FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. D. ALLEN BLANKENSHIP (CRD No. 2842335), Respondent.	Disciplinary Proceeding No. 2019064333401 Hearing Officer–LOM **EXTENDED HEARING PANEL DECISION** October 31, 2025

Respondent engaged in a pattern of unsuitable trading in mutual fund shares in violation of FINRA Rules 2111 and 2010. He facilitated the unsuitable trading by circumventing his firm's supervision, which was unethical and violated FINRA Rule 2010. He also falsely marked mutual fund transactions as unsolicited when they were not, which caused his firm's books and records to be inaccurate and violated FINRA Rules 4511 and 2010. For this misconduct, we bar Respondent from associating with any FINRA member firm in any capacity and order him to pay costs.

Appearances

For the Complainant: Tina Lawrence, Esq., Justin W. Arnold, Esq., John R. Baraniak Jr., Esq., and Jennifer L. Crawford, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Alex Padla, Esq. and Dochtor D. Kennedy, Esq., AdvisorLaw, LLC

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DECISION

I. Introduction

Respondent, D. Allen Blankenship, was registered with FINRA member firm Independent Financial Group, LLC ("IFG" or the "Firm") from July 2016 until the Firm terminated him in October 2019 (the "Relevant Period"). Respondent is currently registered with another FINRA member firm. During his tenure at IFG, the bulk of his business was buying and selling Class A mutual fund shares for his customers.

FINRA's Department of Enforcement filed a Complaint containing three causes of action alleging that during the Relevant Period Respondent (i) engaged in trading in numerous customer accounts that was unsuitable for any investor in violation of FINRA Rules 2111 and 2010; (ii) concealed the unsuitable trading by circumventing his Firm's supervisory procedures in violation of Rule 2010; and (iii) mismarked orders as unsolicited when they were not, causing his Firm's books and records to be false and inaccurate in violation of FINRA Rules 4511 and 2010.

The Extended Hearing Panel finds the violations proven. First, although Class A shares carry a high up-front sales charge of 5% or more and are designed for long-term holding (in the range of five years), Respondent sold shares that had been held a year or less. Such trading gives rise to a presumption of unsuitable short-term mutual fund trading that Respondent did not rebut. He also engaged in a practice known as "switching," in which he would sell shares in one fund and use the proceeds to buy a fund in another fund family. By switching, Respondent caused the customer to repeatedly incur high sales charges to stay in the market. If there were a valid reason to switch from one fund to another, Respondent could have instead exchanged funds within the same fund family and the exchange could have been done free of charge. Respondent also routinely purchased the same mutual fund on consecutive business days in increments below $20,000, which caused customers to miss out on "breakpoints," a type of volume discount. The overall result of all these activities was that customers paid more than they should have for their investments, and Respondent received more in compensation than he should have. Such a pattern of trading is unsuitable for any investor.

Second, Respondent circumvented his Firm's supervisory procedures by breaking up almost all his mutual fund purchases (96%) into multiple consecutive transactions of less than $20,000. The Firm's automated system for flagging mutual fund transactions for review was not triggered by purchases below $20,000. In addition, Respondent failed to complete and submit to the Firm for review and approval a form the Firm required him to use to ensure that customers received appropriate disclosures and pricing on their transactions. This conduct is unethical.

Third, Respondent had no credible explanation for the way he routinely marked an initial transaction solicited and then marked a follow-up transaction in the same mutual fund the next business day as unsolicited. He caused his Firm's books and records to be false and inaccurate.

Respondent's main defense rests on detailed handwritten notes that he claims he made of conversations with his customers at the time of the trades at issue. For reasons discussed in the

credibility section (as well as throughout this decision), we cannot credit the veracity and reliability of those notes. That makes his testimony asserting that they are true and accurate contemporaneous records of conversations with his customers not credible. The pattern of trading plus the other, more credible, testimony and documentary evidence all compel the conclusion that Respondent committed the FINRA rule violations alleged in the Complaint.

Based on a careful review of the record, and for the reasons discussed below, we conclude that it is in the public interest to bar Respondent from association with any FINRA member firm in any capacity.

II. Hearing and Post-Hearing Briefing

A six-day evidentiary hearing was held in Philadelphia on February 18–21, and February 24–25, 2025.[1] The parties filed post-hearing briefs on the merits of the charges, with a first round of simultaneous opening briefs and a second round of simultaneous response briefs.[2] In addition, Respondent argued that the proceeding violated the United States Constitution for various reasons. Those arguments were separately briefed. Respondent filed an initial post-hearing brief on the constitutional issues, and Enforcement followed with a responsive brief.[3]

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[1] Three witnesses appeared in person: Blankenship, Robert Sica (a FINRA principal investigator), and MH (a customer). Two witnesses appeared by videoconference: Jonee Powell (a former IFG supervisor now with a different FINRA member firm) and Richard Mireles (an IFG supervisor still with IFG). Testimony is cited here with an abbreviation for transcript, "Tr.," the witness's initials in parentheses, and a page number. For example, Respondent's testimony is cited as "Tr. (DAB) 705."

The joint exhibits are cited by the prefix "JX," a unique identifying number, and a page number (*e.g.*, JX-1, at 7). Enforcement's exhibits are marked with the prefix "CX" for Complainant, a unique identifying number, and a page number (*e.g.*, CX-1, at 2). Respondent's exhibits are marked with the prefix "RX," a unique identifying number, and a page number (*e.g.*, RX-1, at 2).

Two customers (BK and PG-W) provided declarations made under penalty of perjury, which are referred to by their exhibit numbers (CX-13 and CX-23).

The parties also entered stipulations, which are cited by the abbreviation "Stip." and the applicable paragraph number (*e.g.*, "Stip. ¶ 9.").

Appendix A, which is attached to the decision as publicly issued, explains for ease of reference how we usually identify the mutual funds discussed in the decision. Appendix A lists the funds, setting forth for each fund what we understand to be its five-letter securities identifier and name. The fund family of a fund is typically signified in the name of the fund. In general, in the decision (both text and tables) we refer to each fund by its five-letter securities identifier as a short-hand reference. For example, PRUAX stands for the PGIM Jennison Utility Fund. Occasionally, where a document refers to a fund by name, we use the name but with the short-hand reference in a parenthetical. The information in Appendix A is derived from CX-24, a spreadsheet that contains the Firm's records in its blotter about all Respondent's mutual fund purchases and sales at the Firm during the Relevant Period.

Customers are referred to by their initials throughout this decision. Appendix B, which is served on the parties only, identifies the customers by their initials and full names.

[2] The parties' simultaneous opening briefs are referred to as "Enf. Open. Br." and "Resp. Open. Br." Their simultaneous responsive briefs are referred to as "Enf. R. Br." and "Resp. R. Br."

[3] Although Respondent's counsel touched on Respondent's constitutional arguments in his opening statement at the

III. Findings of Fact

A. Respondent and Jurisdiction

Respondent first became registered with FINRA as an Investment Company and Variable Products Representative ("IR") through his association with two former member firms in February 1997. From February 1997 until July 2016, Respondent was registered through several FINRA member firms as an IR, a General Securities Representative ("GSR") (beginning in February 1999), and as a General Securities Principal ("GSP") (beginning in April 2001).[4]

During the Relevant Period Respondent was registered as an IR, GSR, and GSP through FINRA member firm IFG.[5] He derived most of his income, almost 90%, from commissions earned through the purchase and sale of Class A mutual fund shares in customer accounts.[6]

Since April 2020, Respondent has been registered as an IR, GSR, and GSP through three different FINRA member firms.[7] Currently, Respondent is registered through Southeast Investments, N.C., Inc.[8] Because Respondent is currently registered, FINRA has jurisdiction to bring a disciplinary proceeding against him for violation of its rules.[9]

B. Class A Mutual Fund Shares

Respondent's business largely consists of buying and selling Class A mutual fund shares in customer accounts.[10] Mutual funds offer investors different classes of mutual fund shares for purchase.[11] In determining which class to purchase, an investor may consider how long he or she plans to hold the fund, the size of the investment, and whether a purchase qualifies for any sales charge discounts or other fee waivers. Class A shares typically impose a substantial front-end sales charge but have lower operating costs than the other classes.[12] Accordingly, they may be cheaper to hold over time than the other classes of mutual fund shares. Class B and Class C

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hearing, he did not lay out the arguments in any detail. Respondent did not file a pre-hearing brief, so there was no prior explication of Respondent's constitutional arguments. At the hearing, the parties agreed to a separate post-hearing briefing schedule for the constitutional issues, with Respondent filing an initial brief and Enforcement afterward filing a response brief. These are referred to as "Resp. Const. Br." and "Enf. Const. Br."

[4] Stip. ¶ 1.

[5] Stip. ¶ 2.

[6] Stip. ¶ 4; Tr. (RS) 69; Tr. (DAB) 684–85, 734.

[7] Stip. ¶ 3; Tr. (DAB) 674–75; JX-11.

[8] Tr. (DAB) 676.

[9] Under Article V, Section 4(a) of FINRA's By-Laws, even if Respondent's association with a FINRA member firm were terminated, FINRA would retain jurisdiction for two years.

[10] Stip. ¶ 4; Tr. (RS) 69; Tr. (DAB) 684–85, 734.

[11] FINRA provides information on its website about the different types of mutual funds and the most common share classes. *See* https://www.finra.org/investors/investing/investment-products/mutual-funds#share-classes.

[12] *Id.*

shares do not impose a front-end sales charge, but they impose higher operating costs.[13] Class B shares also carry with them what is called a "contingent deferred sales charge" that will be imposed if the shares are sold before the expiration of a certain period, often six years.[14] Class C shares may be less expensive than Class A or Class B shares if an investor has a shorter-term investment horizon. Class C shares do not impose a front-end sales charge and if they are sold within one year only a small charge, often 1%, may be imposed.[15]

Class A mutual fund shares are meant to be held long-term because the upfront sales charge is large, often between 5% and 5.75%, which means that it will take time for the customer to recoup the sales charge.[16] Holding Class A shares for one year or less is generally understood to be short-term mutual fund trading.[17]

At the hearing, Respondent agreed that Class A mutual fund shares are more appropriate for long-term holding periods because they have significant front-end sales charges that can exceed 5% of the principal amount.[18] He agreed that it generally takes time for the shares to increase in value to achieve a higher return than the sales charge,[19] and that is why Class A shares usually have long-term holding periods.[20] A hypothetical was posed to Respondent where a customer buys Class A shares and incurs a 5% sales charge but sells when the shares have only returned 4%. He acknowledged that in that case the customer will lose money.[21]

If a customer who has paid 5% or more for Class A shares plans to sell before the end of five years, it is more sensible for that customer to buy Class C shares.[22] That is because a customer is charged about 1% per year when selling Class C shares. It is only at the five-year mark that the cost of each share, whether Class A or Class C, is roughly equal. When Respondent was asked about this analysis, he said, "That's reasonably accurate, yes."[23] But he declined to confirm that the industry recommends Class C shares if a client is going to hold the shares less

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[13] *Id.*

[14] *Id.*

[15] *Id. See also* the U.S. Securities and Exchange Commission website, Mutual Funds and ETFs, A Guide for Investors, at 33–34 (www.sec.gov>sec-guide-to-mutual-funds). The SEC explained the differences among Class A, Class B, and Class C mutual fund shares in *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *4 n.8 (Jan. 30, 2009).

[16] Tr. (RS) 69–70.

[17] Tr. (RS) 318. *E.g.*, *Dep't of Enforcement v. Mehringer*, No. 2014041868001, 2020 FINRA Discip. LEXIS 27, at *8–9 (NAC June 15, 2020).

[18] Tr. (DAB) 734.

[19] Tr. (DAB) 734.

[20] Tr. (DAB) 735.

[21] Tr. (DAB) 735.

[22] Tr. (RS) 320.

[23] Tr. (DAB) 970.

than five years.[24] We find that testimony evasive given the clear up-front cost differential between Class A and Class C shares.

C. Respondent's Mutual Fund Business at IFG

Respondent has worked from a home office most of his career.[25] He lives outside of Philadelphia,[26] but IFG is headquartered in California.[27] He worked alone while he was registered with IFG.[28]

During the Relevant Period, Respondent had between 100 and 200 customers.[29] While he was at IFG, Respondent effected a total of 932 mutual fund purchases in his customers' accounts.[30] Only 33 of those transactions were above $20,000, less than 4% of the total, and most of those occurred in 2016, at the beginning of Respondent's tenure at IFG.[31] This means that close to 900 of Respondent's mutual fund purchases in customer accounts, roughly 96%, occurred in amounts less than $20,000.[32]

Nearly all the purchases that Respondent recommended to his customers at IFG involved Class A mutual funds shares.[33] When a customer made a purchase, a sales charge would flow through the mutual fund, which would take a portion before sending the rest to IFG.[34] Respondent would receive 90% of whatever came to IFG.[35] During the roughly three years Respondent was at IFG, he derived most of his income from commissions based on purchasing and selling Class A mutual funds, a total of around $580,000.[36]

FINRA has an online tool for analyzing mutual fund share costs, which registered representatives can use before making a recommendation. Respondent testified that he did not recall using it or being required or encouraged to use it while he was at IFG.[37] At one of the

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[24] Tr. (DAB) 970.

[25] Tr. (DAB) 677.

[26] JX-11, at 9–11.

[27] JX-11, at 11.

[28] Tr. (DAB) 677.

[29] Tr. (DAB) 678.

[30] Stip. ¶ 8.

[31] Tr. (RS) 72–73; CX-5.

[32] Tr. (RS) 74; CX-5.

[33] CX-24.

[34] Tr. (DAB) 1009.

[35] Tr. (DAB) 735–36, 1009–10.

[36] Tr. (DAB) 684–85; Tr. (RM) 837.

[37] Tr. (DAB) 970–71. The Firm's Written Supervisory Procedures, however, referred to FINRA's online tool as a helpful way to compare mutual funds and share classes and the costs of fees and expenses. *See*, *e.g.*, JX-1, at 9.

firms where he worked after IFG terminated him, however, Respondent was required to use that tool for analysis.[38]

Respondent portrayed IFG as discouraging trading in Class C mutual fund shares. The Firm did not forbid such trading, he said, but it required a registered representative to have "a really good reason" for trading in Class C shares.[39] It would examine the explanation and whether the shares were held for the correct time.[40] He said his expectation was that Class A shares were "the right fit."[41] But while Respondent was at IFG he did have the ability to recommend Class B and Class C shares as well as Class A shares.[42]

D. Events Leading to Respondent's Termination by IFG

In mid-2019, IFG changed its rules for conducting additional review of mutual fund transactions, which it memorialized in its September 2019 Written Supervisory Procedures ("WSPs").[43] When the Firm changed its rules, it noticed Respondent's unusual pattern of transactions. Almost all his purchases of Class A mutual fund shares were under $20,000, and he often purchased the same mutual fund on consecutive business days in increments below that threshold. That pattern caused the Firm to investigate Respondent's activities, and the investigation then led to his termination.[44] Respondent's record in the Central Registration Depository ("CRD") reflects that he was discharged for violating the Firm's policy regarding the submission of required documents for certain mutual fund transactions and the failure to ensure that clients received the benefit of mutual fund breakpoints (as discussed below, a form of volume discount).[45]

The details of Respondent's conversations with Firm personnel during the Firm's investigation are relevant. They show that he was twice given the opportunity to justify his pattern of trading, but he did not mention the handwritten notes of purported customer conversations that he now characterizes as critical to his defense.

When the Firm became aware of Respondent's trading pattern, Richard Mireles, who supervised Respondent from 2016 to 2018 and afterward became the Firm's vice president for supervision, pulled all of Respondent's trading activity to review.[46] After an initial review,

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[38] Tr. (DAB) 971.

[39] Tr. (DAB) 969.

[40] Tr. (DAB) 969–70.

[41] Tr. (DAB) 969.

[42] Tr. (DAB) 684–85.

[43] JX-5; Tr. (RM) 826–27; Tr. (JP) 786–87.

[44] Tr. (RM) 834–36; Tr. (RS) 105; JX-14.

[45] JX-11, at 5.

[46] Tr. (RM) 836.

Mireles and the Firm's general counsel called Respondent and said they had some questions about his mutual fund trading activities. They asked about his strategies and how he made recommendations.[47] Mireles testified that Respondent told them that his strategies were based on "economies of scale."[48] Mireles said,

> [This explanation] didn't make too much sense to me at the time given the type of trading that was going on. You know, if you're trading in a certain sector, then you're basically moving all your clients with it. But in this case, it was moving out of some funds for one client and then purchasing the same funds for another client at the same time. So it was kind of discombobulated.[49]

With respect to the mutual fund purchases below $20,000, Mireles remembered Respondent saying that "he looked to purchase a small amount first so that the client can soak in the purchase and decide from there."[50] This was the first opportunity Respondent had to produce his handwritten notes to support his trading, but Mireles did not remember Respondent saying anything about such notes.[51]

After his conversation with Respondent, Mireles spoke with IFG's Chief Executive Officer ("CEO") about the issues they were seeing with Respondent's trading, and Mireles spoke to three of Respondent's customers.[52] Mireles concluded that clients were not receiving the breakpoints to which they were entitled.[53] Based on the trading pattern and what the customers said about their interactions with Respondent, Mireles inferred that Respondent was breaking up trades so that they would be below $20,000 to avoid the Firm's process for flagging transactions

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[47] Tr. (RM) 836–38.

[48] Tr. (RM) 838.

[49] Tr. (RM) 838. The Firm's records support Mireles's observation about contradictory or "discombobulated" trading. For example, in September 2016, Respondent sold HFEAX out of a customer account, EA (9/19/2016), and less than a month later he purchased HFEAX in a different customer account belonging to MH's mother (10/5/2016). Two months after that, he again sold HFEAX out of another customer account, PS (12/6/2016). He marked all three transactions as solicited. CX-24, at rows 70, 113, and 188. Similarly, Respondent sold IBNAX out of a customer account in November 2016, MW (11/7/2016), but the day after selling IBNAX out of that account he bought IBNAX for another customer, BK (11/8/2016), and he continued to buy IBNAX for BK on succeeding days (11/9/2016 through 11/16/2016). CX-24, at rows 147, 152, 155, 157, 161, and 163. Respondent likewise bought JVIAX in late April 2018 in one customer account, DC (4/25/2018), and sold JVIAX the next week out of a different customer account, SB (5/1/2018). CX-24, at rows 1089 and 1094. Thus, within a matter of a few months and sometimes even within a few days, Respondent was both buying and selling the same mutual fund in different customer accounts.

[50] Tr. (RM) 839–40.

[51] Tr. (RM) 840.

[52] Tr. (RM) 841–47; JX-16; JX-17.

[53] Tr. (RM) 840–47.

for review.[54] Mireles testified that Respondent had to know how to apply breakpoints because he was a licensed professional who had gone through training courses.[55]

After further discussion with the CEO, Mireles was instructed to terminate Respondent.[56] Mireles called Respondent. He told Respondent that, unless there was more that he could add, the Firm was going to terminate him for cause.[57] Mireles testified that Respondent had nothing to add. "He was quiet and he didn't say anything, just was accepting of it. . . . There was no rebuttal."[58] This was Respondent's second opportunity to mention his notes, but he never said that he had extensive contemporaneous notes of conversations with his clients that could support the trading in their accounts.[59]

The Firm filed a Form U5 notice of Respondent's termination.[60]

E. IFG's Supervisory Procedures – 2016 through early 2019

1. Respondent's Agreement to Comply with Firm Policies and Procedures

When Respondent joined the Firm, he signed an Initial Compliance Questionnaire and Agreement for Registered Representatives in which he agreed to comply with the Firm's policies and procedures.[61] The Firm's WSPs for January 2016, January 2017, January 2018, May 2018, and much of 2019 were, in all respects pertinent to this case, the same.[62] In March 2017, Respondent signed an acknowledgment that he had received and reviewed the Firm's WSPs and understood that he was required to comply with them.[63] In January 2018, he signed another acknowledgment that he had received and reviewed the WSPs and agreed to comply with them.[64] At the hearing, Respondent admitted that he was familiar with IFG's WSPs.[65]

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[54] Tr. (RM) 843–47; JX-17.

[55] Tr. (RM) 870–72.

[56] Tr. (RM) 847–48.

[57] Tr. (RM) 848.

[58] Tr. (RM) 848.

[59] Tr. (RM) 848.

[60] Tr. (RM) 848.

[61] CX-22, at 16–21.

[62] JX-1; JX-2; JX-3; JX-4.

[63] CX-22, at 6–7.

[64] CX-22, at 13.

[65] Tr. (DAB) 698.

2. Required Mutual Fund Disclosures Relating to Breakpoints

The WSPs required a registered representative to disclose all material facts to the customer when recommending either the purchase or sale of a mutual fund, including breakpoints, Letters of Intent, Rights of Accumulation, and all relevant fees and sales charges.[66] The WSPs instructed a registered representative to discuss with the customer the effect of sales charges on the anticipated return on investment and, where breakpoints might be available, to disclose their existence.[67] The WSPs also said that a representative "must" discuss the availability and use of Letters of Intent in conjunction with breakpoint discounts.[68] A Letter of Intent is a way of obtaining a breakpoint discount by aggregating smaller purchases to achieve the breakpoint.[69] Rights of Accumulation are another way of obtaining a discount by aggregating holdings in multiple accounts held by a person or household.[70]

3. Suitability and Solicited Transactions

The Firm's WSPs provided that a registered representative must have a reasonable basis to believe that a recommended transaction or investment strategy is suitable for the customer.[71] Thus, the suitability obligation is linked to whether a recommendation has been made. The WSPs told the Firm's registered representatives that the suitability requirement applies only to recommended transactions, but the WSPs cautioned that the term "recommended transaction" is broadly defined. The WSPs declared, "Regulatory authorities consider a transaction as solicited (recommended) if a registered representative does anything more than accept and process a direct, specific order."[72]

As an illustration, the WSPs described a scenario in which a customer calls a registered representative to ask about an investment idea the customer has. When the representative gives a positive opinion and then places the trade, the WSPs said that is a solicited transaction.[73] Although the customer had the idea, the representative expressed a positive view and then executed the transaction. The representative is considered to have recommended the transaction.[74]

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[66] JX-1, at 7–8; JX-2, at 8; JX-3, at 9; JX-4, at 9.

[67] JX-1, at 8; JX-2, at 8; JX-3, at 9; JX-4, at 9.

[68] JX-1, at 8; JX-2, at 8; JX-3, at 10; JX-4, at 9.

[69] JX-8, at 3.

[70] JX-1, at 10; JX-2, at 11; JX-3, at 12; JX-4, at 12.

[71] JX-1, at 4; JX-2, at 4, 6; JX-3, at 5; JX-4, at 5.

[72] JX-1, at 6. *See also* JX-2, at 6; JX-3, at 7; JX-4, at 7.

[73] JX-1, at 6; JX-2, at 6; JX-3, at 7; JX-4, at 7.

[74] JX-1, at 6; JX-2, at 6; JX-3, at 7; JX-4, at 7.

The WSPs also instructed that where a customer learns about a product from material sent to the customer by either the representative or the Firm, any resulting trade would be a solicited transaction.[75]

4. Mutual Fund/529 Plan Transaction Form

For most of the Relevant Period, the Firm employed a form it called the Mutual Fund/529 Plan Transaction Form ("MFTF") to assist in supervising mutual fund trading and to ensure that customers received appropriate disclosures.[76] The Firm required a fully completed MFTF to be signed by the customer, the registered representative, and an appropriate supervisory principal.[77] The last page of the MFTF was a disclosure statement that explained various terms and a registered representative was required to provide a copy to the customer.[78]

The WSPs required an MFTF to be completed:

- for all initial mutual fund share purchases (except for an initial investment in a fund that was exchanged for a fund within the same fund family);[79]
- for any additional purchase of a mutual fund already held, *if* the additional purchase was for $20,000 or more;[80] and
- for any "switch" between fund families (using proceeds from the sale of one mutual fund to purchase shares in another mutual fund in a different fund family).[81]

If a representative did not properly submit the MFTF in connection with a switch from one fund family to a different fund family, then the Firm might reverse and retain any commissions related to the switch transaction.[82] If the Firm determined that the switch was not appropriate, then the Firm might either cancel the entire transaction or credit the sales charge back to the customer.[83]

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[75] JX-1, at 6; JX-2, at 6; JX-3, at 7; JX-4, at 7.

[76] JX-1, at 7; JX-2, at 9; JX-3, at 10; JX-4, at 10. A copy of the MFTF is in evidence as JX-8.

[77] JX-1, at 8; JX-2, at 9; JX-3, at 10; JX-4, at 10.

[78] Tr. (RM) 821.

[79] JX-1, at 7; JX-2, at 9; JX-3, at 10; JX-4, at 10; Tr. (RM) 811–13. Sica explained that there is no charge when a fund is exchanged for a fund in the same fund family, so in that case there is no reason to fill out the form. Tr. (RS) 641–42.

[80] JX-1, at 7; JX-2, at 9; JX-3, at 10; JX-4, at 10; Tr. (RM) 811–13.

[81] JX-1, at 9; JX-2, at 10; JX-3, at 11; JX-4, at 11.

[82] JX-1, at 9; JX-2, at 10; JX-3, at 11; JX-4, at 11.

[83] JX-1, at 9; JX-2, at 10; JX-3, at 11; JX-4, at 11.

The MFTF stated in a heading, "Complete and submit for all initial purchases and additional purchases of $20,000 and over."[84] This is the language upon which Respondent's defense against the charge of circumventing the Firm's procedures largely depends. He argues that he did not evade the Firm's supervision because he reasonably understood that no form had to be filed for any transaction below $20,000. The basis for his argument is that the sentence lacks a comma between "initial purchases" and "additional purchases." He interprets that to mean that the $20,000 threshold applies to both initial and additional purchases.[85] He claims that the MFTF instructions were "not precisely aligned" with the WSPs, implicitly acknowledging that his interpretation of the MFTF heading is not supported by the WSPs.[86]

We reject Respondent's construction of the MFTF heading. It is not a plausible reading of the Firm's requirements and is not corroborated by any other evidence. First, we note, a comma is unnecessary between just two items like "initial purchases" and "additional purchases." Each item is separated from the other by the conjunction "and." That means that the $20,000 threshold for filing an MFTF modifies only "additional purchases" and not the earlier, separate item referring to "initial purchases."[87] Second, just below the heading on which Respondent focuses and to the left, the form required that a box be checked identifying the kind of mutual fund transaction that was being reported—either a "New Purchase" or an "Additional Purchase ($20,000 and over)."[88] At that part of the form, the $20,000 threshold clearly applied only to additional purchases. Third, Mireles, who supervised Respondent for much of the time he was at IFG, testified that the MFTF "was required for all initial purchases and any additional purchases above $20,000."[89] Fourth, Jonee Powell, who also supervised Respondent for some of the time he was at IFG, testified that the MFTF was required for all initial purchases of mutual funds and any additional purchases of more than $20,000.[90] And fifth, the WSPs from 2016 until September 2019, when new procedures were implemented, explicitly required an MFTF to be

[84] JX-8, at 1.

[85] Tr. (DAB) 1063–67. Respondent testified, "[T]he way that sentence is structured, the word 'and' takes those two sentence clauses, the clause preceding 'and' and the clause following 'and' and makes them equal weight in relation to the prepositional phrase of 'of $20,000 and over.'" Tr. (DAB) 1063.

[86] Tr. (DAB) 715. In paragraph 13 of his Answer (and footnote 1 to it), Respondent admitted that the Firm's WSPs provided for the completion of an MFTF upon (a) the initial purchase of a mutual fund and (b) an additional purchase of more than $20,000, but Respondent claimed that the WSPs were "contrary" to the language in the upper right-hand corner of the MFTF.

[87] The New Fowler's Modern English Usage (3rd Ed. 1996), edited by R.W. Burchfield (comma, item 4), at 162. A serial comma (sometimes referred to as an Oxford comma) is placed before a conjunction in a list of three or more items. A serial comma may be optional in different style guides. It is grammatically incorrect, however, to place a comma in a list of only two items. *See* https://www.scribbr.com/commas/serial-comma.

[88] JX-8, at 1.

[89] Tr. (RM) 811. *See also* Tr. (RM) 813.

[90] Tr. (JP) 790–91.

filed for any initial purchase. There was no $20,000 threshold for submitting an MFTF on initial purchases.[91]

The MFTF also required disclosure of whether a mutual fund purchase was solicited or unsolicited and whether the source of funds for the purchase was a mutual fund liquidation.[92] If the source of funds was a liquidation of another mutual fund, then the reason for the switch had to be identified, along with whether the switch involved multiple issuer families.[93] If an exchange within the existing fund family was not an option, the reason had to be stated.[94] The MFTF also required disclosure of aggregate household investments per fund family to ascertain whether a breakpoint might apply.[95] The Firm sought this information to ensure that the customer received any price breaks that might be due.[96]

The Firm expected a registered representative at IFG to fill out the portions of the MFTF relevant to a particular transaction and to sign it.[97] The customer was to sign it, too, acknowledging receipt and confirming the customer's understanding of the investment's features and costs.[98] The representative was to provide a copy of the MFTF to the client.[99] Then the representative was to send the MFTF to IFG by uploading it into the Firm's system as an item for a supervisory principal to review.[100] The supervisor would review and sign it, after which the form was moved to a document repository operated by a third-party vendor.[101] The MFTFs were maintained in that system, organized by client, and available for subsequent review by compliance and others as necessary.[102]

However, in response to a Rule 8210 request, the Firm told FINRA staff that it had no record of any MFTF completed by Respondent.[103] When asked about that, Respondent suggested

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[91] JX-1, at 7 ("All initial mutual fund share purchases" except for exchanges between funds within the same fund family "require a fully completed Mutual Fund/529 Plan Transaction Form signed by the customer(s), the registered representative, and the SP."). *See also* JX-2, at 9; JX-3, at 10; JX-4, at 10.

[92] JX-8, at 1.

[93] JX-8, at 1.

[94] JX-8, at 1–2.

[95] JX-8, at 2.

[96] Tr. (RM) 818–19.

[97] JX-8, at 1–2; Tr. (RM) 820–21.

[98] JX-8, at 2; Tr. (RM) 820–21.

[99] Tr. (RM) 821.

[100] Tr. (RM) 821–22.

[101] Tr. (RM) 822.

[102] Tr. (RM) 822–24.

[103] JX-114.

that the Firm might have had a "records retention issue."[104] He denied that he never filled out and submitted an MFTF to the Firm.[105]

We do not believe the Firm's records system would so completely fail. And, if Respondent had completed and submitted the MFTF in connection with the mutual fund transactions he executed, it would have been unnecessary for him to make extensive handwritten notes to show that he talked with his customers about the applicable breakpoints and sales charges on their transactions. No customer with whom FINRA staff spoke mentioned receiving any such form[106] or understood that a breakpoint was a way of obtaining a volume discount.[107] We find that Respondent never completed and submitted a single MFTF.

As the WSPs stated, the purpose of the MFTF was to assist in supervising the Firm's registered representatives and to ensure that customers received the breakpoint discounts to which they are entitled.[108] Mireles testified that the Firm "wanted to confirm that there was [a] thorough explanation and consideration of various factors on that form."[109] The form, he said, was used to supervise and review transactions.[110] Respondent refused "to speculate on the purpose of the form."[111] He denied that one purpose was to enable supervisors at the Firm to monitor mutual fund switches.[112] We find his testimony evasive. The MFTF was part of the Firm's supervisory procedures, and by not completing and submitting a single MFTF, Respondent evaded the Firm's supervision.

5. Letters of Intent for Aggregating Investments and Obtaining Volume Discounts

A Letter of Intent informs a mutual fund company that the customer intends to invest a certain amount of money in a mutual fund in that company's fund family over the course of time, but not all at once. The company will then apply a breakpoint discount to all the smaller transactions based on the aggregate amount intended for purchase.[113] Some funds also offer

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[104] Tr. (DAB) 726–27.

[105] Tr. (DAB) 726.

[106] CX-7; CX-8; CX-9; CX-10; CX-11; CX-12; CX-13; CX-14; CX-15; CX-16; CX-17; CX-20; CX-21; CX-23.

[107] CX-11, at 1; CX-12, at 3; CX-13; CX-15, at 2; CX-16, at 2; CX-21, at 1.

[108] JX-1, at 7; JX-2, at 9; JX-3, at 10; JX-4, at 10.

[109] Tr. (RM) 813–14.

[110] Tr. (RM) 814, 816.

[111] Tr. (DAB) 730.

[112] Tr. (DAB) 730.

