BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Wilfredo Felix North Amityville, NY, Respondent.	DECISION Complaint No. 2018058286901 Dated: May 26, 2021

Respondent failed to comply with FINRA Rule 8210 requests and falsified expense entries, causing his member firm to maintain inaccurate books and records and file inaccurate FOCUS reports. Held, findings and sanctions affirmed, in relevant part.

Appearances

For the Complainant: Megan P. Davis, Esq., and Gabrielle Hirz, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Wilfredo Felix, Pro Se

Decision

Wilfredo Felix ("Felix") appeals, and the Department of Enforcement ("Enforcement") cross-appeals, a July 1, 2020 Hearing Panel decision.[1] The disciplinary case leading to the Hearing Panel's decision originated with FINRA's investigation of whether Felix misclassified personal expenses as business expenses in his member firm's books and records. We briefly discuss Felix's liability for misclassifying expenses to provide a foundation for considering whether to modify the Hearing Panel's sanctions. The main issue we address, however, arises from Felix's failure to comply with FINRA Rule 8210 requests issued during the investigation. In particular, we consider whether Rule 8210(a)(2) extends to a tax record

[1] Although Felix's member firm was a party to the disciplinary proceeding below, it is not a party to this appeal.

regarding Felix's wages and income—a document that, if provided, would have aided Enforcement's investigation by verifying his reported compensation from the firm.

After independent consideration of the relevant text, context, and purpose of Rule 8210(a)(2)—as well as the specific circumstances of this case—we conclude that Felix's 2013 wage and income transcript falls within the rule's scope. As a result, we determine that Felix violated Rule 8210 when he refused to provide that document to Enforcement and therefore we affirm the Hearing Panel's finding of liability. Because we find that a bar is warranted for this misconduct, we also affirm the sanction the Hearing Panel imposed.

On cross-appeal, Enforcement challenges the sanctions imposed by the Hearing Panel for the causes arising from Felix's misclassification of personal expenses as business expenses. For those causes, the Hearing Panel assessed a $25,000 fine against Felix and suspended him from associating with any FINRA member as a financial and operations principal ("FINOP") for 30 business days, and thereafter until he requalifies by examination in that capacity. We affirm the Hearing Panel's sanctions and reject Enforcement's argument that an independent bar is warranted for those causes.

I. Factual Background

A. Felix and Primex

Felix entered the securities industry in 1995. In 2001, he purchased Primex Prime Electronic Execution, Inc. ("Primex" or "the Firm"). Felix was the sole shareholder of Advantage Trading, LLC, a holding company that was the sole shareholder of Primex. During the relevant period, from 2013 through 2015, Felix served as Primex's chief executive officer, chief financial officer, and chief compliance officer. He was registered with the Firm as a general securities principal, FINOP, operations professional, and corporate securities representative. Felix was the only person at the Firm who made entries in the general ledger and submitted FOCUS reports.[2] In addition, he was the sole person with control over Primex's bank account. Felix's association with Primex continued until May 27, 2020, when the Firm's FINRA registration was cancelled. Felix is not currently associated with a FINRA member.

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[2] A Financial and Operational Combined Uniform Single Report ("FOCUS") report is a periodic regulatory summary depicting a firm's assets, liabilities, and ownership equity. Regulators use the information in the report to determine if a firm is in net capital compliance, as well as to detect any abnormalities.

B. Primex's CPA Reclassifies Business Expenses as Shareholder Distributions to Felix for the Firm's 2014 and 2015 Annual Audited Reports

Between 2002 and 2016, Primex employed an outside auditor ("CPA") to complete its annual audited reports and provide tax services. CPA dealt primarily with Felix to complete Primex's audit and tax work. For the Firm's 2013 annual audited report, CPA focused primarily on calculating Primex's net capital and did not reclassify any of the Firm's expenses. For the Firm's 2014 and 2015 annual audited reports, however, CPA conducted a more rigorous review of Primex's financial statements.[3]

While conducting this more rigorous review, CPA noticed that many Firm expenses were categorized as business expenses but appeared to be personal in nature. Because a personal expense paid by a firm should be categorized as compensation—and not as a business expense—CPA reviewed the questionable expenses to determine if they should be reclassified. CPA examined the nature of an expense and any documentation provided by Primex to determine whether, in his professional judgment, the expense in question was an ordinary and necessary business expense for a broker-dealer. CPA reclassified a total of $174,066 in Firm expenses to shareholder distributions for Primex's 2014 annual audited report, and a total of $140,492 in Firm expenses to shareholder distributions for the 2015 annual audited report. The reclassifications had the effect of increasing Felix's personal tax liability.

Felix did not agree with all of CPA's reclassifications for the 2014 and 2015 audits. Nevertheless, he acquiesced to CPA's reclassifications because the Firm was under time pressure to timely file its annual audited reports and potentially faced fines and a suspension if the reports were not filed timely.

C. FINRA Identifies Concerns with Misclassified Expenses During a Cycle Examination of Primex

FINRA identified concerns with Primex's expense classifications in 2015, when its Department of Membership Supervision ("Member Supervision") conducted a cycle examination of the Firm covering the period from September 2013 to March 2015. After

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[3] CPA testified that, beginning in 2014, the Public Company Accountability Oversight Board ("PCAOB") standards applied to broker-dealer audits. *See Broker-Dealer Reports*, Exchange Act Release No. 34-70073, at *2, 8, 20-21, 120, 127 (July 30, 2013), 78 Fed. Reg. 51910, 51913, 51915 (Aug. 21, 2013) (amending the Securities Exchange Act of 1934 Rule 17a-5 to provide that PCAOB standards will apply when auditing supplemental information that accompanies a broker-dealer's audited financial statements). CPA determined that these newly applicable standards required him to conduct a more rigorous review of Primex's financial statements. CPA explained, however, that the newly applicable standards had no effect on a broker-dealer's pre-existing responsibility to properly record business expenses.

examining the Firm's general ledger, Member Supervision suspected that some of Felix's personal expenses were recorded as business expenses of Primex. Member Supervision considered such a practice to be problematic, as any personal expenses paid by the Firm should be properly recorded as compensation, and any misclassifications of such expenses in the Firm's general ledger would cause inaccuracies in the Firm's regulatory FOCUS reports. Accordingly, Member Supervision requested information concerning the business purpose of some of the expenses it found questionable. When Primex (through Felix) responded to these requests, it failed to identify the specific business purpose for many of the expenses in question.[4]

Because the payment of personal expenses by a firm is a form of compensation, Member Supervision also requested that Primex provide any Forms 1099 or W-2 the Firm issued for its employees during the relevant period. In its response, Primex included a copy of Felix's 2013 Form 1099 listing compensation in the amount of $42,849. During a prior examination of the Firm, however, Primex had provided Member Supervision with a 2013 Form 1099 listing compensation in the amount of $42,200.

Member Supervision concluded in its examination report that Primex, acting through Felix, misclassified personal expenses as Firm expenses and caused the Firm to maintain inaccurate records. After receiving Primex's response to the report, Member Supervision issued a disposition letter dated April 8, 2016. The letter informed Primex that Member Supervision was referring the possible records violation to Enforcement.

D. Enforcement Investigates Primex's Expense Classifications and Felix's Compensation

1. Enforcement Requests Felix's IRS Account Transcripts to Verify His Compensation from Primex

Because Member Supervision's referral concerned the payment of Felix's personal expenses by Primex, Enforcement sought to verify Felix's Firm compensation by reviewing his tax records. During a 2016 on-the-record interview ("OTR") with Enforcement, Felix stated that he did not file personal tax returns during the relevant period. Accordingly, Enforcement asked Felix to provide his IRS account transcripts.[5]

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[4] Member Supervision's requests for additional information concerning Primex's expenses became the subject of cause three of Enforcement's complaint, which alleged that Primex violated FINRA Rules 8210 and 2010 by failing to timely respond. Because Primex is not a party to this appeal, cause three is not at issue on appeal.

[5] A taxpayer may obtain several different types of IRS account transcripts upon request. *See* IRS, "Transcript Types and Ways to Order Them," "Transcript Types," https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them (last visited April 20, 2021). Some transcripts show data from an individual's tax return, while the wage and

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Enforcement sent the first Rule 8210 request to Felix's attorney on May 26, 2016, asking that Felix either provide his IRS account transcripts for 2013-2015, or complete IRS Form 4506-T ("Request for Transcript of Tax Return") for the purpose of obtaining his account transcripts from the IRS.[6] Through counsel, Felix declined to provide the transcripts. Enforcement sent a follow-up Rule 8210 request for the transcripts to Felix's attorney on July 7, 2016. Through counsel, Felix responded that it was unclear how the request related to FINRA's investigation, and that the transcripts did not fall within the scope of Rule 8210 because he did not have possession, custody, or control over those documents. Enforcement sent a third Rule 8210 request for the transcripts to Felix's attorney on October 17, 2016. Felix, through counsel, responded that FINRA lacked authority to request his account transcripts because they are IRS records.

