

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Market Regulation,

Complainant,

vs.

Shiva Naby
Newport Beach, CA,

Respondent.

DECISION

Complaint No. 20120320803-01

Dated: July 24, 2017¹

Respondent falsified documents that her member firm provided to FINRA in response to a request for information. Held, findings and sanctions modified.

Appearances

For the Complainant: Gary E. Jackson, Esq., Manuel Yanez, Esq., James J. Nixon, Esq.,
Department of Market Regulation, Financial Industry Regulatory Authority

For the Respondent: Leandro Palencia, Esq.

Decision

Shiva Naby appeals and FINRA's Department of Market Regulation ("Market Regulation") cross-appeals an April 4, 2016 Hearing Panel decision pursuant to FINRA Rule 9311. The Hearing Panel found that Naby violated FINRA Rules 8210 and 2010 by falsifying documents that her member firm, Wedbush Securities Inc. ("Wedbush"), provided to FINRA in response to a FINRA Rule 8210 request for information. For the misconduct, the Hearing Panel fined Naby \$25,000 and suspended her from association with any FINRA member firm in all capacities for two years. After an independent review of the record, we modify the Hearing Panel's findings of liability and the sanctions it imposed.

¹ The National Adjudicatory Council re-issued its decision previously issued on July 21, 2017, to correct the complaint number. The decision did not substantively change.

I. Procedural History

Market Regulation filed a four-cause complaint on December 18, 2014, against Naby, Wedbush, Peter Auzers (the head of municipal trading, underwriting, and institutional sales at Wedbush), and Samantha McAfee (the capital markets business conduct officer at Wedbush). As relevant to this matter, Market Regulation alleged that all of the respondents falsified documents that Wedbush produced to FINRA in response to a FINRA Rule 8210 request for information. Specifically, Market Regulation alleged that Naby accessed the Real-time Transaction Reporting System (“RTRS”) of the Municipal Securities Rulemaking Board (“MSRB”), printed Wedbush’s Dealer Data Quality - Summary Reports (“MSRB Report Cards”) for the fourth quarter of 2011, and redacted dates that showed when she generated the MSRB Report Cards. Auzers initialed and signed the MSRB Report Cards, which Wedbush produced to FINRA in response to a FINRA Rule 8210 request for information. Market Regulation alleged that, in doing so, respondents falsified documents that Wedbush produced to FINRA and intentionally created the false impression that Wedbush conducted and evidenced supervisory reviews of the MSRB Report Cards during the fourth quarter of 2011.

Only two causes of action were alleged against Naby. The first cause of action alleged that, by falsifying records, Naby, Wedbush, and Auzers engaged in deceptive, dishonest, or unfair practices and failed to deal with all persons fairly, in willful violation of MSRB Rule G-17. The second cause of action alleged that, as a result of the same actions, Naby, Wedbush, Auzers, and McAfee produced these falsified documents to FINRA, in violation of FINRA Rules 8210 and 2010.

A week prior to the hearing, Wedbush and McAfee settled the charges against them, so the hearing proceeded solely on the charges against Naby and Auzers.² After a three-day hearing, the Hearing Panel issued its decision. The Hearing Panel found that MSRB Rule G-17 was applicable to the alleged misconduct, but it declined to find a violation because Naby and Auzers could not “fairly foresee the application of [MSRB] Rule G-17 to the conduct at issue.” The Hearing Panel found that Naby violated FINRA Rules 8210 and 2010 by falsifying documents that were provided to FINRA. For her misconduct, the Hearing Panel fined Naby \$25,000 and imposed a two-year suspension in all capacities.³

² McAfee consented to the findings that she failed to reasonably supervise the production of supervisory documents to FINRA that contained falsified information. Wedbush consented to findings that it created and produced to FINRA staff falsified information, reported at least 55 municipal securities transactions untimely, failed to conduct supervisory reviews of MSRB Report Cards, and failed to designate a registered principal with the responsibility to conduct supervisory reviews of the firm’s reporting of municipal securities transactions.

³ The Hearing Panel found that Market Regulation did not prove by a preponderance of the evidence that Auzers, who it found honest and credible, modified the documents produced by Wedbush to FINRA so as to make them misleading. The Hearing Panel therefore dismissed the complaint against Auzers.

Naby appealed the decision with respect to the Hearing Panel's sanctions and Market Regulation cross-appealed with respect to the Hearing Panel's determination that Naby did not have reasonable notice of the applicability of MSRB Rule G-17 to her misconduct.

II. Facts

A. Background

Naby never has been registered in the securities industry. She began working at a member firm as a temporary employee in October 2008 and later was promoted to operations manager. Naby joined Wedbush in October 2010 and continues to work for the firm. During the review period from October 1, 2011, to December 31, 2011, Naby worked as a fixed income trade processing specialist, which she described as "like a trading assistant, back office," and provided the sole support to approximately 25 traders. Among other duties, Naby opened accounts for institutional clients and dealt with the "back office" of institutional clients.

Naby was located in Wedbush's Newport Beach, California office, along with two fixed income independent contractors. Naby reported to Sue Pease, a managing director in the Minneapolis, Minnesota office of Wedbush. Auzers was located in Wedbush's San Francisco office.

Pursuant to Wedbush's written supervisory procedures during the relevant period, Douglas Charchenko, the Director of Public Finance at Wedbush, was responsible for supervising trade reporting of municipal securities, including initialing and dating the relevant reports.⁴ Charchenko left Wedbush in January 2012.