[113] Tr. (RS) 252 ("[W]ith the Letter of Intent, you get the breakpoint from the very first purchase, whether it's $50,000 or not."); Tr. (DAB) 692–93 (If a customer submits the Letter of Intent before the first purchase, the customer will receive the applicable breakpoint discount from the first investment. But if the customer does not follow through, the discount will be retracted. In that case, the customer would be charged the same as the customer would have been if there were no Letter of Intent.). See also FINRA Rules and Guidance, Frequently Asked

retroactive Letters of Intent, which allow an investor to qualify for a breakpoint discount based on aggregating purchases in the recent past.[114]

The IFG WSPs specified that the aggregation or accumulation of purchases for purposes of taking advantage of breakpoint discounts should be considered across a span of time. The WSPs explained that if a registered representative was meeting with a client about an initial purchase, the registered representative had to inquire whether there was a potential for additional funds to be deposited.[115] If the client said "yes," the WSPs instructed the representative to use a Letter of Intent to take advantage of a volume discount.[116] If the client said no additional investment was contemplated, but later the client deposited additional funds, then the WSPs instructed the representative to make use of Rights of Accumulation, another way of aggregating holdings to achieve a breakpoint discount.[117]

The MFTF, which was supposed to be given to a client, explained Letters of Intent.[118] But, since IFG has no record of Respondent submitting an MFTF for any client,[119] the Firm has no record that Respondent explained Letters of Intent to his customers. Respondent admits that while he was at IFG none of his customers submitted a Letter of Intent or a Retroactive Letter of Intent.[120] If he did adequately explain Letters of Intent to his customers, it is difficult to understand why no customer made use of a Letter of Intent or Retroactive Letter of Intent.[121] We consider the lack of any Letter of Intent or Retroactive Letter of Intent as evidence that Respondent did *not* explain to his customers that Letters of Intent are a way of obtaining a

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Questions about Breakpoints, https://www.finra.org/rules-guidance/guidance/faqs/breakpoints-frequently-asked-questions. The SEC explained Letters of Intent and Rights of Accumulation in *Kenneth C. Krull*, Exchange Act Release No. 40768, 1998 SEC LEXIS 2664, at *10 n.10 (Dec. 10, 1998), *petition for recons. denied*, Exchange Act Release No. 41008, 1999 SEC LEXIS 210 (Feb. 1, 1999), *aff'd*, 248 F.3d 907 (9th Cir. 2001).

[114] Tr. (DAB) 693–94.

[115] JX-1, at 8; JX-2, at 8; JX-3, at 9; JX-4, at 9.

[116] JX-1, at 8; JX-2, at 8; JX-3, at 9; JX-4, at 9.

[117] JX-1, at 8; JX-2, at 8; JX-3, at 9; JX-4, at 9.

[118] JX-8, at 3.

[119] JX-114, at 1.

[120] Tr. (DAB) 695.

[121] Respondent argues that he was not required to force his customers to use Letters of Intent; he was only required to explain Letters of Intent to them. He asserts that his customers preferred "flexibility" instead of meeting a purchase threshold "within a fixed time frame." Resp. R. Br. 12–13.

There is no record evidence that Respondent's customers preferred "flexibility" to receiving a volume discount. In fact, there was no reason not to use a Letter of Intent. If a customer for any reason did not meet the investment threshold for a breakpoint discount within the specified time frame, the mutual fund would simply recalculate what would have been the cost without the breakpoint discount and the extra charge would be deducted from the investment. The charge would be the same as if no Letter of Intent had been submitted. Tr. (DAB) 692–94; JX-8, at 3. In any event, retaining "flexibility" does not explain why none of Respondent's customers used a Retroactive Letter of Intent to take advantage of a breakpoint discount after having accumulated in recent transactions enough shares to qualify for a discount.

volume discount on purchases, and he did *not* advise his customers that they could use Letters of Intent to hold down costs.[122]

6. Training

The WSPs required the Firm's Chief Compliance Officer ("CCO") to provide training on the Firm's mutual fund practices at least annually. That training was to include breakpoints and the section in the MFTF on breakpoints, Letters of Intent, Rights of Accumulation, switching, and the use of the MFTF section on switching.[123] Mireles, Respondent's supervisor during much of his time at IFG, testified that he believed Respondent had had training on the proper use of breakpoints.[124]

7. The Firm's Review Process

From 2016 until 2019, IFG supervised its registered representatives' transactions through the submission of a transaction form (in the case of a mutual fund transaction, the MFTF) and by using the Firm's proprietary software system, which was called the Gateway Smart Blotter ("Smart Blotter").[125] The Smart Blotter captured all transactions[126] but only certain ones were marked for attention. The Smart Blotter employed an automated system in which the transactions were run through various rule sets and flagged with a color designation for possible review.[127] If a transaction was not flagged by the system for further attention, it would be marked by a white flag.[128] A transaction marked with a white flag might be reviewed for patterns and trends or subjected to random sampling, but ordinarily it would not be reviewed.[129] If a transaction was flagged by one rule set, it would be marked by a yellow flag and would receive greater attention.[130] If a transaction was flagged more than once, the transaction would be marked by a

[122] Respondent also sometimes failed to apply a breakpoint discount because he did not aggregate holdings in a household's various accounts. CX-2R (column with explanation for missed breakpoints); Tr. (remarks of Hearing Officer and Enforcement's counsel) 15–19.

[123] JX-1, at 10; JX-2, at 11; JX-3, at 12; JX-4, at 12.

[124] Tr. (RM) 870–74.

[125] Tr. (RM) 808–09, 811.

[126] Tr. (RM) 854.

[127] Tr. (RM) 808–09.

[128] JX-14.

[129] Tr. (RM) 810; JX-14.

[130] JX-14.

red flag.[131] A red flag required investigation into the justification for the transaction,[132] and commissions on a red-flagged transaction would be withheld until the flag was cleared.[133]

Of critical importance here, from 2016 to mid-2019, the rule sets in place for mutual fund transactions would only flag transactions of $20,000 or more for review.[134] Trades below that threshold would be white flagged.[135] There were thousands of white flag items that came through daily.[136] By trading in increments of less than $20,000, Respondent made it unlikely that his transactions would be reviewed by the Firm.[137] Mireles noted that the $20,000 threshold was significant because that was usually the point at which breakpoints might begin to apply.[138]

Respondent's supervisors were unaware of his trading pattern. The person who supervised Respondent from December 2018 through mid-October 2019 responded to a FINRA Rule 8210 request saying that she did not recall ever seeing any of Respondent's transactions as part of her spot checks.[139] Another person who supervised Respondent between May and November 2018 said in a Rule 8210 response that he did not discover Respondent's "prolific" mutual fund purchases under $20,000 until later because at the time the Firm was only looking at mutual fund transactions above $20,000.[140] Mireles said in testimony that nothing ever stood out about Respondent's trading and he did not recall ever seeing Smart Blotter flags with Respondent's trading.[141] Mireles knew nothing about the significant number of Respondent's purchases below $20,000 in customer accounts or how often Respondent purchased the same mutual fund over multiple days.[142] Mireles testified that he only learned later that Respondent's transactions "weren't flagging because they were under $20,000."[143] The evidence showed that, by trading in increments of less than $20,000, Respondent evaded his Firm's supervision.

[131] Tr. (RM) 810.

[132] Tr. (RM) 810.

[133] Tr. (RM) 810–11.

[134] Tr. (RM) 812, 825, 854; Tr. (RS) 634–35.

[135] JX-14.

[136] JX-14.

[137] Tr. (RM) 634–35.

[138] Tr. (RM) 853–54.

[139] JX-14; Tr. (RS) 101–04.

[140] JX-15; Tr. (RS) 101–04.

[141] Tr. (RM) 832.

[142] Tr. (RM) 831–33.

[143] Tr. (RM) 833.

F. IFG Supervisory Procedures – September 2019 – The New Switch Form

In many regards, the Firm's revised WSPs issued in September 2019 are consistent if not identical to the WSPs for the prior years.[144] The basic suitability obligation remained the same. The 2019 WSPs told registered representatives that they were obligated to have a reasonable basis to believe a recommendation or strategy was suitable.[145] The September 2019 WSPs explained that the suitability obligation arises whenever there is a recommendation, in other words a solicitation.[146] These WSPs also cautioned that the term "recommendation" is broadly defined and that a transaction would be considered solicited if the registered representative did anything more than accept and process a direct, specific order.[147] Registered representatives continued to be required to discuss the availability and use of Letters of Intent in conjunction with breakpoint discounts and the differences in sales loads and their effect.[148] The September 2019 WSPs required a registered representative to verify that a purchase of Class A shares qualified for the appropriate breakpoint discount.[149]

What is different about the September 2019 WSPs from the prior WSPs is that the Firm deleted references to the MFTF and the $20,000 threshold for reporting on additions to a mutual fund holding. The September 2019 WSPs referred to a new form, the Mutual Fund Purchase Switch Acknowledgement ("Switch Form").[150] A registered representative was required to fill out the Switch Form when the proceeds from a sale of a mutual fund were being used to purchase a mutual fund in a different company's fund family.[151] Like the MFTF, the Switch Form was required to be completed and signed by the client, registered representative, and appropriate supervisor.[152] Exchanges between funds within the same fund family did not require a Switch Form.[153] However, all transactions, whether above or below the $20,000 level, had to be documented with a Switch Form if they involved selling a mutual fund in one fund family to buy a mutual fund in a different fund family.[154] A memorandum announcing the change was

[144] Tr. (RS) 83.

[145] JX-5, at 9.

[146] JX-5, at 9.

[147] JX-5, at 9.

[148] JX-5, at 11, 14.

[149] JX-5, at 12.

[150] JX-5, at 13; JX-9; Tr. (RS) 83.

[151] JX-5, at 13.

[152] JX-9.

[153] JX-5, at 13.

[154] JX-5, at 13.

published earlier in 2019,[155] and at the Firm's annual conference in August 2019 a panel discussed the new form and new procedures.[156]

Respondent maintains that he reasonably thought there was a $20,000 reporting threshold for the MFTF,[157] an assertion we have rejected.[158] He also maintains that there continued to be a $20,000 reporting threshold after the Firm adopted the new Switch Form.[159] Respondent asserts that, around the time of the Firm's August 2019 annual conference, he was told by two supervisors, Powell and Mireles, that the Switch Form did not need to be completed and submitted if a mutual fund transaction was less than $20,000.[160] Respondent purportedly took notes of these conversations that he later produced to Enforcement in its investigation.[161]

We do not find Respondent's assertion that the supervisors told him that the Switch Form was only required for transactions over $20,000 credible. In sworn testimony, the two supervisors adamantly denied telling him any such thing.[162] The new WSPs put in place in September 2019 do not refer to any such threshold,[163] and the Switch Form itself does not mention $20,000 or any other dollar limit.[164] Indeed, as one supervisor, Powell, explained, it would make no sense to tell Respondent he need not submit a Switch Form for any transaction below $20,000, because the purpose of changing the Firm's procedures was to capture switches at lower dollar amounts.[165]

In addition to flagging transactions over $20,000, as it always had, the Firm deployed a new rule set in its Smart Blotter in 2019 with a focus on switches between mutual funds.[166] The new rule set focused on individual accounts and flagged for review the sale of one mutual fund

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[155] Tr. (RM) 826–27.

[156] Tr. (JP) 786–87.

[157] Tr. (DAB) 1063–67.

[158] *See supra* at 12–15.

[159] Tr. (DAB) 731–34, 1068–72; JX-104.

[160] Tr. (DAB) 731–34, 1068–72.

[161] Tr. (DAB) 731–34; JX-104. These notes are not in the record for reasons explained below at pages 95 through 96 of this Decision.

[162] Tr. (JP) 786–89, 792–94, 802–03; Tr. (RM) 815–16.

[163] JX-5, 1–14.

[164] JX-9.

[165] Tr. (JP) 793. Switching between mutual funds in different fund families merited extra review, as Mireles explained (Tr. (RM) 819):

[W]hen we're talking about switching from one fund family to another, that would be the generation of a sales charge payable to the rep and debited from the client. And in order to justify that, again, you'd have to have done your due diligence in the client's best interest to make sure that there wasn't a comparable or equal position of the one you were going into within that same fund family, which then would not be a cost to the client.

[166] Tr. (RM) 827–28.

position whenever there was a purchase of another mutual fund position in the same account within a 30-day period.[167] This new rule set had no dollar limitation. Whenever there was a pair of transactions that could be viewed as a possible mutual fund switch within 30 days, the transactions were flagged.[168]

G. Respondent's General Pattern of Trading

The pattern of Respondent's trading in customer accounts is revealed by the Firm's Smart Blotter[169] and several summary exhibits based on the information in it.[170] FINRA's principal investigator, Robert Sica, reviewed all of Respondent's trading during the Relevant Period[171] and worked on the summaries, which he explained in his testimony.[172]

1. Unsuitable Trading

Respondent engaged in a pattern of unsuitable short-term trading across multiple accounts and throughout his tenure at the Firm. That pattern was unsuitable for any investor because it unnecessarily increased his customers' costs and diminished their potential profit while, at the same time, it benefited Respondent by increasing his compensation. The suitability obligation requires a registered representative to minimize the sales charge that a customer pays for mutual fund shares.[173]

Respondent's short-term trading pattern is evidenced by CX-1, which Enforcement created from the Firm's Smart Blotter.[174] As alleged in the Complaint (¶¶ 1, 9, 11, and 38), CX-1 shows that Respondent sold 27 batches of Class A mutual fund shares that had been purchased less than a year before Respondent sold them. The sales occurred in 11 customer accounts held by nine customers (treating a married couple as a single customer).[175] Selling Class A shares after holding them less than a year gives rise to a presumption of unsuitability that can only be

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[167] Tr. (RM) 827–28.

[168] Tr. (RM) 828–29.

[169] CX-24 is a spreadsheet with the details of all Respondent's purchases and sales during the Relevant Period as recorded in the Firm's Smart Blotter. Enforcement received the information in two parts (one for 2016 and the other for 2017 through 2019) and combined the two parts without altering any of the data received from the Firm. Tr. (RS) 63–64. Accordingly, CX-24 is not a summary created by Enforcement, but rather the Firm's data extracted from the Smart Blotter. It is the source for information in summaries created by Enforcement.

[170] CX-1; CX-2R; CX-5; Tr. (RS) 114–15.

[171] Tr. (RS) 63–64.

[172] Tr. (RS) 62–64, 69–74, 108–28, 141, 149–58.

[173] *Dep't of Enforcement v. Sathianathan*, No. C9B030076, 2006 NASD Discip. LEXIS 3, at *31 (NAC Feb. 21, 2006), *aff'd*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572 (Nov. 8, 2006), *petition for review denied*, 304 F. App'x 883 (D.C. Cir. 2008).

[174] CX-1.

[175] CX-1; Tr. (RS) 147–58.

rebutted in rare circumstances,[176] perhaps by a change in investment objectives or an unexpected immediate need for cash. As discussed throughout this decision, Respondent's proffered reasons for his trading are insufficient to rebut the presumption. We find CX-1 to be probative and reliable evidence of Respondent's unsuitable short-term trading in Class A shares.[177]

Respondent engaged in another pattern of unsuitable trading, mutual fund switching, that benefited him at the expense of his customers. He admitted in his hearing testimony that while he was at IFG he effected numerous switches from one mutual fund to another.[178] CX-1 shows that when Respondent sold shares of a fund after holding those shares less than a year, he usually used the proceeds to purchase another fund in a different fund family.[179] As alleged in the Complaint (¶ 10), in 23 of the 27 short-term sales identified in CX-1, the proceeds were used to switch to a mutual fund in a different fund family.[180] A switch between fund families was significant because the customer incurred a sales charge when switching between funds in different fund families, whereas exchanging funds in the same fund family could be done free of charge.[181] Respondent received a commission on a switch between different fund families, but

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[176] *See*, *e.g.*, *Mehringer*, 2020 FINRA Discip. LEXIS 27, at *8–10.

[177] We have evidence that Respondent engaged in other short-term trading as well, which we are permitted to consider for purposes of sanctions, even though the specific trades were not identified and charged in the Complaint. *See*, *e.g.*, *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *38 (Sept. 16, 2011) (holding that an adjudicator may consider matters that fall outside the underlying rule violation in determining sanctions); *Dep't of Enforcement v. McCrudden*, No. 2007008358101, 2010 FINRA Discip. LEXIS 25, at *26 n.20 (NAC Oct. 15, 2010) ("Evidence of misconduct that is not alleged in the complaint, but is similar to the misconduct charged in the complaint, is admissible to determine sanctions.") (citing *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *22 n.33 (July 1, 2008)).

FINRA's principal investigator, Sica, testified that Respondent sold some mutual fund shares after holding them barely more than a year. "We saw a lot of funds that . . . were bought and sold just over a year as well, being over 365 days, in that range." Tr. (RS) 158. He said that is not common with Class A mutual fund shares because they are meant to be held over a longer term. Tr. (RS) 158. His testimony is supported by CX-24, which shows that Respondent sold additional Class A shares when they had been held less than two or three years and still far short of the appropriate holding period for such shares. We discuss some of these transactions in connection with the trading in specific accounts. While a holding period of a year or less is presumptively short-term, a holding period of only two or three years may also constitute unsuitable short-term trading if there is no justification for selling the shares early. *See*, *e.g.*, *Russell L. Irish*, Exchange Act Release No. 7687, 1965 SEC LEXIS 241, at *7–8 (Aug. 27, 1965) (finding unsuitable trading where some mutual fund shares were held less than one year, some shares were held less than two years, and other shares were held less than three years). We conclude that Respondent's pattern of sales after holding the Class A shares less than two or three years also constitutes short-term trading. We find CX-24 and information extracted from it to be probative and reliable evidence of additional unsuitable short-term trading in Class A shares.

[178] Tr. (DAB) 727.

[179] CX-1; Tr. (RS) 156, 197–98, 229, 233, 268–70.

[180] CX-1. When Respondent sold three batches of CWGIX in BK's account, the exhibit does not show that the proceeds were used to switch mutual fund families. Similarly, when Respondent sold one batch of RYPDX in the account of MJ and her husband, there is no indication that he used the proceeds in a switch between mutual fund families.

[181] Tr. (RS) 641.

not on an exchange of funds in the same fund family.[182] Mutual fund switching is viewed as an unsound practice.[183] We find CX-1 probative and reliable evidence of unsuitable mutual fund switching.[184]

In addition, Respondent engaged in unsuitable trading when he purchased mutual fund shares in increments below $20,000, which deprived his customers of breakpoint discounts they should have received. CX-2R contains detailed information about Respondent's trading from the Firm's Smart Blotter[185] and CX-5 tallies some of the information in CX-2R.[186] The exhibits show that Respondent almost always purchased mutual funds in transactions below $20,000.[187] Of the 932 mutual fund purchases he made during his tenure at IFG, only 33 were above $20,000.[188] Often Respondent would buy Class A shares of a mutual fund for a customer's account and then in a matter of two to five days (generally consecutive business days)[189] buy more shares of the same mutual fund.[190] As alleged in the Complaint (¶ 23), the exhibits show that during the Relevant Period Respondent made 578 purchases of less than $20,000 within two to five business days in 59 customer accounts held by 44 customers (treating married couples as separate customers).[191] Of the 578 purchases below $20,000, CX-2R shows that customers were overcharged in 131 transactions because they missed breakpoint discounts they would have received if the piecemeal purchases had been made as single purchases.[192] We find CX-2R and

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[182] Tr. (DAB) 895.

[183] *See*, *e.g.*, *Irish*, 1965 SEC LEXIS 241, at *9–10; *Mehringer*, 2020 FINRA Discip. LEXIS 27, at *8.

[184] CX-24 reveals additional mutual fund switching, some of which we discuss below in connection with Respondent's trading in specific customer accounts. As set forth *supra* at 22, in note 177, the additional mutual fund switching can be considered for purposes of sanctions.

[185] CX-2R.

[186] CX-5.

[187] CX-2R, column on amounts invested.

[188] CX-5; Tr. (RS) 72–74.

[189] FINRA Rule 9145 provides that in a proceeding such as this an adjudicator can take "official notice of such matters as might be judicially noticed by a court." A court may take judicial notice of "a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). "Because calendar dates and days of the week are a matter of public record and not subject to reasonable dispute, the Court can take judicial notice of such days and dates . . ." *Guymon v. Vidal*, No. 1:23-cv-1302 (RDA/JFA), 2025 U.S. Dist. LEXIS 5515, at *7 n.5 (E.D. Va. Jan. 10, 2025). In *Guymon*, the court consulted a publicly available record of calendar and weekdays for earlier years. We have consulted and take official notice of the same source in determining that Respondent followed a pattern of trading not just within five days but often on consecutive business days. *See* https://www.timeanddate.com/calendar. Pursuant to FINRA Rule 9145(b), the parties were given notice and an opportunity to object to or comment upon taking official notice of the days of the week from this website. No party filed any objection or comment.

[190] CX-24; CX-2R; Tr. (RS) 74.

[191] CX-2R; Tr. (RS) 117.

[192] CX-2R (first column with total number of purchases of less than $20,000 within two to five business days; fifteenth column with number of trades with overcharge). CX-2R shows slightly different figures for the total amount of overcharges ($20,824.51) than alleged in the Complaint ($21,873.91) because the exhibit was revised

CX-5 probative and reliable evidence of unsuitable trading that failed to take advantage of breakpoint discounts.

2. Circumventing Firm's Supervisory Procedures

Since the Firm only flagged mutual fund transactions for review during most of the Relevant Period if they amounted to $20,000 or more,[193] Respondent avoided triggering the Firm's scrutiny of his activities by structuring numerous purchases to stay under that $20,000 threshold. We find CX-2R and CX-5 to be probative and reliable evidence of 578 purchases within two to five consecutive business days below the $20,000 threshold, as alleged in the Complaint (¶¶ 2, 22–25, and 43). As discussed below, Respondent has offered no credible explanation for his pattern of purchases below $20,000.

As alleged in the Complaint (¶¶ 13–18 and 43), Respondent also avoided scrutiny by not completing and submitting the MFTF form that the Firm required for initial purchases and mutual fund switches to make disclosures to customers and allow the Firm to supervise the trades. The WSPs required the completion of the MFTF for initial purchases, switches between mutual fund families, and additions of $20,000 or more to existing holdings.[194] CX-24 shows that Respondent purchased and sold mutual funds in customer accounts monthly, and often he switched from one mutual fund family to another. As discussed throughout this Decision, Respondent's purchases in increments of less than $20,000 were unsuitable; the purchases should have been aggregated. Much of Respondent's trading was covered by the requirement to complete and submit an MFTF. As previously noted, we find that Respondent failed to complete and submit a single MFTF.

3. Mismarking Trades as Unsolicited

CX-2R demonstrates that Respondent routinely marked trades in a way that makes no sense. After marking an initial purchase as solicited, Respondent marked many of the follow-up purchases in the same mutual fund as unsolicited, as though his customers had regularly contacted him after an initial purchase to instruct him to purchase more of the same mutual

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prior to being introduced into evidence. The sales charge for 11 transactions related to FKUTX was initially incorrectly calculated. When recalculated, the overcharges were lower. Tr. (remarks of Hearing Officer and parties' counsel on motion to substitute the revised version of CX-2R for the earlier one) 15–19. The figure for the number of customer accounts affected by missed breakpoints shown on CX-2R (38 accounts) also differs slightly from the number of affected accounts alleged in the Complaint (37 accounts) (¶¶ 25 and 29). And, although the Complaint (¶ 39) alleges customers missed breakpoints in connection with 143 mutual fund purchases, we find only 131 purchases proven, based on CX-2R.

[193] Tr. (RM) 825.

[194] *See supra* at 12–15.

fund.[195] We find, as alleged in the Complaint (¶¶ 3 and 51), that out of 578 mutual fund purchases, Respondent falsely marked 250 of the transactions, almost half, as unsolicited.[196]

While, perhaps, one could believe that one or two customers instructed Respondent to purchase mutual funds in this manner (we do not), it is impossible to believe that so many customers would independently instruct Respondent to trade in this piecemeal fashion. It was a pattern of trading that benefited only him, not the customers. The conclusion that Respondent mismarked many transactions is bolstered by other evidence. The customers who talked to FINRA staff during the investigation did not remember instructing Respondent to break up transactions into smaller purchases on consecutive days, and some of them emphatically told the staff that they never would have called Respondent back to purchase more of a mutual fund after they gave initial authorization for a transaction.[197]

We find CX-2R to be probative and reliable evidence that Respondent falsely marked numerous transactions as unsolicited when they were not. Respondent's Explanation for the General Pattern

At the hearing, Respondent explained his overall pattern of trading in general terms. He testified that he employed the "art" of slowly moving a client into a sector or allowing the customer to "wade" into the sector.[198] He might recommend investing a modest amount initially "to keep them comfortable."[199] Respondent's explanation makes no sense to us and is not supported by the record. Respondent almost immediately followed an initial purchase with additional purchases of the same mutual fund on consecutive business days. In most instances, there was little or no time for the customer to "wade" into the investment and get more comfortable with it.[200]

H. Evidence Relating to Specific Customer Accounts

We examined Respondent's trading in individual customer accounts. We found no credible explanation for any instance of Respondent's short-term trading, mutual fund switches, or piecemeal purchases below $20,000 in the accounts. Nor was there a credible explanation for

[195] CX-24, description column; CX-2R, trade date column and solicited/unsolicited column.

[196] CX-2R; CX-5; Tr. (RS) 141.

[197] Tr. (RS) 339–41, 389; CX-7, at 1–2; CX-10, at 1; CX-11, at 1; CX–12, at 2–3; CX-13; CX-14, at 1; CX-15, at 1–2; CX-16, at 1–2; CX-18, at 1–2; CX-20, at 1–2; CX-23, at 1.

[198] Tr. (DAB) 1003–04.

[199] Tr. (DAB) 1002–04.

[200] Mireles, Respondent's supervisor, testified that during his investigation of Respondent's trading, Respondent spoke of "soak[ing] in [an investment] within 24 hours and then to, you know, to resoak and then come back another day." Tr. (RM) 839. Respondent told Mireles that he purchased a small amount of shares first "so that the client can soak in the purchase and decide from there." Tr. (RM) 839–40. Mireles said, "It didn't make much sense to me." Tr. (RM) 839.

marking many follow-up transactions after an initial purchase as unsolicited. We discuss some examples here.

1. Customer CF

Customer CF's account is illustrative. We have a selection of her monthly account statements beginning the month of December 2017.[201] CF's portfolio value during December 2017 was approximately $338,000 (rounded off), and about 91% of the portfolio was invested in mutual funds.[202] Activity in CF's account is found in CX-2R, derived from CX-24. The table below, based on CX-2R, shows Respondent's purchases in CF's account from 2017 through 2019.

Mutual Fund Purchases in CF's Account (Sept. 2017–Mar. 2019)

	Date of Purchase[204]	Mutual Fund Purchased[205]	Marked Solicited / Unsolicited[206]	Purchase Amount[207]	Sales Charge[208]
Three Funds –Three Business Days[203]	9/29/17	JVIAX	S	$16,500	5.75%
	10/2/17	JVIAX	U	$18,500	5.75%
	10/3/17	JVIAX	U	$ 9,700	5.75%
	9/29/17	MMUFX	S	$10,750	5.75%
	10/2/17	MMUFX	U	$16,000	5.75%
One Fund - Two Business Days	9/29/17	PCGOX	S	$15,000	5.76%
	10/2/17	PCGOX	U	$19,000	5.76%
	12/18/17	HFEAX	S	$15,000	5.74%

[201] JX-29 (monthly statements for December 2017, January 2018, May 2018, and October 2018).

[202] JX-29, at 1.

[203] This table, like all the other tables in this decision showing Respondent's mutual fund purchases in individual customer accounts, collects in one color (green or blue) transactions that happened on the same days. Transactions in different mutual funds on those same days are distinguished by a lighter or darker shade of green or blue. Green and blue colors alternate between each series of transactions.

The tables usually track the consecutive business days on which Respondent traded, not calendar days. Thus, what might look like a span of five days shows trades on three consecutive business days, with a weekend in between. Occasionally, the transactions were not on consecutive business days. When that happens, the tables indicate the number of calendar days involved.

[204] Source: CX-2R, at 3, Trade Date column.

[205] Source: CX-2R, at 3, Fund column.

[206] Source: CX-2R, at 3, Solicited/Unsolicited column.

[207] Source: CX-2R, at 3, Amount Invested column.

[208] Source: CX-2R, at 3, Sales Charge % column.

	12/19/17	HFEAX	U	$19,882.85	5.75%
One Fund - Three Business Days	1/29/18	RRIAX	S	$17,000	5.74%
	1/30/18	RRIAX	U	$17,500	5.78%
	1/31/18	RRIAX	U	$13,000	4.48%
One Fund - Two Business Days	10/8/18	HFQAX	S	$19,500	5.77%
	10/9/18	HFQAX	U	$18,000	5.77%
Two Funds – Two Business Days	1/4/19	HFQAX	U	$17,500	5.77%
	1/7/19	HFQAX	U	$5,000	4.50%
	1/4/19	IAUX	S	$17,500	5.48%
	1/7/19	IAUX	U	$19,000	5.52%
One Fund – Two Business Days	3/13/19	PRUAX	S	$19,850	5.53%
	3/14/19	PRUAX	S	$19,850	4.98%

This table shows multiple purchases of the same mutual fund within two or three consecutive business days after an initial purchase. All the purchases were in increments below $20,000, which caused at least a couple of likely missed breakpoint discounts. The last purchases of RRIAX (January 13, 2018), HFQAX (January 7, 2019) and PRUAX (March 14, 2019) carried a much smaller sales charge than the earlier purchases of those same funds a few days before.[209]

The table also shows that Respondent marked many of the follow-up purchases in CF's account as unsolicited although they generally occurred only a few days after an initial purchase of the same fund. For example, Respondent marked three initial purchases for CF's account as solicited on September 29, 2017, which was a Friday: JVIAX, MMUFX, and PCGOX. The next business day was October 2, 2017. That day, Respondent purchased the same three mutual funds for CF's account, but this time he marked all three purchases as unsolicited. Then, on the third consecutive business day, October 3, 2017, Respondent purchased JVIAX a third time and marked that transaction unsolicited.

We do not believe that a single investor would purchase three mutual funds in three solicited transactions and then purchase more of the same three funds the next business day in unsolicited transactions. While it is plausible that an investor might rethink one investment and call back to increase the commitment, it is unlikely that the investor would do that with three mutual funds at the same time. It is even more unusual that the same investor would, unsolicited, direct the purchase of one of the funds on yet a third consecutive business day. The markings do not reflect the reality of the transactions.

Altogether, in three consecutive business days, Respondent purchased for CF's account a total of $44,700 of JVIAX, $26,750 of MMUFX, and $34,000 of PCGOX. But each individual

[209] CX-2R, at 3.

transaction fell below $20,000. We can only conclude that Respondent made the piecemeal purchases to avoid the Firm's automated flagging system for review.

Respondent also engaged in short-term trading in CF's account. He sold shares of HFEAX and MMUFX in CF's account less than a year after purchasing the shares for her account.[210] Respondent likewise sold all of CF's holdings of FDSAX on January 30, 2018, when a portion had been held less than a year and the rest had only been held about fifteen months.[211] And Respondent sold shares of FKUTX that had been in CF's account for only twelve to fifteen months.[212]

CF's account also reflects mutual fund switching. For example, Respondent sold FKUTX and AMECX from the account on December 18, 2017, and used the funds to purchase HFEAX in two separate transactions below $20,000 on December 18 and 19, 2017.[213] FKUTX is a Franklin Utilities fund and AMECX is in the American fund family; HFEAX is in the Janus Henderson fund family.[214] So the switch from FKUTX and AMECX to HFEAX caused CF to incur high up-front sales charges on the HFEAX purchases.

On October 4, 2018, Respondent sold the Class A shares of HFEAX in CF's account that had been purchased in December 2017 (along with other shares purchased in January 2018). The account had held all the HFEAX shares less than a year.[215] Respondent marked the sale as unsolicited. On the same day, he purchased MSFBX ($19,850) and JVIAX ($18,000) with the proceeds of the HFEAX sale.[216] This was both short-term trading and mutual fund switching.

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[210] CX-1, at 1.

[211] JX-29, at 5, 24.

[212] JX-29, at 4, 8.

[213] JX-29, at 4, 7–8. In testimony, Respondent declined to admit that the sales of AMECX and FKUTX funded the purchases of HFEAX in December 2017. He said he would have to review the client's entire statement to see whether there was residual cash in the account before the purchases occurred. Tr. (DAB) 908–12. CF's account statement for December 2017 showed that she did not have residual funds sufficient to make the two HFEAX purchases without selling AMECX and FKUTX. JX-29, at 8. If these transactions in December 2017 had occurred after the Firm changed its procedures and adopted the Switch Form in 2019, all these transactions would have been automatically flagged for the Firm's review because they involved selling funds in one fund family and using the proceeds to buy funds in a different fund family.

[214] CX-24 at rows 101, 237, *et seq*. (FKUTX: Franklin Utilities Fund); CX-24 at rows 138, 881, *et seq*. (AMECX: Income Fund of America); CX-24 at rows 10, 23, 673, 679 *et seq*. (HFEAX: Henderson European Focus Fund); Appendix A.

[215] CX-1, at 1.

[216] CX-1, at 1; JX-29, at 20; Tr. (DAB) 914–19; Tr. (RS) 156.