Enforcement again asked Felix about his Firm compensation during a 2018 OTR. During the OTR, Enforcement noted that Primex had provided FINRA with different versions of Felix's 2013 Form 1099 listing different compensation amounts, and asked Felix to explain the discrepancy. Felix testified that CPA prepared his Forms 1099 to report his Firm compensation to the IRS, and that he did not know why the forms listed different compensation amounts.[7] After reviewing emails between Felix and CPA, Enforcement was unable to confirm that CPA had prepared a 2013 Form 1099 for Felix.

To verify the accuracy of the Forms 1099 in its possession—and as part of its overall efforts to verify Felix's compensation from Primex—Enforcement renewed its efforts to

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income transcript shows the information reported on any information returns (such as a Form 1099) filed with the IRS on an individual's behalf. *See id.* (explaining that a wage and income transcript "shows data from information returns we receive such as Forms W-2 [and] 1099"). In effect, a wage and income transcript serves as a copy of the income reported for an individual to the IRS. *See EEOC v. Brown-Thompson*, No. 16-CV-1142-R, 2018 U.S. Dist. LEXIS 229639, at *6 (W.D. Okla. Nov. 8, 2018) (explaining that there was no need for the production of W-2 Forms because that information would be contained in the wage and income transcript).

[6] A Form 4506-T is used to request several different types of IRS account transcripts, including the wage and income transcript.

[7] In addition to the two versions of his 2013 Form 1099 described above, Felix also provided FINRA with a third version of his 2013 Form 1099. He had submitted this third version, which listed compensation in the amount of $271,883.08, to a car dealership. The record does not reflect when Felix provided this third version of his 2013 Form 1099 to FINRA, and Enforcement asked Felix only about the other two versions of the 2013 Form 1099 during his 2018 OTR. At the hearing, Felix testified that the third version of his Form 1099 was mistakenly generated by CPA, and that the compensation listed was that of another Primex employee.

obtain Felix's IRS transcripts. On August 17, 2018, Enforcement sent Felix a Rule 8210 request asking him to provide his IRS wage and income transcripts for years 2012-2017 or request the transcripts from the IRS by either completing Form 4506-T or submitting an online request. Through counsel, Felix reasserted his position that his tax transcripts do not fall within the scope of Rule 8210. Enforcement responded to Felix's attorney on September 7, 2018, explaining that the transcripts fall within Rule 8210's scope because Felix has the right to demand them. Enforcement attached to its letter a final Rule 8210 request, which again sought Felix's IRS wage and income transcripts for years 2012-2017. Felix responded through counsel on September 14, 2018, reiterating his objection to the request. Felix never provided any of his tax transcripts—including his 2013 wage and income transcript—to Enforcement.

In total, Enforcement issued five Rule 8210 requests for Felix's tax transcripts, each of which warned Felix that his failure to comply could result in a bar or other sanctions. Enforcement ultimately charged Felix with violating Rule 8210 based on his refusal to provide his 2013 wage and income transcript in response to the two requests Enforcement issued in 2018.

2. Enforcement Investigates Primex's Expense Misclassifications and Their Effect on the Firm's FOCUS Reports

Enforcement reviewed Primex's expenses from 2013, 2014, and 2015, particularly focusing on those Firm expenses that CPA reclassified as shareholder distributions to Felix for the Firm's 2014 and 2015 annual audited reports. Before making those reclassifications, CPA had asked Primex to provide documentation for any business expenses that did not appear to be ordinary and necessary expenses for a broker-dealer. CPA typically treated an expense as a shareholder distribution if Primex did not provide documentation for it. If Primex provided documentation but, in CPA's judgment, the expense was likely personal in nature, or the documentation was insufficient, he reclassified the charge to shareholder distributions. In some cases, CPA had accepted Felix's verbal explanations for the business purpose of an expense, if he considered the explanation to be logical. Applying this methodology, CPA reclassified hundreds of Firm expenses as shareholder distributions to Felix because the Firm provided no or insufficient documentation of the business purpose of the expenses in question.

Enforcement asked Primex to provide additional information about expenses that were reclassified by CPA, or that otherwise appeared to be personal in nature. Felix responded that he could not recall or determine whether many of the expenses were personal or business in nature. For others, Felix identified a general category for the expense (such as "food and entertainment") but provided no further detail.

After reviewing Felix's responses to its requests—as well as the email communications between Felix and CPA concerning the 2014 and 2015 reclassifications—Enforcement concluded that Primex improperly had recorded $174,066 in personal expenses as Firm expenses in 2014, and $140,492 in personal expenses as Firm expenses in 2015. Enforcement decided to treat the full amount of CPA's reclassifications as personal expenses, as CPA had closely reviewed those expenses. For 2013 (the relevant year for which there were no

reclassifications by Primex's CPA), Enforcement copied the methodology CPA used for reclassifications in 2014 and 2015 to conclude that Primex recorded $123,096 in personal expenses as Firm expenses that year. Altogether, Enforcement calculated that Primex misclassified a total of $437,654 in personal spending as business expenses during the relevant period.

Based on its net capital requirement, Primex filed quarterly FOCUS reports.[8] Enforcement determined that the Firm's expense misclassifications caused inaccuracies in its quarterly FOCUS report filings for the relevant years. In particular, the misclassified expenses caused the Firm's general ledger to overstate its business expenses and understate Felix's compensation. The inaccuracies in the general ledger were then reflected in Primex's 2013, 2014, and 2015 FOCUS reports.

Primex amended its 2014 and 2015 FOCUS reports after receiving CPA's final audit adjustments for those years. For both years, however, Primex made the year's total adjustment for CPA's reclassifications in the fourth quarter report. As a result, the FOCUS reports for the preceding three quarters continued to understate shareholder distributions for those periods, while the amended fourth quarter reports overstated shareholder distributions for those periods.[9] Primex did not amend any of its 2013 FOCUS reports, as CPA did not require it to reclassify any expenses that year. As a result, all of its 2013 quarterly FOCUS reports reflect the expenses in question as the Firm's business expenses and not as Felix's compensation.

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[8] *See* Exchange Act Rule 15c3-1(a)(2)(vi), 17 C.F.R. § 240.15c3-1(a)(2)(vi); Exchange Act Rule 17a-5(a)(2)(iii), 17 C.F.R. § 240.17a-5(a)(2)(iii) (setting forth the requirements for how often a firm must file FOCUS reports).

[9] Because Primex amended only its fourth quarter FOCUS reports for 2014 and 2015, its reports for the preceding three quarters of each year overstated the Firm's expenses. Primex's amended fourth quarter FOCUS report for 2014 reported Firm expenses in an amount drastically lower than the expenses reported for the previous three quarters ($4,978, as opposed to amounts ranging between $115,176 and $132,434). Accordingly, it appears that the Firm made the full year's adjustment to its expenses in the amended fourth quarter report. Primex's amended 2015 fourth quarter report, however, listed Firm expenses in an amount consistent with the previous three quarters ($103,146, with the preceding amounts ranging between $98,343 and $135,380). As a result, it is not clear whether, or to what extent, Primex adjusted the Firm expenses reported in its amended 2015 fourth quarter FOCUS report.

II. Procedural Background

A. Enforcement Commences a Disciplinary Proceeding

Enforcement filed a six-cause complaint against Felix and Primex, alleging that: (1) Felix violated FINRA Rule 2010 by making false expense entries in Primex's books and records; (2) Felix violated FINRA Rules 4511 and 2010 by causing Primex to maintain inaccurate books and records and file inaccurate FOCUS reports, and Primex willfully violated Rules 4511 and 2010, and willfully violated Exchange Act Rules 17a-3 and 17a-5, by failing to maintain accurate books and records and filing inaccurate FOCUS reports; (3) Primex violated Rule 8210 by untimely responding to requests for information and documents related to expenses recorded in the Firm's general ledger; (4) Felix violated Rule 2010 by providing FINRA with false information concerning why Primex's auditor required it to reclassify expenses for its 2014 and 2015 annual audited reports; (5) Felix violated Rule 2010 by providing false information concerning who prepared his 2013 Form 1099; and (6) Felix violated Rule 8210 when he refused to provide a copy of his 2013 IRS wage and income transcript in response to Enforcement's two 2018 Rule 8210 requests. Only causes one and six, and cause two as it relates to Felix, are at issue in this appeal.

The Hearing Panel conducted a four-day hearing, during which Felix, CPA, and two FINRA investigators testified. In his testimony, Felix admitted that some of the expenses identified by Enforcement were personal in nature and insisted that others had a business purpose.