B. April 10, 2012 FINRA Rule 8210 Request

On April 10, 2012, Market Regulation issued a FINRA Rule 8210 request to Wedbush after reviewing the firm's late reporting of municipal securities transactions in the fourth quarter of 2011. Market Regulation directed the request to McAfee. The request asked for information and documentation relating to 162 transactions reported by Wedbush to the MSRB during the review period, including "[c]opies of any and all documents evidencing that a supervisory review of trade reporting compliance of municipal securities was conducted during the review period."

McAfee forwarded by email the request to Naby, Pease, Auzers, Gary Wedbush (executive vice president and head of capital markets), and eight other individuals at Wedbush. McAfee wrote, "It doesn't appear that there has been any improvement in our MSRB reporting. And to be quite frank, this does not reflect well on the firm as we're currently negotiating fines for this continual violation." McAfee requested that the email recipients forward her responsive

⁴ The written supervisory procedures refer to Dealer Feedback System (DFS) reports, which were the predecessor to the various MSRB reports, including the MSRB Report Cards.

documents, including a copy of trade tickets, a detailed explanation as to why the trade was reported late, any documentation supporting why it was late, copies of supervisory reviews conducted during the review period, and copies of any exception reports created during the review period. Pease, Naby's supervisor, responded to all parties on the email that she and Naby would work on the request.

Naby thereafter printed the spreadsheet of late-reported trades attached to McAfee's email and pulled the trade tickets for each trade to determine the cause of Wedbush's late trade reporting. Naby made notations on the spreadsheet reflecting her research. Naby testified that the three or four instances when she previously had been asked to pull supervisory review documents, she gathered exception reports and cancel/rebill reports. Naby pulled those reports, along with trade tickets and other supporting documentation. Naby sent a brief, draft email to Pease that included these documents.⁵ Naby testified that Pease directed her to provide a summary and a table that detailed which late-reported trades were related to issues caused by an outside vendor. After Naby had done so and re-sent it to Pease, Pease directed Naby to reply to McAfee's initial email and send the summary, table, and the documents.⁶

On April 19, 2012, Naby emailed McAfee, Pease, Auzers, and two other individuals at Wedbush a detailed summary of her research and attached the spreadsheet with notations and all the supporting documentation that she had compiled.

On April 23, 2012, at 1:10 p.m.,⁷ McAfee replied to all parties on Naby's April 19 email and added a few additional recipients. McAfee wrote, "Hi all. I also need copies of proof of supervision. They're asking for reports or any other kinds of sign-offs showing that someone is looking at these transactions. If someone signs off on the report cards, that would be good, too." At 1:51 p.m., Auzers emailed McAfee, Naby, and Pease. Auzers wrote:

I review [Wedbush's municipal securities transactions] daily, real time, on Bloomberg. That is the best way to catch anything out of order – no blotters are printed out on paper. The only reports that are printed out and kept are the daily and weekly exception reports. I also don't know what you mean by 'report cards.'

Naby testified that she, too, did not know what McAfee meant by "report cards" at the time. After Auzers sent this email, Naby called Pease and told her that she was going to

⁵ Naby testified that she sent an email to Pease first because Pease had relayed to her that Gary Wedbush had stressed the importance of the firm addressing FINRA's inquiry and concerns "right away" and Pease was her supervisor.

⁶ Naby testified that Pease directed her to reply to everyone "to show that [Naby] had assisted and it took – it was not easy to gather all this stuff."

⁷ All times in this decision are pacific time.

MSRB's website to figure out to what McAfee was referring. Pease directed Naby to email both her and Auzers and explain that Naby was trying to figure out what the report cards were on MSRB's website. Within minutes of Auzers's email, Naby responded to Auzers's email at 1:56 p.m. and copied Pease. Naby wrote:

Looking in MSRB there are report cards that we can pull on a monthly basis that shows summary, matches, late trades etc. . . [sic] I will run this for this review period and send to you to sign as supervisory review. This will be a new report going forward.⁸ They have 5 different reports they offer so I have to narrow down to the correct one and I will send it over to you both.⁹

Naby did not copy McAfee on the email. After sending this email, Naby immediately emailed McAfee that she would send McAfee "the supervisory review shortly."

After reviewing the reports available on MSRB's RTRS website, Naby found the MSRB Reports Cards, printed the reports for October, November, and December 2011, scanned them, and emailed them to Auzers and copied Pease at 2:04 p.m. Naby wrote, "Please see attached reports for the review period (oct 2011 – dec 2011). Please print sign and scan back to me."

At 2:21 p.m., Auzers's assistant emailed Naby the MSRB Report Cards signed by Auzers. The first page of each three-page monthly MSRB Report Card contained the date on which the report was generated in the header (i.e., "Report generated on 4/23/2012") and the date in footer of each page (i.e., "4/23/2012").¹⁰ The third page also had "Copyright 2012 Municipal Securities Rulemaking Board" at the end of the report. Auzers had initialed the first two pages

⁸ Naby had decided on her own that the monthly MSRB Report Cards should be "a new report going forward" for her in the future to pull, print, and email to Auzers to sign.