HFEAX is in the Janus Henderson fund family,[217] while MSFBX is in the Morgan Stanley fund family[218] and JVIAX is in the Virtus Vontobel fund family.[219]

On October 8, 2018, only four days after Respondent sold all the HFEAX in CF's account, he purchased $19,500 of HQFAX Class A shares in what he marked as a solicited transaction. And the following day, October 9, he purchased another $18,000 of HQFAX Class A shares in what he marked an unsolicited transaction.[220]

The transactions in HFEAX and HQFAX are an astonishing example of mutual fund switching without justification. HFEAX and HQFAX are both funds in the Janus Henderson family.[221] Any exchange of shares in one Janus Henderson family fund for shares in another Janus Henderson family fund should have been free of charge. Respondent admitted that he could have simply exchanged the two Janus Henderson funds in CF's account and there would have been no sales charge.[222] Instead, Respondent imposed a high sales charge on both purchases of HQFAX, 5.77%, as if the fund belonged to a different fund family. If Respondent had combined the two purchases of HQFAX in CF's account, which totaled $37,500, the Firm's automated system would have flagged the single purchase for review. And if Respondent had submitted an MFTF, as he was required to do, the Firm undoubtedly would have been alerted to the improper imposition of a sales charge on the exchange of funds in the same fund family. But Respondent effected the transactions in a way that avoided the Firm's supervision.[223]

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The pattern in CF's account strongly supports the conclusion that Respondent engaged in unsuitable trading, circumvented his Firm's supervisory procedures, falsely marked transactions

[217] CX-24, at row 1349 (HFEAX: Janus Henderson European Focus Fund); Appendix A.

[218] CX-24, at row 1351 (MSFBX: MSIF Global Franchise Portfolio Fund); Appendix A.

[219] CX-24, at row 1350 (JVIAX: Virtus Vontobel Foreign Opportunities Fund); Appendix A.

[220] Tr. (DAB) 917–19; CX-2R, at 3.

[221] CX-24, at rows 1349 (HFEAX: Janus Henderson European Focus Fund) and 1355 (HFQAX: Janus Henderson Global Equity Income Fund); Appendix A.

[222] Tr. (DAB) 918–19.

[223] Tr. (DAB) 914–19; JX-29, at 47. This does not appear to be an inadvertent or one-off mistake, as Respondent acted similarly in other customer accounts. For example, just the month before the switch between HFEAX and HFQAX in CF's account, Respondent did the same thing in Customer JS's account. Respondent sold HFEAX, a Janus Henderson family fund, on September 10, 2018, that had been in JS's account for only seven to eight months. On the same day, he bought for JS's account $19,500 shares of HFQAX, another Janus Henderson family fund. Although this was a switch between funds in the same fund family, which should have been treated as an exchange and therefore free of charge, Respondent charged JS 5.75% for the switch. CX-1, at 2. Respondent admitted that he could have done an exchange and not imposed a sales charge. Tr. (DAB) 895. He also admitted that if he had done the exchange without a sales charge, he would not have received a commission. Tr. (DAB) 895.

unsolicited, and benefited himself to the detriment of CF, his customer. The pattern betrays a standard way of doing business that benefited Respondent, not the customer.[224]

2. Customer SB

Respondent's trading in SB's account was like his trading in CF's account. See the table below.

Mutual Fund Purchases in SB's Account (Dec. 2016–June 2017)

	Date of Purchase[225]	Mutual Fund Purchased[226]	Marked Solicited / Unsolicited[227]	Purchase Amount[228]	Sales Charge[229]
Three Funds – Two Business Days	12/19/16	IBNAX	S	$15,000	5.26%
	12/20/16	IBNAX	U	$10,000	5.24%
	12/19/16	MSFBX	S	$17,000	4.74%
	12/20/16	MSFBX	U	$10,000	4.73%
	12/19/16	RYPDX	S	$15,000	4.75%
	12/20/16	RYPDX	S	$17,500	4.75%
One Fund – Two Business Days	12/20/16	EKWAX	S	$18,000	5.75%
	12/21/16	EKWAX	U	$17,500	5.76%
Two Funds –Three Business Days	3/2/17	JVIAX	S	$16,800	5.76%
	3/3/17	JVIAX	U	$15,000	5.74%
	3/6/17	JVIAX	U	$15,000	5.76%
	3/3/17	FDSAX	S	$18,500	5.75%
	3/6/17	FDSAX	U	$4,825	5.73%
Two Funds – Two Business Days	6/13/17	FDSAX	S	$18,250	5.76%
	6/14/17	FDSAX	U	$12,000	4.73%
	6/13/17	PGCOX	S	$10,000	5.74%
	6/14/17	PGCOX	U	$12,500	5.74%

[224] We have no handwritten notes of Respondent's interactions with CF in the record. Nor do we have any indication that FINRA staff interviewed CF. We draw our conclusions from the pattern of trading in CF's account.

[225] Source: CX-2R, at 1–2, Trade Date column.

[226] Source: CX-2R, at 1–2, Fund column.

[227] Source: CX-2R, at 1–2, Solicited/Unsolicited column.

[228] Source: CX-2R, at 1–2, Amount Invested column.

[229] Source: CX-2R, at 1–2, Sales Charge % column.

This table reflects that Respondent circumvented his Firm's supervision in multiple transactions by purchasing in increments below $20,000. On December 19, 2016, Respondent bought three mutual funds: IBNAX, MSFBX, and RYPDX, He then bought more of all three funds the next day, December 20. All six purchases were below $20,000: IBNAX ($15,000 and $10,000); MSFBX ($17,000 and $10,000); RYPDX ($15,000 and $17,500).[230] On December 20, Respondent also bought EKWAX ($18,000) and the next day, December 21, he bought more EKWAX ($17,500).[231] In March 2017, Respondent purchased JVIAX on three consecutive business days in amounts less than $20,000: March 2 ($16,800); March 3 ($15,000); March 6 ($15,000). On March 3 and March 6, Respondent also purchased FDSAX in two transactions of less than $20,000.[232]

Respondent never provided a credible reason for the repeated purchases below $20,000. We can only conclude that he entered the purchases that way to avoid the Firm's automated system for flagging transactions for review. By doing that, he did not have to justify the trading.

Respondent's markings related to these transactions would have us believe that the customer repeatedly instructed him to add to her holdings immediately after he solicited the initial purchases. The table above shows that he marked follow-up transactions in SB's account as unsolicited eight times: IBNAX, MSFBX, EKWAX, JVIAX (twice), FDSAX (twice), and PGCOX. Because this is a pattern, not an isolated event that might have an explanation, and the pattern did not benefit the customer, Respondent's markings of the follow-up purchases as unsolicited are not credible.

In June 2017, Respondent purchased PGCOX and FDSAX on consecutive business days in amounts below $20,000.[233] Notably, the sales charge on the second purchase of FDSAX was lower than the sales charge on the first, signifying a missed breakpoint.

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We separately discuss a table of Respondent's trading in SB's account in September 2017 because it is so unusual.

[230] CX-2R, at 1–2.

[231] CX-2R, at 1.

[232] CX-2R, at 1–2.

[233] CX-2R, at 1–2. June 13, 2017 (FDSAX $18,250 and PGCOX $10,000); June 14, 2017 (FDSAX $12,000 and PGCOX $12,500).

Mutual Fund Purchases in SB's Account (Sept. 2017)

	Date of Purchase[234]	Mutual Fund Purchased[235]	Marked Solicited / Unsolicited[236]	Purchase Amount[237]	Sales Charge[238]
Five Funds – Three Business Days	9/14/17	AIVSX	S	$19,000	5.74%
	9/15//17	AIVSX	U	$5,000	5.74%
	9/14/17	FUGAX	S	$18,500	5.75%
	9/15/17	FUGAX	U	$19,500	5.74%
	9/18/17	FUGAX	U	$10,000	5.76%
	9/14/17	IBIAX	S	$19,000	5.75%
	9/15/17	IBIAX	U	$10,000	5.76%
	9/14/17	IRSAX	S	$19,000	5.75%
	9/18/17	IRSAX	U	$5,000	5.25%
	9/14/17	MMUFX	S	$19,000	5.77%
	9/15/17	MMUFX	U	$19,500	5.74%
	9/18/17	MMUFX	U	$10,000	5.75%

On September 14, 2017, a Thursday, Respondent purchased Class A shares of five mutual funds for SB's account. All the purchases were below $20,000: AIVSX ($19,000); FUGAX ($18,500); IBIAX ($15,000); IRSAX ($19,000); MMUFX ($19,000). All the transactions carried a hefty sales load of approximately 5.75%. Respondent marked all five transactions as solicited. The next day, on Friday, September 15, 2017, Respondent purchased more shares in four of the mutual funds, with each transaction less than $20,000: AIVSX ($5,000); FUGAX ($19,500); IBIAX ($10,000); MMUFX ($19,500). He marked all four follow-up purchases as unsolicited. Again, the transactions bore a sales charge of approximately 5.75%. On the next business day, Monday, September 18, 2017, Respondent purchased more shares in three of the same funds he had purchased the preceding Thursday: FUGAX ($10,000), IRSAX ($5,000), and MMUFX ($10,000). He marked all three trades as unsolicited. The customer paid a sales charge of 5.76% on the FUGAX transaction, 5.25% on the IRSAX transaction, and 5.75% on the MMUFX transaction.

The fact that Respondent purchased five mutual funds in SB's account for a total of approximately $173,500 within five days (three consecutive business days) shows that funds

[234] Source: CX-2R, at 1–2, Trade Date column.

[235] Source: CX-2R, at 1–2, Fund column.

[236] Source: CX-2R, at 1–2, Solicited/Unsolicited column.

[237] Source: CX-2R, at 1–2, Amount Invested column.

[238] Source: CX-2R, at 1–2, Sales Charge % column.

were available to choose between investments and make fewer but larger purchases all at once. The purchases below $20,000 were not the product of a liquidity constraint.

There was no discernable benefit to the client in making the purchases in this piecemeal fashion. But breaking the transactions into pieces benefited Respondent. It meant that he would avoid the Firm's automated system for flagging transactions for review.

As with the trading in CF's account, we find it difficult to believe that the transactions that immediately followed the initial purchases of these five mutual funds in SB's account were unsolicited and directed by the client. Perhaps one investment might have been re-thought, but not all five.

Furthermore, one of the five mutual funds Respondent purchased for SB in September 2017 in piecemeal transactions was the same mutual fund he purchased for CF in September and October 2017 in piecemeal transactions—MMUFX. Respondent marked the follow-up purchase of MMUFX in CF's account unsolicited, and he marked two follow-up purchases of MMUFX in SB's account unsolicited. We cannot believe it is a coincidence. It strains credulity that during the same period (September–October 2017) the two customers, CF and SB, each independently called Respondent back the next business day after the initial purchase to buy more MMUFX. We find that Respondent mismarked the transactions when he marked them unsolicited.

Respondent's disregard for costs is demonstrated by the FUGAX and MMUFX purchase transactions. Both these funds are utilities funds, so buying both did not contribute diversity to the portfolio.[239] If Respondent had purchased only MMUFX in a single purchase, applying all the money Respondent used to purchase both FUGAX and MMUFX, the total of $96,500 would have qualified for a discounted sales charge of 4.75%. And if another $4,000 had been added, the purchase of MMUFX would have qualified for another breakpoint at $100,000. The sales charge in that case would have been 3.75%[240] instead of the 5.75% Respondent charged for the FUGAX and MMUFX purchases. The customer could have achieved the same amount of exposure to utilities at a lower cost.

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Respondent's trading in SB's account continued to follow the same pattern throughout 2018 and into 2019, as the next table reflects. He repeatedly purchased the same mutual fund on consecutive business days in amounts below $20,000, and often Respondent marked the follow-up transaction as unsolicited.

[239] CX-24 at row 737 (FUGAX: Fidelity Advisor Utilities Fund) and row 740 (MMUFX: MFS Utilities Fund); Appendix A.

[240] CX-4.

Mutual Fund Purchases in SB's Account (Feb. 2018–Aug. 2019)

	Date of Purchase[241]	Mutual Fund Purchased[242]	Marked Solicited / Unsolicited[243]	Purchase Amount[244]	Sales Charge[245]
One Fund – Two Business Days	2/27/18	HFEAX	S	$19,500	5.74%
	2/28/18	HFEAX	U	$19,750	5.74%
One Fund – Three Business Days	5/1/18	RRIAX	S	$15,000	5.73%
	5/2/18	RRIAX	U	$17,500	5.72%
	5/3/18	RRIAX	U	$10,250	5.77%
One Fund – Two Business Days	7/5/18	SGAAX	S	$19,500	5.75%
	7/6/18	SGAAX	U	$19,250	4.73%
One Fund – Three Business Days	10/15/18	JVIAX	S	$19,500	5.75%
	10/16/18	JVIAX	S	$19,500	5.76%
	10/17/18	JVIAX	U	$3,500	5.75%
Two Funds – Two Business Days	5/6/19	IBNAX	S	$19,750	5.74%
	5/7/19	IBNAX	U	$16,600	5.74%
	5/6/19	PRUAX	S	$19,750	5.48%
	5/7/19	PRUAX	U	$16,600	4.99%
One Fund – Five Calendar Days	8/9/19	SSIZX	S	$19,750	5.77%
	8/13/19	SSIZX	U	$19,750	5.74%

Although SB engaged in transactions below $20,000 while she was Respondent's customer at IFG, she traded differently when she was Respondent's customer at other firms. At Respondent's prior brokerage firm, SB routinely bought mutual funds in amounts greater than $20,000.[246] She also routinely purchased mutual funds in amounts greater than $20,000 when she transferred her account to Respondent's new firm after he left IFG.[247] That evidence supports the

[241] Source: CX-2R, at 1–2, Trade Date column.

[242] Source: CX-2R, at 1–2, Fund column.

[243] Source: CX-2R, at 1–2, Solicited/Unsolicited column.

[244] Source: CX-2R, at 1–2, Amount Invested column.

[245] Source: CX-2R, at 1–2, Sales Charge % column.

[246] JX-19, at 4–6; Tr. (RS) 129–32.

[247] CX-3, at 1; Tr. (RS) 136.

conclusion that SB did not choose to trade in increments below $20,000 at IFG. Rather, Respondent made that choice for his own purposes.

As in CF's account, Respondent sold Class A mutual fund shares in SB's account after SB had held them less than a year. For example, Respondent sold all of SB's FDSAX holdings (amounting to approximately $43,484) on July 5, 2018, including the shares bought the preceding December and January, less than a year before.[248] This was short-term trading.

Respondent applied the proceeds from the sale of FDSAX to purchase SGAAX (as shown in the table above) in two tranches, $19,500 on July 5 and $19,250 on July 6.[249] FDSAX is in the AIG/Sunamerica family of funds; SGAAX is in the American Beacon/Virtus family of funds.[250] This was mutual fund switching.

Notably, the sales charge for the first SGAAX purchase was 5.75% but the sales charge on the purchase made the next day was 4.73%.[251] This suggests that the second transaction achieved a breakpoint discount, and that the customer could have had that discount apply to the first purchase, too, if the transactions had not been made in piecemeal fashion.

Respondent claims he counseled against the sale of FDSAX but the customer was adamant.[252] He produced a handwritten note to Enforcement dated July 5, 2018, purporting to memorialize a conversation with SB.[253] According to the note, Respondent called her simply to make a status check without suggesting any changes be made.[254] She insisted on selling the FDSAX shares and he argued against it. The note supplies no reason that SB was adamant about selling FDSAX.[255] Nothing in the note indicates the unusual circumstances that would be necessary to justify the short-term trading in FDSAX and the mutual fund switching from FDSAX to SGAAX.

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[248] CX-1, at 1.

[249] CX-1, at 1.

[250] CX-24, at row 1193 (FDSAX: AIG Focused Dividend Strategy Fund); CX-24, at row 1197 (SGAAX: Virtus SGA Global Growth Fund, successor of American Beacon SGA Global Growth Fund). *See* JX-19, at 65. *See also* Appendix A.

[251] CX-2R, at 2.

[252] Resp. Open. Br. 3.

[253] JX-21, at 2. We have Respondent's handwritten note, but it does not appear that SB spoke to FINRA staff in the investigation. We have no memorandum of an interview.

[254] JX-21, at 2.

[255] JX-21, at 2. If a customer insisted on a transaction that the registered representative advised against, the Firm's WSPs required the representative to send a letter to the customer memorializing that the customer had been advised against the transaction. This was to protect the representative and the Firm if the customer later complained. JX-2, at 6–7; Tr. (DAB) 704–05. The letter would show that the representative did not recommend the transaction. While at IFG, Respondent never sent any letters of this type. Tr. (DAB) 705. This undercuts Respondent's claim in his handwritten notes that he advised against some transactions his customers wanted to effect and was overridden.

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The trading in SB's account showed yet another pattern of unsuitable trading. As demonstrated in the table below, during the three years he was at IFG, Respondent traded out and in and out again in the same mutual fund in the same customer's account.

Respondent's Out-In-Out Trading in SB's Account

CX-24 Row[256]	Date of Transaction	Buy/Sell	Mutual Fund	Solicited/ Unsolicited[257]	Amount Invested	Sales Charge
10	7/18/16	S	HFEAX	Unsolicited	$13,000	-
999	2/27/18	B	HFEAX	Unsolicited	$19,500	5.74%
1008	2/28/18	B	HFEAX	Unsolicited	$19,750	5.74%
1104	5/3/18	B	HFEAX	Unsolicited	$10,250	5.74%
1709	5/6/19	S	HFEAX	Unsolicited	$39,327	-

Trading in and out of the same mutual funds in less than three years was short-term trading. The pattern also proves that Respondent's explanation for purchasing in increments of less than $20,000 is baseless. Respondent's customers did not need time to "soak" or "wade" into the investments and become comfortable with their purchases when at least some of the mutual funds Respondent purchased for their accounts were mutual funds that they had already once owned. Finally, Respondent's pattern of marking these trades as unsolicited compels the conclusion that the markings are false. The trades benefited only the Respondent; they were to his customers' detriment.

3. Customer GC

The table below shows that Respondent engaged in the same pattern of trading in the accounts of Customer GC and her husband as he did in CF's and SB's accounts.

[256] The sources for the information in this table are CX-24 and CX-2R. Each transaction appears on a numbered row of the spreadsheet contained in CX-24.

[257] In CX-24, the column describing the transaction indicates whether the transaction was solicited or unsolicited. CX-2R breaks out that information in its own column, where it is more readily visible.

Mutual Fund Purchases in Accounts of GC and Husband (Sept. 2018–Aug. 2019)

	Date of Purchase[258]	Mutual Fund Purchased[259]	Marked Solicited / Unsolicited[260]	Purchase Amount[261]	Sales Charge[262]
Two Funds – Two Business Days	7/20/17	PGCOX	S	$19,500	5.75%
	7/21/17	PGCOX	U	$19,500	5.74%
	7/20/17	SGAAX	S	$18,500	5.74%
	7/21/17	SGAAX	U	$5,000	5.76%
One Fund – Two Business Days	7/24/17	FDSAX	U	$19,500	5.74%
	7/25/17	FDSAX	U	$9,300	5.75%
One Fund – Two Business Days	4/3/18	JVIAX	S	$10,000	5.75%
	4/4/18	JVIAX	U	$14,000	5.75%
One Fund – Three Business Days	7/23/18	HFQAX	S	$19,500	5.80%
	7/24/18	HFQAX	U	$19,500	5.75%
	7/25/18	HFQAX	U	$7,400	5.73%
One Fund – Three Business Days	2/6/19	PRUAX	S	$19,750	5.50%
	2/7/19	PRUAX	U	$19,750	5.00%
	2/8/19	PRUAX	U	$10,000	4.99%

As the table shows, in accounts held by GC and her husband, Respondent engaged in the same pattern of multiple purchases of Class A shares in the same mutual fund on consecutive days, all below $20,000. This conduct served no conceivable purpose except to avoid the Firm's automated system for flagging transactions for review. Respondent marked all the follow-up purchases as unsolicited. This also is highly implausible.

In at least one case, it appears that GC missed a breakpoint by the piecemeal purchases all below $20,000. As reflected in the table, Respondent purchased PRUAX on three consecutive business days in February 2019. All the purchases were below $20,000. At that time, PRUAX Class A shares cost 5.5% for purchases up to $25,000, 5% for purchases between $25,000 and $50,000, and 4.5% for purchases between $50,000 and $100,000.[263] If the three purchases of PRUAX had been combined in a single transaction totaling $49,500, the entire transaction would

[258] Source: CX-2R, at 2, Trade Date column.

[259] Source: CX-2R, at 2, Fund column.

[260] Source: CX-2R, at 2, Solicited/Unsolicited column.

[261] Source: CX-2R, at 2, Amount Invested column.

[262] Source: CX-2R, at 2, Sales Charge % column.

[263] CX-4.

have qualified for a discounted sales charge of 5%. And if another $500 had been added to that purchase, the transaction would have qualified for a sales charge of 4.5%.

FINRA staff members interviewed Customer GC on March 4, 2021, by conference call to ask general questions about her interactions with Respondent and about the three PRUAX purchases.[264] According to the memorandum that FINRA staff wrote the same day as the interview, GC could not recall why the PRUAX purchases were made over a three-day period.[265] She had no recollection of Respondent calling her three days in a row to make the investment.[266] She also said that she would not have called him to direct him to buy more.[267] She ended the conversation saying that she "never called back to direct more trades."[268]

During the investigation, Respondent produced to FINRA staff a handwritten note that he purportedly made of conversations with GC about the PRUAX investment.[269] Respondent's note is inconsistent with what GC told FINRA staff.

The note, dated February 6, 2019, reflects that Respondent and GC had two conversations on February 6, 2019.[270] In the first conversation, they discussed the domestic bull market and a possible correction. Respondent wrote that GC "should focus on defensive posture, migrate accounts to more purposely preserve wealth."[271] According to Respondent's note, GC wanted to sell all of American Beacon Growth (SGAAX) and buy PGIM Jennison Utilities (PRUAX) but he talked her out of immediately selling all of American Beacon (SGAAX).[272] The note says then she told him she wanted to sell all of AIG Focused Dividend (FDSAX), "citing performance disappointment."[273] According to the note, he talked her out of that idea as well, saying the investment was consistent with a defensive posture.[274] The note says, "Sales charges and breakpoints disclosed." The note contains no specifics of what was said about sales charges and breakpoints, and it is unclear whether the discussion was about sales charges and breakpoints generally or as they related to a particular investment.[275]

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[264] CX-7.

[265] CX-7, at 1–2.

[266] CX-7, at 2.

[267] CX-7, at 2.

[268] CX-7, at 2.

[269] JX-27.

[270] JX-27.

[271] JX-27.

[272] JX-27.

[273] JX-27.

[274] JX-27.

[275] JX-27.

According to Respondent's note, GC called him back that same day, February 6, 2019, after talking to her husband.[276] The note says that she "directed unsolicited American Beacon SGA Global Growth Fund [SGAAX] redemption and that the $19,750 PGIM Jennison Utility fund [PRUAX] purchase of earlier be duplicated."[277] Respondent noted that utilities were more in GC's "comfort zone."[278] The note for that day ended, "Sales charges disclosed."[279] Although this disclosure appears tied to the investment in PRUAX, the note does not indicate precisely what was disclosed about sales charges.[280]

The following day, February 7, 2019, Respondent's note indicates that he called Customer GC to tell her, "[A]ll previously discussed transactions affected [sic]; keep confirmations."[281] She responded, according to the note, by suggesting that they take the remaining sales proceeds and invest another $25,250 in PRUAX.[282] According to the note, he said "No!"[283] When he indicated a different preference, he wrote that GC "jumps on that 'Okay, lets do that!'"[284] Respondent indicated in the note that he agreed to the alternative investment even though "Not intended." The note is tailored to support Respondent's defense. By saying "Not intended," Respondent suggests that he did not recommend the transaction, although GC "jumped on" something Respondent suggested might be a good idea.

We do not credit Respondent's marking of the transactions in GC's account or his handwritten note. First, we find it highly unlikely that GC and her husband would consistently split up their purchases of Class A mutual fund shares into batches below $20,000 over the course of a year and a half. Perhaps there might be a reason to do that once, but not to do it repeatedly.

Second, we resolve the inconsistency between what GC told FINRA staff and what Respondent wrote in his note by finding GC's statements to the staff more credible than Respondent's note. In her interview with FINRA staff, GC described a hands-off approach to investing. She said that she and her husband met with Respondent about twice a year and Respondent sometimes telephoned to recommend a new investment.[285] She said that she received trade confirmations but did not follow them closely.[286] Prior to working with

[276] JX-27.

[277] JX-27.

[278] JX-27.

[279] JX-27.

[280] JX-27.

[281] JX-27.

[282] JX-27.

[283] JX-27.

[284] JX-27.

[285] CX-7, at 1.

[286] CX-7, at 1.

Respondent, she had no experience with purchasing mutual funds.[287] She said that she had an unwritten understanding with Respondent that if he had a recommendation for her and he could not reach her, he could go ahead with the investment without speaking with her first.[288] It appears to us that her attitude toward investing was to rely on Respondent. She was very clear with the staff that she "never" called Respondent back to direct more trades.[289]

In contrast, Respondent portrayed GC in his note as highly involved in making investments and very specific about trades she wanted to make in her account. His note appears tailored exactly to rebut the charges in this case, mapping a series of conversations to justify why he marked follow-up purchases as unsolicited and claiming that he disclosed sales charges and breakpoints to her. He had an interest in shaping the story in his note; she had no interest to be served in telling falsehoods to FINRA staff.

Third, GC missed a breakpoint discount on her PRUAX investment because of the three separate purchases.[290] That fact undercuts Respondent's claim in his note that he explained breakpoints. The three separate purchases below $20,000 three days in a row make no sense if, as Respondent claims, GC was informed that she could purchase PRUAX more cheaply if she invested the entire amount at one time.

4. Customer JDB

Respondent's mutual fund purchases in JDB's account follow the same pattern.

Mutual Fund Purchases in JDB's Account

	Date of Purchase[291]	Mutual Fund Purchased[292]	Marked Solicited / Unsolicited[293]	Purchase Amount[294]	Sales Charge[295]
One Fund –Three Business Days	2/9/17	RYPDX	S	$18,500	4.76%
	2/10/17	RYPDX	S	$17,400	4.75%
	2/13/17	RYPDX	U	$16,225	4.76%

[287] CX-7, at 1.

[288] CX-7, at 1.

[289] CX-7, at 2.

[290] Tr. (RS) 267.

[291] Source: CX-2R, at 2, Trade Date column.

[292] Source: CX-2R, at 2, Fund column.

[293] Source: CX-2R, at 2, Solicited/Unsolicited column.

[294] Source: CX-2R, at 2, Amount Invested column.

[295] Source: CX-2R, at 2, Sales Charge % column.

One Fund – Four Business Days	2/19/19	PRUAX	S	$10,000	5.50%
	2/20/19	PRUAX	S	$19,500	4.99%
	2/21/19	PRUAX	U	$19,500	5.03%
	2/22/19	PRUAX	U	$4,000	4.51%

As reflected in the table above, Respondent purchased PRUAX in JDB's account in February 2019 in a manner identical to his trading in GC's account that same month. On four straight days, Respondent purchased PRUAX Class A shares in JDB's account in amounts less than $20,000: February 19 ($10,000), February 20 ($19,500), February 21 ($19,500), and February 22 ($4,000). Respondent marked the first two transactions solicited and the last two unsolicited. The sales charge dropped from 5.50% on the first purchase to 4.51% on the last purchase. Respondent charged the customer more by breaking up the investment into multiple small purchases under $20,000.

It is impossible to believe that during the same month, February 2019, the two customers, GC and JDB, independently instructed Respondent to purchase PRUAX in a manner that was against their interest but advantageous to him. The record of the same trading in the same month in two different customers' accounts bolsters the conclusion that Respondent's note attributing the follow-up purchases of PRUAX to GC's independent, informed—and unsolicited—decision is false.[296]

5. Customer DF

Respondent traded in the same manner in customer DF's account as he did in his other customers' accounts.

Mutual Fund Purchases in DF's Account (Aug. 2018; Aug. 2019)

	Date of Purchase[297]	Mutual Fund Purchased[298]	Marked Solicited / Unsolicited[299]	Purchase Amount[300]	Sales Charge[301]
Five Funds – Three Business Days	8/15/18	AMECX	S	$15,000	5.73%
	8/16/18	AMECX	U	$10,000	5.01%

[296] We have no handwritten note from Respondent regarding the trading in JDB's account. Nor is there any record evidence that FINRA staff interviewed her. We draw our conclusions from the pattern of trading.

[297] Source: CX-2R, at 2–3, Trade Date column.

[298] Source: CX-2R, at 2–3, Fund column.

[299] Source: CX-2R, at 2–3, Solicited/Unsolicited column.

[300] Source: CX-2R, at 2–3, Amount Invested column.

[301] Source: CX-2R, at 2–3, Sales Charge % column.

Three Funds – Three Business Days	8/15/18	HFQAX	S	$19,000	5.76%
	8/16/18	HFQAX	S	$19,500	5.72%
	8/17/18	HFQAX	U	$7,000	5.70%
	8/15/18	JVIAX	S	$19,500	5.75%
	8/16/18	JVIAX	S	$19,500	5.75%
	8/15/18	FKUTX	S	$19,000	4.27%
	8/16/18	FKUTX	S	$19,500	4.23%
	8/16/18	FDSAX	S	$18,500	5.74%
	8/17/18	FDSAX	S	$19,000	5.75%
	8/16/19	PRUAX	S	$19,800	5.49%
	8/20/19	PRUAX	U	$7,500	5.01%
	8/16/19	SGGDX	U	$19,900	4.48%
	8/20/19	SGGDX	U	$16,800	4.49%
	8/16/19	SSIZX	S	$19,800	5.77%
	8/19/19	SSIZX	U	$19,800	5.73%
	8/20/19	SSIZX	U	$19,800	4.77%

As the table demonstrates, Respondent bought shares in four mutual funds for DF's account on August 15, 2018: AMECX ($15,000), HFQAX ($19,500), JVIAX ($19,500), and FKUTX ($19,000). The next day, he bought shares in the same four mutual funds, again in transactions of less than $20,000: AMECX ($10,000), HFQAX ($19,500), JVIAX ($19,500), and FKUTX ($19,500). On the third consecutive day, he bought shares in HFQAX again, in an amount much smaller than the other transactions ($7,000).

The initial purchases in HFQAX, JVIAX, and FKUTX were all just under $20,000 ($19,000 to $19,500). So were the follow-up purchases (all $19,500). The only purpose apparent on the face of this pattern was to bring each transaction below the $20,000 threshold for subjecting the purchases to potential scrutiny by the Firm.

Respondent marked the first purchase of each mutual fund as solicited. He then marked one purchase on the second day as unsolicited, AMECX, and marked the other three follow-up purchases, HFQAX, JVIAX, and FKUTX, as solicited. When Respondent bought shares of HFQAX on the third consecutive day, however, he marked that transaction unsolicited.

There seems little rhyme or reason to Respondent's marking of the transactions as solicited or unsolicited. If Respondent consulted DF and recommended the follow-up purchases of HFQAX, JVIAX, and FKUTX, it seems odd that the follow-up purchase of AMECX on the same day would be treated differently. It also seems odd that Respondent would first recommend purchases of HFQAX, JVIAX, and FKUTX on one day and then, as though he had not fully thought out his first recommendation, recommend purchasing another batch of shares in those

same three funds. We also have no basis to believe that the third HFQAX transaction, although marked unsolicited, was anything other than the product of Respondent's earlier recommendation of the fund.

One year later, in August 2019, Respondent purchased shares in three mutual funds in DF's account for less than $20,000, all on the same day, August 16, 2019: PRUAX ($19,8000), SGGDX ($19,900), and SSIZX ($19,800). He purchased more of SSIZX on August 19 ($19,800) in a transaction he marked unsolicited. And then he purchased more of all three mutual funds on August 20: PRUAX ($7,500), SGGDX ($16,800), and SSIZX ($19,800), and marked all three transactions unsolicited.

As shown in the table above, the first two purchases of SSIZX incurred sales charges of 5.77% and 5.73%. The third transaction incurred a much smaller sales charge of 4.77%. That likely means that the third transaction met the breakpoint for that fund. Notably, the three SSIZX purchases were very close to the $20,000 threshold and, if those purchases had been combined, the entire investment could have been purchased at a discount. DF missed four breakpoints because of the way Respondent structured the trades.[302]

FINRA staff interviewed DF by telephone, on August 31, 2020, and summarized the conversation in an interview memorandum.[303] DF said that the first year she worked with Respondent she would speak with him every three to six months, but after that they spoke only every six to twelve months.[304] It was during those periodic discussions that Respondent would recommend investments.[305] He might call a couple of weeks before he actually made the investments, since she had given him discretion to decide the best time to make an investment.[306] She did not know why the investments in her account were made in smaller pieces over several days.[307] She asked FINRA staff if they knew why mutual fund investments would be made in smaller amounts over consecutive days.[308] She could not recall whether Respondent discussed front-end loads and breakpoints with her.[309] She could not recall asking him to make subsequent investments after initial purchases.[310] FINRA staff told DF that Respondent had told the staff that he recommended the initial investments but that she had asked him to make the subsequent

[302] Tr. (RS) 275–76.

[303] CX-20.

[304] CX-20, at 1.

[305] CX-20, at 1.

[306] CX-20, at 1.

[307] CX-20, at 1–2.

[308] CX-20, at 2.

[309] CX-20, at 2.