B. The Hearing Panel's Decision

The Hearing Panel issued a July 1, 2020 decision finding violations as alleged under causes one and two (the "books and records violations"), as well as causes three and six, and dismissing causes four and five. As noted above, only causes one and six, and cause two as it relates to Felix, are at issue in this appeal.

Addressing cause six, the Hearing Panel found that Felix violated Rule 8210 by failing to produce his 2013 IRS wage and income transcript.[10] The Hearing Panel concluded that the requested transcript falls within Rule 8210's scope, as Felix had the right to demand it and it pertained to the relationship between Felix and Primex. The Hearing Panel barred Felix for this violation.

The Hearing Panel also found Felix liable for the books and records violations alleged in causes one and two. With respect to cause one, the Hearing Panel found that Felix acted unethically—and, therefore, violated Rule 2010—by falsely recording his personal expenses

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[10] One panelist dissented, opining that IRS tax transcripts fall outside the intended scope of Rule 8210 and, therefore, that Felix should not be found liable for cause six.

as Firm expenses in Primex's general ledger. With respect to cause two, the Hearing Panel concluded that Felix violated Rules 4511 and 2010 because his misclassifications caused Primex to maintain inaccurate records and file inaccurate FOCUS reports. The Hearing Panel determined that Felix caused Primex to misclassify a total of $248,893 in personal expenses as business expenses. The Hearing Panel based this conclusion on its credibility findings, finding that Felix identified a credible business purpose for some expenses (such as computer equipment) and failed to do so for others (such as fitness equipment).

For the books and records violations, the Hearing Panel assessed a $25,000 fine against Felix, and suspended him from serving as a FINOP for 30 business days, and thereafter until he requalified by examination as a FINOP. Considering the bar it imposed for cause six, the Hearing Panel did not impose these sanctions.

Felix appealed his liability under cause six, and Enforcement cross-appealed the sanctions the Hearing Panel imposed for the books and records violations under causes one and two.

III. Discussion

A. Felix Violated FINRA Rules 8210 and 2010 by Failing to Provide His 2013 IRS Wage and Income Transcript to Enforcement

After de novo review, we affirm the Hearing Panel's determination that Felix violated Rules 8210 and 2010 by refusing to provide his 2013 wage and income transcript to Enforcement.[11] Rule 8210(a)(2) provides that any person subject to FINRA's jurisdiction shall permit FINRA to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in [an] investigation, complaint, examination, or proceeding that is in such member's or person's possession, custody, or control." "The rule is at the heart of the self-regulatory system for the securities industry" and "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations." *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). An associated person's "failure to respond [to a Rule 8210 request] impedes [FINRA's] ability to detect misconduct that threatens investors and markets." *Berger*, 2008 SEC LEXIS 3141, at *14.

On appeal, Felix argues that his wage and income transcript does not fall within the scope of Rule 8210 because it is an IRS record. After independent consideration of the text, context, and purpose of Rule 8210(a)(2), we reject Felix's argument and conclude that the transcript falls within the rule's scope. *See Dep't of Enf't v. Charles Schwab & Co.*, Complaint No. 2011029760201, 2014 FINRA Discip. LEXIS 5, at *15 (FINRA Bd. of

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[11] A violation of Rule 8210 is also a violation Rule 2010. *CMG Inst. Trading*, *LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *30 n.36 (Jan. 30, 2009).

Governors Apr. 24, 2014) (when interpreting a rule, FINRA "examine[s the] rule text as a whole by considering its context, object, and policy").

1. Enforcement's Requests for Felix's Wage and Income Transcript Were "with Respect to" a Matter Involved in an Investigation

Enforcement is not required to establish the relevance of Felix's 2013 wage and income transcript to obtain his compliance with a Rule 8210 request. *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 4625, at *16 (Apr. 17, 2014). Firms and individuals under FINRA's jurisdiction are required to comply with Rule 8210 requests promptly and fully, without second-guessing them. *Id.*; *CMG Inst. Trading*, *LLC*, 2009 SEC LEXIS 215, at *21. Because Felix argues that the request for his transcript was not authorized under Rule 8210, however, we examine whether the request met the rule's requirements—including whether the request for the transcript was "with respect to [an] investigation." FINRA Rule 8210(a)(2); *Goldstein*, 2014 SEC LEXIS 4625, at *14-15 (explaining that FINRA's requests for information and documents fell within Rule 8210's scope because they were "with respect to" its investigation into possible misconduct). The issue of whether a requested record is "with respect to any matter involved in [an] investigation" should be viewed from FINRA's perspective. *See Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *12-13 (Nov. 8, 2007) ("Whether a requested record is 'with respect to any matter involved in [an] investigation' is a determination made by [FINRA] staff.") (quoting Rule 8210(a)(2)), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

Enforcement's requests for Felix's 2013 wage and income transcript were "with respect to" its investigation into the expense misclassifications. The payment of personal expenses by a firm is a form of compensation and, as a result, Enforcement's efforts to verify Felix's Firm compensation related to its investigation into the misclassification of his personal expenses. *See Meyers Assoc., L.P.*, Exchange Act Release No. 86497, 2019 SEC LEXIS 1869, at *45-46 & n.80 (July 26, 2019) (explaining that a firm must record the payment or reimbursement of personal expenses as employee compensation in order to maintain accurate books and records and file accurate reports). Because Felix's wage and income transcript is evidence of his compensation from the Firm, Enforcement's request for that document was "with respect to" its investigation. *See Erenstein*, 2007 SEC LEXIS 2596, at *12-14 (explaining that the respondent was required to provide a copy of his tax return under Rule 8210 because his income was at issue).

Although Primex provided Enforcement with its tax information for Felix for the relevant years (2013-2015), the Firm provided different versions of Felix's 2013 Form 1099—each of which listed a different compensation amount.[12] Enforcement was entitled to

[12] For 2014 and 2015, Primex provided FINRA with an IRS Schedule K-1 for Felix, which reflected Felix's compensation as adjusted by CPA. For 2013, however, Primex issued

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investigate whether these differing forms were false or misleading. *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *35 (June 14, 2013) (explaining that FINRA "was entitled to test the accuracy of the assertions [the respondent] made" in response to a Wells notice); *cf. Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23 (Aug. 22, 2008) ("An associated person who provides false or misleading information to [FINRA] in the course of an investigation violates [FINRA] Rule 8210"). Therefore, Enforcement's requests for Felix's 2013 wage and income transcript were "with respect to" its investigation for another reason—the transcript would have revealed which, if any, of the Forms 1099 accurately reflected the compensation reported to the IRS by Primex.

2. Felix's Wage and Income Transcript Lies Within His "Possession, Custody, or Control"

Felix's 2013 wage and income transcript also meets Rule 8210(a)(2)'s requirement that the record at issue must lie within an associated person's "possession, custody or control." FINRA Rule 8210(a)(2). FINRA added the phrase "possession, custody, or control" to Rule 8210 when it amended the rule in 2013. *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *2 (Jan. 2013). That language clarifies that the rule applies to books, records, and accounts that an associated person controls, even if the person does not own or physically possess the book, record, or account at issue. *Id.*; *see also Goldstein*, 2014 SEC LEXIS 4625, at *21-22 (explaining that the 2013 amendment to Rule 8210 addressed whether the rule applies to documents over which a member firm or associated person has possession, custody, or control, if not ownership). Indeed, the rule's Supplementary Material explains that a member firm or associated person must make books, records, or accounts available when they are in the possession of a third party, but the firm or individual "controls or has a right to demand them." FINRA Rule 8210, Supplementary Material .01.

A taxpayer can obtain a copy of his own tax transcripts (including his wage and income transcript) from the IRS by submitting an online request, or by faxing or mailing Form 4506-T to the IRS. It is undisputed that Felix can obtain his 2013 wage and income transcript by using one of these methods. Accordingly, we conclude that the transcript is within Felix's "control" for purposes of Rule 8210, regardless of whether he owns or possesses the document. *See* FINRA Rule 8210, Supplementary Material .01; *Goldstein*, 2014 SEC LEXIS 4625, at *21-22.