⁹ McAfee also responded to Auzers's 1:51 p.m. email that same day at 2:30 p.m. and copied Naby and Pease. In response, McAfee wrote:

The daily and weekly exception reports will work great. FINRA publishes report cards on a monthly basis for different trading aspects. They publish a monthly report card for MSRB reporting and TRACE reporting. It shows how many transactions you reported and what percentage of them were reported late. They also show you your percentile in reference to others in your peer group [sic] I can send you a copy of one of the reports if you'd like to see an example. Please let me know.

¹⁰ Unlike the header date, the footer date was not generated by the RTRS in the MSRB Report Card. Rather, the footer date was a setting in the user's internet browser and printer setting, so it was only generated if the user printed the MSRB Report Card with those settings.

and signed the third page.¹¹ Auzers did not date his signature or initials. After receiving this email, Naby printed the initialed and signed MSRB Report Cards. Naby testified:

When I got them off the printer to take them to scan, I noticed the date on the footer. I whited out the date on the footer. I then went to go scan the documents, and when I was going to scan the documents, I noted the 'report generated' date that's in the middle of the top of the page, and I whited that out as well.¹²

Naby did not tell anyone that she redacted the dates. Naby testified that she did not know why she did not just forward Auzers's assistant's email to McAfee instead of printing the attached MSRB Report Cards only to rescan them and email them to McAfee. Naby testified that "she was in a rush trying to get everything done" and printed them.

At 2:39 p.m., Naby replied to McAfee's email requesting supervisory review. Besides McAfee, she sent the email to Auzers, Pease, and two other individuals at Wedbush. She wrote, "Sam, Please see attached for supervisory review. Attached are the monthly MSRB report cards reviewed and signed by Peter Auzers during the review period." Naby attached the MSRB Report Cards for the months October, November, and December 2011 that were signed and initialed by Auzers in which she had whited out the report generated and footer dates. Naby testified that it was her understanding that Pease knew that Auzers did not sign the report cards during the review period because Pease knew that Auzers said he did not know what the report cards were.

On April 24, 2012, McAfee, on behalf of Wedbush, produced the altered MSRB Report Cards to Market Regulation staff in response to the FINRA Rule 8210 request for evidence of supervisory review of municipal securities trade reporting compliance during the fourth quarter of 2011.

C. FINRA's September 2012 Follow-Up Request

In September 2012, Market Regulation staff noticed that the dates had been deleted in the MSRB Report Cards produced by Wedbush in response to its April 10, 2012 FINRA Rule 8210 request. Market Regulation staff thereafter telephoned McAfee and requested that Wedbush produce the original MSRB Report Cards.

¹¹ Auzers testified that, by signing and initialing the Report Cards in April 2012, he was not trying to suggest he had looked at them in the fourth quarter of 2011. Rather, he believed that the exception and cancel/rebill reports that he reviewed daily and weekly captured the vast majority of the late trades that appeared on the MSRB Report Cards, so he "was very comfortable with having seen these transactions before." The Hearing Panel found Auzers's assertions credible.

¹² Naby did not redact the 2012 copyright text on the third page.

On September 4, 2012, McAfee emailed Naby that a FINRA examiner had requested that Wedbush send “the original report cards with signatures” and attached the altered MSRB Report Cards that she previously produced as reference. Naby responded that she would “[inter-office mail] the original report cards” to McAfee. Naby thereafter emailed Auzers’s assistant, attaching the same MSRB Report Cards, and asked that he send her the original copies with Auzers’s initials and signatures. Auzers told Naby that he no longer had the originals. Naby testified that she believed that FINRA’s request for originals related to its desire for “wet ink signatures,” so she went to MSRB’s RTRS website, regenerated the MSRB Report Cards for October, November, and December 2011, and printed them. She whited out the report-generated and footer dates from the MSRB Report Cards, scanned them, and emailed them to Auzers’s assistant for Auzers to sign.

Naby did not tell anyone that she had redacted the dates from the second set of MSRB Report Cards. Naby testified she whited out the dates on the second set because she previously had done it and she “just didn’t think that the dates mattered.”¹³ Auzers initialed the first two pages and signed the third page of each monthly MSRB Report Card without dating them, and sent them via inter-office mail to Naby.

In response to McAfee’s inquiries about the status of the request on September 6, 2012, Naby told McAfee that she was going to send her the originals after she received them from Auzers. McAfee directed Naby instead to send them directly to the Market Regulation examiner and provided her the address. Naby testified that she typed a cover letter from McAfee while on the phone with her and at her direction. Naby sent the letter to FINRA and enclosed the second set of fourth quarter of 2011 MSRB Report Cards in the mailing. The letter contained McAfee’s name and title in the signature box, but it was not signed or dated.

FINRA received the letter and second set of altered MSRB Report Cards on September 10, 2012. When compared to the first set, Auzers’s signatures and initials were in different locations, and the header lines of the report where the date generated appeared were broken in different places from the white out. FINRA later obtained on-the-record testimony from Naby.¹⁴ Naby admitted that she had removed the dates from both sets of MSRB Report Cards. Market Regulation staff testified that Naby was cooperative and forthcoming in her testimony.

¹³ Naby testified, “I did it again because I remembered I had done it last time --- the dates, I didn’t think, belonged on there, didn’t look right, so I whited [them] out again.”

¹⁴ FINRA also took on-the-record testimony from Auzers, McAfee, and Pease.

III. Discussion

For the reasons set forth below, we modify the Hearing Panel's liability findings.