[310] CX-20, at 2.

investments, which he did make even though he tried to discourage her.[311] She said she could not recall anything like that.[312]

Respondent produced to FINRA staff two pages of notes on purported conversations with DF on August 16 and 19, 2019.[313] He wrote in his August 16 notes that the conversation was a one-year anniversary account review.[314] The notes reflect discussion about market volatility, the bull market, and precious metals—comments that appear to be Respondent's side of the conversation.[315]

According to Respondent's notes, DF actively suggested various transactions. He wrote that he tried to talk her out of an unsolicited full redemption of one investment and that she tendered two other unsolicited transactions against his advice.[316] Respondent wrote that he was interrupted during order entry and unable to complete all the transactions before market close (suggesting perhaps a reason that transactions in the same fund occurred on consecutive days).[317] His August 19 note indicates that he called her to tell her the changes she wanted had been made, and then she tendered additional unsolicited transactions.[318] Respondent wrote in the two notes that he discussed sales charges and breakpoints, although the notes did not say exactly what was said about those matters.[319]

Respondent argues that the customer's lack of recall does not undermine his detailed, purportedly contemporaneous, notes of his conversations with DF.[320] We agree that the customer's lack of recall of any discussion of front-end loads and break points does not prove that Respondent did not discuss the topic with her. But discussing the topic in general would be different from discussing the specific costs of trading in multiple smaller increments in a specific mutual fund. When DF spoke with FINRA staff about her interactions with Respondent, she did not understand the effect of making multiple smaller investments on her costs.[321] We do not believe that Respondent discussed front-end loads and break points in a meaningful way with DF.

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[311] CX-20, at 2.

[312] CX-20, at 2.

[313] CX-20, at 3–4.

[314] CX-20, at 3.

[315] CX-20, at 3.

[316] CX-20, at 3.

[317] CX-20, at 3.

[318] CX-20, at 3.

[319] CX-20, at 3–4.

[320] Resp. Open. Br. 20 (Customers' "vague memory gaps" do not show that Respondent's handwritten notes are false).

[321] CX-20, at 2.

In weighing the evidence regarding DF's trading, we also believe that DF did not instruct Respondent to make the follow-up purchases in her account that were marked unsolicited. In Respondent's notes, he made DF sound very active in discussing potential investments. According to the notes, Respondent had to strongly discourage some of her ideas and, when he did, she resisted.[322] In the notes, he portrays DF as an equal partner in the investing decisions and as sharply rebuking him for attempting to override her investment choice. If DF had been that active and that well informed about sales charges and breakpoint discounts, we do not believe she would have engaged in the disadvantageous trading in her account. And we do not think that when FINRA staff interviewed her, DF would have sounded so puzzled about the trading in her account. The active investor that Respondent portrays in his notes is inconsistent with the things DF said to FINRA staff about leaving investment decisions in her account to Respondent.

6. Customer RG

Between January 2018 and March 2019, Respondent made eleven purchases under $20,000 in Customer RG's account.[323] This pattern shows Respondent's attempt to circumvent his Firm's supervision. Respondent marked each initial purchase of a fund as solicited, and then marked follow-up purchases made the next consecutive business day as unsolicited. As discussed in connection with the trading in other customers' accounts, we find the marking of follow-up purchases to be false. The table below shows Respondent's mutual fund purchases for RG's account from January 2018 through March 2019.

Mutual Fund Purchases in RG's Account (Jan. 2018–Mar. 2019)

	Date of Purchase[324]	Mutual Fund Purchased[325]	Marked Solicited / Unsolicited[326]	Purchase Amount[327]	Sales Charge[328]
Two Funds – Two Business Days	1/16/18	HFEAX	S	$15,000	5.74%
	1/17/18	HFEAX	U	$16,000	5.76%
	1/16/18	RRIAX	S	$15,000	5.76%
	1/17/18	RRIAX	U	$16,000	5.75%
One Fund – Two Business Days	3/12/18	FDSAX	S	$19,500	5.73%
	3/13/18	FDSAX	U	$5,250	5.73%

[322] CX-20, at 3.

[323] CX-2R, at 3; Tr. (RS) 281.

[324] Source: CX-2R, at 3, Trade Date column.

[325] Source: CX-2R, at 3, Fund column.

[326] Source: CX-2R, at 3, Solicited/Unsolicited column.

[327] Source: CX-2R, at 3, Amount Invested column.

[328] Source: CX-2R, at 3, Sales Charge % column.

One Fund – Three Business Days (weekend and holiday intervening)	1/18/19	PRUAX	S	$19,750	5.02%
	1/22/19	PRUAX	U	$19,750	5.03%
	1/23/19	PRUAX	U	$7,000	4.52%
One Fund – Two Business Days	3/14/19	JVIAX	S	$19,800	5.76%
	3/15/19	JVIAX	U	$2,650	5.75%

FINRA staff interviewed RG on February 23, 2021, about Respondent's trading in his account and memorialized what RG told them in a memorandum of interview.[329] The discussion with RG focused on the three separate purchases of PRUAX on three consecutive business days in January 2019. RG said he could not recall why the purchases were broken into pieces.[330] RG's lack of an explanation for breaking purchases into pieces bolsters the conclusion that Respondent mismarked the transactions labeled unsolicited.

7. Customer PG-W

Respondent purchased five funds in the account of Customer PG-W in piecemeal fashion from January through July 2017 in transactions all under $20,000. We find that these purchases, like those in other customer accounts, were designed to evade the Firm's automated flagging system for marking transactions for review.

Mutual Fund Purchases in PG-W's Account

	Date of Purchase[331]	Mutual Fund Purchased[332]	Marked Solicited / Unsolicited[333]	Purchase Amount[334]	Sales Charge[335]
Two Funds – Two Business Days	1/5/17	FKUTX	S	$16,500	4.27%
	1/6/17	FKUTX	S	$16,000	4.26%
	1/5/17	JVAAX	S	$16,500	5.24%
	1/6/17	JVAAX	U	$16,000	5.26%
One Fund – Two Business Days	5/23/17	PGCOX	S	$18,500	5.75%
	5/24/17	PGCOX	U	$11,750	5.75%

[329] CX-17. We have no handwritten notes from Respondent in the record regarding RG's account.

[330] Tr. (RS) 280–81; CX-17.

[331] Source: CX-2R, at 3, Trade Date column.

[332] Source: CX-2R, at 3, Fund column.

[333] Source: CX-2R, at 3, Solicited/Unsolicited column.

[334] Source: CX-2R, at 3, Amount Invested column.

[335] Source: CX-2R, at 3, Sales Charge % column.

Two Funds – Two Business Days	7/26/17	HFEAX	S	$19,500	5.75%
	7/27/17	HFEAX	S	$18,500	5.74%
	7/26/17	SGAAX	S	$19,500	5.74%
	7/27/17	SGAAX	S	$18,500	5.74%

Customer PG-W provided a statement on May 23, 2024, under penalty of perjury in lieu of testifying.[336] She said in her declaration that she had no idea why the trades were made the way they were, and she thought it would be "ridiculous" to trade in that fashion.[337] She relied on Respondent, and he never called to make a recommendation one day and then called again the next day.[338] She told FINRA staff that she never spoke with Respondent two days in a row.[339] This evidence bolsters the conclusion that Respondent structured the transactions to evade the Firm's supervision and also contributes to the conclusion that he mismarked transactions as unsolicited when they were not.

8. Customer JJ

Unsurprisingly, Respondent's pattern of purchases in increments below $20,000 is the same in the accounts of JJ and her husband.

Mutual Fund Purchases in Accounts of JJ and Her Husband

	Date of Purchase[340]	Mutual Fund Purchased[341]	Marked Solicited / Unsolicited[342]	Purchase Amount[343]	Sales Charge[344]
Two Funds – Two Business Days	5/20/19	JVIAX	S	$19,900	5.76%
	5/21/19	JVIAX	U	$1,600	5.76%
	5/20/19	PRUAX	S	$19,900	5.52%
	5/21/19	PRUAX	U	$1,600	5.51%
Two Funds –Three Business Days	5/23/19	HFQAX	S	$19,900	5.71%

[336] CX-23; Tr. (RS) 201–02.

[337] CX-23.

[338] CX-23, at 1; Tr. (RS) 205–06.

[339] Tr. (RS) 206. We have no notes from Respondent in the record regarding the trading in PG-W's account.

[340] Source: CX-2R, at 4, Trade Date column.

[341] Source: CX-2R, at 4, Fund column.

[342] Source: CX-2R, at 4, Solicited/Unsolicited column.

[343] Source: CX-2R, at 4, Amount Invested column.

[344] Source: CX-2R, at 4, Sales Charge % column.

	5/24/19	HFQAX	S	$19,900	5.81%
	5/28/19	HFQAX	U	$14,125	4.49%
	5/23/19	SGGDX	S	$19,900	4.98%
	5/24/19	SGGDX	S	$19,900	4.52%
	5/28/19	SGGDX	U	$14,125	4.03%
One Fund – Two Business Days	8/13/19	SGGDX	U	$17,500	4.02%
	8/14/19	SGGDX	U	$9,900	4.00%

As reflected in the table, in 2019 Respondent made 12 purchases of mutual funds in JJ's and her husband's accounts.[345] All the purchases were for less than $20,000, seven of them just barely less at $19,900. Respondent structured the purchases to evade the Firm's Smart Blotter system for flagging transactions for review. There is no conceivable reason a customer would trade this way.

The couple missed seven breakpoints because their purchases were broken up over several days into separate purchases of less than $20,000.[346] They also missed breakpoints because they had other accounts with holdings that could have been added to obtain a volume discount.[347]

FINRA staff interviewed JJ on February 9, 2021, and memorialized the conversation in a memorandum of interview the same day.[348] The staff asked her why certain funds purchased in May and August 2019 were purchased over several days instead of in one purchase. She said she could not remember why the transactions were done that way.[349] When the staff asked her about breakpoints, she did not know what they were.[350] She told the staff that she took Respondent's recommendations; she did not recommend funds to be purchased.[351]

Respondent produced extensive notes on his interactions with JJ and her husband in connection with transactions in November 2018.[352] According to the notes he spoke with them

[345] Tr. (RS) 285.

[346] Tr. (RS) 286.

[347] Tr. (RS) 286.

[348] CX-21.

[349] Tr. (RS) 284–85.

[350] Tr. (RS) 285.

[351] Tr. (RS) 210–11.

[352] JX-35; Tr. (RS) 211–16.

on November 12, 13, and 15, 2018, and they directed him to make several unsolicited trades, including at least one that was against his advice.[353]

Respondent's notes appear designed to justify the trading in the couple's accounts and to demonstrate that Respondent made all the required disclosures. They are inconsistent with what JJ said to FINRA staff, and they portray the customers as initiating trading that was not to their advantage. Considering all the evidence, we do not credit Respondent's notes.

9. Customer BK

Respondent made over 50 purchases of mutual fund shares in BK's account, all of them below the $20,000 threshold that would have triggered the Firm's review. The transactions were structured so that BK missed breakpoint discounts on 20 of the purchases.[354] Many of the mutual funds in the account were sold less than a year after they were purchased.[355] The table below reflects the pattern in Respondent's purchases for BK's account.

Mutual Fund Purchases in BK's Account

	Date of Purchase[356]	Mutual Fund Purchased[357]	Solicited / Unsolicited[358]	Purchase Amount[359]	Sales Charge[360]
Two Funds – Eight Calendar Days	8/15/2016	FDSAX	S	$15,000	5.75%
	8/22/2016	FDSAX	U	$15,000	5.76%
	8/15/2016	MGIAX	S	$18,675	4.76%
	8/22/2016	MGIAX	U	$18,750	4.75%
One Fund – Nine Calendar Days	11/8/2016	IBNAX	U	$18,250	5.74%
	11/9/2016	IBNAX	U	$15,000	5.76%
	11/10/2016	IBNAX	S	$16,500	5.75%
	11/11/2016	IBNAX	U	$18,500	5.24%
	11/15/2016	IBNAX	U	$16,500	5.27%
	11/16/2016	IBNAX	U	$10,000	5.27%
One Fund – Two Business Days	11/8/2016	RYPDX	U	$16,000	4.76%
	11/9/2016	RYPDX	U	$15,000	4.74%
Two Funds – Three Business Days	2/13/2017	GAUAX	S	$18,500	5.73%
	2/14/2017	GAUAX	U	$18,500	5.75%

[353] JX-35, at 1.

[354] Tr. (RS) 196.

[355] Tr. (RS) 196–97; CX-1, at 1.

[356] Source: CX-2R, at 5–6, Trade Date column.

[357] Source: CX-2R, at 5–6, Fund column.

[358] Source: CX-2R, at 5–6, Solicited/Unsolicited column.

[359] Source: CX-2R, at 5–6, Amount Invested column.

[360] Source: CX-2R, at 5–6, Sales Charge % column.

	2/15/2017	GAUAX	U	$16,000	4.72%
	2/13/2017	JVIAX	S	$17,500	5.76%
	2/14/2017	JVIAX	S	$18,000	5.76%
	2/15/2017	JVIAX	S	$18,200	4.75%
Two Funds –Three Business Days	5/4/2017	FKUTX	S	$18,500	4.26%
	5/5/2017	FKUTX	U	$18,000	4.23%
	5/4/2017	RRRAX	S	$18,500	5.74%
	5/5/2017	RRRAX	U	$18,000	5.74%
	5/8/2017	RRRAX	U	$10,400	5.74%
One Fund – Two Business Days	5/8/2017	CWGIX	S	$11,000	5.75%
	5/9/2017	CWGIX	U	$12,000	5.75%
One Fund – Two Business Days	11/20/2017	FKUTX	U	$19,000	4.27%
	11/21/2017	FKUTX	U	$10,000	4.26%
	1/12/2018	RRIAX	S	$19,750	5.77%
One Fund – Eight Calendar Days	1/16/2018	RRIAX	U	$19,750	5.76%
	1/17/2018	RRIAX	U	$19,000	4.48%
	1/19/2018	RRIAX	U	$19,500	4.47%
Two Funds – Three Business Days	5/18/2018	HFEAX	U	$15,000	5.74%
	5/21/2018	HFEAX	U	$17,500	5.76%
	5/22/2018	HFEAX	U	$17,500	5.74%
	5/18/2018	IGAAX	S	$15,000	5.76%
	5/21/2018	IGAAX	S	$15,000	4.99%
Two Funds – Four Business Days	11/14/2018	HFOAX	S	$19,500	4.50%
	11/15/2018	HFOAX	U	$19,500	4.49%
	11/16/2018	HFOAX	U	$17,000	4.50%
	11/19/2018	HFOAX	U	$19,500	3.50%
	11/14/2018	JVIAX	S	$19,500	4.75%
	11/15/2018	JVIAX	U	$19,500	3.76%
	11/16/2018	JVIAX	U	$17,000	3.74%
	4/8/2019	FKUTX	S	$15,000	3.74%
Three Funds – Five Business Days	4/10/2019	FKUTX	S	$10,000	3.74%
	4/8/2019	IBNAX	S	$17,500	5.75%
	4/9/2019	IBNAX	U	$19,800	5.74%
	4/10/2019	IBNAX	S	$19,850	5.24%
	4/11/2019	IBNAX	U	$19,850	5.24%
	4/12/2019	IBNAX	U	$15,000	5.26%
	4/8/2019	PRUAX	S	$19,800	5.52%
	4/9/2019	PRUAX	U	$19,800	5.03%
	4/10/2019	PRUAX	U	$19,850	4.47%

A series of purchases in February 2017 serves as an exemplar of Respondent's trading in BK's account. On February 13, 14, and 15, 2017, Respondent purchased GAUAX for BK's account. The first transaction was for $18,500, and the sales charge was 5.73%. The second transaction was for $18,500, and the sales charge was 5.75%. The third transaction was for

$16,000, and the sales charge was 4.72%.[361] Respondent marked the second and third transactions as unsolicited.[362] Sica, the FINRA principal investigator, testified that by breaking up the purchases BK only received a breakpoint discount on the third transaction.[363] If all the purchases had been combined into only one purchase, the discount would have applied to the entire purchase.[364]

Those same three days in February 2017 (February 13, 14, and 15), Respondent also purchased JVIAX in BK's account. All the transactions were below $20,000. On February 13, he purchased $17,500; on February 14, he purchased $18,000; and on February 15, he purchased $18,200.[365] Respondent marked all three of the JVIAX transactions as solicited.[366] Because the purchases were made in piecemeal fashion, BK missed breakpoints on the first two transactions. He only received a breakpoint discount on the third transaction.[367] BK told FINRA staff that he did not know why the purchases were made in series, with all the transactions below $20,000.[368]

We cannot believe that Respondent solicited three separate purchases of JVIAX three days in a row. If he had, the customer would likely have remembered such an unusual circumstance. Furthermore, the customer likely would have complained that Respondent had not fully thought through his recommendation at the outset and had caused the customer to miss breakpoints on JVIAX purchases. We also do not believe that on those same days BK independently suggested the idea of two follow-up transactions in GAUAX. Again, we believe that the customer would have remembered such an unusual series of events. The fact that all these transactions were below the $20,000 threshold that would flag the transactions for potential scrutiny by the Firm compels the conclusion that Respondent structured the purchases to circumvent the Firm's supervision.

FINRA staff interviewed BK several times between February 2, 2021, and October 26, 2023.[369] He did not appear to give in-person testimony at the hearing, but he provided a declaration under penalty of perjury dated May 30, 2024.[370] In that declaration, he stated that he did not direct Respondent to break up purchases of the same mutual fund into multiple purchases over several days.[371] He also said that Respondent may have discussed breakpoints with him, but

[361] CX-2R, at 5–6.

[362] CX-2R, at 5–6.

[363] Tr. (RS) 171–74.

[364] Tr. (RS) 171–74.

[365] CX-2R, at 5–6; Tr. (RS) 180.

[366] CX-2R, at 5–6; Tr. (RS) 182.

[367] Tr. (RS) 180–81.

[368] Tr. (RS) 181–82.

[369] Tr. (RS) 159, 165, 167–69; CX-10; CX-11; CX-12; CX-13.

[370] CX-13.

[371] CX-13.

Respondent never explained that there were discounts for purchasing mutual funds over certain dollar amounts.[372]

According to the memoranda FINRA staff used to memorialize interviews with BK, BK said that he spoke with Respondent only one time for each trade and BK never called Respondent back asking to purchase the same mutual fund after the original trade.[373] BK told FINRA staff that he "relied on Blankenship" and "the way the investments were entered was 'all Blankenship.'"[374] Respondent would call BK on a periodic basis, every few months or so, and they would discuss Respondent's recommendations.[375] BK said that "each conversation 'was a done deal.'"[376] BK said he had no idea why the purchases of GAUAX were made on three separate days and "there was no chance" that he would have called Respondent to instruct him to buy more of that fund.[377]

Respondent produced to FINRA staff handwritten notes dated February 10, 11, 14, 15, and 16, 2017, the same period when Respondent purchased GAUAX and JVIAX for BK's account in multiple transactions below $20,000.[378] In these notes, Respondent portrays himself as suggesting various transactions in the $30,000 to $35,000 range.[379] According to the notes, the customer said "no" to the amounts suggested but authorized one or two purchases below $20,000.[380] The notes do not indicate why BK rejected the suggestion to make purchases in the $30,000 to $35,000 range but did authorize purchases below $20,000.[381] According to the notes, Respondent discussed breakpoints and sales charges in connection with each position, but the notes do not contain specifics.[382]

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[372] CX-13.

[373] CX 10; CX-11.

[374] CX-11.

[375] CX-12, at 2.

[376] CX-12, at 2. Respondent's counsel suggested that BK's comment that he only spoke to Respondent one time for each trade might mean that BK spoke to Respondent each time he made a trade, including each of three trades in a row. Sica, the FINRA principal investigator who testified, said that he understood BK to mean that he spoke to Respondent once, when the initial trade was made. Tr. (RS) 601–02. Sica said the reference to "done deal" meant that "once the call was over, the first call, they didn't speak again. That means the first call was a done deal. He wanted to invest X amount of money, and there w[ere] no other calls after that." Tr. (RS) 631. We think Sica's view the more reasonable interpretation of what BK said and more consistent with BK's declaration.

[377] CX-12, at 2.

[378] JX-46, at 1–2.

[379] JX-46, at 2.

[380] JX-46, at 2.

[381] JX-46, at 1–2.

[382] JX-46, at 1–2.

In the conversation described in the February 15 note, Respondent wrote that BK asked for the breakpoint for GAUAX, and Respondent told him $50,000.[383] According to the note, the customer then tendered what Respondent marked as an unsolicited GAUAX purchase of $16,000.[384] That third GAUAX purchase received a breakpoint discount.[385] Respondent had purchased GAUAX for the account the day before and the day before that, in two tranches of $18,500 each.[386] If all three purchases had been combined, they would have totaled $53,000 and the entire purchase would have qualified for the breakpoint discount.[387] We believe that the customer would have reacted negatively if Respondent had told him that the breakpoint for this mutual fund was $50,000. That would mean that the customer had missed the discount on the first two purchases for no good reason. But the note does not record any such reaction or even any discussion of the fact of the missed breakpoint discount.

At the hearing, Respondent was asked whether he remembered any occasion when BK called him and instructed him "to do something out of the blue."[388] He answered, "Yes."[389] Respondent then embarked on a monologue talking in general about how BK was "a world traveler" and understood concepts like exchange rates that "would escape most Americans."[390] The monologue described what Respondent "would" do and how he "might" project what he thought would happen in the next six months.[391] Respondent said, "So we would have those kinds of exchanges, and, yes, he would absolutely call me with economic- or market-based questions."[392] But Respondent never provided a single example of a specific conversation in which BK called him to instruct him to make a particular investment.

We find that Respondent's notes regarding trades in BK's account are not credible, while BK's declaration is. We also find the staff's multiple memoranda memorializing conversations with BK to be probative and reliable evidence. These findings, coupled with the pattern of mutual fund purchases under $20,000, compel us to conclude that Respondent purchased mutual fund shares in multiple transactions under $20,000 in BK's account to circumvent his Firm's supervisory procedures. Because BK missed breakpoint discounts, the piecemeal investing was unsuitable and to his detriment.

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[383] JX-46, at 2.

[384] JX-46, at 2.

[385] CX-2R, at 5–6.

[386] CX-2R, at 5–6.

[387] Tr. (RS) 171–74.

[388] Tr. (DAB) 1049.

[389] Tr. (DAB) 1049.

[390] Tr. (DAB) 1049.

[391] Tr. (DAB) 1050.

[392] Tr. (DAB) 1050.

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As in SB's account, Respondent engaged in another pattern of unsuitable trading. He sometimes traded the same mutual fund in BK's account, in and out and back in. This trading further demonstrates Respondent's disregard for the high costs his trading imposed on his customers' investments. It is abundantly clear that he never considered whether the trading was suitable.

For example, as reflected in the table below, Respondent purchased a total of almost $95,000 of IBNAX Class A shares in BK's account in November 2016; each purchase was in an amount less than $20,000. Then he sold $97,513 of IBNAX in November 2017, roughly a year after he had purchased the shares. About 16 months after selling IBNAX out of the account, in April 2019, Respondent repurchased a total of almost $92,000 of IBNAX Class A shares; again, each purchase was less than $20,000. This trading was, on its face, against the customer's interest. BK could have avoided the high sales charge on the repurchase (doubling the already high sales charge of more than 5% for the initial purchase) if he had simply held the Class A shares for the standard five-year period thought appropriate for such investments. Only Respondent benefited from the in-out-in trading because it generated extra commissions for him.

Respondent's In-Out-In Trading of IBNAX in BK's Account

CX-24 Row[393]	Date of Transaction	Buy/Sell	Mutual Fund	Solicited/ Unsolicited[394]	Amount Invested	Sales Charge
147	11/8/16	B	IBNAX	Unsolicited	$18,250	5.74%
152	11/9/16	B	IBNAX	Unsolicited	$15,000	5.76%
155	11/10/16	B	IBNAX	Solicited	$16,500	5.75%
157	11/11/16	B	IBNAX	Unsolicited	$18,500	5.24%
161	11/15/16	B	IBNAX	Unsolicited	$16,500	5.27%
163	11/16/16	B	IBNAX	Unsolicited	$10,000	5.27%
827	11/13//17	S	IBNAX	Unsolicited	$68,000	-
843	11/20/17	S	IBNAX	Unsolicited	$29,513	-
1667	4/8/19	B	IBNAX	Solicited	$17,500	5.75%
1670	4/9/19	B	IBNAX	Unsolicited	$19,800	5.74%

[393] The sources for the information in this table are CX-24 and CX-2R. Each transaction appears on a numbered row of the spreadsheet contained in CX-24.

[394] In CX-24, the column describing the transaction indicates whether the transaction was solicited or unsolicited. CX-2R breaks out that information in its own column, where it is more readily seen.

1674	4/10/19	B	IBNAX	Solicited	$19,850	5.24%
1678	4/11/19	B	IBNAX	Unsolicited	$19,850	5.24%
1683	4/12/19	B	IBNAX	Unsolicited	$15,000	5.26%

As reflected in the table below, Respondent did something similar in BK's account when he sold $44,120 of Class A HFEAX shares out of the account in February 2017 but a little over a year later repurchased a total of $50,000 HFEAX shares. Respondent repurchased HFEAX on three consecutive business days in May 2018, with each separate purchase below $20,000. Once again, BK owned a substantial amount of HFEAX, but he paid roughly 5.75% to repurchase the mutual fund shares. Respondent exacerbated the damage to his customer by selling at least some of the HFEAX shares ($39,292) less than a year later, in April 2019, well before the high cost of the Class A shares could be recovered. Remarkably, Respondent marked the entire series of HFEAX transactions as unsolicited even though there was no benefit to the customer. Only Respondent benefited. The pattern was inarguably unsuitable for any customer.

Respondent's Out-In-Out Trading in HFEAX in BK's Account

CX-24 Row[395]	Date of Transaction	Buy/Sell	Mutual Fund	Solicited/ Unsolicited[396]	Amount Invested	Sales Charge
376	2/21/17	S	HFEAX	Unsolicited	$44,120	-
1126	5/18/18	B	HFEAX	Unsolicited	$15,000	5.74%
1132	5/21/18	B	HFEAX	Unsolicited	$17,500	5.76%
1135	5/22/18	B	HFEAX	Unsolicited	$17,500	5.74%
1677	4/11/19	S	HFEAX	Unsolicited	$39,392	-

10. Customer MH and His Mother

One customer testified at the hearing, MH. He runs a family business engaged in land surveying and site engineering.[397] Respondent had been advising MH's mother on investments for a few years, and she followed him when he moved to IFG.[398] In August 2016, when she

[395] The sources for the information in this table are CX-24 and CX-2R. Each transaction appears on a numbered row of the spreadsheet contained in CX-24.

[396] In CX-24, the column describing the transaction indicates whether the transaction was solicited or unsolicited. CX-2R breaks out that information in its own column, where it is more readily seen.

[397] Tr. (MH) 509.

[398] Tr. (MH) 511–12, 514.

opened an account at IFG naming Respondent as her account representative,[399] MH was identified as holding power of attorney for her account.[400] After MH began exercising his mother's power of attorney and working with Respondent, MH opened his own account at IFG in early December 2016.[401]

The only investing that MH had done until he met Respondent was in a Simplified Employee Pension ("SEP") plan held at Merrill Lynch.[402] He moved his SEP account and four or five SEP accounts held for employees at his business from Merrill Lynch to IFG with Respondent as the account representative.[403]

MH held mutual funds in his SEP account at Merrill Lynch. He had held some of those funds a very long time, as much as 16 to 17 years.[404] In February 2017, however, after MH's mutual funds were transferred from Merrill Lynch to IFG, Respondent sold the mutual funds in MH's SEP account and purchased new mutual funds.[405] As the table below shows, Respondent made the initial purchases in MH's account all under the $20,000 threshold that would have triggered his Firm's review.

Mutual Fund Purchases in MH's Account

	Date of Purchase[406]	Mutual Fund Purchased[407]	Solicited / Unsolicited[408]	Purchase Amount[409]	Sales Charge[410]
Three Funds – Three Business Days	2/13/17	FDSAX	S	$17,600	5.75%
	2/14/17	FDSAX	S	$18,500	5.73%
	2/13/17	RYPDX	S	$15,000	4.75%
	2/14/17	RYPDX	S	$16,750	4.75%

[399] Tr. (MH) 514; Tr. (RS) 374; JX-78, at 1.

[400] Tr. (MH) 515–16.

[401] Tr. (MH) 513–14.

[402] Tr. (MH) 510–11. A SEP is a retirement plan set up and funded by a business for its employees. The employer makes the contributions, which vest in the employee. *See* https://www.irs.gov/retirement-plans/plan-sponsor/simplified-employee-pension-plan-sep.

[403] Tr. (MH) 512.

[404] Tr. (MH) 521–23; JX-71, at 123.

[405] JX-71, at 158–66.

[406] Source: CX-2R, at 4, Trade Date column.

[407] Source: CX-2R, at 4, Fund column.

[408] Source: CX-2R, at 4, Solicited/Unsolicited column.

[409] Source: CX-2R, at 4, Amount Invested column.

[410] Source: CX-2R, at 4, Sales Charge % column.

One Fund – Three Business Days	2/15/17	RYPDX	U	$10,000	4.75%
	2/13/17	SGGDX	S	$15,000	4.98%
	2/14/17	SGGDX	U	$5,000	4.99%
	11/2/18	JVIAX	S	$19,750	5.76%
	11/5/18	JVIAX	S	$19,750	5.75%
	11/6/18	JVIAX	S	$19,950	4.75%

On February 13, 2017, Respondent began selling mutual funds that had been transferred from MH's Merrill Lynch account to MH's account at IFG and using the proceeds to purchase other mutual funds.[411] That day, Respondent bought FDSAX ($17,600), RYPDX ($15,000), and SGGDX ($15,000) for MH's account. Respondent marked each transaction as solicited.[412] The very next day, February 14, Respondent bought more shares of the same three funds for the account: FDSAX ($18,500), RYPDX ($16,750), and SGGDX ($5,000). Respondent marked the FDSAX and RYPDX purchases as solicited but the SGGDX purchase as unsolicited.[413] The following day, the third day after the initial purchases, he bought more RYPDX ($10,000) and marked the transaction unsolicited.[414]

MH did not corroborate Respondent's marking of the follow-up purchases—either those marked as solicited or those marked unsolicited. MH said that he never on his own called Respondent to tell him to sell a mutual fund.[415] He said he was "not a very engaged investor."[416] He relied on Respondent's recommendations.[417] The only time he took a "proactive" step was during the time of the COVID shutdown when he called Respondent to make sure that his investments were on the conservative side.[418] When FINRA staff interviewed MH in October of 2023, MH declared that Respondent had "definitely not" called him back to purchase more of the same mutual fund after the initial purchase.[419] When FINRA staff interviewed MH in December 2021, MH said that he would not have spoken to Respondent over three almost consecutive days. He told the staff, "[T]hat did not happen."[420] At the hearing, MH testified that at the time of the

[411] JX-71, at 162–67. The Firm's WSPs required the Respondent to complete the MFTF for switches between fund families in the SEP account, even if Merrill Lynch or someone else other than the Respondent originally recommended the funds held in the account. The MFTF required him to explain the reason for the switches *See, e.g.*, JX-2, at 10. But Respondent did not complete and submit any MFTF while he worked at IFG. JX-114, at 1.

[412] CX-2R, at 4.

[413] CX-2R, at 4.

[414] CX-2R, at 4.

[415] Tr. (MH) 534.

[416] Tr. (MH) 539.

[417] Tr. (MH) 539.

[418] Tr. (MH) 539–40.

[419] CX-14, at 1.

[420] CX-16, at 2.

trading at issue, he was unaware that the purchases had been made in multiple transactions on consecutive days and did not know why Respondent entered the transactions that way.[421]

With regard to the follow-up purchases marked unsolicited (SGGDX on February 14, 2017, and RYPDX on February 15, 2017), MH testified that the purchases were recommended by Respondent and MH agreed to the recommendation.[422] MH further testified that he agreed to make one large purchase of each fund.[423] We find MH's sworn testimony credible and Respondent's markings false. Prior to becoming Respondent's customer, MH had not actively traded mutual funds.[424] Instead, he purchased and held them, some as long as 16 or 17 years.[425] It is unlikely that he would suddenly have taken charge and instructed Respondent what to do.[426]

Respondent produced two sets of notes to FINRA staff during the investigation that he claimed were contemporaneous notes relating to the February 2017 purchases in MH's account. The first set of Respondent's February 2017 notes purport to record what he and MH discussed in conversations on February 10 and 14.[427] However, the notes do not mention the specific mutual funds. The notes simply say that MH confirmed orders to be sold and new acquisitions.[428] Similarly, the notes say that Respondent "again apprised [MH] of related sales charge and breakpoint detail."[429] The notes are vague and provide no specific information about what Respondent said.

The second set of February notes, in contrast, are specific. They identify the mutual funds bought in February 2017, SGGDX, FDSAX, and RYPDX.[430] But they do not reflect any conversation with the customer. Instead, they reflect Respondent's thoughts about the justification for the purchases.[431] In this second set of February notes, the February 10 note on

[421] Tr. (MH) 527–28.

[422] Tr. (MH) 527.

[423] Tr. (MH) 527.

[424] Tr. (MH) 521–22; JX-71, at 11–22.

[425] Tr. (MH) 521–22; JX-71, at 11–22.