Even if this result were not clear from Rule 8210(a)(2)'s language and supplementary material, our conclusion is supported by federal caselaw interpreting the phrase "possession, custody, or control" for purposes of discovery requests under Federal Rule of Civil Procedure 34 ("FRCP 34"). We look to such caselaw as relevant context because the 2013 amendment

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a Form 1099 for Felix. Felix's 2013 Form 1099 would not have reflected any adjustments to his compensation by CPA, as CPA made no adjustments that year.

to Rule 8210 linked its use of that phrase "to the existing body of case law that has defined possession, custody or control as used in [FRCP] 34."[13] *Gregory Evan Goldstein*, Exchange Act Release No. 68904, 2013 SEC LEXIS 552, at *19 & n.38 (Feb. 11, 2013) (order denying a stay) (quoting *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *2). Federal courts interpreting FRCP 34 have determined that its use of the phrase "possession, custody, or control" extends the rule's reach to a document owned or possessed by a third party, as long as the party subject to the discovery request has the "right, authority, or practical ability" to obtain the document. *Gordon Partners v. Blumenthal (In re NTL, Inc. Sec. Litig.)*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007).[14] Under this interpretation, federal courts have required parties to obtain and produce their tax records—including tax transcripts—from the IRS. *See Brown-Thompson*, 2018 U.S. Dist. LEXIS 229639, at *5-6 (ordering the claimants to obtain and produce their IRS wage and income transcripts); *United States v. All Assets Held at Bank Julius Baer & Co.*, 142 F. Supp. 3d 37, 42-43 (D.D.C. 2015) (interpreting FRCP 34 to require that the claimant obtain his tax records from the United States government).[15]

In sum, we find that Rule 8210(a)(2)'s language and supplementary material clearly provide that Felix's 2013 wage and income transcript falls within the rule's scope because he "controls or has a right to demand" that document. *See* FINRA Rule 8210(a)(2), Supplementary Material .01. To the extent the relevant language could be considered ambiguous, this result is confirmed by the stated intent of Rule 8210's drafters—which was to link Rule 8210's use of the phrase "possession, custody or control" to the use of the same phrase in FRCP 34. *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *2, 7; *Schwab*

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[13] We note that this approach is atypical because the review of our decision is conducted by the Commission, whose precedent is binding upon us. As noted above, however, federal caselaw interpreting the phrase "possession, custody, or control" for purposes of FRCP 34 provides relevant context here, because the 2013 amendment to Rule 8210 expressly linked its use of that phrase to the same language in FRCP 34. *Goldstein*, 2013 SEC LEXIS 552, at *19 & n.38; *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *2.

[14] *See also Resol. Trust Corp. v. Deloitte & Touche*, 145 F.R.D. 108, 111 (D. Col. 1992) (explaining that FRCP 34 requires "a party to produce relevant records not in its physical possession when the records can be obtained easily from a third-party source"); *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991) ("Federal courts construe 'control' very broadly under [FRCP] 34.").

[15] *See also Fasesin v. Henry Indus. Inc.*, No. 13-2490-JTM-GEB, 2016 U.S. Dist. LEXIS 89043, at *16-17 (D. Kan. July 8, 2016) (ordering plaintiffs to produce either their IRS tax return transcripts or an IRS verification of non-filing); *Butler v. Exxon Mobil Ref. & Supply Co.*, No. 07-386-C-M2, 2008 U.S. Dist. LEXIS 66091, at *2-3, 12-13 & n.2-3 (M.D. La. Aug. 28, 2008) (ordering the plaintiff to sign Form 4506-T to authorize the release of his 2006 tax return transcript) (cited, with approval, by *English v. Tex. Farm Bureau Bus. Corp.*, 462 F. Supp. 3d 667, 671 & n.1 (W.D. Tex. 2020)).

& Co., 2014 FINRA Discip. LEXIS 5, at *15 (explaining that FINRA will consider rulemaking history where a rule's language is ambiguous). Federal caselaw interpreting the relevant language in FRCP 34 supports our conclusion that Felix's wage and income transcript lay within his "possession, custody or control" for purposes of Rule 8210(a)(2).[16] *See Brown-Thompson*, 2018 U.S. Dist. LEXIS 229639, at *5-6*; All Assets Held at Bank Julius Baer & Co.*, 142 F. Supp. 3d at 42-43.

3. Felix's Wage and Income Transcript Is a Personal Tax Record Relating to His Association with Primex

For the reasons discussed above, Felix's wage and income transcript lies within his "possession, custody or control," and Enforcement's request for the transcript was "with respect to [a] matter involved in [an] investigation." *See* FINRA Rule 8210(a)(2). Despite the record's connection to an investigation—and his ability to obtain it—Felix argues that his wage and income transcript falls outside Rule 8210's scope because, in his view, it is not his document and it does not relate to his association with Primex. *See id.* (referring to the books, records, and accounts "of such member or person"). We reject his argument.

An associated person's tax records long have been viewed as falling within Rule 8210's parameters when, as here, there is a regulatory need for them. *See Erenstein*, 2007 SEC LEXIS 2596, at *12, 19; *see also Dep't of Enf't v Hansen*, Complaint No. 2005001085001, 2008 FINRA Discip. LEXIS 2, at *11 (FINRA Hearing Panel Jan. 10, 2008) ("[T]ax records are routinely sought pursuant to Rule 8210 requests"). Felix's wage and income transcript is his personal tax record, as he is the only person who can request it and it

[16] For similar reasons, we reject Felix's assertion that a party cannot be required to sign an authorization form, such as Form 4506-T, under Rule 8210. In rejecting his argument, we again look to the FRCP 34 context, where federal courts have held that a document lies within a party's "possession, custody, or control" if he can obtain it by signing an authorization form, and have compelled the completion of such forms when needed. *See Butler*, 2008 U.S. Dist. LEXIS 66091, at *7 ("a request to have the plaintiff execute an authorization for release of tax records is an acceptable and compellable means of obtaining a party's tax return information"); *see also Friedman v. Sthree Plc.*, No. 3:14-CV-00378-AWT, 2016 U.S. Dist. LEXIS 146960, at *22-23 (D. Conn. Oct. 24, 2016) (ordering the plaintiff to complete Form 4506-T when he advised that he could not provide tax returns for certain years); *Mazariegos v. Am. Home Assur. Ins.*, No. 4:07-CV-0107-HLM, 2008 U.S. Dist. LEXIS 130202, at *18 (N.D. Ga. Mar. 31, 2008) (compelling the plaintiff to complete Form 4506 to request a copy of his tax return from the IRS when his income was at issue, and he did not possess copies of his tax returns); *Grove v. Aetna Cas. & Sur. Co.*, 855 F. Supp. 113, 116 (W.D. Pa. 1993) (compelling the plaintiff to either provide his Social Security Administration disability file, or sign a release permitting the defendant to obtain it).

is, in effect, a copy of his reported compensation.[17] While Felix contends that the transcript falls outside of Rule 8210's scope because it is an IRS document, accepting this argument would require us to ignore the 2013 amendment to Rule 8210, which clarified that a party need not own or physically possess the record at issue. *See* FINRA Rule 8210, Supplementary Material .01*; FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *2.

Felix also contends that his wage and income transcript falls outside Rule 8210's scope because it is not a record that he made or kept. We disagree. Rule 8210's Supplementary Material explains that the "books, records and accounts" referenced in the rule are those "that the *broker-dealer or its associated persons* make or keep relating to its operation as a broker-dealer *or relating to the person's association with the member*." FINRA Rule 8210(a)(2), Supplementary Material .01 (emphasis added). Here, the broker-dealer (Primex) created Felix's 2013 Form 1099 for transmission to the IRS, and Felix's 2013 wage and income transcript is a copy of that transmission.[18] The transcript's content—that is, the amount of compensation Primex reported for Felix—clearly relates to Felix's association with Primex. *See FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *3 (explaining that Rule 8210's Supplementary Material "indicates that all aspects of the relationship between a broker-dealer and its associated persons are potentially the subject of a Rule 8210 request"). In sum, the wage and income transcript is Felix's personal tax record, and it is a copy of information provided by Primex concerning the Firm's association with Felix. Therefore, it falls within Rule 8210's purview. *See* FINRA Rule 8210(a)(2), Supplementary Material .01; *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *2.

Even if Rule 8210(a)(2)'s language and Supplementary Material were not clear in this respect, our conclusion is supported by the intended purpose of the rule. *See Schwab & Co.*, 2014 FINRA Discip. LEXIS 5, at *15. The purpose of Rule 8210 "is to give [FINRA], in the absence of subpoena power, the ability to detect misconduct among its members and associated persons." *CMG Inst. Trading*, 2009 SEC LEXIS 215, at *37. The purpose of the 2013 amendment to Rule 8210(a)(2) is to facilitate investigations by clarifying that the rule applies to a broad range of records under a member firm's or associated person's control,

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[17] Indeed, information that the IRS has provided concerning tax transcripts reflects that the agency considers such transcripts to be a taxpayer's personal record. *See* IRS, "Individuals," "Your Information," "Tax Record (Transcript)," https://www.irs.gov/individuals/get-transcript (last visited April 20, 2021) (explaining that the online transcript service "is for individual taxpayers to retrieve *their own transcripts*") (emphasis added).