A. Naby Provided Falsified Documents to FINRA in Violation of FINRA Rules 8210 and 2010

The Hearing Panel found that Naby falsified the MSRB Report Cards that Wedbush provided in response to a FINRA Rule 8210 request for information, in violation of FINRA Rules 8210 and 2010, as alleged in cause two of the complaint. On appeal, the parties do not dispute this finding but make various arguments about Naby's state of mind at the time of her falsification. We affirm the Hearing Panel's findings.

FINRA Rule 8210 requires FINRA members and their associated persons to provide information orally or in writing in response to requests for information issued by FINRA staff with respect to any matter involved in an investigation.¹⁵ The duty of members and their associated persons to cooperate with FINRA investigations and respond fully to FINRA Rule 8210 requests is unequivocal. *See Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *54 (Sep. 24, 2015). It is well settled that providing false information to FINRA in response to a FINRA Rule 8210 request is a violation of both FINRA Rule 8210 and FINRA Rule 2010.¹⁶ *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *32 (Aug. 22, 2008).

“In those instances when FINRA staff does not direct a request for information to a specific associated person, an individual may nevertheless violate [FINRA] Rule 8210 when he is aware that the false information is being provided by the member firm to FINRA in response to a request for information issued pursuant to [FINRA] Rule 8210.” *Dep't of Enforcement v. Palmeri*, Complaint No. 2007010580702, 2013 FINRA Discip. LEXIS 2, at *12 n.6 (FINRA NAC Feb. 15, 2013); *see also Michael A. Rooms*, 58 S.E.C. 220, 227 (2005) (“Liability under [Rule 8210] may possibly extend to associated persons of a firm who are aware of an 8210 request directed to the firm and seek to falsify or impede the firm's response.”), *aff'd*, 444 F.3d

¹⁵ FINRA rules apply with equal force to all members and associated persons. *See* FINRA Rule 0140(a) (“Persons associated with a member shall have the same duties and obligations as a member under the Rules.”).

¹⁶ FINRA Rule 2010 provides that a “member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.” A violation of any FINRA rule, including FINRA Rule 8210, is also a violation of FINRA Rule 2010. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *26 n.29 (July 2, 2013), *aff'd sub nom., Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

1208 (10th Cir. 2006). Scienter is not an element of a FINRA Rule 8210 violation.¹⁷ See *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *39 (Nov. 14, 2008), *aff'd*, 347 Fed. Appx. 692 (2d Cir. 2009).

The parties do not dispute that Naby knew that McAfee was responding, on behalf of Wedbush, to a request for information issued by FINRA. The parties also do not dispute that Naby whited out the dates on the two sets of MSRB Reports Cards that Wedbush produced to FINRA. As the person who altered the MSRB Report Cards, we find that Naby was responsible for Wedbush's production of falsified MSRB Report Cards in response to a FINRA 8210 request. Accordingly, we affirm the Hearing Panel's finding that Naby violated FINRA Rules 8210 and 2010.

B. Naby's Misconduct Violated MSRB Rule G-17

The allegations in cause one of the complaint are identical to those in cause two, except that cause one alleges that Naby's falsification of records violated MSRB Rule G-17. The Hearing Panel found that MSRB Rule G-17 was applicable to the misconduct, but it declined to find a violation and dismissed the allegations in cause one because a "prudent associated person could [not] reasonably foresee that [MSRB] Rule G-17 could be construed to apply to the particular conduct at issue here." We agree that MSRB Rule G-17 was applicable to Naby's misconduct and, contrary to the Hearing Panel, impose liability for the violation.

As an initial matter, we note that, pursuant to Section 15B(b)(2) of the Securities Exchange Act of 1934 (the "Exchange Act"), MSRB is charged with exclusive authority to promulgate rules related to the municipal securities industry. FINRA's By-Laws provide that its members and persons associated with members agree to comply with MSRB Rules, and FINRA is authorized to impose sanctions for violations of MSRB Rules. See FINRA By-Laws Article IV, § 1(a)(1) (agreement by firms); FINRA By-Laws Article V, § 2(a)(1) (agreement by registered persons); FINRA By-Laws Article XIII, § 1(b) (authorization to impose sanctions for violation of MSRB Rules). Under Section 15A(b)(7) of the Exchange Act, it is FINRA's role to enforce the compliance of FINRA members and their associated persons with MSRB rules.

MSRB Rule G-17 provides that, "[i]n the conduct of its municipal securities or municipal advisory activities, each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice." MSRB Rule G-17 encompasses both an antifraud prohibition and a duty to deal fairly. See *Notice of Filing of Proposed Rule Change Relating to Rule G-17*, Exchange Act Release No. 45361, 2002 SEC LEXIS 304, at *1-2 (Jan. 30, 2002). "[T]he duty to deal fairly is intended to refer to the customs

¹⁷ Although Naby's state of mind is not relevant to liability under FINRA Rule 8210, it is relevant to our findings with respect to Naby's liability under MSRB Rule G-17 and sanctions. We address in detail in our sanctions analysis the parties' arguments related to Naby's state of mind with respect to falsifying the MSRB Report Cards and providing them, directly and indirectly, to FINRA.

and practices of the municipal securities markets, which may, in many instances differ from the corporate securities markets. As part of a dealer's obligation to deal fairly, the MSRB has interpreted the rule to create affirmative disclosure obligations for dealers." *Id.* (internal quotations omitted).