[426] In any case, even if MH did call Respondent to make those follow-up purchases on February 14 and February 15 (which we do not believe he did), that call would have been the result of Respondent's sales efforts on February 13 and February 14. The transactions were all connected and those marked unsolicited would not have happened were it not for Respondent's solicitation of the initial transactions. Under the Firm's broad definition of solicited transactions in its WSPs (*e.g.*, JX-2, at 6), none of the follow-up transactions were unsolicited.

[427] JX-81, at 4.

[428] JX-81, at 4.

[429] JX-81, at 4.

[430] JX-81, at 5.

[431] JX-81, at 5.

FDSAX is identical to the February 14 note on FDSAX.[432] Word for word, on each day, Respondent hand wrote:

> Buy FDSAX: Consistent with client stated risk tolerance, established profitable domestic company orientation expected to provide modest appreciation capital gains, and mute full effects of domestic market volatility.[433]

The word-for-word repetition of the justification for buying FDSAX makes abundantly clear that those notes are not a contemporaneous record of conversations with MH. Rather, they are Respondent's justification for the transactions.

We do not credit Blankenship's claim that these are contemporaneous notes. It is difficult to understand why there would be two separate sets of notes for the same dates and same transactions if they were contemporaneous records of conversations with MH. The circumstances make us skeptical of the reliability of either set of notes as a contemporaneous record of conversations with MH.[434]

At the hearing, MH was shown the first set of Respondent's handwritten notes purporting to memorialize a conversation between the two of them on February 10, 2017. MH's attention was drawn to the statement, "[MH] apprised of sales charges and breakpoint discounts related to transactions authorized this date." When asked if the statement was accurate, he said, "No."[435] He explained that there had been no discussion of breakpoints and no specific conversation about sales charges.[436] He also testified that the similar statement in the note dated February 14, 2017, was not accurate.[437]

MH said Respondent did not discuss the sales charges tied to the new purchases in his account.[438] At some point, MH inquired generally about fees and asked Respondent for "a little explanation."[439] Respondent told him that he was going to be paid some commission, but he did

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[432] JX-81, at 5.

[433] JX-81, at 5.

[434] Respondent testified that he kept two kinds of notes. One would focus on the customer and would contain all kinds of personal details that might affect securities recommendations. Those notes were organized by customer. Tr. (DAB) 989–90. But, Respondent said, he kept another set of notes of all trade recommendations. He said those were in a chronological list. Tr. (DAB) 990, 1027–28. So those notes might record a recommendation to one customer and then a recommendation to another customer on the same day. Tr. (DAB) 987–90. Respondent provided no reason for keeping two separate sets of notes. As discussed in the credibility section below, Respondent provided a slightly different description of his notetaking practices during investigative testimony.

[435] Tr. (MH) 529.

[436] Tr. (MH) 530.

[437] Tr. (MH) 530.

[438] Tr. (MH) 523, 529.

[439] Tr. (MH) 523.

not explain the sales charge each time MH bought a mutual fund.[440] Nor did Respondent explain breakpoint discounts to him.[441] MH only learned what they were when FINRA contacted him in connection with the investigation.[442]

MH testified that Respondent made recommendations of funds to be purchased and he would agree.[443] MH said that when he authorized a large purchase of mutual fund shares he thought he was authorizing the total amount to be purchased.[444] Respondent never told him that he was making the purchases in smaller amounts over multiple days.[445] MH said multiple conversations with Respondent in one day like the ones described in some of Respondent's notes "did not happen."[446]

Another set of transactions occurred on November 2, 2018. Respondent bought JVIAX ($19,750) for MH. That was followed the next business day with another purchase of JVIAX ($19,750). And the day following that he bought more shares of JVIAX for the account ($19,950). Notably, by the third purchase, the sales charge had declined from 5.76% to 4.75%, suggesting that a breakpoint had been reached. If the three transactions had been treated as one, that discount could have been applied to the entire purchase.[447]

At the same time Respondent purchased JVIAX on three consecutive days in early November 2018, he sold FDSAX and RYPDX out of MH's account, which yielded approximately $79,000.[448] Much of that money was used to make the JVIAX purchases. Respondent also purchased HFQAX with funds from the sales of FDSAX and RYPDX.[449] As noted above, Respondent had purchased FDSAX and RYPDX in February of 2017 in the initial wave of purchases after MH opened his account at IFG. When Respondent sold those two mutual funds, MH had held them for approximately 20 months.[450]

MH was asked at the hearing why he sold FDSAX and RYPDX after holding them for only 20 months. He responded, "The decision would have been made, again, after consultation with Allen [the Respondent]. It would have been his recommendation to move the funds for . . . I

[440] Tr. (MH) 523.

[441] Tr. (MH) 524.

[442] Tr. (MH) 524.

[443] Tr. (MH) 530.

[444] Tr. (MH) 531.

[445] Tr. (MH) 531.

[446] Tr. (MH) 540–41.

[447] CX-2R, at 4.

[448] JX-71, at 277–78.

[449] JX-71, at 278.

[450] JX-71, at 285–86; Tr. (MH) 532.

guess for the economic conditions at the time."[451] Respondent marked the sale of RYPDX as an unsolicited transaction.[452] But MH said he did not on his own call Respondent and tell him to sell RYPDX.[453] Again, we find MH's testimony credible, and Respondent's markings false. MH had no reason to testify falsely, but Respondent's marking practices helped him evade the Firm's scrutiny of his trading in customer accounts.

Respondent traded in MH's mother's account in the same manner as he traded in other customer accounts. He broke purchases into pieces, all less than $20,000, marking the initial purchase as solicited and most of the follow-up purchases as unsolicited.[454] We find that the transactions in her account were unsuitable and designed to avoid the Firm's scrutiny. We further find that the markings of some purchases as unsolicited were false. See the table below.

Mutual Fund Purchases in Account of MH's Mother

	Date of Purchase[455]	Mutual Fund Purchased[456]	Solicited / Unsolicited[457]	Purchase Amount[458]	Sales Charge[459]
Two Funds – Two Business Days	10/2/17	HFEAX	S	$15.000	5.76%
	10/3/17	HFEAX	U	$10,000	5.75%
	10/2/17	PGCOX	S	$18,000	5.76%
	10/3/17	PGCOX	U	$15,000	5.75%
Two Funds – Three Business Days	11/2/18	JVIAX	S	$19,800	5.76%
	11/5/18	JVIAX	U	$19,500	5.75%
	11/6/18	JVIAX	S	$16,000	4.75%
	11/2/18	HFQAX	S	$19,500	5.77%
	11/5/18	HFQAX	S	$19,500	5.77%
	7/10/19	PONAX	S	$19,750	3.73%

[451] Tr. (MH) 532–33. The sales of FDSAX and RYPDX after only 20 months are examples of short-term trading in addition to the trading in less than a year shown in CX-2R. Notably, MH did not mention any special reason for selling FDSAX and RYPDX after holding them less than two years, such as a change in his investment objectives or a need for cash. Rather, he testified that Respondent must have recommended the sale based on general economic conditions.

[452] JX-71, at 278.

[453] Tr. (MH) 534.

[454] CX-2R, at 4.

[455] Source: CX-2R, at 4, Trade Date column.

[456] Source: CX-2R, at 4, Fund column.

[457] Source: CX-2R, at 4, Solicited/Unsolicited column.

[458] Source: CX-2R, at 4, Amount Invested column.

[459] Source: CX-2R, at 4, Sales Charge % column.

Two Funds – Two Business Days	7/11/19	PONAX	U	$ 9,750	3.73%
	7/10/19	SSIZX	S	$19,750	5.76%
	7/11/19	SSIZX	U	$ 9,750	5.76%

I. PRUAX: Pattern of Transactions Across Multiple Customer Accounts

Respondent's pattern of keeping transactions below $20,000 and mismarking follow-up transactions as unsolicited is demonstrated clearly by tracing the pattern of his trading in one mutual fund across various customer accounts. For instance, as demonstrated in the following table, from January 2019 through August 2019, Respondent purchased PRUAX in at least nine customer accounts on multiple consecutive business days, in transactions below $20,000. He routinely marked the second and third purchases as unsolicited. It is not credible that nine different customers would independently have the same idea of trading in PRUAX in multiple transactions below $20,000, and that all those customers would instruct Respondent to trade against their self-interest. In several cases, it is apparent that the customers missed breakpoint discounts because a follow-up purchase incurred a lower sales charge than the initial purchase. By trading in this fashion, Respondent escaped his Firm's supervisory oversight and received higher commissions. The table below tracks the pattern. It dispels any notion that Respondent's trading turned on the individual needs and circumstances of his customers.

Respondent's 2019 Purchases of PRUAX in Customer Accounts[460]

Customer	Date of Purchase	Mutual Fund Purchased	Solicited/ Unsolicited	Purchase Amount	Sales Charge
GM – Two Business Days	1/7/19	PRUAX	S	$19,500	5.48%
	1/8/19	PRUAX	U	$16,800	5.02%
RG –Three Business Days (weekend and holiday intervening)	1/18/19	PRUAX	S	$19,750	5.02%
	1/22/19	PRUAX	U	$19,750	5.03%
	1/23/19	PRUAX	U	$7,000	4.52%
GC – Three Business Days	2/6/19	PRUAX	S	$19,750	5.50%
	2/7/19	PRUAX	U	$19,750	5.00%

[460] The source for this information is CX-2R. That exhibit identifies the customers in the second column. They are listed in alphabetical order by last name. The eighth column lists the mutual fund purchases in each customer's account, with each fund identified by its five-letter ticker symbol. The funds are listed in alphabetical order within each customer account. The tenth column shows the trade date for each transaction. The fourth column shows whether Respondent marked the purchase solicited or unsolicited. The eleventh column shows the dollar amount of the purchase, and column twelve shows the percentage paid as the sales charge. The information collected in this table appears on pages one through ten of CX-2R.

The information has been reorganized in our table to flow chronologically by trade date and allow the reader to see the regular month-by-month pattern of Respondent's trading across customer accounts.

	2/8/19	PRUAX	U	$10,000	4.99%
MW – Three Business Days	2/6/19	PRUAX	S	$19,000	5.50%
	2/7/19	PRUAX	S	$19,000	5.00%
	2/8/19	PRUAX	U	$10,250	4.99%
BK – Three Business Days	4/8/19	PRUAX	S	$19,800	5.52%
	4/9/19	PRUAX	U	$19,800	5.03%
	4/10/19	PRUAX	U	$19,850	4.47%
SB – Two Business Days	5/6/19	PRUAX	S	$19,750	5.48%
	5/7/19	PRUAX	U	$16,600	4.99%
MJ – Two Business Days	5/6/19	PRUAX	S	$18,500	4.98%
	5/7/19	PRUAX	U	$7,000	4.99%
JS – Two Business Days	6/6/19	PRUAX	S	$19,500	5.52%
	6/7/19	PRUAX	U	$12,750	5.00%
DF –Five Calendar Days	8/16/19	PRUAX	S	$19,800	5.49%
	8/20/19	PRUAX	U	$7,500	5.01%

J. Credibility of Testifying Witnesses

1. Respondent

We do not find Respondent credible for many reasons. We believe that he concocted a defense based on false documents and that he gave false testimony at the hearing. As explained more fully below, we have considered various factors in reaching this conclusion.[461]

a. Demeanor

Respondent's demeanor at the hearing was tightly controlled. He parsed questions closely and declined to provide a clear answer to many questions because he took issue with a particular word or implication in the question.[462] At the same time, he answered some questions at length without providing much information. He often concluded, "Does that answer your question?" as though he were sincerely trying to be responsive.[463] But the refrain seemed more an artificial way of prompting a positive response to the answer from the interlocutor. Respondent enjoyed

[461] *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964) ("Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.").

[462] *See*, *e.g.*, Tr. (DAB) 677–78, 687–88, 696, 703, 705, 707, 734–35, 924.

[463] *See*, *e.g.*, Tr. (DAB) 967, 971, 976, 981, 987, 992, 1001, 1004, 1006, 1008, 1014, 1018, 1060, 1069, 1080, 1081, 1086, 1097, 1101, 1110.

answering open-ended questions with long disquisitions about what he would generally do,[464] but he resisted clearly answering more pointed questions.[465]

b. Handwritten Notes

Respondent's defense rests largely on his handwritten notes, which he represents to be truthful and accurate contemporaneous records of his conversations with customers.[466] Regardless of when those notes were made, we do not believe that they are true and accurate reflections of conversations between Respondent and his customers for several reasons.

First, it is not clear exactly what was Respondent's note-keeping practice. At the hearing, he testified that he made notes immediately after a meeting or telephone call with a client or, at most, no later than the next day.[467] "I took those notes and recorded them promptly after concluding a conversation."[468] He kept two sets of notes, he testified, one organized by customer summarizing conversations between Respondent and the customers, and one organized by date listing purchase recommendations made on any given day to various customers.[469]

This is different from the way Respondent testified about his notetaking in on-the-record testimony on June 30, 2021, and July 1, 2021 ("OTR"). Respondent explained in his OTR testimony that he might have a few bullet points that he jotted down during a conversation with a customer but that he would almost immediately go back and memorialize the conversation.[470] Once he had "put the notes in a more meaningful format," he said that he would "probably throw the [more contemporaneous] bulletized version away.[471]

We have examples of two types of notes in the record, lengthy notes about various purported conversations between Respondent and his customers, and shorter notes identifying

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[464] *See*, *e.g.*, Tr. (DAB) 965–67, 984–87, 988–90, 990–92, 999–1001, 1003–04, 1004–06, 1006–08, 1011–14, 1014–18.

[465] *See*, *e.g.*, Tr. (DAB) 704–05, 706, 707–09, 714, 730–31, 734, 737–38, 967–68.

[466] Tr. (DAB) 947–50, 954. Respondent's counsel declared in his opening statement that Respondent's notes were the "scripture" for the defense case and should be "considered the absolute truth of what occurred." Tr. (counsel) 42. Counsel claimed that the notes "exonerate" Respondent. Tr. (counsel) 48. In his closing, Respondent's counsel declared that Respondent's "handwritten client conversation notes . . . provide clarity that the numbers on Enforcement's tailor-made charts do not." Tr. (counsel) 1239. "The notes outweigh the numbers." Tr. (counsel) 1240, 1253. Respondent's post-hearing brief on the merits declares that Respondent's handwritten notes refute the allegations in the Complaint and are exculpatory. Resp. Open. Br. at 2–6.

[467] Tr. (DAB) 949.

[468] Tr. (DAB) 950.

[469] Tr. (DAB) 987–90.

[470] Tr. (DAB) 950–54.

[471] Tr. (DAB) 950–54.

recommended mutual funds and Respondent's thoughts about the funds. We have no bullet points.

Second, most of Respondent's handwritten notes lack an important hallmark of authenticity—specificity. For example, most of the notes contain no specifics of what Respondent told a customer about sales charges or breakpoints. Most of the handwritten notes contain only Respondent's general representation that he discussed sales charges and breakpoints with his customers.[472] Similarly, when Respondent says in his notes that a customer insisted on making a follow-up purchase of a mutual fund recently purchased only a day or two before, he generally does not record why the customer wanted to effect the follow-up transaction.[473] When he does record a reason for a customer's proposed transaction, it is a vague generality. For example, he wrote that a customer wanted to sell a mutual fund because of a "lack of performance."[474] There is no indication of how or why the customer was disappointed in the fund's performance.

When one of Respondent's notes is specific, it is specific in a way that does not lend it credibility. Some of the specifics are random details adding color but not meaningful content. Other specifics appear tailored to meet Enforcement's concerns during its investigation.

For example, Respondent produced a note dated May 4, 2017, purporting to memorialize a conversation with BK. It is one of the more specific notes in the record. According to the note, BK called Respondent. Respondent wrote, "Now, [BK], I only have a few minutes – Let's see how far we get. Have commitment at noon. Said that I would like to ultimately see [BK] with about 50K of Franklin Utilities [FKUTX]."[475] Those sentences are unnecessary scene setting. And if Respondent was in a hurry, as the note suggests, it would make no sense to spend time writing out what he said about being in a hurry. It is as though Respondent were imagining how the conversation could have happened. According to the note, Respondent told BK that the first breakpoint for Franklin Utilities [FKUTX] was $100,000.[476] BK purportedly said, "Maybe,

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[472] *See*, *e.g.*, JX-21, at 1 ("She is reminded that as discussed yesterday, breakpoints and sales charges apply."); JX-21, at 2 ("Sales charge and breakpoint detail again relayed."); JX-27, at 1 ("Sales charges and breakpoints disclosed"; "Sales charges disclosed"; "Sales charges and breakpoint detail for both purchases disclosed"); JX-35, at 1 ("Again reminded of related breakpoints and sales charge."); JX-46, at 1 ("Breakpoints and sales charges for purchases conveyed."), 2 ("Breakpoints and sales charges discussed for each position secured."), 4 ("Sales charges again disclosed."); JX-64, at 2 ("Sales charge and breakpoint detail specifically reviewed for agreed acquisitions.").

[473] *See*, *e.g.*, JX-21, at 2 (According to the note, after investing $19,500 in American Beacon Global Growth [SGAAX] on July 5, 2018, the customer purportedly said on July 6, 2018, "Well let's invest another $19,250 today." According to the note, the customer commented that the purchase would leave sufficient funds in money market reserves. There is no other explanation of the follow-up transaction in the note.); JX-46, at 2 (The customer purportedly wanted to place a second purchase of Gabelli Utilities [GAUAX] in the identical amount of an initial purchase the day before. There is no explanation of the reason for the follow-up transaction or the amount.).

[474] JX-27. *See also* JX-21, at 2 (redemption tendered because customer "remains unimpressed").

[475] JX-46, at 3.

[476] JX-46, at 3.

would prefer our usual more modest acquisition increments, we can always talk again!"[477] According to the note, BK then said to purchase $18,500 in Franklin Utilities [FKUTX], not the $50,000 that Respondent supposedly suggested as the "ultimate" goal. There is no explanation for how BK settled upon an investment of $18,500. The note describes what was said like a scene in a play. Respondent "Said that I had to go just now, but if [BK] wants to talk further, call me late this afternoon or evening."[478] According to the May 4, 2017 note, BK called Respondent back later the same day and tendered an "unsolicited" second purchase of Franklin Utilities [FKUTX] for another $18,000.[479] The note says that BK thanked Respondent for his earlier advice about Franklin Utilities [FKUTX] and said that it "made sense."[480] Even if we accepted the note as true and accurate (which we do not), the note shows that the second purchase of Franklin Utilities [FKUTX] was the product of Respondent's solicitation earlier in the day. It should not have been marked unsolicited.

Third, we observe that the notes are carefully written in tidy blocks on graph paper. They do not look hastily made, as contemporaneous notes would. There are no scratch outs or after-the-fact insertions.[481] The May 4, 2017 note flows without interruption from the first conversation with BK that day to the second.[482] In the handwritten notes, the names of the mutual funds are frequently written out in full instead of abbreviated or referred to by some other shorthand.[483] It is as though the notes were meant for a reader other than Respondent (such as a supervisor or regulator) to easily understand.

Carefully writing out the notes on graph paper would have been a time-consuming task, and we are not sure what business purpose it would serve to write them this way. Nor do we understand why there are two sets of notes, one organized by customer and the other organized by date. We conclude that the handwritten notes specific to certain customers were designed to respond to charges that Respondent anticipated might be made regarding his trading in customer accounts.

Fourth, we find a fundamental inconsistency between how Respondent portrays his customers in his notes and how he portrayed them in his testimony. On the one hand, in his notes he describes his customers as involved investors with their own investment ideas who pressed him to make specific investments, sometimes against his advice.[484] On the other hand, in his

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[477] JX-46, at 3.

[478] JX-46, at 3.

[479] JX-46, at 3.

[480] JX-46, at 3.

[481] JX-21; JX-27; JX-35; JX-46; JX-56; JX-64; JX-69; JX-81; JX-82.

[482] JX-46, at 3.

[483] JX-21; JX-27; JX-35; JX-46; JX-56; JX-64; JX-69; JX-81; JX-82.

[484] *See*, *e.g.*, JX-46, at 4 (Nov. 7, 2017 note: "[BK] called, said he thought it time for 'account maintenance.' [I] [r]eplied that although it has been a few months since we have specifically discussed the accounts, would prefer to

testimony he described how he relied on simple analogies to pies and breakfast cereal to explain mutual fund investments to his customers and help them retain certain basic investment concepts.[485] As Respondent's counsel said in his opening statement, Respondent "discussed breakpoints and sales charges in a way a middle-schooler could understand."[486] If Respondent was speaking to his customers in terms of pies and cereal boxes, those customers were not equipped to direct their mutual fund investments in the way he describes in his handwritten notes.

Fifth, no customer who spoke with FINRA staff corroborated Respondent's notes. No customer could remember being informed that breakpoints were sales discounts.[487] No customer could remember instructing Respondent to buy more of a recently purchased mutual fund.[488] And some customers affirmatively said that it never happened the way Respondent described their interactions in his notes.[489]

In just one example, BK told FINRA staff that he spoke with Respondent only once for each trade, that he never called Respondent back asking to purchase more of the same mutual

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delay a comprehensive account review until January. After a bit of negotiation, a $19.5K MFS Intl Value Fund [MGIAX] acquisition was concluded.") (Nov. 13, 2017 note: "[BK] requests entire Ivy Balanced Fund Redemption [IBNAX]. Strongly Discouraged. . . . [BK] has his own ideas and asserts his position. He cannot contain himself until January.") (Nov. 18, 2017 note: "[BK] – against advice – tenders unsolicited Ivy Balanced Fund [IBNAX] full redemption, tenders unsolicited Franklin Utilities [FKUTX] purchase.").

[485] Tr. (DAB) 1005–08. Respondent testified that he tells his clients that mutual funds are like pies. We paraphrase: All pies are pies, but they have different ingredients. Maybe one pie is made of cherries, and another is made of pecans. Similarly, all mutual funds are mutual funds, but they are made with different components. Respondent uses this analogy to explain how asset classes vary among mutual funds. Tr. (DAB) 1005–06.

Respondent testified that he explains breakpoints to his customers by talking about breakfast cereal. He explained that one might buy six small individually wrapped boxes of different kinds of cereal, each with enough for one bowl. Or one might buy 40 pounds of Cheerios at Costco, and that might cost a lot more out of pocket, say $40. That box of Cheerios would last much longer than the individual boxes, but it costs more up front. The individual boxes cost more per bowl, but less up front. And the individual boxes provide diversification. Tr. (DAB) 1006–08. Respondent said that he uses analogies like these to "facilitate hopefully longer-term retention . . . [t]o make the point and drive the concept home." Tr. (DAB) 1006. Notably, Respondent did not include in his explanation any indication that a breakpoint is the name for a volume discount.

[486] Tr. (remarks of Respondent's counsel) 52. Moreover, even in the notes there are signs that the customers were not as sophisticated and actively involved as Respondent would have us believe. Frequently he wrote in his notes that he reminded them to keep their confirmations of transactions. JX-21, at 1; JX-27, at 1; JX-35, at 1; JX-46, at 3. If they were as sophisticated and active as he portrayed them in his notes, they would not have needed those reminders.

[487] CX-7; CX-8; CX-9; CX-10; CX-11; CX-12; CX-13; CX-14; CX-15; CX-16; CX-17; CX-18; CX-20; CX-21.

[488] CX-7; CX-8; CX-9; CX-10; CX-11; CX-12; CX-13; CX-14; CX-15; CX-16; CX-17; CX-18; CX-20; CX-21.

[489] CX-7, at 2 (customer said that she "would not have called him to 'buy more'" and she "never called back to direct more trades."); CX-12 (customer said "there was no chance" he would have called Respondent to buy more of the Gabelli Utilities fund [GAUAX] after the initial purchase; customer said he never called Respondent back to make additional purchases, and there was "no way" that happened.); CX-14 (customer said Respondent "definitely [did] not" call him back the next day to purchase more of the same mutual fund after the initial purchase); CX-16, at 2 (customer said he did not speak to Respondent three consecutive days—"that did not happen.").

fund after the original trade, and that he did not know why purchases in his account were broken up in piecemeal fashion.[490] He provided a declaration under penalty of perjury saying he did not direct Respondent to purchase the same mutual fund in multiple piecemeal purchases over several days.[491] This declaration flatly contradicts Respondent's handwritten note of May 4, 2017, which describes BK as authorizing one solicited purchase of FKUTX for $18,500, and then calling back later the same day to make a second unsolicited purchase of the same fund for $18,000. We credit BK's declaration and not Respondent's handwritten note.

Sixth, all of Respondent's customers conveyed to FINRA staff in the investigation the sense that they relied on Respondent and were not actively engaged with their investment portfolio,[492] in contradiction to the way that Respondent made them sound in his notes. It is impossible to believe that all the customers with whom FINRA staff spoke told the staff falsehoods. The customers liked Respondent and gave the staff no reason to believe that they had an "axe to grind."[493] Furthermore, it is not even clear that the customers had enough of an understanding about the duties of a registered representative to formulate a purposeful falsehood. At least a couple of the customers told FINRA staff that they had orally given Respondent discretion to trade what or when he thought best without necessarily conferring with them in advance.[494] They apparently did not understand that Respondent was required to confer with them and obtain approval before making a trade in their account.[495]

c. Suspicious Circumstances Surrounding Respondent's Document Production

For the reasons discussed above, we do not find Respondent's notes reliable. Furthermore, the suspicious circumstances in which Respondent's notes came to light increase our skepticism of their truth and reliability. When IFG began its investigation of Respondent's trading in customer accounts and Mireles, his supervisor, called him to ask questions about the

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[490] CX-10; CX-11; CX-12.

[491] CX-13.

[492] CX-7, at 1 (customer did not review trade confirmations that carefully); CX-8, at 2 (customer never questioned Respondent when he made recommendations); CX-11, at 1 (customer relied on Respondent and the way the investments were made were "all Blankenship"); CX-14, at 1–2 (customer stayed with Respondent when he left IFG and went to a new firm; customer said he likes Respondent); CX-16, at 1 (customer said he was not an active trader); CX-17, at 1 (customer said he did not follow the market that closely); CX-18, at 1 (customer relied on Respondent); CX-18, at 2 (customer met with Respondent about once per year and customer relied on Respondent to manage his portfolio).

[493] Tr. (RS) 426. When the Firm investigated Respondent's trading, Mireles, the supervisor, noted that the customers all liked Respondent. Tr. (RM) 864; JX-16; JX-17.

[494] CX-7, at 1 (customer gave oral authorization for Respondent to make investments without first speaking with her); CX-18, at 1 (same). Another customer gave Respondent discretion to determine the best time to make a trade. CX-20, at 1.

[495] FINRA Rule 3260(b) prohibits a registered representative from exercising discretionary authority in a customer's account unless the customer has given prior written authorization and the representative's firm has accepted that authorization and supervisory responsibility under FINRA Rule 3110.

trading, Respondent did not tell him that he had contemporaneous notes of conversations with customers that would justify the trading.[496] When Mireles called Respondent a few weeks later to terminate him, Respondent did not defend himself by saying that he had notes to support the legitimacy of what he did.[497] If the notes exculpate Respondent, as he claims they do,[498] then one would have expected that, when the Firm investigated and ultimately terminated him, he would have said immediately that he had contemporaneous notes that supported the trading. But, according to Mireles, he did not.[499]

Respondent's failure to mention or produce the supposedly exculpatory notes is "strongly at variance with the way in which we would normally expect a similarly situated person to behave,"[500] and it is inconsistent with "common experience and knowledge."[501] If Respondent made those notes contemporaneously with his conversations with clients, then he would have had them in his file when Mireles spoke to him about the Firm's decision to terminate him, and he would have produced them to justify his trading. His failure to do so strongly suggests that the handwritten notes were fabricated sometime after the Firm terminated Respondent and FINRA began investigating.

At the hearing, Respondent refused to admit that he did not mention the notes to Mireles in the two calls leading to his termination. He also refused to admit that he did not give any of his notes to IFG. Instead, he attempted to prevent any firm conclusion from being drawn. He said that he could not recall exactly what Mireles confronted him about because the conversations were too long ago. "I don't have independent recollection of that conversation in that distant past."[502] And, when pressed to admit he did not produce the notes to the Firm, he said, "I don't recall if they were given [to the Firm]."[503] By using the passive voice, he seemed to distance himself from knowledge and responsibility. Then he attempted to distract from the focus of the question, saying "I do know that during my annual branch examinations when an examiner came to the office to review files, the examiner was given everything he or she requested and was satisfied."[504]

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[496] Tr. (RM) 840, 848.

[497] *See supra* at 8–10.

[498] Resp. Const. Br. 32.

[499] Tr. (RM) 840, 848.

[500] *Jackson v. United States*, 353 F.2d 862, 867 (D.C. Cir. 1965).

[501] *Id.*

[502] Tr. (DAB) 959.

[503] Tr. (DAB) 959.

[504] Tr. (DAB) 959. We note that, despite the passage of time, Respondent vividly remembered his reaction to being informed that he was about to be terminated for cause if he did not have something more to say in his defense. He said that when Mireles told him he was being terminated effective immediately, "I just sunk to the floor. All I tried to do was to try to remember to make my heart beat and to breathe. That's it. It was that draining to hear those words

We reject Respondent's attempt to inject doubt about his failure to mention his handwritten notes when Mireles spoke to him about his trading and the Firm's decision to terminate him. Mireles did not remember any reference to contemporaneous notes of customer conversations, and certainly if the Firm had learned of any such notes when it was considering his termination it would have included an analysis of the notes in its investigatory inquiry. We find that Respondent did *not* mention the notes and did *not* provide them to the Firm to defend himself against termination.

Another reason we doubt the reliability of Respondent's notes is his incomplete production. Respondent himself has acknowledged that the notes he produced are not complete. He testified that some of his notes were destroyed.[505] According to Respondent, this occurred after he was "disassembling" his files to respond to FINRA requests for specific information about specific trades on specific dates.[506] He would "extract information to answer the question asked,"[507] and create a separate file for responses to FINRA. Respondent redacted his notes based on his understanding of what was responsive to FINRA's Rule 8210 requests.[508] He used paper clips and paper to cover entries he thought were not covered by FINRA's requests. He then copied the redacted originals and gave the redacted copies to his legal team for production to FINRA.[509] The copies that Respondent gave his legal team have blank spots and show the shadows of the paper clips holding pieces of paper used to redact the originals.[510]

Then, Respondent claims, when he was away from his home office, a toilet overflowed and destroyed his notes and other documents.[511] Sica, the FINRA principal investigator who testified, said that in the course of the investigation Respondent and his attorney told FINRA staff that the notes were lost in a flood the day after his OTR,[512] and Respondent testified that the water damage occurred while he was away at his OTR.[513] It is unclear from Respondent's testimony whether any originals still exist or whether the redacted copies are all that is left. But what is clear is that, even according to Respondent's own testimony, the notes in the record are the incomplete product of whatever "disassembling," redactions, and extraction of information

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from Mr. Mireles. I sat there on the floor for a while, 20, 30, maybe 45 minutes. I could feel I was white." Tr. (DAB) 1035. Then, he said, when he could stand, he called his attorney. Tr. (DAB) 1035–36.

[505] Tr. (DAB) 947–48, 990–92.

[506] Tr. (DAB) 991.

[507] Tr. (DAB) 991.

[508] Tr. (DAB) 1028–31, 1036–37.

[509] Tr. (DAB) 991, 1029.

[510] Tr. (DAB) 1028–29.

[511] Tr. (DAB) 992.

[512] Tr. (RS) 142.

[513] Tr. (DAB) 1147–50.

Respondent engaged in prior to the water damage. This further diminishes the credibility of the notes.[514]

d. Respondent's Evasive Hearing Testimony

Leaving aside the suspect nature of Respondent's handwritten notes, we also find that most of Respondent's hearing testimony was not candid, forthcoming, or credible.

First, Respondent's testimony about his trading and his interactions with his customers was almost entirely dependent on the notes that we have determined to be dubious and unreliable. Respondent said that he could not remember conversations with customers from years ago,[515] and we acknowledge that memory fades over time. But, if Respondent could not look at his handwritten notes, he would not or could not testify about any specifics at all regarding his conversations with customers or his trading on their behalf.[516] He also refused to confirm information that seemed obviously true on the same basis.[517]

Respondent's counsel sought to show Respondent his notes to "refresh" his recollection, but over the course of the hearing it became clear that his memory was not being "refreshed" by the notes. Rather, Respondent was reading into the record what the notes said and testifying that they were true and authentic. His dependence on the notes became even more evident when Respondent was testifying from a particular note and Enforcement asked that the note be taken down from the computer monitor. Respondent started making a note for himself from the note before it was removed from the screen.[518] In no way was he testifying from a "refreshed" memory.[519]

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[514] The circumstances of the purported water destruction are also suspect. In a letter dated December 20, 2022, Respondent's counsel explained in response to a Rule 8210 request that "the vast majority" of the documents potentially responsive to Enforcement's requests had been water damaged while Respondent was at his OTR. JX-121, at 3. In response to a question raised by Enforcement, counsel further explained that the water damage did not affect Respondent's books and records related to his current business with another FINRA member firm. Only the papers "cordoned off" for responding to FINRA's investigative inquiries were damaged. JX-121, at 3. Counsel also said no insurance claim had been made because there was no identifiable damage to the room and the insurance company did not assign value to the paperwork destroyed. JX-121, at 3–4. Counsel attached an undated email that appeared to be from an insurance agent to Respondent that said Respondent had "indicated the clean-up of this situation is not that significant." JX-121, at 6. We find it not credible that an unexpected toilet overflow damaged only the documents relevant to the investigation without affecting anything else.

[515] Tr. (DAB) 889.

[516] Tr. (DAB) 748–49, 888–89, 921–22, 947, 1014, 1040.

[517] Tr. (DAB) 752–54. JX-54 was a joint exhibit containing selections from account statements for customer HN. One account statement showed a solicited purchase of RRIAX for $19,805 on January 19, 2018, which carried a 5.74% sales charge. When asked if he had recommended the transaction, Respondent said, "By what's appearing on this screen, yes. To be confident and secure, I'd want to review my notes." Tr. (DAB) 754. Respondent did not need his notes to agree that he recommended the transaction because he marked it as solicited.

[518] Tr. (DAB) 1039–41.

[519] Tr. 1052–58 (remarks of counsel and Hearing Officer).

As discussed more fully below, the Hearing Officer denied Respondent's efforts to enter untimely notes into evidence.[520] Respondent began to use the lack of notes as a shield to avoid answering questions unrelated to his conversations with customers. For example, Enforcement asked him if he knew that sales of Class A shares within less than a year of purchase were not suitable. He responded, "I'd have to refer to my notes."[521] This was a general question about Class A mutual fund shares, not a question about whether a particular transaction was suitable. Mutual fund Class A shares are the bulk of his business. He had to know or have an opinion about whether sales within less than a year were or could ever be suitable. Yet, he refused to answer without his notes.

Second, Respondent qualified many answers by saying that "context" had to be considered. For example, he refused to admit that breakpoint discounts are important to consider when recommending Class A mutual fund shares, although the Firm's WSPs clearly identified breakpoints as important to disclose to customers.[522] Instead, he vaguely answered,

> In some circumstances, it is. Other occasions, there are other – other considerations that become more important. So it is – I would go back to my statement of it is a consideration. . . . So, in response to your question, sir, it is a consideration. You failed to give me a context to be more specific.[523]

Respondent often said context was needed as a way of saying he needed his notes to provide background and detail. For example, a mutual fund transaction he had marked solicited was pointed out to him. He was then asked whether the mark showing that the transaction was solicited meant that he "recommended" the sale. Respondent answered, "For the details and context, I'd want to refer to my notes."[524] But an experienced professional could answer that question without notes or additional "context." As the Firm's WSPs clearly stated, a solicited transaction is a recommended transaction.[525] Respondent said that he needed his notes for "context" as a way of making his answers ambiguous.[526]

Third, Respondent declined to provide specifics of even important events that one would expect him to remember. He was asked, for instance, roughly when the water damage occurred that supposedly destroyed his IFG customer files. After waffling without answering, he indicated

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[520] *See infra* at 98–100.

[521] Tr. (DAB) 922.

[522] *See*, *e.g.*, JX-1, at 7–8. "All material facts must be disclosed to the customer when recommending the purchase or sale of mutual funds." The WSPs then listed specific examples of material facts that were required to be disclosed, including "Explanation of Breakpoints." JX-1, at 7–8.

[523] Tr. (DAB) 688.

[524] Tr. (DAB) 758.

[525] *See*, *e.g.*, JX-1, at 6.

[526] Tr. (DAB) 778. "Context is important." Tr. (DAB) 719. "As I said several times previous today, I'm looking for the context." Tr. (DAB) 778.

that he wanted help from his lawyer to answer the question.[527] He could only say from memory, vaguely, it was a few years ago. Eventually, when he was asked what events were going on around the time of the water damage, he said it was after FINRA began asking questions about his trading.[528] Later in the hearing, when subjected to cross-examination, he said that the water damage to his notes occurred while he was attending his OTR, which was on June 30, 2021, and July 1, 2021.[529] We believe that the OTR was a major event, as was the alleged destruction of notes bearing on the investigation, and we further believe that Respondent would remember that they happened around the same time.

Finally, while Respondent said he could not remember any conversations with customers or when the purported water damage occurred, Respondent testified expansively about other conversations and events that seemed safely on the periphery of the merits of the case. For example, his counsel asked him whether, outside of his mutual fund trading, his supervisor, Mireles, had questioned him about other matters. Respondent responded at length about an incident when he thought Mireles was unreasonably questioning him about a planned absence.[530] Respondent vividly set the scene. "I believe it was in March of '17, I sent an email saying, "I'm going to be out of the office these dates. All of a sudden, every means of communication lights up like a Christmas tree. Emails, phones ringing, 'call me immediately.'"[531] Mireles was concerned that Respondent had been out of the office the previous December and then again in January. But, Respondent said, he had not actually been absent even though that had been his original plan.[532] Respondent played out their conversation in detail:

> So I helped him remember that during the initial time I had planned to be out of the office, which included Christmas, I said, "Rich," I said, "did you approve the account application and paper work for Mr. [JS]?"
>
> "Absolutely."
>
> I said, "Did you look at the date? The forms are dated December 25th, which is Christmas day." I said, "I was working, Rich. Were you working on Christmas?"
>
> "I wasn't working."
>
> "Well, I was working Christmas day, and you signed off on the form."[533]

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[527] Tr. (DAB) 1031–34.

[528] Tr. (DAB) 1031–34, 1038–39.

[529] Tr. (DAB) 1147–50.

[530] Tr. (DAB) 1087–90.

[531] Tr. (DAB) 1088.

[532] Tr. (DAB) 1087–90.

[533] Tr. (DAB) 1089.

Respondent's memory of this conversation was detailed, unlike his recollection of his conversations with customers. We also note that this conversation shows that Respondent did not hesitate to push back when he thought he had a justification for his actions. We believe that, if Respondent possessed extensive contemporaneous notes of conversations with customers, as he claims, he would have brought them up when Mireles told him he was being terminated for cause. The fact that he did not suggests that, at least at the time the Firm terminated him, he had no such notes.

e. Respondent's Attempt to Deny Stipulated Facts

Respondent even tried to dispute the numbers in a summary table describing his pattern of trading, even though he had previously stipulated to their accuracy. Through counsel, he stipulated prior to the hearing that, while he was at IFG, he effected a total of 932 mutual fund purchases in his customers' accounts.[534] At the hearing, however, Respondent said there was no reason to believe that number was correct without referring to source documentation.[535] Enforcement then asked,

> Q: Isn't the fact that you stipulated to it reason to believe it's accurate?
>
> A: Given the gravity of this conversation, I would want to reverify with source documentation to confirm.[536]

This attempt to create doubt about the facts, even when he had previously stipulated to those facts, illustrates Respondent's continual effort to cloud and obstruct the fact-finding process.

f. Respondent's Attempt to Build a False Record of Guidance

Respondent also built a false narrative about the guidance he received from the Firm. Respondent observed that no time frame was specified in the Firm's WSPs after which a solicited transaction might be treated as unsolicited, and he thought that was an ambiguity.[537] Respondent explained his concern about the supposed ambiguity saying, "For example, if I were to make a mutual fund recommendation 12 years ago, am I expected to recall that and mark the next transaction solicited?"[538] This is a "straw man" type of argument. Respondent was soliciting his customers to purchase a mutual fund on one day and then purchasing the same mutual fund the following day but marking the follow-up transaction unsolicited. There was no 12-year gap. Generally, there was only a one- to five-day gap.

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[534] Stip. ¶ 8.

[535] Tr. (DAB) 922–24; Stip. ¶ 8.

[536] Tr. (DAB) 923.

[537] Tr. (DAB) 997–98.

[538] Tr. (DAB) 998.

According to Respondent, he asked Mireles during the cocktail hour at the Firm's annual conference in August 2019 how much time must pass between a solicited and an unsolicited trade and, supposedly, Mireles said three to four hours. Respondent claims he made a note on a cocktail napkin so that he had a record.[539] We do not credit Respondent's testimony about the cocktail napkin note. Mireles denied giving Respondent any such guidance,[540] and the Firm's WSPs contained no such time frame when a solicitation might transform into an unsolicited transaction.[541] Indeed, allowing a recommended transaction to be marked unsolicited solely because of the lapse of a few hours after a discussion with the registered representative would be contrary to the WSPs. They provided that a transaction was solicited if the representative did *anything* in connection with the transaction other than execute an order at the customer's direction.[542]

By the time of the Firm's August 2019 annual conference, it appears that Respondent was attempting to create a record that he had been given guidance that would justify his trading and the way he had marked transactions in customer accounts as unsolicited. This suggests that he was conscious that his activities might not be compliant with the applicable rules, policies, and procedures.

In sum, for the reasons discussed above, we do not find Respondent credible.

2. Other Testifying Witnesses

In contrast to Respondent, we find the other witnesses who testified at the hearing to be reliable and credible.

a. Robert Sica

Respondent asserts that Sica, the FINRA principal investigator who testified, conducted a faulty investigation and was biased.[543] As evidence of bias, Respondent cites Sica's alleged disregard of exculpatory evidence—mainly the handwritten notes that we have found suspect and not reliable.[544] Respondent also claims that the alleged bias arises from a fundamental conflict of

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[539] Tr. (DAB) 997–98. The cocktail note itself, RX-4, is not in the record. The Hearing Officer rejected Respondent's effort to enter it and other exhibits into evidence because Respondent untimely produced those exhibits, in violation of FINRA rules and the Case Management and Scheduling Order. As the Hearing Officer told the parties at that time, the rejected exhibits would be retained as part of a "supplemental record" of offered but not admitted exhibits. That supplemental record could be reviewed in any appeal that might be taken. Tr. (remarks of Hearing Officer) 464–65.

[540] Tr. (RM) 815–16.

[541] *See*, *e.g.*, JX-1.

[542] *See*, *e.g.*, JX-1, at 6.

[543] Resp. Open. Br. 7–9.

[544] Resp. Open. Br. 7–8.

interest, namely that Sica is employed by FINRA.[545] For that reason, Respondent urges us not to credit Sica's testimony.[546]

We reject Respondent's attack on Sica and his work in this case. We find Sica experienced, trustworthy, and credible. We saw no evidence of bias in his testimony.

We first consider Sica's background. Before joining FINRA, Sica was employed at the Federal Bureau of Investigation for 20 years investigating white collar crime, securities fraud, public corruption, and counter terrorism. He then retired from the FBI and joined FINRA, where he has worked for nine years.[547] He has extensive experience participating in customer interviews and memorializing them, both at the FBI and at FINRA. He has created hundreds if not thousands of such memoranda in his career.[548] At one time, he held a Series 7 license and was a Certified Fraud Examiner.[549] He is both an experienced investigator and experienced in the securities brokerage industry.

We also provide our impressions of Sica's testimony. Sica testified credibly about his process of taking notes and about the process generally employed by FINRA staff in interviewing people while conducting investigations. He summed up, you report "what the person you're speaking to told you."[550] He also described a lengthy and thorough investigative process that led to the filing of the Complaint in this matter.[551] In the investigation, Sica reviewed all of Respondent's mutual fund transactions.[552] We have no reason to distrust Sica's testimony or the interview memoranda created in the investigation of Respondent's trading. Nor do we have reason to distrust the summary exhibits that Sica created.

Sica had rational explanations for judgments he formed during the investigation. For example, Respondent's counsel noted that many of Respondent's customers said on their account opening forms that they had many years of experience investing in mutual funds.[553] Respondent's counsel pressed Sica to explain in the face of the account opening statements why he believed the customers when they said they did not know anything about sales charges and breakpoints. Sica testified that in his experience even people who have had mutual funds in their

[545] Resp. Open. Br. 7–9.

[546] Resp. Open. Br. 7–9.

[547] Tr. (RS) 55–56.

[548] Tr. (RS) 58–59.

[549] Tr. (RS) 57.

[550] Tr. (RS) 58.

[551] Tr. (RS) 60–68, 78–82, 84–85, 93–96, 99–105, 125–28.

[552] Tr. (RS) 158.

[553] Tr. (remarks and questions posed by Respondent's counsel) 378–80.

accounts for decades do not know how they work.[554] They simply know that their broker has bought mutual funds in their accounts.[555]

Similarly, Sica explained why he concluded that Respondent had fabricated his notes. Sica said that he believed the initial conversations happened but not the subsequent conversations described in the notes because Respondent's clients consistently said that they spoke to Respondent once.[556] They said they did not speak to him again after they authorized a transaction.[557] Sica acknowledged that people may not have a recollection of any specific conversation in the past, but he said that people do tend to remember patterns.[558] And not one customer with whom FINRA staff spoke remembered a pattern of speaking with Respondent multiple days in a row.[559]

Although Respondent's counsel repeatedly attacked Sica's competence and objectivity,[560] Sica remained throughout the hearing calm, balanced, and dispassionate. We saw no evidence of unfair bias, and we find him credible.

b. Customer MH

Respondent contends that MH's testimony must be rejected primarily because it contradicts Respondent's handwritten notes about purported conversations with MH.[561] As is abundantly clear throughout this decision, we find the handwritten notes wholly unreliable and not credible. That MH has a different recollection is no basis for discounting his testimony.

Respondent also claims that MH had "selective memory" that made his testimony "inherently suspect."[562] We reject this contention as a gross distortion of the record. We saw no "selective memory." MH could not remember specific conversations on specific dates, but he had a good general recollection of how he interacted with Respondent.

Consistent with what other customers told FINRA staff in the investigation, MH testified that Respondent would make recommendations and MH would approve the recommendations. MH never understood that the mutual fund purchases he approved were being broken up into multiple smaller transactions to be made on consecutive business days and he had only a hazy idea of how Respondent was compensated. He was unaware of breakpoint discounts and the cost

[554] Tr. (RS) 380–81.

[555] Tr. (RS) 380–81.

[556] Tr. (RS) 389–92.

[557] Tr. (RS) 389–92.

[558] Tr. (RS) 425–26.

[559] Tr. (RS) 426.

[560] Tr. (remarks and questions posed by Respondent's counsel) 380–82.

[561] Resp. Open. Br. 14–16.

[562] Resp. Open. Br. 15.

of switching mutual funds between different fund families instead of exchanging funds within one fund family.[563] We find MH's testimony believable given the limited experience MH had with trading (as opposed to holding) mutual funds before Respondent became his registered representative.

c. Richard Mireles

Mireles supervised Respondent from the time he joined IFG in 2016 until 2018, when Mireles became vice president of supervision at the Firm.[564] Mireles testified about IFG's supervisory systems and discussed his dealings with Respondent.[565] Mireles investigated Respondent's trading and was the person who told Respondent that he was being terminated.[566] He denied giving Respondent any guidance contrary to what was written in the WSPs.[567] And he specifically denied that he ever told Respondent that he was only required to complete the MFTF if a trade was over $20,000.[568]

We find Mireles's testimony credible.[569] He answered questions without evasion and displayed no animosity toward Respondent. He reported positive as well as negative aspects of Respondent's work in his notes about his conversations with customers. For example, Mireles quoted a customer as saying Respondent was "great to work with."[570]

d. Jonee Powell

We find Powell, a former senior supervisor at IFG, credible. She was straightforward in the way she answered questions and what she said made sense. She was asked hypothetically what she would have said if a representative had asked whether the new Switch Form was required only if a transaction was over $20,000. She responded without hesitation, "Oh, that's a no."[571] She explained that the very reason for the new form was to collect information about switches below the $20,000 threshold.[572] The automated flagging system was triggered only when a purchase transaction was for $20,000 or more. But the new switch form called attention

[563] Tr. (MH) 529–30.

[564] Tr. (RM) 806–08, 830–32.

[565] Tr. (RM) 808–33.

[566] Tr. (RM) 834–48.

[567] Tr. (RM) 815.

[568] Tr. (RM) 815–16.

[569] We were informed when Mireles testified that he had just completed a four-month suspension for improper supervision that was the result of a settlement with FINRA pursuant to an Acceptance Waiver and Consent. But that settlement was not related to Respondent or this case. Tr. (RM) 806. Respondent's argument that Mireles should be impeached because of that regulatory history (Resp. Open. Br. 12, 14) is unfounded.

[570] Tr. (RM) 845–46.

[571] Tr. (JP) 788–89.

[572] Tr. (JP) 792–93.

to all potential switches in any amount. When shown the Switch Form and the WSPs discussing switches, Powell said that neither document contains a reference to a dollar amount.[573] She said that she would never have told Respondent something different from the WSPs.[574] Powell knew the purpose of the new form. She was at the Firm's 2019 annual conference to educate people at the Firm about the Switch Form.[575] We believe her testimony that she would not have told Respondent something different from what the WSPs provided.

Powell was shown Respondent's notes purporting to memorialize her saying that the new form did not have to be used unless a transaction was over $20,000. One claimed to be a note from a conversation with her at the annual conference; the other claimed to be from a telephone conversation afterward.[576] Powell testified that Respondent's notes do not accurately represent any conversation she would have had with him.[577] She said she would "absolutely not" tell Respondent that the new Switch Form only had to be used in mutual fund transactions exceeding $20,000.[578] We credit her testimony.

IV. Legal Conclusions

A. Standard of Proof

Enforcement bears the burden of proving the charges. It is well established that the standard of proof in a disciplinary proceeding such as this is proof by a preponderance of the evidence.[579] The preponderance standard requires only that the complainant "prove it is more likely than not" that the allegations are true.[580] Essentially, the balance of the evidence must tip at least slightly in favor of the complainant.

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[573] Tr. (JP) 788–89.

[574] Tr. (JP) 793–94.

[575] Tr. (JP) 787.

[576] Tr. (JP) 791–92.

[577] Tr. (JP) 793–94, 802–03.

[578] Tr. (JP) 793.

[579] *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *16 (June 2, 2016) (applying a preponderance of the evidence standard in FINRA disciplinary proceedings); *Luis Miguel Cespedes*, Exchange Act Release No. 59404, 2009 SEC LEXIS 368, at *18 & n.11 (Feb. 13, 2009) (citing *David M. Levine*, Exchange Act Release No. 48760, 2003 SEC LEXIS 2678, at *25 n.42 (Nov. 7, 2003) (holding that preponderance of the evidence is the standard of proof in self-regulatory organization ("SRO") disciplinary proceedings), *petition for review denied*, 407 F.3d 178 (3rd Cir. 2005)); *Dep't of Enforcement v. Claggett*, No. 2005000631501, 2007 FINRA Discip. LEXIS 2, at *25 (NAC Sept. 28, 2007) (Enforcement had burden of proof, which it had to satisfy by a preponderance of the evidence.).

[580] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 328–29 (2007) (stating that, at trial, proof of scienter under the preponderance standard requires showing that allegation is "more likely than not"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (discussing preponderance standard and holding that it applies to civil damage actions for securities fraud); *United States v. Montano*, 250 F.3d 709, 713 (9th Cir. 2001) (under the preponderance of the evidence standard, the relevant facts must be shown to be more likely than not); *Days Inn*

Enforcement submitted the Firm's Smart Blotter records of all Respondent's trading, CX-24, and summaries of Firm records to show Respondent's pattern of trading. Enforcement also submitted memoranda of interviews with customers to show that the customers did not instruct Respondent to trade in the manner that he did, and two customer declarations to the same effect. Enforcement presented the hearing testimony of a third customer, MH, who denied instructing Respondent to purchase mutual funds in multiple transactions over consecutive days. And, in addition, Enforcement presented hearing testimony from two of Respondent's former supervisors at IFG, who testified that they did not give Respondent guidance he claimed that they did.

Respondent primarily relies on his purported contemporaneous notes of conversations with his customers, which he testified are true and accurate.[581] He maintains that these notes exculpate him from the charges and constitute stronger proof than the numbers in the tables showing his pattern of trading.[582]

Adjudicators are expected to evaluate the evidence, not merely accept it. We must consider Respondent's evidence and testimony, but we are not required to believe it.[583] We must draw on our common sense to make reasonable inferences from the evidence, and carefully weigh and balance its reliability and probative value.[584] Moreover, we should evaluate the evidence as a whole. "[T]he sum of an evidentiary presentation may well be greater than its constituent parts."[585]

Respondent argues that inferences and beliefs are not proof.[586] Respondent has an incorrect understanding of the nature of proof. "The process of drawing inferences from facts in

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Worldwide, Inc. v. Sonia Invs., No. 3:04-CV-2278-D, 2007 U.S. Dist. LEXIS 29689, at *11 n.6 (N.D. Tex. Apr. 23, 2007) (preponderance of the evidence means to prove the claim or element is more likely than not).

[581] Tr. (DAB) 948–50; Tr. (remarks of Respondent's counsel) 53.

[582] Resp. Const. Br. 32.

[583] *See Jackson,* 353 F.2d at 866–67 (rejecting testimony of police officer because it was inconsistent with his conduct in making arrest). *See also Alfred P. Reeves, III*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568, at *9–10 (Nov. 5, 2015) (respondent's claim was implausible); *Dep't of Enforcement v. Capellini*, No. 2020066627202, 2024 FINRA Discip. LEXIS 19, at *64–65 (NAC Oct. 3, 2024) (respondent's testimony was not credible and argument was implausible), *appeal docketed*, No. 3-22284 (Oct. 30, 2024); *Dep't of Enforcement v. Iannazzo*, No. 2020067734001, 2025 FINRA Discip. LEXIS 1, at *4 (OHO Feb. 6, 2025) (respondent's explanations for his conduct defied belief), *appeal docketed* (NAC Mar. 3, 2025); *Dep't of Enforcement v. Gadelkareem*, No. 2014040968501, 2016 FINRA Discip. LEXIS 9, at *15 (OHO May 2, 2016) (respondent's testimony was implausible and emails were fabricated); *Dep't of Enforcement v. Scholander*, No. 2009019108901, 2013 FINRA Discip. LEXIS 37, at *36–37, *45–48, *54–55 (OHO Aug. 16, 2013) (respondents' testimony was untrustworthy and not consistent with the facts).

[584] *United States v. Starks*, 309 F.3d 1017, 1021–22 (7th Cir. 2002); *Jackson*, 353 F.2d at 866 (testimony rejected where it contained internal contradictions and was contrary to human experience); *United States v. La-Van Hawkins*, No. 04-370-05, 2005 U.S. Dist. LEXIS 21729, at *22–23 (E.D. Pa. Sept. 28, 2005) (criminal verdict can be supported by circumstantial evidence and reasonable inferences using common sense).

[585] *United States v. O'Brien*, 14 F.3d 703, 707 (1st Cir. 1994) (citing *Bourjaily v. United States*, 483 U.S. 171, 179–80 (1987) (quoting *United States v. Ortiz*, 966 F.2d 707, 711 (1st Cir. 1992)).

[586] Resp. R. Br. 4.

evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which . . . [the factfinder is] permitted to draw . . . from facts which have been established by either direct or circumstantial evidence."[587] We are permitted to draw inferences based on Respondent's trading pattern, the content and circumstances surrounding his production of his handwritten notes, and the absence of corroboration for Respondent's version of events.[588]

B. Violations

1. Suitability (First Cause of Action)

a. FINRA Rules 2111 and 2010

In the First Cause of Action, Enforcement charges that Respondent violated FINRA Rules 2111 and 2010.[589] Under FINRA Rule 2111(a), when a registered representative recommends a securities transaction or strategy, the representative must have a "reasonable basis" to believe the transaction or strategy is "suitable" for the customer. As explained in supplementary material to Rule 2111, "Implicit in all member and associated person relationships with customers and others is the fundamental responsibility for fair dealing."[590] "The suitability rule is fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct."[591]

There are three types of suitability obligations: (i) reasonable-basis suitability; (ii) customer-specific suitability; and (iii) quantitative suitability.[592] Reasonable-basis suitability means that a registered representative must have a reasonable basis to believe that the recommendation is suitable for at least some investors.[593] "To satisfy reasonable-basis suitability a broker must conduct a reasonable investigation and conclude that a recommendation could be

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[587] *United States v. Pauling*, 924 F.3d 649, 657 (2d Cir. 2019) (quoting *Leonard B. Sand et al*., Modern Federal Jury Instructions § 6.01 (2011)).

[588] *See United States v. Joyner*, Nos. 23-4126 and 23-4139, 2024 U.S. App. LEXIS 32845, at *6 (4th Cir. Dec. 30, 2024) (pattern of transactions below currency reporting threshold permitted inference of knowledge and intent to evade reporting requirements).

[589] FINRA Rule 2111 no longer applies to recommendations made to retail customers. The SEC's Regulation Best Interest ("Reg BI") now applies when a broker-dealer and associated persons make a recommendation to a retail customer of any securities transaction or investment strategy involving securities. But Rule 2111 applies where the conduct at issue pre-dates the effective date of Reg BI, which was June 30, 2020. *See* the version of Rule 2111 in effect from May 1, 2014, through June 29, 2020, which covered the Relevant Period in this case, https://www.finra.org/rules-guidance/rulebooks/finra-rules/2111. References here to FINRA Rule 2111 are references to that version of the Rule.

[590] FINRA Rule 2111, Supplementary Material, .01, General Principles.

[591] *Id.*

[592] FINRA Rule 2111, Supplementary Material, .05, Components of Suitability Obligations.

[593] FINRA Rule 2111, Supplementary. Material, .05(a), Components of Suitability Obligations.

suitable for at least some investors."[594] Customer-specific suitability means that the representative has a reasonable basis for believing the transaction or strategy suitable for a particular customer.[595] Suitability for a particular customer turns on a host of factors specific to that individual, generally collected through "reasonable diligence" to form an investment profile.[596] The third component of the suitability obligation concerns whether a series of transactions is suitable. A representative must have a reasonable basis for believing that a series of transactions is not excessive or unsuitable.[597] There is no single definition of what constitutes excessive activity,[598] but quantitative suitability often concerns considerations of the effect of costs on the potential for profitable returns.[599]

A violation of the suitability rule also violates FINRA's ethical conduct rule, Rule 2010.[600] Rule 2010 requires a FINRA member firm to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of its business. FINRA Rule 140 imposes the same obligation on a member firm's associated persons.[601] In a sense, the fair dealing obligation contained in Rule 2010 is the foundation for the more particularized requirements of Rule 2111.

b. Respondent's Unsuitable Trading

Respondent engaged in unsuitable trading, as alleged in the First Cause of Action in the Complaint (¶¶ 1, 9, 10, 11, 31–40). Respondent engaged in short-term trading of Class A mutual fund shares. As alleged in the Complaint (¶¶ 1, 9, 11, and 38), and as demonstrated in CX-1, in 27 instances in 11 customer accounts, Respondent sold Class A shares after holding them less than a year.[602] He also engaged in mutual fund switching. As alleged in the Complaint (¶¶ 10 and 34) in the First Cause of Action, and as demonstrated in CX-1, in 23 of those 27 instances of short-term trading, he used the proceeds from the sale of one mutual fund to switch to a mutual fund in a different fund family, thereby imposing a new sales load on the customer and garnering a new commission for himself.

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[594] *Dep't of Enforcement v. Taddonio*, 2019 FINRA Discip. LEXIS 3, at *56 (NAC Jan. 29, 2019), *aff'd*, Exchange Act Release No. 97325, 2023 SEC LEXIS 980 (Apr. 19, 2023), *petition for review denied*, Nos. 23-6526-ag & 23-6653-ag, 2025 U.S. App. LEXIS 81 (2d Cir. Jan. 3, 2025).

[595] FINRA Rule 2111, Supplementary. Material, .05(b), Components of Suitability Obligations.

[596] FINRA Rule 2111(a).

[597] FINRA Rule 2111, Supplementary. Material, .05(c), Components of Suitability Obligations.

[598] *Id.*

[599] *Id.*

[600] *Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *7 n.8 (Apr. 3, 2020) (finding that violations of other FINRA Rules, including Rule 2111, also violate FINRA Rule 2010).

[601] *Dep't of Enforcement v. Saliba*, No. 2013037522501, 2019 FINRA Discip. LEXIS 1, at *45 n.11 (NAC Jan. 8, 2019).

[602] CX-1.

Respondent had no reasonable basis for believing that the short-term trading and mutual fund switching were suitable for any customer. Class A mutual fund shares (in contrast to Class C shares) are specifically designed for long-term holding because of their high front-end sales charge.[603] Respondent used the Class A mutual fund shares in his customers' accounts, however, as trading vehicles that generated commissions for him. This was fundamentally at odds with the nature of these mutual fund investments and was unsuitable for any investor. "Mutual fund shares generally are suitable only as long-term investments and cannot be regarded as a proper vehicle for short-term trading, especially where such trading involves new sales loads."[604] "The high initial sales charges of front-end load mutual funds make them presumptively unsuitable as trading vehicles."[605]

Short-term trading of mutual funds in less than a year and mutual fund switching have both been long recognized as unsuitable.[606] This kind of trading gives rise to a presumption of unsuitability that can only be rebutted by evidence of extraordinary circumstances that would justify selling the mutual fund shares early.[607] The reason for the presumption is that such trading imposes high costs and reduces a customer's likelihood of making a profit.

As the NAC said in *Mehringer*, "A pattern of mutual fund switches violates FINRA's suitability rule and creates a rebuttable presumption of unsuitability."[608] This is not a new concept. More than 25 years ago the Securities and Exchange Commission ("SEC") similarly said in *Krull*, "[A] pattern of mutual fund switching . . . is presumptively violative of NASD [now FINRA] rules . . . [Such trading], particularly on a short-term basis, violates a salesman's responsibility for fair dealing."[609] More than 50 years ago, the SEC explained in *Irish* that when customers are "continuously in the market, yet repeatedly paying substantial selling loads," that increased activity benefits the registered representative selling the funds "but decrease[s] the customers' chances for profit."[610] A switch between mutual funds "may be difficult to justify if

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[603] Tr. (RS) 69–70, 344.

[604] *Krull*, 248 F.3d at 912 (quoting *Winston H. Kinderdick*, Exchange Act Release No. 12818, 1976 SEC LEXIS 783, at *7–8 (Sept. 21, 1976)).

[605] *Krull,* 1998 SEC LEXIS 2664, at *12.

[606] Short-term trading: *Krull*, 248 F.3d at 912 n.6 (average of 10 months); *Terry Wayne White*, Exchange Act Release No. 34-27895, 1990 SEC LEXIS 669, at *3 (Apr. 11, 1990) (average of 70 days); *Dist. Bus. Conduct Comm., No. 2 v. Koppel-Heath*, No. C02950044, 1998 NASD Discip. LEXIS 10, at *5, 11 (NBCC Jan. 6, 1998) (168 to 228 days). Mutual fund switching: *Mehringer*, 2020 FINRA Discip. LEXIS 27, at *8–9; *Irish*, 1965 SEC LEXIS 241, at *10–11.

[607] *Mehringer*, 2020 FINRA Discip. LEXIS 27, at *9 (collecting cases).

[608] *Id.* at *8.

[609] *Krull*, 1998 SEC LEXIS 2664, at *7–8 (collecting cases).

[610] *Irish*, 1965 SEC LEXIS 241, at *10–11. The SEC pointed out the "unsoundness of a practice of switching from one mutual fund to another" long ago. *Id.* (citing *Thomas Arthur Stewart*, Exchange Act Release No. 3720, 1945 SEC LEXIS 318, at *8 (Aug. 6, 1945)).

the financial gain or investment objective to be achieved by the switch is undermined by the transaction fees associated with the switch."[611]

In this case, there is no evidence that Respondent ever engaged in any analysis of the costs his mutual fund switching imposed on his customers. He ignored his obligation to minimize his customers' costs.[612] Instead, Respondent engaged in a pattern of trading that increased his customers' costs.

Where a pattern of mutual fund trading gives rise to a presumption of a violation, it is a respondent's burden "to demonstrate the unusual circumstances which justified what is a clear departure from the manner in which mutual fund investments are normally made."[613] Respondent here failed to carry that burden.

Respondent claimed that it was his customers who chose to trade in this way. He asserted that his handwritten notes of purported conversations with customers prove his claim.[614] As discussed above in connection with Respondent's credibility[615] and in our analysis of the trading in individual customer accounts,[616] we do not credit those notes.

Furthermore, even if we credited the notes, the justifications supplied by them for the mutual fund switches are insufficient to rebut the presumption of a violation. For example, Respondent wrote that GC wanted to sell shares of one mutual fund because of "performance disappointment" and that she purchased another mutual fund because utilities were more in her "comfort" zone.[617] These are vague generalities, not the kind of "unusual circumstances" that would justify switching mutual funds. "As the SEC has recognized, 'a generally declining market' and a fund's 'poor performance' are not sufficient reasons to rebut the presumption against the suitability of mutual fund switching."[618] The burden of justifying "a broad pattern of short-term trading" cannot be met by "assorted explanations, such as generating tax advantages, loss of faith in fund management, or concerns about a particular industry."[619]

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[611] *Mehringer*, 2020 FINRA Discip. LEXIS 27, at *9.

[612] *Dep't of Enforcement v. Wilson*, No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at *20 (NAC Dec. 28, 2011) (Respondent "made no discernable effort to determine whether the purportedly better performance of the funds into which he switched his customers would justify the costs associated with the switches. In failing to do so, [he] ignored his obligation to avoid increasing the costs that his . . . customers pay.") (quotation marks and citation omitted).

[613] *Id.* at *8 (footnote omitted).

[614] Resp. Open. Br. 2–6.

[615] *See supra* at 64–68.

[616] *See supra* at 30–35, 36–40, 41–45, 47–49, 49–54, 56–61.

[617] JX-27.