[18] *See* IRS, "Transcript Types and Ways to Order Them," "Transcript Types," "Wage and Income Transcripts," https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them (last visited April 20, 2021) (explaining that a wage and income transcript "shows data from information returns we receive such as Forms W-2 [and] 1099"); *see also Brown-Thompson*, 2018 U.S. Dist. LEXIS 229639, at *6 (explaining that there was no need for the production of W-2 Forms because that information would be contained in the wage and income transcript).

including those records pertaining to the relationship between a member firm and its associated persons. *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *3.[19] Accepting Felix's argument would frustrate these objectives by permitting him to withhold an IRS document under his control that would verify his reported compensation from a member firm.[20]

We do not hold that an associated person's IRS tax transcript will always fall within Rule 8210's scope. Rather, the determination of whether Rule 8210's criteria are satisfied depends on the circumstances of the particular case. *See*, *e.g.*, *Goldstein,* 2014 SEC LEXIS 4625, at *14-19 (conducting a fact-specific analysis to determine whether the requested records were within Rule 8210's scope); *Erenstein*, 2007 SEC LEXIS 2596, at *13-14 (explaining that, under the circumstances of the case, the request for respondent's tax return served an investigative need). Because we have determined that those criteria are satisfied here, we conclude that Felix violated Rule 8210 when he refused to provide his 2013 wage and income transcript to Enforcement.

B. Felix Violated FINRA Rules 4511 and 2010 by Falsifying Expense Entries, Causing the Firm to Maintain Inaccurate Records and File Inaccurate Reports

We discuss briefly Felix's liability for cause one (falsification of expenses) and cause two (failure to maintain accurate books and records and file accurate reports) to provide a foundation for considering whether to modify the Hearing Panel's sanctions, which Enforcement challenges in its cross-appeal. As part of the liability analysis, we also discuss the Hearing Panel's findings that Felix did not credibly identify a business purpose for many of the expenses at issue.

1. We Defer to the Hearing Panel's Credibility Findings

We defer to the Hearing Panel's credibility findings concerning Felix's testimony about the purpose of many of the Firm expenses in question, as the record contains no substantial evidence to overturn those findings. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1161-

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[19] *See also Notice of Filing of Amendment Nos. 1 and 2, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to FINRA Rule 8210 (Provision of Information and Testimony and Inspection and Copying of Books)*, Exchange Act Release No. 34-68386, 2012 SEC LEXIS 3798, at *28 (Dec. 7, 2012) (Order Approving Proposed Rule Change) (explaining that the 2013 amendment to Rule 8210 clarifies the rule's requirements and facilitate investigations).

[20] Felix urges us to adopt the dissenting Hearing Panelist's view that there is a meaningful distinction between a tax transcript and a tax return for purposes of Rule 8210(a)(2). We reject his argument for the reasons discussed herein, and note that accepting his argument would have a troubling result—that is, permitting an individual to keep relevant tax information out of Rule 8210's reach because he failed to file a tax return.

62 & n.6 (2002) (explaining that a credibility determination is entitled to deference absent substantial evidence to the contrary). For example, the Hearing Panel accurately observed that Felix's testimony that certain expenses had a business purpose (e.g., loan and insurance payments on a car and gifts to sponsors) was unsubstantiated by the Firm's records. In other instances, the Hearing Panel reasonably concluded that Felix's explanations for his spending with various vendors were implausible in light of the nature and amount of the expenses, and the vendors involved.[21] In addition, the Hearing Panel reasonably found Felix's business justifications for his spending with toy and game vendors to be implausible in light of the fact that he had young children at the time the expenses were incurred. In contrast, when Felix identified a specific and credible business justification for an expense (such as computer equipment), the Hearing Panel credited his testimony.

In sum, the record provides no basis to disturb the Hearing Panel's credibility determinations concerning Felix's testimony about the purpose of the Firm expenses in question. *See Manoff*, 55 S.E.C. at 1161-62 & n.6. Accordingly, we see no reason to disturb the Hearing Panel's related conclusion that Felix classified $248,893 in personal expenses as Firm expenses during the relevant period.[22]

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[21] These vendors included, for example, general retailers, including a warehouse club and department stores; apparel retailers; entertainment providers, including cinemas and a video streaming service; and fitness brands, including an on-demand workout program and a sporting goods retailer.

[22] We find no material error in the Hearing Panel's calculation of the amount of personal expenses improperly classified as Primex's business expenses. Although Felix provided evidence to the Hearing Panel that certain purchases from two general retailers (that is, purchases of telephones and a table lamp) had a business purpose, the total amount of all purchases with those two vendors—$1,059.30—would make no difference to the liability or sanctions analysis, even if it were deducted from Felix's personal spending.

We also note that the Hearing Panel credited Felix's testimony that he sometimes purchased food for the office. In making this credibility finding, the Hearing Panel cited to certain portions of Felix's testimony, as well as to Enforcement's summary of Felix's spending on "food" and "food and entertainment." Although one of the pages of testimony cited by the Hearing Panel included a discussion of a receipt from a warehouse club, we do not interpret this to mean that the Hearing Panel credited Felix's testimony concerning his spending at the warehouse club. Rather, based on the Hearing Panel's reasoning, as well as its citation to Enforcement's summary exhibits, we understand the Hearing Panel's decision to find that the expenses that Enforcement categorized as "food" and "food and entertainment" had a credible business purpose, but that Felix's spending at the warehouse club (which was categorized as general retail spending) did not.

2. We Affirm the Hearing Panel's Conclusion that Felix Violated FINRA Rules 2010 and 4511, as Alleged in Causes One and Two

We affirm the Hearing Panel's conclusion that Felix violated Rule 2010 by making false expense entries in Primex's general ledger, as alleged in cause one. Rule 2010 requires that members and associated persons, "in the conduct of [their] business, [ ] observe high standards of commercial honor and just and equitable principles of trade."[23] To determine whether a respondent's conduct amounts to an independent violation of Rule 2010, "we must determine whether the respondent has acted unethically or in bad faith." *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 SEC LEXIS 2684, at *28 (Feb. 7, 2020), *aff'd*, No. 20-1092, 2021 U.S. App. LEXIS 5724 (D.C. Cir. Feb. 26, 2021). "Unethical conduct is that which is not in conformity with moral norms or standards of professional conduct, while bad faith means dishonesty of belief or purpose." *Id.* The principal consideration is whether the misconduct reflects on an associated person's ability to comply with the regulatory requirements necessary to the proper functioning of the securities industry and investor protection. *See James A. Goetz*, 53 S.E.C. 472, 477 (1998). Neither a showing of scienter nor harm is required to establish a violation of Rule 2010. *See Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *50 (May 27, 2015) (stating that scienter is not required); *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *22 (Dec. 11, 2014) (stating that harm is not an element).

Falsifying records—including expense records—is a form of misconduct that has been held to be "unethical" for purposes of Rule 2010. *See Fillet*, 2015 SEC LEXIS 2142, at *50 (finding that applicant violated former NASD Rule 3110 (the predecessor to Rule 4511) and separately violated former NASD Rule 2110 (the predecessor to Rule 2010) by backdating customers' variable annuity records and providing them to FINRA during an examination); *Dep't of Enf't v. Hunt*, Complaint No. 2009018068701, 2012 FINRA Discip. LEXIS 62, at *16-17 (FINRA NAC Dec. 18, 2012) (concluding that the respondent violated Rule 2010 when he falsified expense reports to garner reimbursement for expenses before they were actually incurred). Here, Felix effectively acknowledged that he falsified Firm records by admitting that he misclassified at least some personal expenses as Firm expenses in Primex's general ledger. While Felix testified that other expenses were not misclassified, we defer to the Hearing Panel's determination that much of his testimony in this regard lacked credibility. We conclude that this misconduct was unethical, as it adversely reflects on Felix's ability to comply with regulatory requirements. As the Hearing Panel noted, Felix served as Primex's FINOP and should have understood the obligation to record his personal expenses as

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[23] FINRA Rule 0140 provides that FINRA rules apply with equal force to member firms and associated persons. Thus, an associated person violates Rules 4511 and 2010 when he or she causes a member firm to maintain inaccurate books and records. *See Dep't of Enf't v. Trevisan*, Complaint No. E9B2003026301, 2008 FINRA Discip. LEXIS 12, at *28 (FINRA NAC Apr. 30, 2008) (finding that an associated person who entered inaccurate information into a member firm's records violated NASD Rules 3110 and 2110).

compensation, rather than Firm expenses. Accordingly, we conclude that Felix violated his obligation to "observe high standards of commercial honor and just and equitable principles of trade," in violation of Rule 2010. *See Ortiz*, 2008 SEC LEXIS 2401 at *22-23 (concluding that the respondent violated former NASD Rule 2110 by providing false information to his firm, as such misconduct interferes with regulatory oversight and a firm's internal compliance procedures).