MSRB Rule G-17 has been analogized to Section 17(a) of the Securities Act of 1933, *SEC v. Fitzgerald*, 135 F. Supp. 2d 992, 1027 (N.D. Cal. 2001), and requires a showing of at least negligence to establish a violation. *See Dolphin and Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 SEC LEXIS 1592, at *49 (July 13, 2006). According to MSRB's interpretive guidance, the rule "establishes a general duty of a dealer to deal fairly with all persons (including, but not limited to, issuers of municipal securities), even in the absence of fraud." *Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities* (August 2, 2012), <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2>. The rule "is most often cited in connection with duties owed by dealers to investors; however, it also applies to their interactions with other market participants, including municipal entities such as states and their political subdivisions that are issuers of municipal securities." *Id.*

Naby, as an associated person of Wedbush, was bound by MSRB Rule G-17.¹⁸ But it is an issue of first impression whether MSRB Rule G-17 applies to an associated person's misconduct related to a firm's production of municipal trade reporting records to a regulator.¹⁹ FINRA is not a market participant but rather regulates the conduct of municipal securities dealers with other market participants. FINRA members are required to provide accurate and truthful information to FINRA in response to a FINRA Rule 8210 request. *See Ortiz*, 2008 SEC LEXIS 2401, at *31-32. We find that municipal securities dealers responding to a regulator's request for information about the supervisory review of reports of municipal securities transactions is "[i]n the conduct of [their] municipal securities activities," and the response must be accurate and truthful. Accordingly, we find that altering municipal securities supervisory records that knowingly will be produced to a regulator is an inherently dishonest practice in the conduct of a firm's municipal securities activities. For reasons explained herein, Naby's misconduct was well beyond negligent.²⁰ A reasonable associated person would not have altered any document to be

¹⁸ "Unless the context otherwise requires or a rule of the [MSRB] otherwise specifically provides, the terms 'broker,' 'dealer,' 'municipal securities broker,' [or] 'municipal securities dealer,' . . . shall refer to and include their respective associated persons. Unless otherwise specified, persons whose functions are solely clerical or ministerial shall not be considered associated persons for purposes of the Board's rules." MSRB Rule D-11. Naby took orders from institutional clients, so she does not qualify as "solely clerical or ministerial" and was subject to MSRB Rule G-17.

¹⁹ The Office of Hearing Officers has considered MSRB Rule G-17 in other contexts, but its decisions are not authoritative for or binding on the National Adjudicatory Council.

²⁰ We address Naby's state of mind in detail in our sanctions analysis. *See Part IV infra.*

produced in response to a regulatory inquiry, and Naby should have known so. We therefore find that Naby violated MSRB Rule G-17.

Having found that Naby violated MSRB Rule G-17, we turn to the question of whether the application of MSRB Rule G-17 was reasonably foreseeable. On appeal, Market Regulation argues that the Hearing Panel erred in finding that Naby did not have reasonable notice that MSRB Rule G-17 applied to her misconduct of falsifying supervisory records relating to the firm's municipal securities business. Naby argues that no prudent associated person could foresee that MSRB Rule G-17 could be construed to apply to the preparation and production of documents to a regulator because a prudent associated person "would frame the scope of the rule as encompassing municipal securities or municipal advisory activities, rather than dealings with regulators."

It is fair to charge Naby with, and find her liable for, violating MSRB Rule G-17 here even though it was the first time the rule was used to regulate the relationship between an associated person of a municipal securities dealer and a regulator. Fair notice "requires that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Rooms*, 58 S.E.C. at 228 (internal quotations omitted) (finding that respondent's deliberate attempted obstruction of NASD's investigation violated NASD Rule 2110, despite its novel application to the conduct, because its application was foreseeable); *cf. James W. Browne*, Exchange Act Release No. 58916, 2008 SEC LEXIS 3113, at *25 (Nov. 7, 2008) (rejecting FINRA's interpretation of its rule, stating that "the parameters of the rule must be sufficiently clear so that associated persons have fair notice of what conduct is proscribed"). The language of MSRB Rule G-17 is unambiguous as it relates to the prohibition of deceptive and dishonest conduct. Although it is a new application of the rule, altering municipal securities records (to make it appear that a supervisory review was conducted) to be provided to a regulator is "inherently and knowingly wrong without being made so by a rule or regulatory interpretation, and [is] wrong in every context." *Wheat, First Sec., Inc.*, Initial Decisions Release No. 155, 1999 SEC LEXIS 2683, at *56-57 (Dec. 17, 1999) (finding that respondents' actions in executing a false warranty and concealing information required to be disclosed to issuers when acting in the capacity of a financial advisor violated MSRB Rule G-17). Indeed, the NAC has previously stated that "it is self[-]evident that altering documents . . . in an effort to frustrate [FINRA's] performance of its regulatory function is inherently deceptive." *Dep't of Enforcement v. Dieffenbach*, Complaint No. C06020003, 2004 NASD Discip. LEXIS 10, at *31 (NASD NAC July 30, 2004) (holding that an associated person had fair notice that altering documents to impede NASD's investigation violates NASD Rules 8210 and 2210), *aff'd sub nom. on other grounds, Rooms*, 58 S.E.C. 220. Thus, Naby cannot claim that the application of MSRB Rule G-17 to the facts of this case was not reasonably foreseeable.