[618] *Wilson*, 2011 FINRA Discip. LEXIS 67, at *23–24 (citing *Charles E. Marland & Co*., Exchange Act Release No. 11065, 1974 SEC LEXIS 2458, at *6–7 (Oct. 21, 1974)).

[619] *Mehringer*, 2020 FINRA Discip. LEXIS 27, at *9.

Respondent engaged in yet another type of unsuitable trading. Because most of Respondent's mutual fund purchases (96%) were made in increments below $20,000, his customers also missed breakpoint discounts to which they were entitled, as alleged in the Complaint (¶¶ 1, 23). CX-2R demonstrates that Respondent's customers missed breakpoint discounts 131 times because of the way he traded.[620] Respondent had a duty to assist his customers to take advantage of breakpoint discounts,[621] and the Firm's WSPs and supervisory procedures were designed to enforce that duty.[622]

Respondent had no reasonable basis for believing that his trading was suitable for any investor. In fact, because of his experience and training, he had to know that the trading was not suitable. He benefited from it, but his customers did not. Respondent's short-term trading, mutual fund switching, and missed breakpoints were not isolated mistakes either. The unsuitable trading was simply Respondent's standard way of doing business. As alleged in the First Cause of Action, we conclude that Respondent violated FINRA Rules 2111 and 2010.

2. Ethical Conduct (Second Cause of Action)

a. FINRA Rule 2010

In the Second Cause of Action, Enforcement charges that Respondent violated FINRA Rule 2010. When a Rule 2010 violation is charged as a stand-alone cause of action, meaning that it is not based on the violation of another FINRA rule, Enforcement must prove that the conduct is unethical or in bad faith.[623] Unethical conduct is conduct that is "not in conformity with moral norms or standards of professional conduct."[624] Bad faith means "dishonesty of belief or purpose."[625]

Rule 2010 reaches conduct that may not violate a specific rule but nevertheless fails to meet the required "high standards" of business conduct. It prohibits unethical conduct.[626] "Rule

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[620] The Complaint alleged (¶ 25) that Respondent caused 37 customers to miss breakpoints they should have received in 143 purchases. CX-2R (the revised version of the exhibit admitted into evidence) identified 38 customers and 131 purchases in which breakpoints were missed. Our finding of a violation due to missed breakpoints is based on the exhibit as revised.

[621] *Dep't of Enforcement v. Belden*, No. C05010012, 2002 NASD Discip. LEXIS 12, at *13 (NAC Aug. 13, 2002) (respondent could have saved customer money by purchasing mutual funds in fewer fund families and availing customer of breakpoint discounts on Class A shares).

[622] *See supra* at 10–15.

[623] *Dep't of Enforcement v. Mantei*, No. 2015045257501, 2023 FINRA Discip. LEXIS 10, at *23 (NAC May 30, 2023), *appeal docketed*, No. 3-21516 (SEC June 27, 2023).

[624] *Id.* at *25–26 (quoting *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 SEC LEXIS 2684, at *28 (Feb. 7, 2020), *petition for review dismissed in part and denied in part*, 989 F.3d 4 (D.C. Cir. 2021)).

[625] *Id.*

[626] *Dep't of Enforcement v. Maheshwari*, No. 2017055608101, 2020 FINRA Discip. LEXIS 46, at *15 (NAC Dec. 17, 2020); *Mehringer*, 2020 FINRA Discip. LEXIS 17, at *43; *Dep't of Enforcement v. Fretz*, No. 2010024889501, 2015 FINRA Discip. LEXIS 54, at *9 (NAC Dec. 17, 2015).

2010 sets forth a standard intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace. Harm need not be shown."[627] "Rule 2010 is designed to protect investors and the securities industry from dishonest practices that are unfair to investors."[628] Both the SEC and the courts have held repeatedly that Rule 2010 applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill [their] fiduciary duties in handling other people's money."[629] "This Rule codifies 'high ethical standards' because 'customers and firms must be able to trust securities professionals with their money.'"[630]

b. Respondent's Unethical Evasion of his Firm's Supervision

We find, as alleged in the Second Cause of Action in the Complaint (¶¶ 23, 41–45), that Respondent circumvented his Firm's supervisory procedures by making 578 mutual fund purchases in customer accounts in multiple piecemeal transactions on consecutive business days in increments of less than $20,000. Respondent's trading, to speak colloquially, "flew under the radar" at his Firm. The Firm's Smart Blotter only marked for review with a yellow or red flag a transaction of $20,000 or more. Transactions of less than $20,000 were white flagged and only subject to spot reviews. With thousands of white-flagged transactions entering the system each day, Respondent made it highly unlikely that his trading would be scrutinized.[631]

We reject Respondent's justifications for trading in increments below $20,000. We do not believe that Respondent's customers were responsible for his pattern of executing hundreds of purchases below $20,000. Those trades benefited only Respondent, not his customers. He generated commissions with each switch from one mutual fund to another. And by trading in increments of less than $20,000, he often caused customers to miss out on breakpoint discounts. When we examined the evidence regarding individual customers and the transactions in their accounts, we found no credible evidence that any individual customer instructed Respondent to trade in piecemeal increments below $20,000. The handwritten notes Respondent offered to prove that it was the customers who decided to trade in piecemeal fashion were not credible.

Furthermore, during his tenure at IFG, Respondent also failed to complete and submit a single MFTF,[632] even though the MFTF was required for all initial purchases and switches between mutual fund families, regardless of the amount of the transaction.[633] In so doing,

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[627] *Springsteen-Abbott*, 2020 SEC LEXIS 2684, at *28–29 (internal quotation marks and citation omitted).

[628] *Id.* at *30 (internal quotation marks and citation omitted).

[629] *Id.* at *31 (internal quotation marks and citation omitted).

[630] *Logan v. SEC*, No. 24-1095, 2024 U.S. App. LEXIS 32802, at *2 (D.C. Cir. Dec. 27, 2024) (quoting *Saad v. SEC*, 873 F.3d 297, 299 (D.C. Cir. 2017)).

[631] Tr. (RM) 810; JX-14.

[632] JX-114, at 1.

[633] *See supra* at 12–15.

Respondent avoided creating any record of his trading that would have triggered his Firm's supervisory review.

Respondent's conduct was unethical because it was inconsistent with industry norms for Class A shares of mutual funds. Those norms recognize that mutual funds are not suitable for "trading" at all. Rather, Class A mutual fund shares are designed to be held without trading for a period of roughly five years.[634] Given that most of Respondent's business is investing in Class A mutual fund shares for customers, and given the high costs involved in trading such shares after holding them for only a year or two, we also conclude that Respondent acted in bad faith. He acted with knowledge that his trading benefited him to the detriment of his customers, and that, in our view, was the reason he circumvented the Firm's supervisory procedures. He knew his trading could not withstand the Firm's review. Respondent violated his FINRA Rule 2010 obligation to deal fairly with his customers.

3. Books and Records (Third Cause of Action)

a. FINRA Rules 4511 and 2010

In the Third Cause of Action, Enforcement charges that Respondent violated FINRA Rules 4511 and 2010. FINRA Rule 4511 requires members to "make and preserve books and records as required under the FINRA rules, the [Securities] Exchange Act [of 1934] and the applicable Exchange Act rules." FINRA Rule 140 makes the obligations of FINRA member firms applicable to their associated persons as well. Implicit in the obligation to make and preserve books and records is the obligation to make and preserve true and accurate books and records.[635]

A violation of Rule 4511, like all violations of FINRA's rules, is a violation of Rule 2010, the ethical conduct rule.[636] Falsifying records "is a form of misconduct that has been held to be 'unethical' for purposes of Rule 2010."[637]

b. Respondent's False Marking of Transactions

We find, as alleged in the Third Cause of Action in the Complaint (¶¶ 27–29, 46–52), that Respondent falsely marked 250 purchases as unsolicited when they were not. Repeatedly, in many different customer accounts, Respondent falsely marked follow-up purchases within two to five consecutive business days of the initial purchase as unsolicited, causing the Firm's records

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[634] *See supra* at 5–7.

[635] *See*, *e.g.*, *Dep't of Enforcement v. Inv. Mgmt. Corp.*, No C3A010045, 2003 NASD Discip. LEXIS 47, at *20 (NAC Dec. 15, 2003).

[636] *Trevor Michael Saliba*, Exchange Act Release No. 91527, 2021 SEC LEXIS 865, at *43 (Apr. 9, 2021).

[637] *Dep't of Enforcement v. Kolta*, No. 2018057297102, 2024 FINRA Discip. LEXIS 15, *107–08 & nn.464 & 465 (OHO Aug. 15, 2024) (collecting cases), *appeal docketed* (NAC Sept. 5, 2024).

to be inaccurate.[638] The markings make no sense. Respondent's customers apparently had funds available to make a single large purchase, but for some inexplicable reason, they made several smaller purchases instead, thereby missing breakpoint discounts.[639] And no customer corroborated Respondent's testimony or handwritten notes asserting that customers independently called him to make unsolicited follow-up purchases.

Even Respondent's own notes undercut his marking of "unsolicited" transactions. For example, Respondent wrote, "[BK] called again, thanked me for advice extended and said that my previous assertions regarding Franklin Utilities [FKUTX] now made sense."[640] Respondent then made a second purchase of FKUTX for BK, which Respondent marked unsolicited.[641] If Respondent's handwritten notes were true and accurate about what BK said to Respondent, then the notes show that the follow-up order happened because of what Respondent said to BK in their earlier conversation that same day. Respondent did more than merely accept the order, and the transaction should have been marked solicited.

Falsely marking transactions as unsolicited when they were not violates FINRA Rules 4510 and 2010. Whatever the kind of record, creating false entries in a firm's books and records is a violation.[642] We find that Respondent falsely marked and mismarked 250 transactions as reflected in CX-2R. As alleged in the Third Cause of Action, we conclude that Respondent violated FINRA Rules 4510 and 2010.

C. Respondent's Meritless Constitutional Arguments

Respondent asserts that this proceeding and how it was conducted violated his rights under the U.S. Constitution. He asserts that he was deprived of his right to a jury trial under the Seventh Amendment and his right to due process under the Fifth Amendment. He also argues

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[638] CX-2R.

[639] CX-1.

[640] JX-46, at 3.

[641] JX-46, at 3.

[642] *See Dep't of Enforcement v Mellon*, No. 2017052760001, 2022 FINRA Discip. LEXIS 11, at *19–22 (NAC Oct. 18, 2022) (respondent who caused assistant to submit false expense reports to her firm violated FINRA Rule 2010 independently and separately violated FINRA Rules 4511 and 2010); *Dep't of Enforcement v. Hunt*, No. 2009018068701, 2012 FINRA Discip. LEXIS 62, at *11 (NAC Dec. 18, 2012) (falsified checks and expense reports, violating NASD Rule 2110, the predecessor to FINRA Rule 2010); *Dep't of Enforcement v. Taylor*, No. C8A050027, 2007 NASD Discip. LEXIS 11, at *22–23 (NAC Feb. 27, 2007) ("Falsifying documents [in violation of NASD Rule 2110, the predecessor to FINRA Rule 2010] is a prime example of misconduct that adversely reflects on a person's ability to comply with regulatory requirements and has been held to be a practice inconsistent with just and equitable principles of trade."); *Ramiro Jose Sugranes*, Exchange Act Release No. 35311, 1995 SEC LEXIS 234, at *3–4 (Feb. 1, 1995) (falsifying letter representing that a certificate of deposit was backed by letter of credit and falsifying bank wires in order to induce a customer to make an investment is inconsistent with just and equitable principles of trade).

that the Hearing Officer heard the case in violation of the Appointments Clause.[643] We reject these arguments.

1. FINRA Is Not a State Actor

Constitutional rights are protected from infringement by government entities and those who, in certain circumstances, may be deemed state actors because of their close connection to government entities.[644] That means that the threshold issue before any of Respondent's constitutional arguments can even be considered is whether FINRA is a state actor.[645] As the Second Circuit Court of Appeals has explained, "Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes state action."[646]

FINRA is a private membership organization, a not-for-profit corporation organized under Delaware law.[647] It serves the securities brokerage industry as an SRO and is the modern descendant of self-regulatory organizations dating back to the 1790s, when private actors voluntarily formed and operated securities exchanges. From the beginning, such organizations created their own rules for their members to follow and enforced compliance. "For more than two centuries, the securities industry in the United States has been governed by private

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[643] The constitutional arguments were first raised in this proceeding in Respondent's counsel's opening statement at the beginning of the hearing and then were fleshed out in post-hearing briefing. Respondent had separately raised the argument that he is entitled to a jury trial under the Seventh Amendment in a federal district court injunctive action seeking to stop this proceeding. The injunction was denied for lack of subject matter jurisdiction. *Blankenship v. Fin. Indus. Reg. Auth*., No. 24-3003, 2024 U.S. Dist. LEXIS 158376 (E.D. Pa. Sept. 4, 2024). The fairness arguments arose out of the conduct of the hearing and were addressed in post-hearing briefing.

Respondent asserted laches and estoppel as affirmative defenses in his Answer but he did not mention those defenses at the hearing or in any pre-hearing or post-hearing briefing. We consider those defenses to be abandoned. Respondent also asserted as affirmative defenses in his Answer that he acted in good faith and in compliance with any applicable procedures or rules and that the Complaint fails to state a claim upon which relief can be granted. We consider these assertions to be a general denial of liability, which we address throughout this decision. Finally, he asserted in his Answer that the damages sought are speculative. Because we have not awarded any monetary sanction, we find this claimed defense moot.

[644] *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 936 (1982) (most rights secured by the Constitution are protected only against infringement by governments); *Silva v. Swift*, No. 4:19-cv-286-RH/MJF, 2020 U.S. Dist. LEXIS 107624, at *6 (N.D. Fla. June 1, 2020) (ruling that the Seventh Amendment "cannot be violated by private individuals who were not acting under color of state law or in concert with state actors").

[645] *Santos-Buch v. Fin. Indus. Reg. Auth., Inc*., 32 F. Supp. 3d 475, 482 (S.D.N.Y. 2014) (FINRA is not a state actor). Accord *D.L. Cromwell Invs., Inc. v. NASD Reg., Inc*., 279 F.3d 155, 161 (2d Cir. 2002) (stating that "the Fifth Amendment restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be 'fairly attributable' to the government").

[646] *Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) (internal quotation marks omitted) (quoting *United States v. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am*., 941 F.2d 1292, 1295–96 (2d Cir. 1991)).

[647] *Alpine Sec. Corp. v. Fin. Indus. Reg. Auth*., 121 F.4th 1314, 1319–22 (D.C. Cir. 2024), *motion to stay denied*, No. 23-5129, 2025 U.S. App LEXIS 2917 (D.C. Cir. 2025).

arrangements to regulate business conduct—membership organizations that set rules for their members, and then hold members accountable if they break the rules."[648]

A private entity can, although private, nevertheless be seen as a part of government. The Supreme Court held in *Lebron v. Nat'l R.R. Passenger Corp*.[649] that (i) where the government creates a corporation by special law; (ii) for the furtherance of governmental objectives; and (iii) retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the government for purposes of the First Amendment.[650] Essentially, *Lebron* held that an entity is "what the Constitution regards as the Government" if the entity is government-created and government-controlled.[651] Following that decision, the courts have applied the *Lebron* test in analyzing whether the actions of a private entity are subject to constitutional challenge.[652]

None of the *Lebron* factors apply to FINRA. FINRA is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, and the government does not appoint its board members or serve on any FINRA board or committee.[653] As one court summarized:

> It is beyond cavil that the NASD [now FINRA] is not a government agency; it is a private, not-for-profit corporation. It was not created by statute. None of its directors or executives are government officials or appointees. It receives no government funding, and not being a part of the government or owing its existence to the government, its actions cannot be imputed to the government nor can its agents bind the government.[654]

Since it is indisputable that FINRA is a private membership organization and not part of the government, the question becomes whether there is a connection between FINRA and the SEC that would still justify treating FINRA as a state actor for at least some constitutional

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[648] *Kim v. Fin. Indus. Reg. Auth*, 698 F. Supp. 3d 147, 155–57 (D.D.C. 2023). *See also* the history of FINRA that appears at https://www.finra.org/about/our-history.

[649] *Lebron v. Nat'l R.R. Passenger Corp*., 513 U.S. 374, 400 (1995).

[650] *Id. See also Kim*, 698 F. Supp. 3d at 162.

[651] *LeBron*, 513 U.S. at 398–99.

[652] *See*, *e.g*., *Kim*, 698 F. Supp. 3d at 161–63; *Herron v. Fannie Mae*, 861 F.3d 160, 168 (D.C. Cir. 2017).

[653] *Kim*, 698 F. Supp. 3d at 158 (the government does not control FINRA, and FINRA does not share a close nexus with the government when performing its enforcement work). *See also Traudt v. Rubenstein*, No. 2:24-cv-782, 2025 U.S. Dist. LEXIS 123280, at *17–18 (D. Vt. June 30, 2025) (FINRA and its employees are not state actors).

[654] *United States v. Shvarts*, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000). *See also Alpine*, 121 F.4th at 1346 (concurring in part; dissenting in part) ("[FINRA] was not created by the government. It is not controlled by the government. It is not funded by the government. All these facts point in the same direction: FINRA is a private entity.").

purposes. For a private entity to be a state actor, the Supreme Court has determined that there must be "a nexus between the state and the specific conduct of which plaintiff complains."[655]

The connection between FINRA and the SEC is that the SEC reviews and approves FINRA's rules, oversees FINRA's activities, and, if a Hearing Panel decision is appealed to the National Adjudicatory Council ("NAC"), the SEC may afterward review any NAC decision appealed to the SEC. "[T]he fact that a business entity is subject to 'extensive and detailed' state regulation", however, "does not convert that organization's actions into those of the state."[656] "[A] state is responsible for a private decision only where it exercised coercive power or provided significant encouragement."[657] FINRA disciplinary proceedings are independent of any such governmental coercion or encouragement. The SEC has no role to play in a FINRA disciplinary proceeding, except to the extent that the proceeding might eventually lead to a petition for SEC review. But "[m]ere approval . . . is not sufficient. . . . "[658]

"[C]onstitutional due process and trial by jury requirements do not apply in the disciplinary proceedings of private self-regulatory organizations such as FINRA."[659] "[E]very court to examine the issue has held that FINRA is not a state actor."[660]

2. Respondent Has Waived Any Constitutional Right to Jury Trial

Beyond the fact that FINRA is not a state actor, Respondent's constitutional claims also fail for another reason. The Supreme Court has said that personal constitutional rights like the right to jury trial under the Seventh Amendment can be waived.[661] When Respondent became registered, he waived any Seventh Amendment right to a jury trial of disciplinary charges that he may have had, along with any right to a proceeding governed by the due process requirements of the Fifth Amendment. What Respondent agreed to instead is a disciplinary process governed by FINRA's rules. FINRA member firms and associated persons registered with FINRA

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[655] *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982).

[656] *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) (FINRA's predecessor, NASD, was private actor, not state actor).

[657] *Id.* at 207.

[658] *Id. See also Santos-Buch*, 32 F. Supp. 3d at 483 (rejecting argument that FINRA is so 'entwined' with the state as to be considered a state actor).

[659] *Dep't of Enforcement v. Alpine Sec. Corp*., No 2019061232601, 2025 FINRA Discip. LEXIS 6, at *115–16 (NAC Mar. 25, 2025), *appeal docketed*, No. 3-22471 (SEC Apr. 7, 2025).

[660] *Weber v. PNC Invs. LLC*, No. 2:19-cv-00704, 2020 U.S. Dist. LEXIS 18723, at *38 (W.D. Pa. Feb. 5, 2020).

[661] *CFTC v. Schor*, 478 U.S. 833, 848 (1986) (Article III and jury-trial rights are "subject to waiver, just as are other personal constitutional rights). *See also Thomas v. Union Carbide Agric. Prods. Co*., 473 U.S. 568, 592 (1985) (rejecting Article III challenge to regulatory scheme in which each participant "explicitly consents to have his rights determined by arbitration").

affirmatively agree to abide by FINRA's rules, including its rules regarding disciplinary proceedings, when they join or become registered with FINRA.[662]

3. The Rule Violations Charged Here Are Not Common Law Fraud Claims

Respondent argues that the charges brought against him "equate to common law fraud"[663] claims and, for that reason, they must be heard under the Seventh Amendment by an Article III court and jury.[664] According to Respondent there are five elements of a common law fraud claim: (i) a misrepresentation or omission of a material fact; (ii) scienter; (iii) intent to induce another's reliance; (iv) justifiable reliance; and (v) damages suffered by the party defrauded.[665] And Respondent asserts that each charge in this proceeding alleges each of those elements of common law fraud.[666]

Respondent is incorrect. The Complaint does not plead the elements of common law fraud. For example, the First Cause of Action alleges that Respondent recommended mutual funds without a reasonable basis for believing them suitable. The issue is whether he had a reasonable basis for believing the transactions to be suitable, at least for some investors. Scienter, intent, reliance, and damages are not elements of the violation. He could be held to have violated the reasonable basis requirement regardless of his intention if he simply did not understand the product he sold well enough to have a reasonable basis for his recommendation.[667] Similarly, the Second Cause of Action alleges that Respondent violated the ethical standards in the industry by circumventing his Firm's policies and procedures for supervising mutual fund purchases. This charge focuses on the nature of his conduct and whether it complied with industry standards and norms, not on anyone's reliance or damages. The Third Cause of Action alleges that Respondent

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[662] *See Spartan Cap. Sec., LLC*, No. 2019061528001, 2024 FINRA Discip. LEXIS 20, at *55 n.31 (NAC Oct. 9, 2024). Uniform Application for Securities Industry Registration or Transfer (Form U-4), Section 15A ¶ 2 ("[I]n consideration of the *jurisdictions* and *SROs* receiving and considering my application, I submit to the authority of the *jurisdictions* and *SROs* and agree to comply with all . . . by-laws and rules and regulations of the *jurisdictions* and *SROs* as they are or may be adopted, or amended from time to time.") (emphasis in original), www.finra.org/sites/default/files/form-u4.pdf; 15 U.S.C. § 78c(a)(3)(B) (defining "member" of registered securities association as any broker or dealer that agrees to be regulated by such association, including by enforcement of compliance with association's "own rules").

[663] Resp. Const. Br. 3–4.

[664] Resp. Const. Br. 3–16.

[665] Resp. Const. Br. 6–7.

[666] Resp. Const. Br. 7–16.

[667] *Dep't of Enforcement v. Patatian*, No. 2018057235801, 2023 FINRA Discip. LEXIS 13, at *36 (NAC Sept. 27, 2023) ("A registered representative's recommendation may lack reasonable-basis suitability if the broker . . . fails to understand the transaction, which can result from, among other things, a failure to conduct a reasonable investigation.") (internal quotation marks and case citations omitted), *appeal dismissed*, Exchange Act Release No. 99619, 2024 SEC LEXIS 475 (Feb. 29, 2024). *See also F.J. Kaufman and Co. of Va.*, Exchange Act Release No. 27535, 1989 SEC LEXIS 2376, at *11 (Dec. 13, 1989) (A respondent engages in unsuitable trading if the respondent fails to comprehend the consequences of his own recommendation.); *Stewart*, 1945 SEC LEXIS 318, at *22–23 (whether respondent genuinely did not know trading was unsuitable or he recommended transactions to obtain commissions, he violated his duty to have reasonable grounds for believing transactions to be suitable).

caused his Firm's books and records to be incorrect by mismarking trades. Again, that is simply a rule violation that does not require proof of scienter, reliance, or damages.[668]

Respondent seems to have mistaken natural inferences from the evidence—such as the inference that his violative pattern of trading was intentional; that his customers were injured by that trading pattern; and that he facilitated that trading by purposefully circumventing his Firm's supervision and mismarking trades—for common law allegations of fraud. That the evidence may show intentional misconduct and customer harm does not render the allegation of a rule violation a common law fraud claim. Those inferences, however, do bear on the appropriate sanctions.

In arguing that the disciplinary Complaint in this proceeding is an action for fraud that must be heard by a jury, Respondent depends on the Supreme Court's decision in *SEC v. Jarkesy*.[669] That case involved antifraud claims brought by the SEC under the federal securities laws. The antifraud claims could have been brought either in federal court, where there would be a right to a jury trial, or in-house before an SEC administrative law judge ("ALJ"), where no jury trial would be available. In *Jarkesy*, the Court held that the SEC could not compel the respondents to defend themselves before an ALJ rather than before a jury in federal court.[670] Essentially, the SEC could not choose to deprive the defendant of his right to a jury trial by choosing to bring the same claim that could have been brought in federal court instead before an ALJ. The Court said, "The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury."[671]

Jarkesy does not require that the claims at issue here be heard by a jury. The claims at issue are not fraud claims and do not "replicate" fraud claims. Rather, this case involves allegations of FINRA rule violations. Furthermore, unlike the SEC's fraud claims in *Jarkesy*, the rule violations alleged in this case have no alternative forum where they may be heard. Under the rules of this membership organization, an evidentiary hearing on charges of violating the organization's rules must occur before a hearing panel that includes one Hearing Officer from the Office of Hearing Officers and two industry members appointed in accordance with FINRA's Code of Procedure.

4. The Sanction Is Not a Common Law Remedy

We also reject Respondent's assertion that the potential sanctions for Respondent's rule violations are common law remedies that may only be enforced by courts of law.[672] Respondent

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[668] *Dep't of Enforcement v. Se. Inv., N.C., Inc*., No. 2014039285401, 2017 FINRA Discip. LEXIS 12, at *65 (OHO Mar. 3, 2017) (scienter not required for books and records violation).

[669] Resp. Const. Br. 5–6, 20–24; *SEC v. Jarkesy*, 603 U.S. 109 (2024).

[670] *Jarkesy*, 603 U.S. 109–141.

[671] *Id.* at *120.

[672] Resp. Const. Br. 4 & n.7.

calls the potential sanctions of fine, suspension, and disgorgement "punitive remedies" that must be tried before a jury.[673] No doubt he would classify the sanction we impose, a bar from association with any FINRA member firm, the same.

But, as further discussed below in the sanctions section of this decision, we impose a bar in all capacities to protect investors and other market participants from potential harm and the risk of repeated misconduct if Respondent is permitted to continue working in the securities industry. A bar from association with any FINRA member firm is remedial "if imposed to protect the public."[674]

5. The Appointments Clause Does Not Apply

Respondent argues that the Hearing Officer's role in adjudicating this case violates the Constitution's Appointments Clause regarding the appointment of officers of the United States.[675] Given that FINRA is not part of the government, and the Hearing Officer is employed by FINRA, not the government, the Hearing Officer cannot be an officer of the United States. For that reason, the Appointments Clause does not apply.

Article II of the Constitution concerns the distribution of the President's executive powers to other government actors who assist him in carrying out his responsibilities. Article II, Section 1, Clause 1 vests "executive Power" in the President, and Article II, Section 3 requires him to "take Care that the Laws be faithfully executed." Under the Appointments Clause, Article II, Section 2, Clause 2, the President may be assisted by properly appointed "Officers of the United States."[676] As the Supreme Court has explained, "The Appointments Clause provides that [the President] may be assisted in carrying out [his] responsibility by officers nominated by him and confirmed by the Senate, as well as by other officers not appointed in that manner but whose work . . . must be directed and supervised by an officer who has been."[677] "[T]he Framers recognized, of course, that 'no single person could fulfill that responsibility alone, [and] expected that the President would rely on subordinate officers for assistance.'"[678]

By its terms, the Appointments Clause addresses the appointment of "Officers of the United States." Article II, Section 2, Clause 2 does three things. First, it authorizes the President to appoint a few specifically identified positions with the advice and consent of the Senate. These include ambassadors and Supreme Court justices. These persons are commonly referred to as

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[673] Resp. Const. Br. 4, 6, 17–24.

[674] *Logan*, 2024 U.S. App. LEXIS 32802, at *4; *Saad v. SEC*, 980 F.3d 103, 104–05 (D.C. Cir. 2020).

[675] Resp. Const. Br. 25–27.

[676] *United States v. Arthrex, Inc*., 594 U.S. 1, 6, 10 (2021).

[677] *Id.* at *6.

[678] *Id.* at *11 (citation omitted).

"principal officers of the United States."[679] Second, Article II grants the President residual authority to appoint "all other Officers of the United States," using the advice and consent procedure, if Congress has not granted that appointments power to someone else in government. And third, it provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Plainly, the Appointments Clause concerns the appointment of government officials by other government officials. As the Supreme Court has observed, "Today, thousands of officers wield executive power on behalf of the President in the name of the United States."[680] Notably, persons designated as officers of the United States wield power *on behalf of the President* and *in the name of the United States*. A Hearing Officer does neither.

Respondent argues that FINRA Hearing Officers are subject to the Appointments Clause, because Hearing Officers "are near carbon copies of [SEC] ALJs."[681] The foundation for this argument is the Supreme Court's decision in *Lucia v. SEC*.[682] In that case, the Court held that SEC ALJs are inferior officers of the United States who must be appointed under the Appointment Clause by the President or another appropriately delegated officer of the United States.[683] The decision in *Lucia* turned on the Court's conclusion that SEC ALJs wield "significant executive power."[684] Respondent reasons that FINRA Hearing Officers wield the same kind of power and therefore ought to be subject to the Appointments Clause. He asserts, "Any person who wields significant executive power is an Officer of the United States who . . . must be appointed by an appropriate government body under the Appointments Clause."[685]

Lucia does not support such a broad proposition. The only question in *Lucia* was whether the work of the ALJs is of such character as to elevate them from government employee to the level of an officer of the United States. For that reason, the focus of the decision was on the nature of the work that is performed by SEC ALJs and whether they exercise "significant

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[679] The Supreme Court has adopted the nomenclature of principal officer and inferior officer to distinguish between the two types of officers of the United States covered by the Appointments Clause. *Arthrex,* 594 U.S. at 13; *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.").

[680] *Arthrex*, 594 U.S. at 11.

[681] Resp. Const. Br. 25.

[682] Respondent relies on an opinion concurring in part in *Alpine,* 2023 U.S. App. LEXIS 16987, at *2–10 (D.C. Cir. July 5, 2023), which, in turn, relies on the Supreme Court's decision in *Lucia v. SEC*, 585 U.S. 237 (2018). The concurring opinion speculates that FINRA Hearing Officers will be held to be inferior officers of the United States once the issue is fully briefed and decided in *Alpine*. That opinion expresses the preliminary view of a single appellate judge and is not precedent.

[683] *Lucia*, 585 U.S. at 237.

[684] *Id.*

[685] Resp. Const. Br. 25.

authority,"[686] meaning authority derived from the President's executive power.[687] The Court opened its decision in *Lucia* saying, "The Appointments Clause of the Constitution lays out the permissible methods of appointing 'Officers of the United States,' *a class of government officials* distinct from mere employees."[688]

That is an important difference between FINRA Hearing Officers and SEC ALJs—SEC ALJs work for the government; FINRA Hearing Officers do not. A FINRA Hearing Officer is neither a government employee nor a government official. Regardless of similarities between a Hearing Officer's work and that of an SEC ALJ, the Appointments Clause does not apply.

D. Respondent's Meritless Fairness Arguments

Respondent argues that, for several reasons, the hearing was unfair. He positions these arguments as due process violations.[689] He claims he did not have fair notice of what conduct violates the suitability rule because FINRA has not defined short-term mutual fund trading by rule.[690] He also argues that the Hearing Officer improperly permitted hearsay evidence into the record.[691] And finally, he argues that the Hearing Officer "suppressed exculpatory evidence" in ruling that certain of Respondent's handwritten notes would not be admitted into evidence.[692]

Although due process under the Constitution does not apply to this proceeding, we think it appropriate to address Respondent's fairness arguments more generally. Respondent is entitled to a fair hearing. Section 15A(b)(8) of the Exchange Act requires that FINRA provide "a fair procedure for the disciplining of members and persons associated with members." While rejecting due process arguments, the NAC has nevertheless addressed fairness arguments like "specific notice" and "hearsay."[693]

1. Respondent Had Fair Notice That His Short-Term Mutual Fund Trading Violated the Suitability Rule

Respondent argues that FINRA has failed to give fair notice of what it considers short-term mutual fund trading and that it should have gone through a rule-making process to define

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[686] *Lucia*, 585 U.S. at 245.

[687] *Arthrex*, 594 U.S. at 17 ("The activities of executive officers . . . are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power,' for which the President is ultimately responsible.") (quoting *Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013)).

[688] *Lucia*, 585 U.S. at 241 (emphasis supplied).

[689] Resp. Const. Br. 26–27, 27–31, 32.

[690] Resp. Const. Br. 27–31.

[691] Resp. Const. Br. 32.

[692] Resp. Const. Br. 32; Resp. Open. Br. 16–18.

[693] *Dep't of Enforcement v. Sears*, No. C07050042, 2007 FINRA Discip. LEXIS 1, at *11–16 (NAC Sept. 24, 2007).

the term.[694] Respondent claims that FINRA is enforcing a vague unwritten standard and exceeding its authority.[695]

This argument has no merit. There is no logic in paying a large up-front fee of 5% or more for Class A shares and then selling them after only a year or two. This is because it is almost impossible to recoup the high cost of purchasing the shares in that short amount of time. FINRA's website explains that Class C shares would be more appropriate if an investor's time-horizon is as short as a year,[696] and the SEC's website does likewise.[697] There is a long line of reported Hearing Panel, NAC, and SEC decisions dating back many decades that find short-term mutual fund trading violative of the suitability requirements of FINRA and its predecessor, NASD.[698] In fact, precedents hold any purchase and sale of Class A mutual fund shares within one year to be presumptively a suitability violation.[699]

Given that most of Respondent's business is buying and selling Class A mutual fund shares (96%), he must be aware of the illogic of trading Class A shares after holding them only a year or two. He must know that such trading is not suitable except in rare circumstances not evident here.

2. Hearsay Is Permitted in FINRA Disciplinary Proceedings

FINRA Rule 9145 provides that the formal rules of evidence do not apply in FINRA disciplinary proceedings, although "FINRA adjudicators may look to the Federal Rules of Evidence for guidance."[700] It is well established that hearsay evidence is permitted in FINRA disciplinary proceedings and can form the basis for findings of fact.[701] This is because FINRA

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[694] Resp. Const. Br. 27–31.

[695] Resp. Const. Br. 31.

[696] *See* https://www.finra.org/investors/investing/investment-products/mutual-funds#share-classes.

[697] *See* U.S. Securities and Exchange Commission website, Mutual Funds and ETFs, A Guide for Investors, at 33–34 (www.sec.gov>sec-guide-to-mutual-funds).

[698] *See supra* at 83–84.

[699] *See Krull*, 1998 SEC LEXIS 2664, at *3 (finding unsuitable trading where average length of time funds held in customer accounts was 11 months and respondent engaged in more than 100 switch transactions); *see also Krull*, 248 F.3d at 912 n.6 ("Although the Commission has not defined 'short-term,' its previous decisions focus on periods of less than one year as short-term."); *Winston H. Kinderdick*, 1976 SEC LEXIS 783, at *4–5, 8–9 (unsuitable mutual fund trading found where high volume of switching from one mutual fund to another within 13 to 20 months in various customer accounts); *Irish*, 1965 SEC LEXIS 241, at *6–11 (suitability violation found based on high volume of mutual fund switches, with about a third having been held less than one year, close to a third held between one year and two years, and close to a third held between two years and three years); *Mehringer*, 2020 FINRA Discip. LEXIS 27, at *7–22 (in a single customer account, pattern of mutual fund switching after holding a year or less was presumptively a suitability violation).

[700] *Dep't of Enforcement v. North*, No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at *8 n.5 (NAC Aug. 3, 2017).

[701] *See*, *e.g.*, *Epstein*, 2009 SEC LEXIS 217, at *36 (citing *Charles D. Tom*, Exchange Act Release No. 31081, 1992 SEC LEXIS 2000, at *6–7 (Aug. 24, 1992), *aff'd*, 416 F. App'x 142 (3rd Cir. 2010)).

lacks subpoena power and cannot compel customers and others not subject to FINRA's jurisdiction to testify in a disciplinary proceeding.[702]

"In determining whether to rely upon hearsay evidence, it is necessary to evaluate its probative value, and reliability, and the fairness of its use."[703] This we have done throughout our decision, as we analyzed the summary tables presented by Enforcement to show Respondent's pattern of trading in customer accounts, the staff memoranda memorializing interviews with customers, the two customer statements made under penalty of perjury, and Respondent's handwritten notes. In sum, we find the tables, interview memoranda, and customer statements under penalty of perjury to be reliable and probative evidence. That evidence is consistent with other evidence and credible.[704] Respondent's handwritten notes, on the other hand, are not. And the fact that Respondent's testimony contradicts the hearsay customer evidence does not make it unfair to rely on the hearsay evidence.[705] We have found Respondent not credible. His direct testimony is far less probative and reliable than the mass of other evidence contradicting his story.[706]

3. The Exclusion of Untimely Exhibits Was Not Unfair

Respondent argues that the hearing was unfair because the Hearing Officer "suppressed exculpatory evidence."[707] Respondent's argument is focused primarily on additional handwritten notes of purported conversations Respondent had with his customers (marked RX-4 through RX-29) that he failed to identify as proposed exhibits until after lunch the second day of the hearing, February 19, 2025.

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[702] Telephone or videoconference testimony may substitute for in-person testimony for the same reason. "FINRA lacks subpoena power to compel a witness not subject to FINRA jurisdiction, such as a customer, to appear in person." OHO Order 24–04 (2018057297102) (Jan. 17, 2024), at 2, https://www.finra.org/sites/default/files/2024-05/OHO_Order_24-04_Kolta_2018057297102.pdf.

[703] *Epstein*, 2009 SEC LEXIS 217, at *36.

[704] *See John Montelbano*, Exchange Act Release No. 47227, 2003 SEC LEXIS 153, at *16–17 (Jan. 22, 2003) (holding that hearsay testimony of witnesses was mutually corroborative and consistent and thus reliable); *Dep't of Mkt. Reg. v. Leighton*, No. CLG050021, 2010 FINRA Discip. LEXIS 3, at *48 n.32 (NAC Mar. 3, 2010) (finding hearsay testimony reliable because it was consistent and corroborated by witnesses who testified at hearing); *Dep't of Enforcement v. Sears*, No. C07050042, 2007 FINRA Discip. LEXIS 1, at *15–16 (NAC Sept. 24, 2007) (finding hearsay reliable where, among other things, it was corroborated by other witnesses' live testimony and documentary evidence), *aff'd in relevant part*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521 (July 1, 2008).

[705] *Dep't of Enforcement v. McGuire*, No 20110273503, 2015 FINRA Discip. LEXIS 53, at *26 (NAC Dec. 17, 2015) (rejecting argument that respondent could not be liable because his live, direct testimony contradicted hearsay testimony offered by Enforcement); *Dep't of Enforcement v. Butler*, No. 2012032950101, 2015 FINRA Discip. LEXIS 35, at *23–25 (NAC Sept. 25, 2015) (rejecting respondent's argument that no direct evidence supported finding of conversion because the Hearing Panel discredited respondent's testimony).

[706] *Sears*, 2007 FINRA Discip. LEXIS 1, at *15 (hearsay declarations carried more weight than respondent's direct testimony where respondent found not credible).

[707] Resp. Const. Br. 32.

Respondent's handwritten notes were properly excluded. They were only identified as proposed exhibits after the hearing started and some eight months after the deadline for serving and filing them, in violation of the Case Management and Scheduling Order ("CMSO") and FINRA Rule 9261(a). The circumstances demonstrate that they were withheld until the hearing started as an unfair litigation tactic.

Respondent violated the CMSO, which required the parties to serve and file their exhibits on May 31, 2024. Enforcement served and filed its exhibits, marked with the CX identifier, and the parties' joint exhibits, marked with the JX identifier on the due date. Nothing would have been marked as a joint exhibit if Respondent had not agreed, so Respondent knew the due date and had been working with Enforcement on joint exhibits leading up to the due date. But Respondent submitted no separate exhibits of his own on that date. Then, on June 7, 2024, he submitted a single proposed exhibit. At no time after that, from June 2024 to mid-February 2025, did Respondent amend his list of proposed hearing exhibits or submit additional proposed exhibits. Nor did Respondent's counsel mention the possibility of using additional exhibits at the several pre-hearing conferences held during that period.

By not filing and serving the proposed exhibits until after the hearing started, Respondent also violated FINRA Rule 9261(a), which requires each party to identify and submit proposed exhibits *no later than ten days prior to the hearing*. Advance notice of proposed exhibits is intended to enable the parties to better prepare for hearing, which in turn will aid the Hearing Panel in understanding the evidence and reaching a sound decision.

FINRA's rules are not inflexible, however. FINRA Rule 9261(c) states that a party can "for good cause" offer into evidence exhibits not previously identified. The Hearing Officer has discretion to decide whether to accept such exhibits.[708] But in this case Respondent failed to show good cause for his delay in identifying the proposed exhibits. Respondent's counsel explained the reason for the delay by saying that his law firm was small and did not have the same resources as Enforcement.[709] Given the length of time Respondent had to identify the documents and the fact that they are *his* documents, his handwritten notes regarding purported conversations with customers, that is no excuse at all.

The Hearing Officer's rejection of the untimely exhibits also was consistent with her obligation under FINRA Rule 9235 to regulate the course of the hearing. Parties in FINRA disciplinary proceedings are not free to do as they please if rules and orders dictate otherwise.[710]

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[708] Tr. 433–42, 448–64.

[709] Tr. 452.

[710] FINRA Rule 9280 does not permit a party in a disciplinary proceeding to ignore FINRA's rules or a Hearing Officer's Order without consequences. The Hearing Officer did not deny Respondent's efforts to enter the newly marked exhibits into evidence based on finding his actions to be contemptuous conduct under FINRA Rule 9280. But we note that Rule 9280(b)(1)(B) specifically authorizes adjudicators to order that offered documents may be excluded from evidence as a sanction for contemptuous conduct. We also note that Rule 9280(b)(2) provides that,

If Respondent was disadvantaged by the Hearing Officer's ruling, it was due to his own decision not to comply with the CMSO and FINRA's rules governing the proceeding. His attempt to gain an unfair tactical advantage in the litigation by ignoring the rules was appropriately rejected.

4. The Hearing Officer Properly Ruled Against Reading Excluded Exhibits into the Record

Respondent repeatedly said he could not remember conversations from years ago without looking at his handwritten notes to refresh his recollection. Respondent's counsel showed him some of the handwritten notes that are in the record, and Respondent basically read from the notes saying that is what happened. [711] Enforcement objected that this was not truly "refreshing" the witness's recollection.

Respondent's counsel subsequently asserted that he should be allowed to use the handwritten notes that were not admitted into evidence to refresh Respondent's recollection. The Hearing Officer refused.[712] In post-hearing briefing, Respondent asserts that this "goes against any notions of fairness and impartiality."[713]

The Hearing Officer properly refused to allow Respondent's counsel to use the excluded notes to refresh Respondent's recollection. Based on Respondent's own testimony, Respondent had no actual independent recollection to refresh. The handwritten notes that were used during Respondent's testimony did not prompt any refreshed memory. It was not unfair to preclude use of the untimely exhibits to refresh recollection when there was no evidence that any handwritten notes refreshed Respondent's recollection.

V. Sanctions

For the reasons discussed below, we have aggregated the violations for sanctions purposes and determined that Respondent should be barred from associating with any FINRA member firm in any capacity for his violations of FINRA rules.

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where a party does not disclose information required by a Hearing Officer's Order "without substantial justification," the disobedient party shall not be permitted to use that information as evidence at the hearing.

Although RX-4 through RX-29 were not admitted into evidence, Respondent attached them to his post-hearing brief and referred to them as though they were in the record. Resp. Open. Br. We have not considered any of those exhibits in reaching our decision because they were not admitted into evidence.

[711] Tr. (DAB) 1039–45, 1048.

[712] Tr. 993–97.

[713] Resp. Open. Br. 22.

A. FINRA's Sanction Guidelines

In considering the appropriate sanction for a violation, adjudicators in FINRA disciplinary proceedings use FINRA's Sanction Guidelines ("Guidelines")[714] as their benchmark. The Guidelines contain General Principles Applicable to All Sanction Determinations ("General Principles"), which should be considered with the imposition of sanctions in all cases, and Principal Considerations in Determining Sanctions ("Principal Considerations"), which enumerate generic factors for consideration in all cases where they might be applicable. In addition, the Guidelines contain some considerations that are particular to specific violations ("Specific Considerations").

General Principle 1 contains a succinct statement of the purpose of FINRA's disciplinary process, which must inform the imposition of sanctions in any given case.

> The purpose of FINRA's disciplinary process is to protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent.[715]

The Guidelines recommend a range of sanctions that may be appropriate for specific types of violations, depending on the circumstances and any aggravating and mitigating factors. Recommended sanctions range from fines, restitution, and disgorgement to suspensions and bars from the securities industry. Sanctions may include ordering a person to requalify and other measures as well.[716]

But the recommendations in the Guidelines are not intended to be absolute. If appropriate, adjudicators may impose sanctions outside the ranges recommended, either above or below or different from the sanctions recommended by the Guidelines.[717]

Respondent violated FINRA Rules 2111 and 2010 by engaging in unsuitable trading in customer accounts. Where an individual violates FINRA Rules 2111 and 2010 by making unsuitable recommendations, the Guidelines suggest a range of fines from $2,500 to $40,000. The Guidelines also suggest a suspension for 10 days to two years. Where aggravating factors predominate, however, the Guidelines "strongly" recommend that adjudicators "consider a bar."[718]

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[714] Guidelines (2024), https://www.finra.org/sanctionguidelines.

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

[716] Guidelines at 3–4 (General Principle No. 3).

[717] Guidelines at 1 (Overview) and 3–4 (General Principle No. 3).

[718] Guidelines at 121. The Guidelines make separate recommendations for suitability violations of FINRA Rules 2111 and 2010 that involve churning, excessive trading, or switching. The Guidelines specifically note that these sanctions are appropriate for mutual fund-related violations. Guidelines at 112. Although Enforcement did not

Respondent violated FINRA Rule 2010 by circumventing the Firm's supervisory procedures. He did this in two ways: (i) by breaking up mutual fund purchases into multiple transactions all below $20,000; and (ii) by failing to complete and submit the form that the Firm required to be used to ensure that customers received appropriate disclosures and appropriate pricing, the MFTF.

There are no specific Guidelines for stand-alone Rule 2010 violations. Unethical conduct encompasses a broad range of practices, and it would be impossible to define them all and craft an appropriate sanction for each. When there are no specific Guidelines for a violation, adjudicators are advised to look at the sanction recommendations for the closest analogous violation.[719] In this case, the most closely analogous violation in the Guidelines is for books and records violations, which involve recording false or inaccurate information. Respondent entered transactions into the Firm's books as though they were separate and independent, when they were in fact the product of a single investment decision by a customer. And he deprived the Firm of records necessary for it to supervise the trading when he failed to complete and submit any MFTF. As noted below, for a books and records violation where aggravating factors predominate, the Guidelines recommend a suspension of two years or a bar.

Where an individual violates FINRA Rules 4511 and 2010, as Respondent did here, by making false entries into a FINRA member firm's books and records, the Guidelines provide for a fine ranging from $2,500 to $40,000. The Guidelines instruct adjudicators to consider suspending the person for 10 business days to three months. Where aggravating factors predominate, adjudicators should consider imposing a suspension of up to two years or a bar.[720]

Specific Considerations particular to this violation include (i) nature and materiality of inaccurate information; (ii) type and number of records at issue; (iii) whether inaccurate information was entered intentionally, recklessly, or as result of negligence; (iv) whether violations occurred over extended period of time or involved a pattern of misconduct; and (v) whether the violations allowed other misconduct to occur or to escape detection.

B. Parties' Arguments

Enforcement requests separate sanctions for each of the three types of violations. In the aggregate, Enforcement requests a two-year suspension, a fine of $20,000, and disgorgement of $34,089.86.[721] Enforcement calculated the disgorgement based on excess commissions

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charge Respondent with churning or excessive trading in this case, it did provide evidence of switching among mutual funds and mutual fund families along with short-term mutual fund trading. The Guidelines provide for a suspension of two years or a bar for such violations where aggravating factors predominate. The recommended fine can be as much as $50,000. Whichever set of recommended sanctions is applied to this case, a bar can be the appropriate sanction if aggravating factors predominate.

[719] Guidelines at 1 (Overview).

[720] Guidelines at 91.

[721] Enf. Open. Br. 1; *Hateley v. SEC*, 8 F.3d 653, 655 (9th Cir. 1993) ("The purpose of disgorgement is to deprive a

Respondent received from the 27 purchases and sales identified in CX-1 as unsuitable short-term trades after holding Class A shares less than a year ($16,014.16),[722] and on commissions he received from excess sales charges on transactions due to missed breakpoint discounts ($18,075.70).[723] Enforcement proposes that the disgorgement be paid to the affected customers.[724] The Guidelines provide that the financial benefit of disgorgement can be used to redress harms suffered by customers.[725]

Respondent argues that the fine and disgorgement are punishment because they "cannot reasonably be said to serve any restorative function."[726] Essentially, Respondent labels any sanction that does not compensate victims for losses as punitive.[727] He also quarrels with the proper calculation of the amount of disgorgement, asserting that Respondent only received $16,014.16 from his alleged misconduct, focusing exclusively on the 27 purchases and sales in CX-1.[728] Separately as to the suspension, Respondent argues that it, like an expulsion, is a "life-altering" sanction that serves only to punish.[729]

C. Judicial Guidance

In considering Respondent's arguments regarding sanctions, we are conscious of judicial decisions holding that "FINRA is generally prohibited [under the Exchange Act] from imposing 'excessive or oppressive' penalties"[730] Courts have construed the statute as authorizing remedial, but not punitive, sanctions.[731] Remedies like restitution that are directed toward correcting or undoing the effects of wrongdoing have been long recognized as equitable remedies well within the proper scope of sanctions deployed in FINRA disciplinary proceedings.[732]

Compensating victims is not, however, the only appropriate sanction for securities industry misconduct. A bar from the industry can be a remedial sanction, not punishment, where

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person of ill-gotten gains and prevent unjust enrichment.").

[722] Enf. Open. Br. 9; Stip. ¶ 7; CX-1.

[723] Enf. Open. Br. 16; CX-2R, at 11; Tr. (RS) 128.

[724] Enf. Open. Br. 1.

[725] Guidelines at 5 (General Principle No. 6).

[726] Resp. Const. Br. 22.

[727] Resp. Const. Br. 17–24.

[728] Resp. Const. Br. 24. Respondent does not address the portion of Enforcement's request based on its calculation of what Respondent received from causing customers to miss breakpoint discounts.

[729] Resp. Const. Br. 17–24.

[730] *Springsteen-Abbott v. SEC*, 989 F.3d at 9.

[731] *Siegel v. SEC*, 592 F.3d 147, 157 (D.C. Cir. 2010).

[732] *Dep't of Enforcement v. Wicker*, No 2016052104101, 2021 FINRA Discip. LEXIS 31, at *55 (NAC Dec 15. 2021) (restitution primarily seeks to return customers to their prior position by restoring the funds of which they were wrongfully deprived), *aff'd*, Exchange Act Release No. 100148, 2024 SEC LEXIS 1119 (May 15, 2024).

the purpose of the bar is to protect the public.[733] Accordingly, in considering the appropriate sanctions in this case our focus is on the overarching purposes expressed in General Principle 1 of protecting the investing public, improving the standards of business conduct, and decreasing the likelihood of misconduct recurring.[734]

D. Aggregation of Violations for Sanctions

We have determined to aggregate Respondent's violations for purposes of the sanctions analysis. General Principle 4 of the Guidelines states that aggregation or "batching" of violations may be appropriate for purposes of determining sanctions. One example of a situation where aggregation could be appropriate is where the violations resulted from a single systemic problem.[735]

In our view, the violations in this case all arise from a single, systemic problem: Respondent conducted his mutual fund business without regard for his Firm's supervisory policies and procedures. His business model was to regularly trade Class A mutual fund shares in his customers' accounts in a manner that meant his Firm was unaware of what he was doing, below the $20,000 threshold that would have automatically flagged transactions for review. This in turn allowed him to impose unnecessary and unreasonable costs on his customers at will, thereby increasing his compensation at his customers' expense. Respondent's customers were unaware of what he was doing because he did not fill out the MFTF that the Firm required him to use to disclose charges and breakpoint discounts to them. He never made clear to his customers how the trading affected their costs. All the violations served the same purpose of facilitating Respondent's unsuitable trading in Class A mutual fund shares and increasing his commissions.[736] Respondent's entire business model was dependent on the misconduct, and the misconduct was pervasive and egregious. The sanction must take that into account.

E. Reasons a Bar Is an Appropriately Remedial Sanction

The Guidelines for each of the three violations charged in the Complaint provide that a bar is appropriate where aggravating factors predominate. We find that aggravating factors predominate here.

As a threshold matter, we note that there was proof of substantial additional misconduct of the same kind as the violations charged. When Respondent's trading during the relevant period is viewed in its entirety, it is apparent that Respondent's standard way of doing business depended upon repeated short-term trades and mutual fund switches executed month after month in numerous accounts. The 27 short-term trades and 23 mutual fund switches alleged in the

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[733] *Springsteen-Abbott*, 989 F.3d at 9. *See also Saad*, 980 F.3d at 107.

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

[735] Guidelines at 4 (General Principle No. 4).

[736] *E.g.*, *Patatian*, 2023 FINRA Discip. LEXIS 13, at *69–70 (unitary sanction appropriate where individual transactions arose out of same strategy of recommending unsuitable REIT investments).

Complaint and proven at the hearing were not isolated incidents. Moreover, Respondent consistently purchased mutual fund shares in increments of less than $20,000 and failed to complete and submit a single MFTF, thereby evading the Firm's supervision of his short-term trading and mutual fund switching. And he mismarked 250 purchases as unsolicited when they were not. Respondent engaged in a pattern of numerous acts of misconduct,[737] in many customer accounts,[738] over an extended period, the entire three years he was at IFG.[739] This is aggravating.

Respondent has not acknowledged that he did anything wrong.[740] To the contrary, he carried with him at the hearing a sense of grievance that the investigation and disciplinary proceeding had burdened him with producing documents and damaged his reputation and ongoing business.[741] We find this aggravating.

Also aggravating are his attempts to conceal his misconduct from the Firm. He concealed his unsuitable trading in Class A mutual fund shares by keeping his purchases in customers' accounts below the $20,000 threshold that would have triggered the Firm's scrutiny and by failing to fill out any MFTF, in violation of the Firm's supervisory requirements.[742]

It is aggravating that Respondent's unsuitable trading injured numerous customers.[743] We have found that Respondent's customers were not active investors and did not seem to understand the trading in their accounts. They were not sophisticated in the way that Respondent portrayed them in his handwritten notes.[744] We infer from the way Respondent traded and the way he circumvented the Firm's supervisory policies and procedures that he did so recklessly or intentionally.[745] He had a motive for trading the way he did, because it benefitted him financially.[746] These are additional aggravating factors.

Two of our conclusions are of particular concern in determining the appropriate sanction: (i) Respondent fabricated handwritten notes that he used in the investigation and hearing to conceal his misconduct and (ii) Respondent provided false testimony about those notes at the hearing. Providing inaccurate or misleading testimony or documentary information to FINRA is an aggravating factor.[747] Such falsehoods make it highly unlikely that Respondent could be

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[737] Guidelines at 7 (Principal Consideration No. 8).

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

[739] Guidelines at 7 (Principal Consideration No. 9).

[740] Guidelines at 7 (Principal Consideration No. 2).

[741] Tr. (DAB) 978–81.

[742] Guidelines at 7 (Principal Consideration No. 10).

[743] Guidelines at 7 (Principal Consideration No. 11).

[744] Guidelines at 8 (Principal Consideration No. 18).

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

[746] Guidelines at 8 (Principal Consideration No. 16).

[747] Guidelines at 8 (Principal Consideration No. 12).

trusted to tell the truth in the future to his firm, to regulators, or—importantly—to his customers. "[Respondent's] untruthfulness at the hearing [is] disturbing and reflects strongly on his fitness to serve in the securities industry."[748] A person who lies under oath at a disciplinary hearing lacks the fundamental integrity necessary to participate in the securities industry, where trust and honesty are vital.[749]

The only potentially mitigating factor is that the Firm terminated Respondent when his improper pattern of trading Class A mutual fund shares came to light. The Guidelines provide that adjudicators should "consider" whether a respondent has "demonstrated that the termination qualifies for any mitigative value."[750] Under the Guidelines, it is a respondent's "burden to prove" that a firm's termination of the respondent "has materially reduced the likelihood of misconduct in the future."[751] Adjudicators may find that, even considering a firm's termination, "there is no guarantee of changed behavior."[752] We conclude that there is no guarantee here of changed behavior. That the Firm terminated Respondent when it discovered his pattern of unsuitable trading did not result in any dawn of recognition on Respondent's part that he had done anything wrong. Rather, he embarked on a cover-up using fabricated handwritten notes.[753] Furthermore, as noted above, Respondent displayed a sense of grievance that he has been subject to this disciplinary process, with no hint of remorse.[754] Given these conclusions and the fact that Respondent is still in the industry,[755] the investing public is at risk.

Because aggravating factors predominate and the misconduct was pervasive and egregious, we conclude that a bar from associating with any FINRA member firm is the only appropriate sanction. Our purpose is to protect investors from misconduct in the future, promote

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[748] *Dep't of Enforcement v. White*, No. 2012033128703, 2015 FINRA Discip. LEXIS 48, at *65 (OHO June 30, 2015).

[749] *See Thomas S. Foti*, Exchange Act Release No. 31646, 1992 SEC LEXIS 3329, at *13 (Dec. 23, 1992) (treating lack of candor at hearing as an aggravating factor); *Dep't of Mkt. Reg. v. Burch*, No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *26 (NAC July 28, 2011) (adverse credibility findings at hearing central to finding that respondent engaged in fraud); *Dist. Bus. Conduct Comm. v. Goodman*, No. C9B960013, 1999 NASD Discip. LEXIS 34, at *45–46 (NAC Nov. 9, 1999), *aff'd*, Exchange Act Release No. 43889, 2001 SEC LEXIS 144 (SEC Jan. 26, 2001) (finding false hearing testimony aggravating factor); *Dep't of Enforcement v. Josephthal & Co*., No. C3A990071, 2001 NASD Discip. LEXIS 15, at *80 (OHO May 15, 2001) (false testimony at hearing considered in assessing sanctions).

[750] Guidelines at 6 (General Principle No. 7).

[751] *Id.*

[752] *Id.*

[753] *See supra* at 64–71.

[754] *See supra* at 105–06.

[755] Respondent testified that he had trouble finding work with a new firm after leaving IFG and that he lost customers. Tr. (DAB) 978–82. However, after a few months Respondent did find work at a new firm, and, although he has changed firms three times since IFG terminated him, he is still in the industry. Tr. (DAB) 676. We find that any negative impact Respondent may experience as a result of the bar, such as a financial loss, does not "mitigate the gravity of his conduct." *Stewart v. SEC*, No. 24-1041-ag, 2025 U.S. App. LEXIS 5480, at *8–9 (2d Cir. Mar. 10, 2025).

high standards of business conduct in the securities markets, and ensure market integrity. We believe the individual sanctions requested by Enforcement (fine, disgorgement, suspension) will not do enough to serve those goals. We have no confidence that Respondent would comply with his regulatory responsibilities in the future if he were permitted to re-enter the industry after a suspension, and we do not believe the relatively modest monetary sanctions Enforcement seeks will have any corrective effect on his conduct.[756] Respondent has proven himself unfit to be in an industry built on trust and confidence, and he presents a significant risk to investors.[757]

In imposing a bar from association with any FINRA member firm, we focus "not on past harm to specific investors but rather on protecting investors generally and the future threat [the respondent] could pose to investors and the markets."[758] The bar is appropriate because the securities industry depends heavily on the integrity of its participants and investors' confidence in their integrity. "[I]t is essential that the highest ethical standards prevail in every facet of the securities industry."[759]

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[756] We also think it is difficult to impossible to calculate the appropriate amount of disgorgement based on this record. First, Enforcement seeks as disgorgement the excess compensation Respondent received in connection with the 27 purchases and sales identified in CX-1. CX-1 covers trading that occurred after a holding period of a year or less. But we have found that other sales after a holding period of only a few months more than a year and up to three years were also short-term trading. We do not have a basis for quantifying the appropriate disgorgement for that additional short-term trading. Second, Enforcement seeks disgorgement of excess compensation Respondent received as a result of overcharges due to missed breakpoints in 38 purchases of mutual funds, as shown on CX-2R. We are unclear about the details of how that calculation was made. Third, Respondent's multiple switch transactions imposed unreasonable costs on his customers beyond missed breakpoints. The switch transactions caused the customers to bear entirely new costs they did not need to bear, because most, if not all, of the switches should never have happened. Respondent received much more in ill-gotten gains than the amount of disgorgement Enforcement is seeking. But, again, those ill-gotten gains cannot be quantified based on this record. In light of the circumstances and our imposition of a bar, we decline to order disgorgement.

[757] Respondent characterizes the sanctions requested by Enforcement as punishment. Resp. Const. Br. 17–25. We understand that any sanction that requires Respondent to do something he does not want to do feels like a punishment to him. He does not want to pay a fine or disgorgement or be suspended, so he calls these sanctions a punishment. Resp. Const. Br. 17–25.

"[W]hether a sanction constitutes punishment is not determined from the defendant's perspective," however, "as even remedial sanctions carry the 'sting of punishment.'" *United States v. Merriam*, 108 F.3d 1162, at *1165 n.3 (9th Cir. Mar. 12, 1997). *See also United States v. Halper*, 490 U.S. 435, 447 n.7 (1989) ("[E]ven remedial sanctions carry the sting of punishment."), *abrogated on other grounds*, *Hudson v. United States*, 522 U.S. 93 (1997); *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C. Cir. 1977) ("In one sense, both labels [punitive and remedial] are correct. From the point of view of the public and [the] enforcement agency, the action of the SEC [in barring a person from the industry] is 'remedial.' To the broker removed from his profession the action partakes of 'punitive' impact."), *abrogated on other grounds*, *Steadman v. SEC*, 450 U.S. 91 (1981).

[758] *Stewart*, 2025 U.S. App. LEXIS 5480, at *5–8 (upholding investment adviser bar); *J.S. Oliver Cap. Mgmt., L.P.*, Initial Decision Release No. 649, 2014 SEC LEXIS 2812, at *108–113 (Aug. 5, 2014).

[759] *J.S. Oliver Cap.*, 2014 SEC LEXIS 2812, at *112 (citing *Donald L. Koch*, Exchange Act Release No. 72179, 2014 SEC LEXIS 1684, at *52 (May 26, 2014)). Respondent may claim unfair surprise at the imposition of a bar as the sanction because Enforcement did not request a bar. We reject this idea. FINRA Rule 8310(a) identifies the available sanctions for a violation of FINRA's rules, including a bar from association with a FINRA member firm. It also authorizes the imposition of "any other fitting sanction." Nowhere in this or any other FINRA rule is an adjudicator limited to whatever sanction Enforcement might request.

VI. Order

We find that Respondent D. Allen Blankenship engaged in unsuitable trading in Class A mutual fund shares in violation of FINRA Rules 2111 and 2010, circumvented his Firm's supervisory procedures in violation of FINRA Rule 2010, and falsely marked transactions as unsolicited when they were not, thereby causing his Firm's books and records to be inaccurate in violation of FINRA Rules 4511 and 2010. For all these violations in the aggregate, we **ORDER** Respondent barred from association with any FINRA member firm in any capacity.

If this decision becomes FINRA's final disciplinary action, the bar shall become effective immediately.

Respondent is also **ORDERED** to pay costs in the amount of $11,427.80, which includes a $750 administrative fee and $10,677.80 for the cost of the transcript. The costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action.[760]

Lucinda O. McConathy
Hearing Officer

Copies to:

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Jennifer L. Crawford, Esq., FINRA Enforcement (via email)

[760] The Hearing Panel has considered all the parties' arguments. Any arguments not discussed in this Decision are accepted to the extent they are consistent with the Decision and rejected to the extent they are not.

Appendix A

Department of Enforcement v. D. Allen Blankenship

Disciplinary Proceeding No. 2019064333401
Identification of Funds Referenced in Decision

Fund Initials/ Ticker Symbol	Fund[761]
AMECX	The Income Fund of America
AIVSX	The Investment Company of America
CWGIX	Capital World Growth and Income Fund
EKWAX	Wells Fargo Precious Metals Fund
FDSAX	AIG Focused Dividend Strategy Fund (successor of Sunamerica Focused Dividend Strategy Fund)
FUGAX	Fidelity Advisor Utilities Fund
FKUTX	Franklin Utilities Fund
GAUAX	Gabelli Utilities Fund
HFEAX	Janus Henderson European Focus Fund (successor to Henderson European Focus Fund)
HFQAX	Janus Henderson Global Equity Income Fund
HFOAX	Janus Henderson International Opportunities Fund
IBIAX	Ivy Global Equity Income Fund
IBNAX	Ivy Balanced Fund
IGAAX	International Growth and Income Fund
IRSAX	Ivy Advantus Real Estate Securities Fund
JVAAX	JPMorgan Value Advantage Fund
JVIAX	Virtus Vontobel Foreign Opportunities Fund (successor to Virtus Foreign Opportunities Fund)
MGIAX	MFS International Intrinsic Value Fund (successor to MSF International Value Fund)
MMUFX	MFS Utilities Fund
MSFBX	MSIF Global Franchise Portfolio Fund
PGCOX	Putnam Global Consumer Fund
PRUAX	PGIM Jennison Utility Fund
RRRAX	DWS RREEF Real Estate Securities Fund (successor to Deutsche Real Estate Securities Fund)
RRIAX	Columbia Global Infrastructure Fund
RYPDX	RYDEX Consumer Products Fund
SGAAX	Virtus SGA Global Growth Fund (successor to American Beacon SGA Global Growth Fund)
SGGDX	First Eagle Gold Fund
SHSAX	Blackrock Health Sciences Opportunities Fund (successor to Blackrock Health Sciences Fund)
SSIZX	Sierra Tactical Core Income Fund

[761] The fund names are found in CX-24. All of the investments discussed in this decision involve Class A shares.