We also affirm the Hearing Panel's conclusion that Felix violated Rules 4511 and 2010 by causing Primex to maintain inaccurate records and file inaccurate FOCUS reports, as alleged in cause two. Rule 4511(a) requires member firms and associated persons to "make and preserve books and records as required under the FINRA rules, the Exchange Act and the applicable Exchange Act rules." The SEC has repeatedly held that the duties to maintain records and file reports require that such records and reports be true and correct. *Dep't of Enf't v. Inv. Mgmt. Corp*., Complaint No. C3A010045, 2003 NASD Discip. LEXIS 47, at *20 (NASD NAC Dec. 15, 2003); *David R. Williams*, 48 S.E.C. 122, 123 (1985). A showing of scienter is not required to establish a Rule 4511 violation. *Meyers Assoc.*, 2019 SEC LEXIS 1869, at *42, 48.

Here, Felix's misclassification of his personal expenses as Firm expenses caused Primex's general ledger to misstate both his compensation and the Firm's expenses. Those inaccuracies, in turn, were reflected in the Firm's quarterly FOCUS reports for the relevant period. Accordingly, we conclude that Felix violated Rules 4511 and 2010.

C. Felix Has Not Demonstrated that Any Delay in Filing the Complaint Resulted in an Unfair Proceeding

During oral argument, Felix asserted that Enforcement unduly delayed charging him with the books and records violations alleged in causes one and two, and that those causes should be dismissed because the delay adversely impacted his ability to mount a defense to those causes. Felix presented this argument to the Hearing Officer in a pre-hearing motion, but did not raise it in his notice of appeal or briefs on appeal. In a typical appeal, this means that the party has waived the ability to make the argument. *See Citizens Coal Council v. EPA*, 447 F.3d 879, 905 (6th Cir. 2006) ("The general rule of appellate procedure is that issues not presented in an appellant's initial merits brief are waived.").

Even assuming that Felix's undue delay argument is properly before us, however, we find it unpersuasive because Felix has not shown that the timeframes at issue rendered the proceeding "inherently unfair." *See William D. Hirsch*, 54 S.E.C. 1068, 1077 (2000). To evaluate a claim that the unduly late filing of a complaint resulted in unfairness, the Commission has considered the time periods between the filing of the complaint and: (i) the initial misconduct; (ii) the last misconduct; (iii) notice to the self-regulatory organization ("SRO") of the misconduct; and (iv) the initiation of the investigation. *Dep't of Enf't v. Rooney*, Complaint No. 2009019042402, 2015 FINRA Discip. LEXIS 19, *88-89 (FINRA NAC July 23, 2015). This test is not applied mechanically, and there is no "bright line rule about the impact of the length of a delay in filing a complaint on the fairness of the disciplinary proceedings." *Mark Love*, 57 S.E.C. 315, 323-24 (2004). Instead, we must

"determine the fairness of [the] proceeding [based] on the entirety of the record." *Love*, 57 S.E.C. at 324.

Here, the first two timeframes can be clearly measured. The time that elapsed between the initial misconduct (January 2013) and the filing of the complaint (July 1, 2019) is six years and six months, and the time between the last misconduct (December 2015) and the filing of the complaint is three years and six months. As for notice to FINRA of the misconduct, Member Supervision identified a potential issue with misclassification of personal expenses during its 2015 cycle examination of Primex. After diligent completion of the examination, Member Supervision notified Enforcement of the expense misclassifications on April 8, 2016, when it issued the disposition letter referring the matter to Enforcement. We determine that April 8, 2016 is the date on which Enforcement received definitive notice of the misconduct, which was approximately three years and three months before Enforcement filed the complaint. *See Rooney*, 2015 FINRA Discip. LEXIS 19, at *90 (pinpointing FINRA's notice of the misconduct to the date of its internal referral to Enforcement). Finally, we determine that Enforcement's investigation began on May 26, 2016, when it issued its first Rule 8210 request to Primex. *See id.* (pinpointing the beginning of the investigation to the date of Enforcement's first Rule 8210 request). This was approximately three years and one month before Enforcement filed the Complaint.

The timeframes at issue here generally are shorter than those that have been held to result in inherent unfairness.[24] Moreover, based on our review of the entirety of the record, we conclude that Felix has failed to demonstrate that a delay prejudiced his ability to present an adequate defense to the books and records violations. *See Love*, 57 S.E.C. at 324. Like the Hearing Officer, we observe that Felix was on notice since at least 2015 that FINRA was investigating Primex's expense records. As of 2015, Primex's expense records for the relevant period (2013-2015) fell within the minimum three-year retention window. *See* Exchange Act Rules 17a-4(b)(2)-(3), (5), 17 CFR § 240.17a-4(b)(2)-(3), (5). Because Primex was on notice of the potential claim, it could have preserved its expense records for the relevant period in anticipation of this litigation. *See Timbervest, LLC*, Initial Decisions

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[24] *See Jeffrey Ainley Hayden*, 54 S.E.C. 651, 653-654 (2000) (dismissing charges that were brought 14 years after the first act of misconduct, over six years after the last incident of misconduct, five years after the SRO was informed about the misconduct, and three years and six months after the SRO commenced its investigation); *Dep't of Enf't v. Morgan Stanley DW, Inc.*, Discip. Prcdg. No. CAF000045, 2002 NASD Discip. LEXIS 11, *16 (NASD NAC Jul. 29, 2002) (affirming the dismissal of charges where the complaint was filed seven years after the misconduct, five years and nine months after the SRO was informed of the misconduct, and four years and nine months after the initiation of the investigation); *compare with Dep't of Enf't v. Mehringer*, Complaint No. 2014041868001, 2020 FINRA DISCIP. LEXIS 27, *32-33 (FINRA NAC June 15, 2020) (concluding that the respondent was not denied a fair hearing where the complaint was filed six years and five months after the initial misconduct, three years and four months after the last misconduct, and two years and six months after FINRA learned of the misconduct and initiated an investigation).

Release No. 658, 2014 SEC LEXIS 2990, at *180 (Aug. 20, 2014) (noting that the respondent "could easily have [] preserved [records] in anticipation of possible litigation" when it became aware of the Commission's investigation).

Moreover, CPA testified that Felix was unable to provide documentation for many expenses in response to requests CPA made when completing Primex's annual audited reports. The record also reflects that, during the 2015 cycle examination, Primex failed to provide Member Supervision with requested documentation for a number of expenses incurred during the relevant period. Accordingly, it appears that Felix's failure to present documentation for some expenses during the hearing was caused not by the passage of time, but by his own failure to diligently maintain records. *See Edward John McCarthy*, 56 S.E.C. 1138, 1159-60 (2003) (rejecting the applicant's claim that a delay prejudiced his ability to present a defense where he presented no evidence that the alleged delay caused evidence to be unavailable), *remanded on other grounds*, 406 F.3d 179 (2d Cir. 2005). In any event, Felix was able to testify at the hearing about the purposes of his spending with various vendors. For all of these reasons, we conclude that the timeframes at issue did not result in an unfair proceeding. *See Love*, 57 S.E.C. at 324-25 (concluding that the applicant failed to demonstrate that his "ability to mount an adequate defense was harmed by any delay in the filing of a complaint against him").

D. We Overrule Felix's Objection to Conducting Oral Argument in this Matter by Videoconference

Felix objected to our decision to conduct oral argument by videoconference in this appellate proceeding. We reiterate and further explain that we overrule this objection pursuant to a temporary amendment to FINRA Rule 9341(d), which permits the NAC to hold oral argument in a disciplinary proceeding by videoconference. *See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Temporarily Amend Certain Timing, Method of Service and Other Procedural Requirements in FINRA Rules During the Outbreak of the Coronavirus Disease (COVID-19)*, Exchange Act Release No. 88917, 85 Fed. Reg. 31832 (May 27, 2020).[25] This temporary amendment allows FINRA "to continue critical adjudicatory and review processes in a reasonable and fair manner and meet its critical investor protection goals, while also following best practices with respect to [] health and safety" during the ongoing COVID-19 pandemic, which presents serious health risks for in-person hearings. 85 Fed. Reg. at 31833.