We also find that Naby's violation of MSRB Rule G-17 was willful. A violation is deemed willful if "the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000). To find that Naby's actions were willful, therefore, we examine if she voluntarily engaged in the misconduct. We need not find that she intentionally violated MSRB rules or acted with a culpable state of mind. *See id.* (finding that the law does not require that the willful actor "also be aware that he is violating one of the Rules or Acts") (internal quotations omitted); *see also Jason A. Craig*, Exchange Act Release No. 59137, 2008

SEC LEXIS 2844, at *13 (Dec. 22, 2008) (finding that the law merely requires that the willful actor “voluntarily committed the acts that constituted the violation”). Here, Naby’s actions—i.e., altering municipal securities supervisory review records to be provided to FINRA—were voluntary. Thus, we conclude that her violation of MSRB Rule G-17 was willful.²¹

IV. Sanctions

The Hearing Panel fined Naby \$25,000 and suspended her in all capacities for two years. After an independent review of the record, we modify these sanctions. We impose a unitary sanction comprised of a \$5,000 fine and two-month suspension in all capacities. Naby’s violations result from the same course of conduct, so a unitary sanction is appropriate. *See FINRA Sanction Guidelines* 4 (2017), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*] (General Principle No. 4); *Dep’t of Mkt. Regulation, v. Lane*, Complaint No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *82 (FINRA NAC Dec. 26, 2013), *aff’d*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558 (Feb. 13, 2015).

In its sanctions analysis, the Hearing Panel consulted the FINRA Sanction Guidelines (“Guidelines”) for the falsification of records and the failure to respond truthfully to a FINRA Rule 8210 request.²² We agree with this approach but rely more heavily on the falsification of records guidelines in this instance. The Guidelines for falsification of firm records recommend a fine of \$5,000 to \$146,000 when a respondent falsifies a document without authorization.²³ In such a case, and in the absence of other violations or customer harm, the Guidelines recommend that the adjudicator consider suspending the respondent for a period of two months to two years.²⁴ The Guidelines provide that a bar is standard if the respondent falsified the document in furtherance of another violation.²⁵ The two relevant considerations are the nature of the document falsified and whether the respondent had a good-faith, but mistaken, belief of express or implied authority.²⁶

²¹ Under Sections 3(a)(39) and 15(b)(4)(D) of the Exchange Act, broker-dealers and associated persons are subject to statutory disqualification for willful violations of the federal securities laws or MSRB rules. *See* 15 U.S.C. § 78c(a)(39), 15 U.S.C. § 78o(b)(4)(D). Because Naby willfully violated MSRB rules, she is subject to statutory disqualification. *See* 15 U.S.C. § 78c(a)(39), 15 U.S.C. § 78o(b)(4)(D).

²² *Guidelines*, at 33, 37.

²³ *Id.* at 37.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

The Guidelines for the failure to respond truthfully to a FINRA Rule 8210 request recommend a fine of \$25,000 to \$73,000 and, where mitigation exists, a suspension of up to two years.²⁷ In addition to the Principal Considerations that apply when determining sanctions for all violations,²⁸ the Guidelines instruct the adjudicator to consider the importance of the information requested as viewed from FINRA's perspective.²⁹

We first consider the nature of the document falsified and the importance of the information requested, which we address together as they are similar.³⁰ In its investigation of late-reported municipal securities transactions, FINRA requested documents to determine whether Wedbush was properly conducting a supervisory review of trade reporting of municipal securities. We, like the Hearing Panel, note that proper supervision is the touchstone of compliance, and documents that demonstrate supervision are inherently important. *See Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225 at *35 (Sept. 16, 2011) (stating that supervision is key to ensuring a broker-dealer's compliance with securities laws and critical to investor protection). Wedbush did not have copies of the fourth quarter of 2011 MSRB Report Cards that evidenced timely supervisory review, and the altered MSRB Report Cards created the impression for FINRA, at first glance, that proper supervision of municipal securities transactions was being conducted at Wedbush during that time. Once the Market Regulation examiner looked at the documents more closely, however, she was able to quickly ascertain that they had been altered.³¹ We note that Naby did not insert a date, which would have made FINRA's discovery of the alteration more difficult, and she did not remove a handwritten date next to Auzers's initials and signatures because he did not add one. While we find that the importance of the information requested is aggravating here, it is less so than if Naby had taken these additional steps.

We next turn to whether Naby had a good-faith, but mistaken, belief of express or implied authority.³² Naby did not testify that she believed she had express or implied authority

²⁷ *Id.* at 33.

²⁸ *Id.* at 7-8.

²⁹ *Id.* at 33.

³⁰ *Id.* at 33, 37.

³¹ The Market Regulation examiner testified that she only gave the initial set of MSRB Report Cards produced in April 2012 a cursory glance at the time. When she turned back to the matter in September 2012 and looked at the reports more closely, the date deletions were obvious to her. We note that the examiner previously worked at MSRB, so she was very familiar with MSRB reports.

³² *See Guidelines*, at 37.

to redact the report-generated dates from the MSRB Report Cards. Rather, she testified that she in good faith did not think the dates “looked right” or “mattered,” so she deleted them without consulting anyone. We thus do not find this consideration aggravating or mitigating in this instance.

