*, *Dep’t of Enforcement v. Miller*, No. 2012034393801, 2018 FINRA Discip. LEXIS 13, at *44 (NAC May 23, 2018) (unitary sanction rejected where selling away transactions involved different issuers, sophisticated customers, and no evidence of federal or state securities law violations).

¹⁰⁰ Guidelines at 14-15. These are the recommended sanctions in the current Guidelines (May 2018) for selling away in violation of FINRA Rule 3280. At the time of the misconduct (December 2014–December 2015), the sanctions for a selling away violation of NASD Rule 3040 were the same and the factors to consider in analyzing sanctions for that kind of violation were the same. Guidelines (2015).

Respondent had access to investor funds through his signatory authority on the Affiliate's bank account and financial ties to KB, none of which he disclosed to his customers. This also is a highly aggravating factor. Furthermore, it is highly aggravating that all four customers lost money, and three of them lost most or all of it.

One other Principal Consideration applicable in all types of cases is also relevant here. It is aggravating that the four customers were not experienced investors and were unsophisticated.¹⁰¹ Respondent took advantage of them when he sold them the investment without providing them any documentation memorializing the transactions—and he had to know that he was taking advantage of them. Had they been more experienced and more sophisticated, they would never have given him their money without documentation.

Because of the number and importance of the aggravating factors, and the lack of any mitigating factor, the sanction for this violation should be toward the high end of the range of sanctions. For violating NASD Rule 3040 and FINRA Rule 2010, Respondent would be suspended for 18 months and fined \$50,000. In light of the bars for other violations, however, these sanctions are not imposed.

D. Causing Firm to Violate Books and Records Requirements

The Guidelines recommend a wide range of sanctions for violations of FINRA Rules 4511 and 2010—causing a firm to violate the applicable books and records requirements—depending on a number of factors. A fine of \$1,000 to \$15,000 may be imposed, but where aggravating factors predominate the fine may be as much as \$146,000. The responsible individual may be suspended in any or all capacities for 10 business days to three months. Again, however, if aggravating factors predominate, a suspension of up to two years or even a bar may be imposed.¹⁰²

In this case, aggravating factors predominate. The applicable books and records requirements are detailed and specific. Every broker-dealer must preserve for three years all communications between the firm and its customers related to its business. This is a fundamental requirement for all broker-dealers that is well known to industry participants. In flagrant disregard of the requirement, Respondent failed to preserve all sorts of communications, including customer emails, text messages, facsimiles, and account summaries that he created and sent to JS and others. The failure to preserve the records could not have been mere negligence. The failure is not limited to one type of record, but rather extends to numerous types of records, and, moreover, covers certain material items such as account summaries.¹⁰³ For this misconduct, Respondent would be suspended for two years, but in light of the bars for other misconduct, the suspension is not imposed.

¹⁰¹ Guidelines at 8, Principal Consideration 18.

¹⁰² Guidelines at 29.

¹⁰³ Guidelines at 29.

E. Rule 8210

The sanctions for a Rule 8210 request vary according to whether a respondent fails to respond at all, responds partially, or responds untimely. In addition to a fine that could range as high as \$73,000, if a person does not respond in any manner to a Rule 8210 request, then a bar should be standard. If he or she partially responds but the information is incomplete, a bar also is standard, unless the person can demonstrate that the information proved substantially complied with all aspects of the request. If complete response is made but it is untimely, then adjudicators may consider suspending the person for up to two years.

In this case, Respondent responded untimely and incompletely to the initial Rule 8210 request, ignored two more requests until he was suspended, and never responded to two more requests. It is aggravating that regulatory pressure had to be applied and reapplied to obtain even a partial response, and Respondent has not demonstrated that he substantially complied with any of the requests.¹⁰⁴ Accordingly, the standard sanction is appropriate—Respondent is barred.

V. Order

Enforcement's Default Motion is granted and the allegations of the Complaint are deemed to be true.

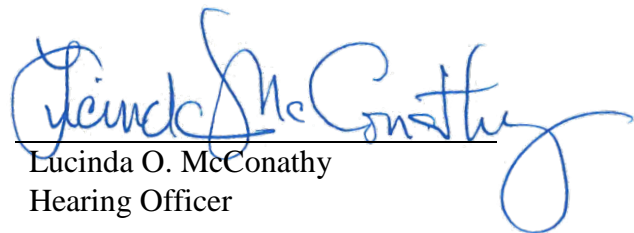
- For violating Section 10(b) of the Exchange Act, Rule 10b-5(b) thereunder, and FINRA Rules 2020 and 2010, Respondent Matthew E. Eckstein is barred from associating with any FINRA member firm in any capacity. He is also required to pay restitution to the four customers in accord with Enforcement's calculations, as listed in Addendum A, plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621.¹⁰⁵
- For violating FINRA Rules 2111(a) and 2010, Respondent is barred from associating with any FINRA member firm in any capacity, and would be ordered to pay restitution in accord with Enforcement's calculations, plus interest, if restitution were not already ordered for the first violation.
- For violating NASD Rule 3040 and FINRA Rule 2010, Respondent would be suspended for 18 months and fined \$50,000. In light of the bars for other violations, however, these sanctions are not imposed.

¹⁰⁴ Guidelines at 33.

¹⁰⁵ The customer accounts are more specifically identified in Addendum B to this Decision, which is served only on the parties.

- For violating FINRA Rules 4511 and 2010, Respondent would be suspended for two years. In light of the bars for other violations, however, the sanction is not imposed.
- For violating FINRA Rules 8210 and 2010, Respondent is barred from associating with any member firm in any capacity.

The restitution shall be payable on a date set by FINRA, but not less than 30 days after this Decision becomes FINRA's final disciplinary action in this matter. The bars shall become effective immediately if this Default Decision becomes FINRA's final disciplinary action.



Lucinda O. McConathy
Hearing Officer

Copies to:

Matthew E. Eckstein (via email, overnight courier, and first-class mail)
Robin W. Sardegna, Esq. (via email and first-class mail)
Perry C. Hubbard, Esq. (via email)
Jeffrey D. Pariser, Esq. (via email)

ADDENDUM A

Customer	Restitution Ordered	Date of Investment
LS	\$ 307,028	December 11, 2014
JS	\$ 273,301	January 21, 2015
LM	\$ 216,452	July 3, 2015
BV	\$ 80,000	September 9, 2015
JS	\$ 65,000	November 20, 2015
JS	\$ 20,000	December 7, 2015