The temporary amendment is consistent with Exchange Act Section 15A(b)(8) which requires, among other things, that FINRA rules provide a fair procedure for the disciplining of

[25] This temporary amendment has been extended to August 31, 2021 due to the continued pandemic. *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Expiration Date of the Temporary Amendments Set Forth in SR-FINRA-2020-015 and SR-FINRA-2020-027*, Exchange Act Release No. 91495, 86 Fed. Reg. 19306 (Apr. 13, 2021).

members and persons associated with members. 85 Fed. Reg. at 31835. In particular, the temporary amendment permitting oral argument to take place by videoconference strikes an appropriate balance between investor protection and providing a fair disciplinary procedure by making a "reasonable accommodation to protect the health and safety of all parties participating in [the] adjudicatory process[] while avoiding unnecessary delay[] to [the] proceeding." *Id.*

Conducting oral argument by videoconference was an appropriate means of protecting the health of all parties involved in this proceeding without indefinitely delaying its resolution. *See* 85 Fed. Reg. at 81252. Felix was able to present his arguments and respond to questions during the oral argument by videoconference and, at the end of the argument, he was given the opportunity to make any additional comments he wished to make. Moreover, Felix has not identified a reason why holding oral argument by videoconference undermines the fairness of this appeal or prejudiced him, and there is no apparent reason why holding oral argument by videoconference would result in unfairness to any party. *Cf. Daniel Joseph Alderman*, 52 S.E.C. 366, 368 n.6 (1995) (upholding reliance on telephonic testimony). Indeed, Rule 9341's other requirements, such as recordation and transcription, were satisfied here. Accordingly, we overrule Felix's objection to holding oral argument by videoconference in this matter.

IV. Sanctions

After de novo review of the full record, we affirm the sanctions imposed by the Hearing Panel. We conclude that a bar is warranted for Felix's refusal to comply with Enforcement's Rule 8210 requests for his 2013 wage and income transcript. We also conclude that the fine and suspension assessed by the Hearing Panel are appropriate sanctions for Felix's books and records violations and reject Enforcement's argument that an independent bar is warranted for those causes.

A. A Bar Is Warranted for Felix's Refusal to Comply with Enforcement's FINRA Rule 8210 Requests for His Wage and Income Transcript

After independent consideration of the FINRA Sanction Guidelines ("Guidelines") and the record, we conclude that a bar is warranted for Felix's refusal to comply with Enforcement's Rule 8210 requests for his 2013 wage and income transcript.[26] An associated person's "failure to respond [to a Rule 8210 request] impedes [FINRA's] ability to detect misconduct that threatens investors and markets." *Berger*, 2008 SEC LEXIS 3141, at *14. Consequently, a violation of Rule 8210 is serious because it "subvert[s] FINRA's ability to carry out its responsibilities as a regulator, threatening both investors and the markets." *Plunkett*, 2013 SEC LEXIS 1699, at *33.

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[26] *See FINRA Sanction Guidelines* (Oct. 2020), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*].

The Guidelines provide that "a bar should be standard" if an individual does not respond to a Rule 8210 request "in any manner."[27] Where a respondent provides a partial but incomplete response, the Guidelines provide that "a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request."[28] Here, Felix responded to Enforcement's Rule 8210 requests for his tax transcripts (which included a request for his 2013 wage and income transcript), but only to advise that he would not comply with the requests. Although such a refusal is generally considered to be tantamount to a complete failure to respond, we also recognize that Felix partially cooperated with Enforcement's investigation by complying with two OTR requests.[29] In such situations, the Commission has directed us to consider applying the Guideline for a partial but incomplete response. *See Plunkett*, 2013 SEC LEXIS 1699, at *55-57.

Applying the Guideline for a partial but incomplete response, we conclude that Felix's misconduct warrants a bar. The principal considerations are the "[i]mportance of the information requested as viewed from FINRA's perspective and whether the information provided was relevant and responsive to the request."[30] Here, Felix entirely refused to comply with Enforcement's request for his 2013 wage and income transcript. Moreover, the requested transcript was important for two reasons. First, as discussed above, the transcript would have aided Enforcement's investigation into whether Primex's books, records, and FOCUS reports accurately reflected Felix's compensation. As a SRO, it is essential that FINRA be able to rely on its members and associated persons to maintain accurate records and submit truthful and accurate filings. *James Alan Schneider*, 52 S.E.C. 840, 844 (1996); *Charles E. Kautz*, 52 S.E.C. 730, 734 (1996). Because Felix's wage and income transcript would have aided FINRA in determining whether he and Primex met this "basic requirement," the document was important. *Kautz*, 52 S.E.C. at 734; *Meyers Assoc.*, 2019 SEC LEXIS 1869, at *45-46 & n.80 (noting the connection between the firm's underreporting of an employee's compensation and its failure to submit accurate regulatory filings).

Second, Felix's wage and income transcript was important because it would have shown which, if any, of Felix's three Forms 1099 accurately reflected the compensation Primex reported to the IRS in 2013. Felix's refusal to provide his 2013 wage and income transcript to Enforcement stymied that line of inquiry, which potentially involved a serious

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27 *See Guidelines,* at 33.

28 *Id.*

29 Felix responded to other requests for information and documents under FINRA Rule 8210, but did so largely on behalf of Primex and not in his personal capacity. Regardless, for the reasons discussed above, we conclude that a bar is the appropriate sanction under the Guideline for partial cooperation.

30 *See Guidelines*, at 33.

violation—the provision of a false or misleading document to FINRA. *See Ortiz*, 2008 SEC LEXIS 2401, at *32 (explaining that supplying false information to FINRA is serious, as it "misleads [FINRA] and can conceal wrongdoing and thereby subverts [FINRA's] ability to perform its regulatory function and protect the public interest"). Thus, for this reason as well, the wage and income transcript that Enforcement requested was important. While Felix may have believed that the document was unimportant, such a belief does not mitigate his failure to comply with FINRA's requests. *See Berger*, 2008 SEC LEXIS 3141, at *26-27 (rejecting the respondent's attempt to mitigate his refusal to testify "by using an after-the-fact assessment of the results of [FINRA's] investigation [and] shift[ing] the focus from [FINRA's] perspective at the time it seeks the information"); *PAZ Sec.*, *Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *21 (Apr. 11, 2008) (accepting FINRA's argument on appeal that "[m]itigation cannot be based on a respondent's second guessing the importance of the investigation"), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009).

The Guideline for a partial response also directs us to consider whether the respondent "thoroughly explain[ed] valid reason(s) for the deficiencies in the response."[31] Felix has failed to do so. For all of the reasons discussed above, we conclude that Felix's objections to Enforcement's requests for his 2013 wage and income transcript lack merit. Moreover, we find it troubling that instead of complying with Enforcement's Rule 8210 requests, Felix effectively asked Enforcement to justify the requests and then refused to respond to the requests. *N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *26 (May 8, 2015) ("If [a]pplicants had concerns about responding to [the Rule 8210] requests, they should have raised, discussed, and resolved them with FINRA in the cooperative spirit and prompt manner contemplated by the Rules . . . [i]nstead, [a]pplicants refused to comply."). Such behavior is inconsistent with an associated person's unequivocal duty to cooperate with FINRA's investigation. *See Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994); *Michael David Borth*, 51 S.E.C. 178, 181 (1992) ("The Rules do not permit second guessing [FINRA's] requests."). While a FINRA member or associated person is not foreclosed from timely raising a genuine concern with a Rule 8210 request, Felix's refusal to comply—even after Enforcement responded to his concerns—contravenes both his obligations under Rule 8210 and the "cooperative spirit contemplated by [FINRA's] rules." *N. Woodward Fin. Corp.*, 2015 SEC LEXIS 1867, at *26.

For these reasons, we conclude that a bar is the appropriate sanction for Felix's refusal to comply with Enforcement's Rule 8210 requests for his wage and income transcript. A bar is the standard sanction for a partial response to a Rule 8210 request, and that sanction is appropriate here.[32] The importance of the requested document aggravates Felix's misconduct. Moreover, despite the importance of the requested document, Felix questioned Enforcement's Rule 8210 requests rather than complying with them. Because Felix failed to follow a FINRA

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31 *Id.*

32 *Id.*

rule that is critical to detecting misconduct, a bar is necessary to protect investors. *See Berger,* 2008 SEC LEXIS 3141, at *15 (explaining that those who fail to respond to Rule 8210 requests in any manner demonstrate that they are unfit to remain in the industry). In addition, a bar serves the remedial purpose of deterring others from failing to comply with Rule 8210 requests. *Elliot M. Hershberg*, 58 S.E.C. 1184, 1189 (2006) ("[T]he bar protects investors by encouraging the timely cooperation that assists in the prompt discovery and correction of wrongdoing.").

B. The Hearing Panel Imposed an Appropriate Sanction for the Books and Records Violations

Felix does not challenge the sanctions assessed by the Hearing Panel for his books and records violations—a $25,000 fine, as well as a suspension from associating with any member firm as a FINOP for 30 business days, and thereafter until he requalifies by examination as a FINOP. Enforcement, however, challenges these sanctions in its cross-appeal, contending that a bar is warranted.