Having examined the Principal Considerations relevant to the failure to respond truthfully to a FINRA Rule 8210 request and the falsification of records, we review the remaining relevant Principal Considerations and General Principles Applicable to All Violations. We, like the Hearing Panel, acknowledge the absence of certain aggravating factors, such as disciplinary history, customer harm, efforts to delay FINRA’s investigation, and the potential for monetary gain for Naby. We note, though, that “not every consideration listed in the guidelines has the potential to be mitigating.” *Siegel v. SEC*, 592 F.3d 147, 157 (D.C. Cir. 2010); *see also, e.g., Keith D. Geary*, Exchange Act Release No. 80322, 2017 SEC LEXIS 995, at *34 (Mar. 28, 2017) (“[N]othing in that testimony or elsewhere in the record indicates that [respondent] took any steps beyond complying with FINRA’s rules requiring him to cooperate with staff inquiries . . . [I]t is not mitigating that he did not delay the investigation, conceal information, or otherwise mislead the investigators.”), *appeal docketed*, No. 17-9522 (10th Cir. May 24, 2017); *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 & n.25 (Feb. 24, 2012) (“The absence of monetary gain or customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally.”); *John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *65 n.77 (Nov. 12, 2010) (“[L]ack of a disciplinary history is not a mitigating factor.”), *aff’d*, 449 Fed. Appx. 886 (11th Cir. 2011).

The majority of the parties’ arguments on appeal with respect to sanctions relates to Naby’s state of mind, which we find is a significant Principal Consideration when determining sanctions in this case.³³ The Hearing Panel found that “Naby falsified firm records, intending to mislead FINRA” and redacted the dates from the MSRB Report Cards “to create the misimpression that the Report Cards were reviewed and signed during the fourth quarter of 2011.” The Hearing Panel further found that Naby “exercised poor judgment and her conduct was intentional.” On appeal, Market Regulation asserts that the Hearing Panel correctly found that Naby acted intentionally. Naby argues that the evidence does not support such a finding, and the language in the Hearing Panel’s decision (e.g., “poor judgment”) supports a negligence or reckless finding.

In contrast to the numerous credibility findings that the Hearing Panel made with respect to Auzers’s testimony, the Hearing Panel only made one credibility finding with respect to Naby. Specifically, the Hearing Panel “did not find credible Naby’s claim that she did not try to conceal her actions in that she did not alert anyone to what she had done.”³⁴ It is undisputed that Naby did not tell anyone that she redacted the dates on either set of the MSRB Report Cards. Her failure to disclose, however, does not equate necessarily to concealment. For instance, the

³³ *See Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 13).

³⁴ On appeal, Naby argues that she did not tell anyone because “she simply didn’t think she did anything wrong.”

Market Regulation examiner testified that it “was very obvious [to her] that the ‘report generated’ date was removed” and that “if somebody’s trying to hide the fact that the ‘report generated’ date was removed, he or she’s not doing a very good job.” We agree with the Hearing Panel that “Naby’s efforts to delete the report-generated dates were not very sophisticated.” Specifically, the whitening out in the header showed breaks around the header lines that previously were not there and some black dots where the footer dates once were. Moreover, Naby left the 2012 copyright text on the third page of each report.

Further, although Naby did not alert anyone to her actions, she attached the altered MSRB Report Cards to emails to individuals at Wedbush, including Auzers, who arguably was in the best position to recognize her deletions. Specifically, after Naby removed the dates from the first set of MSRB Report Cards that Auzers had initialed and signed, Naby scanned and emailed the documents to Auzers along with McAfee, Pease, and a few others. In her email, she wrote, “Attached are the monthly MSRB report cards reviewed and signed by Peter Auzers during the review period.” Sending this email to Auzers, along with attaching altered MSRB Report Cards, does not correlate with concealment.³⁵ Then, in September 2012, Naby forwarded the altered MSRB Report Cards to Auzers to determine whether he had the originals. Auzers’s signed and initialed originals had the report-generated dates, so if Auzers had compared them, he also could have been alerted to Naby’s actions.

As evidence that Naby acted intentionally, Market Regulation notes that Naby falsely told McAfee in her April 23, 2012 email that the attached MSRB Report Cards were signed by Auzers “during the review period.” But less than an hour earlier, Auzers had emailed McAfee that he did not know what McAfee meant by “report cards.” McAfee read and received Auzers’s email because she responded and provided a lengthy description of the reports. In fact, McAfee emailed this explanation to Auzers, Naby, and Pease only nine minutes before McAfee received the first set of altered MSRB Report Cards from Naby. On appeal, Naby acknowledges her “poor choice of words,” but notes that she used the same language in her earlier April 19 email in the same email string where she wrote, “Please see attached I have provided: the MSRB Inquiry spreadsheet with notes, . . . copies of supervisory review and exception reports during the review period.”

On appeal, Naby notes that the Hearing Panel failed to address the fact that she whitened out the dates on later MSRB Report Cards that she emailed to Auzers for his review and signature. In the midst of researching and responding to FINRA’s initial inquiry, Naby emailed Auzers and Pease that the MSRB Report Cards would be “a new report going forward.” Later, on September 26, 2012, Naby emailed Auzers the July and August 2012 MSRB Report Cards with the dates also redacted as she did for the fourth quarter of 2011 reports, noting that the July 2012 Report Card was never signed. We agree with Naby that her continued redaction of the

³⁵ Auzers testified that he never opened the attachment and reviewed the email quickly.

same information weighs against an intent to deliberately mislead FINRA with respect to the fourth quarter of 2011 reports.³⁶

In response to Naby's arguments that she had no motive to mislead FINRA, we agree with Market Regulation that a lack of motive is not fatal but can support an inference that a respondent acted deliberately. Market Regulation asserts that evidence supports "several motives," including that Naby was trying to assist her firm "overcome its admitted history of compliance problems in the area of municipal securities reporting" and "assisting her supervisors in avoiding responsibility for their failure to properly supervise the firm's municipal bond reporting." We are not persuaded that the evidence supports that Naby was motivated in such a way. Naby stood to gain little, if anything, by falsifying the MSRB Report Cards. Pease was Naby's supervisor, and Naby supported Auzers, along with 24 other traders. Neither person was responsible under Wedbush's written supervisory procedures for supervisory review of the MSRB Report Cards.³⁷ In fact, the responsible person, Charchenko, the Director of Public Finance at Wedbush, had left the firm in January 2012, and Wedbush neglected to designate a replacement principal to conduct the supervisory review.

We find that Naby intentionally removed the dates from the two sets of MSRB Report Cards, which reports she knew her firm was going to produce to FINRA as part of an ongoing investigation, but we do not find that the record supports that she intended to mislead FINRA. We do, however, find that Naby's conduct fell far below the standard of ordinary care and was reckless.³⁸ *See Ernst & Young, LLP*, Initial Decisions Release No. 249, 2004 SEC LEXIS 831, at *152 (Apr. 16, 2004) (defining recklessness as an "extreme departure from the standards of ordinary care, and which presents a danger . . . that is either known to the [actor] or is so obvious that the actor must have been aware of it").

Pease testified at the hearing that Naby's conduct was wrong, but she "was put into a situation that she should have never been put into." We agree. McAfee failed to reasonably supervise the production of supervisory documents to FINRA in response to a FINRA Rule 8210 Request, and Wedbush had no records to demonstrate that it conducted supervisory reviews of

³⁶ We would find, however, Naby's redaction of information on supervisory records aggravating as a pattern of misconduct if it continued to occur after her investigative testimony, at which time she readily admitted to what she did and, according to her, realized her mistake. *See id.* at 7 (Principal Consideration No. 8).

³⁷ Auzers was responsible during the relevant period for reviewing daily reports. At the hearing, Pease testified, "I know it was Doug Charchenko's responsibility No one knows if he did the reports. Wedbush couldn't find the reports. That's how this whole thing started, was [McAfee] sent an email to all of us and brought up the municipal reports. No – not the daily reports that [Auzers] did every day I have never, in 40 years, seen a trader view his own municipal report card."

³⁸ *See id.* at 8 (Principal Consideration No. 13).

MSRB Report Cards during the relevant period and failed to designate a registered principal with the responsibility to conduct supervisory reviews of the firm's reporting of municipal securities transactions thereafter. Naby was an unregistered person and, according to her uncontradicted testimony, she never received any training at Wedbush about responding to regulatory requests or the importance of not altering any documents.³⁹ Naby's actions directly injured her member firm, but Wedbush and McAfee were careless in permitting Naby to assist without proper supervision, training, and education.⁴⁰ As Pease testified, "when [the business conduct department] were asked for those three months of reports, from FINRA – or from the MSRB, they should have looked, couldn't find the reports, and say 'we don't have the reports.'"

Naby's actions—i.e., creating the falsified MSRB Report Cards—are undoubtedly serious and warrant significant sanctions. Notwithstanding the seriousness of her actions, Naby has acknowledged her misconduct, accepted responsibility, and expressed sincere remorse.⁴¹ Auzers and Pease, the only Wedbush individuals to testify other than Naby herself, both testified that Naby was an honest, exemplary person who made a horrible mistake.⁴² Considering the unique facts and circumstances in this case, we do not believe that there is a likelihood of future violations on Naby's part.

We conclude that a \$5,000 fine and a two-month suspension in all capacities will best serve to remediate Naby's misconduct.⁴³

V. Conclusion

³⁹ See *Guidelines*, at 7 (Principal Consideration No. 6).

⁴⁰ See *id.* (Principal Consideration Nos. 5, 11).

⁴¹ See *id.* (Principal Consideration No. 2).

⁴² Naby's misconduct, in fact, led to the same underlying complaint implicating Auzers, yet he still asserted that she was honest and extremely competent.

⁴³ For her misconduct, Wedbush imposed a one-week suspension on Naby without pay. We apply the Guidelines in effect at the time of the decision. The Hearing Panel applied the prior version of the Guidelines, which instructed the adjudicator to consider whether the member firm disciplined an individual respondent for the same misconduct prior to regulatory detention. The Hearing Panel found that the one-week suspension provided little mitigation. We agree that the one-week suspension is insufficient to remediate Naby's misconduct. We also note that Wedbush did not impose the one-week suspension on Naby until after FINRA detected the misconduct.

Naby redacted dates from MSRB Report Cards and provided them to her member firm for production to FINRA in response to a request for information, in violation of FINRA Rules 8210 and 2010 and willful violation of MSRB Rule G-17. For her misconduct, we fine Naby \$5,000 and impose a two-month suspension in all capacities. We also affirm the Hearing Panel's order that Naby pay hearing costs of \$5,225.19.⁴⁴

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

⁴⁴ Pursuant to FINRA Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.