After an independent review of the record and relevant Guidelines, we conclude that the sanctions the Hearing Panel assessed for causes one and two are appropriate. As an initial matter, we agree with the Hearing Panel's conclusion that a unitary sanction for these causes is proper, as the underlying violations arise from the same course of conduct—the inaccurate recording of Felix's personal expenses as business expenses in the Firm's general ledger.[33] *See Dep't of Enf't v. Taylor*, Complaint No. 20070094468, 2011 FINRA Discip. LEXIS 17, at *25-26 (FINRA NAC Aug. 5, 2011) (imposing a unitary sanction for providing the firm with false information and causing the firm to maintain inaccurate books and records). To determine the appropriate sanction for the books and records violations, we look to the Guidelines for recordkeeping violations, filing false or misleading FOCUS reports, and for forgery, unauthorized use of signatures or falsification of records.[34]

As relevant here, the Guideline for recordkeeping violations instructs adjudicators to consider a fine of $1,000 to $16,000 or, when aggravating factors predominate, a fine of $10,000 to $155,000.[35] The Guideline further instructs adjudicators to consider a suspension of the responsible individual in all capacities for a period of ten business days to three months and, when aggravating factors predominate, a two-year suspension or bar.[36] The Guideline for filing a false or misleading FOCUS report instructs adjudicators to consider a fine of

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33 *See Guidelines* (General Principles, No. 4), at 4.

34 *See Guideline*s, at 29, 37, 70.

35 *See id.* at 29.

36 *Id.*

$10,000 to $77,000, and suspending the responsible individual in any or all capacities for up to two years.[37] The applicable Guidelines recommend that we consider the following violation-specific factors: the nature and materiality of the inaccurate information; the nature, proportion, and size of the firm records at issue; whether the inaccurate information was entered intentionally; and whether the violations occurred over an extended period of time or involved a pattern of misconduct.[38]

With this guidance in mind, we consider it aggravating that Felix intentionally misclassified hundreds of personal expenses as business expenses over the course of three years.[39] Considering the frequency of the misclassifications over an extended period, we agree with the Hearing Panel's conclusion that Felix engaged in a pattern of misconduct.[40] We also conclude that the misconduct involved a significant amount of money—nearly $250,000—causing Primex's books, records, and FOCUS reports to significantly overstate business expenses and understate compensation to its principal, Felix.[41] In light of these aggravating factors, we conclude that it is appropriate to impose a fine and suspension above the low end of the recommended range in the Guidelines discussed above.

Although we conclude that certain factors aggravated Felix's books and records violations, we reject Enforcement's argument that the Hearing Panel overlooked aggravating factors demonstrating that an independent bar is warranted for causes one and two. Enforcement contends that the Hearing Panel overlooked the following aggravating factors: (1) the materiality of the expense misclassifications, which resulted in the Firm's filing inaccurate FOCUS reports; (2) Felix's failure to accept responsibility for the misclassifications, instead blaming his auditor; (3) Felix's lack of candor during his hearing testimony concerning the purpose of certain expenses; and (4) Felix's potential to gain financially from his misconduct, as the understatement of his personal compensation had the effect of reducing his personal tax liability. As discussed below, we do not find that the Hearing Panel overlooked these considerations. In any event, after de novo consideration of the record and the relevant Guidelines, we conclude that the sanctions imposed are appropriate. *See* FINRA Rule 9348 (providing that the NAC "may affirm, modify, reverse, increase, or reduce any sanction . . . or impose any other fitting sanction"); *Dep't of Enf't v. Geary*, Complaint No. 20090204658, 2016 FINRA Discip. LEXIS 31, at *43 (FINRA NAC July 20, 2016) (noting that the NAC's de novo standard of review applies to sanctions), *aff'd*, Exchange Act Release No. 80322, 2017 SEC LEXIS 995 (Mar. 28, 2017).

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37 *See id.* at 70.

38 *See id.* at 29, 37.

39 *See id.* at 29.

40 *Id.*

41 *Id.*

We do not agree with Enforcement that the Hearing Panel overlooked the aggravating factors Enforcement identifies. When reviewing the considerations specific to recordkeeping violations, the Hearing Panel noted that the nature and materiality of the inaccurate information at issue is a relevant factor. Moreover, the Hearing Panel expressly considered that Felix's books and records violations involved a significant amount of money, resulting in the Firm's filing inaccurate FOCUS reports that understated Felix's compensation and overstated Primex's expenses. Accordingly, we reject Enforcement's assertion that the Hearing Panel failed to consider the materiality of the misclassifications.

Furthermore, we do not agree that the Hearing Panel overlooked the other factors identified by Enforcement. The Hearing Panel stated that it consulted the Principal Considerations in Determining Sanctions. This guidance, in turn, refers to the respondent's acceptance of responsibility for the violation, whether the respondent attempted to conceal the misconduct, and whether the respondent stood to gain financially from the misconduct. Moreover, the Hearing Panel made express, detailed credibility findings regarding Felix's testimony concerning his expenses. The Hearing Panel also rejected Felix's argument that Primex's CPA did not advise him regarding the proper classification of personal expenses, finding that it was Felix's responsibility to make the proper classification. In addition, the Hearing Panel's decision reflects its understanding that Felix's misclassification of his personal expenses had the effect of underreporting his taxable income.[42] We do not believe the Hearing Panel overlooked these findings, or the relevant principal considerations, when it imposed the sanctions for Felix's books and records violations. *Cf. Rita v. United States*, 551 U.S. 338, 358-59 (2007) (holding, in the criminal sentencing context, that while the sentencing judge's explanation for the sentence imposed was brief, the record and context demonstrated that the judge was aware of the relevant considerations).

In any event, after independent consideration of the Guidelines and the record, we conclude that the fine and suspension imposed by the Hearing Panel are sufficient to serve a remedial purpose and have a deterrent effect.[43] *See* FINRA Rule 9348. The $25,000 fine is above the minimum recommended fine in the relevant Guidelines, which is appropriate given the pattern of intentional misclassifications, the amount and materiality of the misclassifications, Felix's reluctance to accept responsibility for (and lack of candor as to) some of the misclassifications, and Felix's potential to gain financially from the misclassifications.[44] We further agree that Felix's suspension from operating as a FINOP for 30 business days (and thereafter until he requalifies in that capacity) is appropriately remedial,

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42 In particular, the Hearing Panel's decision cites IRS guidance explaining that personal expenses paid by a firm are fringe benefits that are taxable as wages.

43 *See Guidelines* (General Principal No. 1), at 2.

44 *See Guidelines*, at 29, 70.

as his misconduct demonstrates a lack of familiarity with the rules requiring a member firm and its associated persons to maintain accurate books and records and file accurate reports.[45]

While Enforcement urges that an independent bar is appropriate, we discern no additional aggravating factors that would support that sanction for causes one and two. Although the inaccuracies in Primex's books, records, and FOCUS reports are serious, there were no net capital violations. We agree with Enforcement that Felix's acquiescence to his CPA's instruction to reclassify expenses as shareholder distributions is not mitigating, as Felix testified that he complied with this instruction only because he otherwise would face penalties for failing to file an annual audited report.[46] Nevertheless, we do not find that the absence of this mitigating factor weighs in favor of a bar, especially since Felix's failure to take responsibility for the misclassified expenses is already reflected in the sanction imposed by the Hearing Panel.

After independent consideration, we affirm the sanctions imposed by the Hearing Panel for causes one and two. Considering the bar imposed for cause six, however, we do not impose the fine or suspension.[47]

V. Conclusion

For failing to comply with Enforcement's Rule 8210 requests for his IRS wage and income transcript, Felix is barred from associating with any FINRA member in any capacity. For making false expense entries in his firm's general ledger and causing his firm to maintain inaccurate books and records and file inaccurate reports, we fine Felix $25,000 and suspend him from serving as a FINOP for 30 business days, and thereafter until he requalifies in that capacity, but do not impose those sanctions in light of the bar. Felix is also ordered to pay

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[45] *See Guidelines* (General Principal No. 8), at 6 ("The remedial purpose of disciplinary sanctions may be served by requiring an individual respondent to requalify by examination as a condition of continued employment in the securities industry. Such a sanction may be imposed when Adjudicators find that a respondent's actions have demonstrated a lack of knowledge or familiarity with the rules and laws governing the securities industry.")

[46] *See Guidelines* (Principal Consideration No. 3), at 7 (referring to whether "the respondent *voluntarily* employed subsequent corrective measures" prior to detection and intervention) (emphasis added).

[47] In determining sanctions, we have reviewed and considered all the parties' arguments on appeal, the Guidelines, and all the relevant facts in this case.

$6,292.70 in hearing costs and $1,729.71 in appellate costs. The bar will become effective immediately upon service of this decision.

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary