SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97325 / April 19, 2023

Admin. Proc. File Nos. 3-19007, 3-19012

In the Matter of the Applications of

EDWARD BEYN and CRAIG S. TADDONIO

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

FINRA barred former registered representative of FINRA member firm from associating with any member firm after it found that he excessively traded and churned customer accounts and made an unsuitable recommendation to a customer. FINRA barred former principal of FINRA member firm from associating with any member firm after it found that he failed to exercise reasonable supervision and gave false testimony. *Held*, FINRA's findings of violations and imposition of sanctions are sustained.

APPEARANCES:

Edward Beyn, Pro se.

Craig S. Taddonio, Pro se.

Alan Lawhead, *Andrew Love*, and *Celia L. Passaro* for FINRA.

Appeal filed: February 26, 2019
Last brief received: March 24, 2020

Edward Beyn and Craig Scott Taddonio ("Applicants") seek review of a FINRA disciplinary action barring them from association with any FINRA member firm in any capacity after FINRA found that they violated FINRA and NASD rules.[1] FINRA barred Beyn after it found that, as a registered representative at member firm Craig Scott Capital, LLC ("CSC"), he (i) excessively traded and churned nine customer accounts; and (ii) recommended that a customer purchase unsuitable exchange traded notes ("ETNs"). FINRA barred Taddonio after it found that as the president, CEO, and sales-force supervisor at CSC, he (i) failed to exercise reasonable supervision in light of red flags of excessive trading; and (ii) gave false testimony at an on-the-record interview ("OTR") that CSC did not possess and its personnel did not use recording devices. We sustain FINRA's findings of violations and imposition of sanctions.[2]

I. Procedural History and Standard of Review

In 2016, FINRA's Department of Enforcement ("Enforcement") filed a complaint against CSC, Taddonio, and Brent Morgan Porges (the Chief Operating Officer of CSC); it subsequently filed a separate complaint against Beyn. FINRA then consolidated the proceedings. CSC did not file an answer to the complaint and the Hearing Officer issued a default decision expelling it from FINRA membership for excessively trading and churning customer accounts.

A FINRA Hearing Panel held a hearing as to the remaining respondents. It found that Beyn excessively traded and churned customer accounts in violation of NASD Rule 2310, FINRA Rules 2111, 2020, and 2010, and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; and recommended unsuitable ETNs to a customer in violation of NASD Rule 2310 and FINRA Rules 2111 and 2010. It found that Taddonio and Porges failed to exercise reasonable supervision in light of red flags of excessive trading by CSC registered representatives in violation of NASD Rule 3010(a) and (b) and FINRA Rule 2010; and testified falsely at OTRs that CSC did not have and its personnel did not use recording devices, in violation of FINRA Rules 8210 and 2010. The Hearing Panel barred Beyn in all capacities for his violations; barred Taddonio and Porges in principal or supervisory capacities for their supervisory failures; and barred Taddonio and Porges in all capacities for their false testimony.

Beyn and Taddonio, but not Porges, appealed to FINRA's National Adjudicatory Council ("NAC"). The NAC affirmed the findings of violation and the sanctions for Beyn's misconduct and Taddonio's false testimony, and increased the sanction for Taddonio's supervisory violations to a bar in all capacities. The NAC stated that it did so to remedy the danger Taddonio posed to the industry and the investing public given that his supervisory violations "were egregious" and

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[1] *Dep't of Enforcement v. Taddonio*, Complaint Nos. 2015044823501, 2015044823502, 2019 WL 397998 (FINRA NAC Jan. 29, 2019).

[2] We deny applicants' request for oral argument because we find that it would not significantly aid our ability to resolve this case. *See* Rule of Practice 451, 17 C.F.R. § 201.451(a) (the Commission considers appeals from self-regulatory organizations based on the briefs alone, unless oral argument would "significantly aid[]"the decisional process).

"reflect[ed] a fundamental lack of understanding of and willingness to abide by the regulatory requirements required of individuals in the securities industry." This appeal followed.[3]

Under Exchange Act Section 19(e)(1), we review FINRA disciplinary action to determine (1) whether Applicants engaged in the conduct FINRA found; (2) whether that conduct violated the provisions FINRA found it to have violated; and (3) whether those provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.[4] We base our findings on an independent review of the record and apply a preponderance of the evidence standard.[5]

Under Exchange Act Section 19(e)(2), we sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[6] We consider any aggravating or mitigating factors,[7] and whether the sanctions imposed are properly remedial or improperly punitive.[8] In imposing sanctions, the NAC relied on FINRA's Sanction Guidelines.[9] Although not binding on us, we use the Guidelines as a benchmark.[10]

II. Analysis

A. Background

In 2012, Taddonio and Porges founded CSC. Taddonio was the majority owner, president, and CEO, and Porges was the minority owner and COO. From 2012 to 2015, CSC had 15 to 40 registered representatives. Junior brokers cold-called prospective investors to open an account and make an initial trade. Senior brokers took over new accounts and solicited the customers to invest more money with CSC and continue trading. Beyn was a senior broker.

For every customer trade, CSC charged (i) a flat $99 fee; and (ii) up to the firm limit of 5% of the trade (reduced in May 2013 to 3.2%) as either a commission for agency transactions or a markup or markdown for riskless principal transactions.[11] Brokers had discretion to run trades

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3 FINRA and Beyn moved to strike certain of the other party's briefs filed in this appeal, but we resolve that issue by accepting all of their briefs.

4 15 U.S.C. § 78s(e)(1).

5 *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, 9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

6 15 U.S.C. § 78s(e)(2). The record does not show, nor do Applicants claim, that FINRA's sanctions impose an unnecessary or inappropriate burden on competition.

7 *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013).

8 *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065-66 (D.C. Cir. 2007).

9 FINRA Sanction Guidelines (Mar. 2017).

10 *See, e.g.*, *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 & n.68 (June 14, 2013) (citing cases).

11 In an agency transaction, a broker receives a customer order and sends it directly to an exchange or other marketplace to be executed. In a riskless principal transaction, a broker

as either agency or riskless principal transactions, and to set the amount of the commission, markup, or markdown. Most trades at CSC were riskless principal transactions. CSC retained the entire $99 fee but paid the broker part of the commission, markup, or markdown. Most of CSC's revenue came from commissions, markups, and markdowns.

For riskless principal transactions, CSC did not disclose in writing the amount of the markup or markdown. The customer account statements did not include that information, and the trade confirmations highlighted only three factors: (1) the "Principal" amount of the trade (the price per share times the total shares); (2) the $99 fee, referred to as the "Firm Commission"; and (3) the "Net Amount" of the trade (the "Principal" minus the "Firm Commission").[12] Although in a separate section for "[s]pecial remarks" the trade confirmations provided the "commission equivalent $[] per share," they did not explain that this number could be multiplied by the shares traded to determine the total markup or markdown, or even that this number related to a markup or markdown. For example, one trade confirmation stated "commission equivalent $0.77990 per share," but did not explain that this could be multiplied by the 3,200 shares purchased to determine that there was a $2,495.68 markup. Customers could only learn if they were being charged a markup or markdown in addition to the $99 fee if they asked their brokers.

B. We sustain FINRA's findings that Beyn excessively traded and churned customer accounts and made unsuitable recommendations to a customer as well as the bar FINRA imposed as a unitary sanction for these violations.

1. We sustain FINRA's findings that Beyn excessively traded and churned customer accounts and made unsuitable recommendations to a customer.

a. Beyn excessively traded and churned customer accounts.

NASD Rule 2310(a) and its successor, FINRA Rule 2111(a),[13] require associated persons to have a reasonable basis to believe that a recommended securities transaction is suitable for the customer. Excessive trading—which occurs when a registered representative controls the trading

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receives a customer order and creates an order for its proprietary account that it sends to an exchange or other marketplace to be executed. Once the execution occurs in the proprietary account, the broker then executes the customer order against its proprietary account. *Consolidated Audit Trail*, Exchange Act Release No. 62174, 2010 WL 2111286, at *39 & n.205 (May 26, 2010). The firm charges a markup for buy transactions—a higher price per share than it paid—and a markdown for sell transactions—a lower price per share than it received.

[12] The record does not indicate if trade confirmations for agency transactions disclosed the commissions charged, but customer account statements did not disclose the commissions.

[13] NASD Rule 2310 applies to transactions prior to July 9, 2012, which is the date it was replaced by FINRA Rule 2111. *See FINRA Regulatory Notice 11-25*, 2011 FINRA LEXIS 45 (May 2011).

in an account, and the level of that trading is inconsistent with the customer's objectives and financial situation—violates these rules.[14] Control over an account may be formal or de facto.[15]

In determining whether the level of trading is inconsistent with the customer's objectives and financial situation, we have considered the cost-to-equity ratio, turnover rate, customer's age, retirement status, and financial condition and objectives.[16] The cost-to-equity ratio is the amount an account would have to appreciate annually to break even given the costs of trading; the turnover rate is the number of times in one year that a portfolio of securities is exchanged for another portfolio.[17] And "[w]hile there is no definitive turnover rate or cost-to-equity ratio that establishes excessive trading," we have held that a cost-to-equity ratio exceeding 20% or a turnover rate of 6 "generally indicates that excessive trading has occurred."[18]

Churning is excessive trading committed with scienter. Scienter may be shown by proof that the broker acted recklessly.[19] We have found scienter "where a 'very high level of commissions and the resulting high cost-to-equity ratio' shows that the broker's 'overriding goal was generating commissions' and therefore the broker must have known he was acting in reckless disregard of his customer's interests."[20] In other words, "scienter may be inferred from the amount of commissions charged by the registered representative."[21] Churning violates the antifraud provisions of Exchange Act Section 10(b), Rule 10b-5 thereunder, and FINRA Rule

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14 *Cody*, 2011 WL 2098202, at *9, 12.

15 *Newport Coast Secs., Inc.*, Exchange Act Release No. 88548, 2020 WL 1659292, at *3 (Apr. 3, 2020) (finding that control may be in the form of formal discretionary accounts or in non-discretionary accounts where the broker nonetheless actually exercises control).

16 *Ralph Calabro*, Exchange Act Release No. 75076, 2015 WL 3439152, at *8 (May 29, 2015).

17 *Id.*

18 *Id.* (internal quotation marks and citation omitted) (noting also that the Commission has found excessive trading where the annual turnover rate was 4 or less, and in accounts with cost-to-equity ratios less than 20%).

19 *Newport Coast Secs., Inc.*, 2020 WL 1659292, at 5.

20 *Id.* (citation omitted).

21 *Calabro*, 2015 WL 3439152, at *13.

2020.[22] Excessive trading and churning also violates FINRA Rule 2010, which requires the observance of "high standards of commercial honor and just and equitable principles of trade."[23]

i. Beyn engaged in the conduct FINRA found.

The record supports FINRA's finding that Beyn traded frequently in nine accounts for six customers. Four of the customers—Edward Kennedy, Bradley McKibbin, Timothy Pixley, and Edwin Heikkila, Jr.—testified at the hearing. At the time they became customers, Kennedy was a 65 year-old owner of a small construction company building solariums; McKibbin was a 60 year-old sales representative for aviation companies; and Pixley and Heikkila, respectively 72 and 69 years old, co-owned a small construction company that primarily built schools. The Hearing Panel found that these customers all testified credibly at the hearing.[24]

All four customers testified that they had limited investment experience. With the exception of buying one stock 20 years earlier, Kennedy had never invested before opening his account at CSC with $350,000, which he told Beyn was his life savings that he wanted to grow for retirement. Kennedy testified that CSC sent him a new account form that incorrectly stated that his net worth was between $1 million and $3 million, and testified that Beyn told him to sign the form despite the error because it was just a "formality" and "not important."

McKibbin testified that he previously had two IRAs that had been managed entirely by brokers with the exception of a few stocks he selected. McKibbin transferred $250,000 in an IRA to CSC, which he told Beyn was for retirement and taking care of his disabled adult daughter, and that he wanted it "to grow but [he] didn't want to lose it either." Pixley and Heikkila both testified that their prior experience was also limited to relying on brokers to manage their investments. Pixley and Heikkila each transferred to CSC their IRAs ($1.4 million each) and also opened individual accounts ($100,000 and $800,000, respectively).

All four customers testified that, after opening their accounts, Beyn called them frequently with stock recommendations. They testified that Beyn solicited all the trades in their accounts, except that Heikkila directed Beyn to buy a gold exchange traded fund, and that they relied on Beyn because of his self-professed expertise. Although the four customers testified that

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[22] *Id.* at *1; s*ee also Newport Coast Secs., Inc.*, 2020 WL 1659292, at 5 (churning is "a shorthand expression for a type of fraudulent conduct in a broker-customer relationship where a broker 'overtrades' a relying customer's account to generate commissions") (internal quotation marks and citation omitted); *William Scholander*, Exchange Act Release No. 77492, 2016 WL 1255596, at *4 (Mar. 31, 2016) (stating that a "violation of Exchange Act Section 10(b) also constitutes a violation of FINRA Rule 2020"), *pet. denied*, 712 F. App'x 46 (2d Cir. 2017).

[23] *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 WL 5571625, at *5 n.3 (Sept. 30, 2016) ("[A] violation of an SRO rule is conduct inconsistent with just and equitable principles of trade and therefore is also a violation of FINRA Rule 2010.").

[24] *See Bruce Zipper*, Exchange Act Release No. 90737, 2020 WL 7496222, at *9 (Dec. 21, 2020) ("We generally accord considerable weight and deference to the fact-finder's credibility determination.").

Beyn solicited all the trades, Beyn marked as solicited 87% of the trades in Kennedy's account; 100% in McKibbin's account; 91% in Pixley's accounts, and 61% in Heikkila's accounts.

All four customers also testified that Beyn never disclosed that they were paying commissions, markups, or markdowns in addition to the $99 fee per trade. Kennedy, McKibbin, and Pixley testified that they did not realize from reading trade confirmations that they were paying more than the $99 fee, and Heikkila testified that he did not read the trade confirmations. All four customers testified that they learned the actual trade costs only after all or nearly all of the trading occurred—Kennedy and McKibbin learned it from their attorneys, Pixley learned it from FINRA staff, and Heikkila learned it from Pixley.

FINRA introduced documentary evidence with respect to the remaining two customers, Wayne Rea and Jim Bolton. When they opened their accounts, Bolton was a 72 year-old owner of a small alloy company, and Rea was a 62 year-old owner of a small construction company. In a letter to CSC, Bolton stated that his "investment objective is . . . to make money and earn a return on [his] investment" but that he "expect[s] [his] account to be traded prudently." Beyn marked as solicited 99% of the trades in his account and 90% of the trades in Rea's accounts.

The six customers paid trade costs of $1,770,014 to CSC, with Beyn receiving $647,648:

Account	Period	Net Loss	Trade Cost	Commission to Beyn	Cost-To-Equity	Turnover
Bolton	4/2014-7/2014	$65,986	$65,803	$38,448	573%	189
Rea #1	6/2013-9/2013	$86,322	$46,201	$25,425	183%	53
Rea #2	4/2014-7/2014	$52,590	$48,836	$27,970	546%	178
Kennedy	3/2012-8/2013	$231,337	$188,705	$116,667	71%	19
McKibbin IRA	1/2015-5/2015	$65,363	$52,645	$15,643	71%	23
Pixley IRA	4/2012-12/2013	$786,887	$599,058	$186,666	34%	11
Pixley	5/2012-12/2013	$66,225	$80,952	$22,947	72%	22
Heikkila IRA	4/2012-7/2014	$985,000	$426,689	$135,586	18%	8
Heikkila	3/2012-7/2014	$571,982	$261,125	$78,296	21%	8
Total:		$2,911,692	$1,770,014	$647,648		

Although all of the accounts suffered net losses and incurred significant trade costs, Beyn completed or advised his junior broker to complete "active account worksheets" for five of the customers, which characterized them as "happy," "satisfied," or "very satisfied" with their

accounts' performance.[25] Two customers subsequently filed complaints with FINRA, and the other three sent letters to CSC complaining about the losses and trade costs in their accounts.

ii. Beyn's conduct violated FINRA's rules.

We find that Beyn violated NASD Rule 2310 and FINRA Rules 2111 and 2010 by engaging in excessive trading.[26] As indicated by the customers' testimony and the document evidence in the record, Beyn had de facto control over the trading in the nine accounts of his six customers. He solicited nearly all trades in the accounts, and the customers acquiesced routinely to his recommendations.[27] Indeed, four of the customers testified that they did not independently evaluate Beyn's recommendations but rather relied on Beyn's supposed expertise. Further, Beyn denied the customers the ability to evaluate the potential profitability of his recommendations by misrepresenting that CSC charged only $99 per trade.[28]

The level of trading in the nine accounts that Beyn controlled exceeded the levels that generally indicate excessive trading has occurred.[29] Seven accounts had cost-to-equity ratios well in excess of 20%—ranging from 34% for Pixley's IRA to 573% for Bolton's account.[30]

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25 The record does not include an active account worksheet for McKibbin. As discussed further below, the worksheets were a tool for Taddonio to monitor active accounts.

26 Beyn admitted in his answer to FINRA's complaint that he "excessively traded" nine accounts for six customers but denied that he "exercised control over" the accounts. Although Beyn subsequently recanted his admission at the hearing, testifying that he "did not review" the answer that his former attorney drafted and filed, Beyn had testified at an earlier OTR that he had reviewed the answer before signing it. In any case, we predicate Beyn's liability on the evidence in the record and not Beyn's admission in his answer that he excessively traded the accounts.

27 *See Calabro*, 2015 WL 3439152, at *19 (finding de facto control where all but one trade in the customer's account were recommended by the representative); *Cody*, 2011 WL 2098202, at *12 (finding de facto control where customers "did not independently evaluate [representative's] recommendations but rather acquiesced in his trades"); *Al Rizek*, Exchange Act Release No. 41725, 1999 WL 600427, at *6 (Aug. 11, 1999) (finding de facto control where "customers placed their reliance on [representative's] supposed expertise, and almost invariably followed his recommendations," and although "customers may have been successful businessmen and most of them had some degree of higher education, they were totally lacking in the degree of investor sophistication necessary to . . . make any sort of independent evaluation of [representative's] strategy"), *aff'd*, 215 F.3d 157 (1st Cir. 2000). Beyn does not argue that he did not control the accounts of the two customers who did not testify.

28 *See Cody*, 2011 WL 2098202, at *13 (finding that customers' reliance on representative's spreadsheets that misleadingly overstated account values confirmed that they were unable to make any sort of independent evaluation of representative's trading in their accounts).

29 *See supra* note 18 and accompanying text.

30 *See Calabro*, 2015 WL 3439152, at *20 (finding that a "turnover rate of 17 and cost-to-equity ratio of 34.6%" was "strong evidence" of excessive trading).

The other two accounts, both belonging to Heikkila, had cost-to-equity ratios of 18% and 21% over more than two-year periods that caused the accounts to incur nearly $700,000 in trade costs.[31] And the turnover rates for all nine accounts significantly exceeded 6—ranging from 8 for Heikkila to 189 for Bolton. Moreover, the record does not establish that these trading levels were consistent with the objectives and financial situation of Beyn's customers, who were all at or near retirement age and four of whom entrusted Beyn with retirement funds.[32]

We also find that Beyn acted with scienter and therefore churned the accounts in violation of Exchange Act Section 10(b) and Rule 10b-5 thereunder, as well as FINRA Rules 2020 and 2010. Because Beyn did not disclose that he was charging markups and markdowns, and because the cost-to equity ratios were so high that it was virtually impossible for the customers to profit, we find that Beyn must have intentionally traded to generate commissions in reckless disregard of his customers' interests.[33] The facts that Beyn received $647,648 from the trading, deceived Kennedy about the importance of the new account forms, and misrepresented on active account worksheets that his customers were "happy," "satisfied," or "very satisfied" with the performance in their accounts despite the losses supports our finding of scienter.[34]

Beyn contends that his customers lied at the hearing. Although he does not specify what lies he thinks they told, presumably he believes they lied about not understanding what was happening in their accounts with respect to the level of trading and trade costs. Beyn notes, for example, that McKibbin signed an Active Account Letter stating he was aware of the trading in his account, and Kennedy, Pixley, and Heikkila signed Affidavits of Support stating they were experienced investors in control of their accounts and did not believe the trading was excessive.[35] But the documents do not undermine the customers' testimony because, at the time of signing,

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[31] *See Shearson Lehman Hutton Inc.*, Exchange Act Release No. 26766, 1989 WL 257097, at *2 (Apr. 28, 1989) (finding that depletion of more than 50% of principal through trade costs over a thirteen month period "clearly indicates excessive trading").

[32] *See Cody*, 2011 WL 2098202, at *13 (noting that the accounts at issues "were to be used to fund retirement, demonstrating a need to protect principal and limit risk-taking").

[33] *See Newport Coast Secs., Inc.*, 2020 WL 1659292, at *6 (finding that broker churned accounts because the high volume of trades and trade costs made it "extremely unlikely" that his customers would "break even" and because he attempted to conceal the trade costs from his customers); *Calabro*, 2015 WL 3439152, at *38 (finding that broker churned account where he failed to disclose that it was extremely unlikely his customer would break even given the trade costs and where he misrepresented that he would waive his commissions).

[34] *See Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *9 (Dec. 11, 2009) (holding that a pecuniary motive was circumstantial evidence of scienter), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010); *Calabro*, 2015 WL 3439152, at *27 (finding that falsely telling customer that account forms "'didn't matter' and that [he] should 'just initial' the prefilled forms that substantially overstated his net worth" was "compelling evidence of scienter" because customer's "actual net worth was inconsistent with the type of speculative and aggressive trading that [broker] was engaged in with a 'very high percentage' of [customer's] liquid net worth").

[35] The record does not include such documents for Bolton or Rea.

the customers still believed Beyn's lie that they were being charged only $99 per trade. Also, Kennedy, Pixley, and Heikkila testified that Beyn urged them to sign the affidavit by telling Kennedy and Pixley that he needed the document signed as a favor to avoid trouble with management and telling Heikkila that he needed it signed "in order to keep trading."

b. Beyn recommended unsuitable ETNs to Kennedy.

Under the suitability rules discussed above, NASD Rule 2310 and FINRA Rule 2111, a recommended transaction must "be consistent with the customer's best interests and financial situation."[36] "Generally, risky investments are unsuitable recommendations for investors with relatively modest wealth and limited investment experience."[37] A broker must disclose the risks of a security to the customer and "be satisfied that the customer is willing to take those risks."[38]

i. Beyn engaged in the conduct FINRA found.

At issue here are three ETNs: iPath S&P 500 VIX Short Term Futures ETN ("VXX"); VelocityShares 3X Long Gold ETN ("UGLD"); and VelocityShares 3X Long Silver ETN ("USLV"). ETNs are unsecured debt obligations of financial institutions with payment terms linked to the performance of an index or benchmark.[39] Leveraged ETNs, such as UGLD and USLV, pay a multiple of the performance of the index or benchmark but typically "reset" their leverage daily, meaning "they are only designed to accomplish the stated leveraged . . . objective on a daily basis" and can be risky medium or long term investments.[40] The record indicates that these three ETNs are generally not buy-and-hold products but are instead meant to manage daily trading risks, typically requiring investors to hold them for less than a day.

In June 2012, Beyn invested $63,619 in VXX for Kennedy, and sold it in June 2013 for $21,121. In August 2013, Beyn invested $120,000—by then Kennedy's entire account value—in UGLD and USLV. By the end of September 2013, the account value was $97,000. Beyn closed the positions in October 2013 when Kennedy transferred his account to another firm.

Beyn admitted in testimony that the three ETNs were "definitely not suitable for" Kennedy, that they were "not supposed to be used for long-term holds," and that "if you continue to hold" them "they will go down in value no matter what." Nonetheless, as Kennedy testified, Beyn recommended that he invest in VXX, UGLD, and USLV. For the latter two investments,

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36 *Newport Coast Sec., Inc.*, 2020 WL 1659292, at *8.

37 *Cody*, 2011 WL 2098202, at *11 (internal quotations omitted).

38 *Newport Coast Secs., Inc.*, 2020 WL 1659292, at *8 (internal quotations omitted).

39 SEC Investor Bulletin, *Exchange Traded Notes (ETNs)*, https://www.sec.gov/oiea/investor-alerts-bulletins/ib_etn.html (Dec. 1, 2015).

40 FINRA, *The Lowdown on Leveraged and Inverse Exchange-Traded Products*, http://www.finra.org/investors/lowdown-leveraged-and-inverse-exchange-traded-products; FINRA Investor Alert, *Exchange-Traded Notes—Avoid Unpleasant Surprises*, https://www.finra.org/investors/alerts/exchange-traded-notes-avoid-unpleasant-surprises.

Kennedy testified that Beyn simply told him that they were gold and silver stocks that would "pay three times as much" if they increased in value. Kennedy testified that Beyn did not explain that any of the investments were ETNs and that he did not know what ETNs are.

Beyn testified that Kennedy insisted on investing in the ETNs over Beyn's objections. But the hearing panel found that Kennedy was credible and that Beyn was "one of the least credible witnesses [the panelists] had ever encountered." We find that Beyn recommended the ETNs and drove the investment decision given (i) Kennedy's testimony, (ii) Kennedy's lack of investment experience, and (iii) the fact that Beyn marked the VXX trade as solicited.

ii. Beyn's recommendation violated FINRA's rules.

We find that Beyn violated NASD Rule 2310 and FINRA Rules 2111 and 2010 by recommending VXX, UGLD, and USLV to Kennedy. As Beyn admitted in testimony, and does not dispute on appeal, those ETNs were unsuitable for Kennedy. They were risky products for sophisticated investors and likely to decrease in value if held for more than short terms. Yet Kennedy was an inexperienced 65-year old investor, Beyn did not explain the risks, and the positions were held for long terms and resulted in losses of $42,498 from VXX and more than $20,000 from UGLD and USLV.[41] Further, Beyn concentrated Kennedy's limited retirement funds in the ETNs, placing 20% of his account in VXX and then 100% in UGLD and USLV.[42]

c. The provisions of the securities laws that Beyn violated are, and were applied in a manner, consistent with the Exchange Act's purposes.

The provisions of the securities laws that Beyn violated are, and FINRA's application of them to Beyn was, consistent with the Exchange Act's purposes. We make that finding as to NASD Rule 2310 and FINRA Rule 2111 because their suitability requirements are consistent with the Exchange Act's goal of protecting investors,[43] and because Beyn's excessive trading and ETN recommendations were unsuitable for his customers. We make that finding as to Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rule 2020 because they are consistent with the Exchange Act's goal of preventing fraud,[44] and because Beyn defrauded his

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41 *See Newport Coast Secs., Inc.*, 2020 WL 1659292, at *8 (finding that recommendation of VXX was unsuitable for three retail customers based on warnings in the prospectus about ETNs, testimony by broker that he understood VXX was unsuitable for retail customers, and customers' testimony "that they never had the risks of VXX explained to them").

42 *See Bernard G. McGee*, Exchange Act Release No. 80314, 2017 WL 1132115, at *10 (Mar. 27, 2017) (finding recommendation unsuitable for retired "unsophisticated investor of moderate means" because it involved the "extremely high-risk strategy" of investing half of her assets in one company), *pet. denied*, 733 F. App'x 571 (2d Cir. 2018).

43 *See id.* at *11 (finding NASD Rule 2310 to be "consistent with the purposes of the Exchange Act, which is meant to protect investors, because [it] require[s] that registered representatives make suitable recommendations").

44 *See Newport Coast Secs., Inc.*, 2020 WL 1659292, at *7 (finding FINRA Rule 2020 consistent with the purposes of the Exchange Act because it is "designed to prevent fraud").

customers. We make that finding as to FINRA Rule 2010 because it reflects the mandate of Exchange Act Section 15A(b)(6) that FINRA's rules "promote just and equitable principles of trade,"[45] and because Beyn's misconduct was inconsistent with those principles.

2. We find that the bar FINRA imposed on Beyn is not excessive or oppressive.

The NAC imposed a unitary sanction for all of Beyn's violations because they "arose out of the same trading." In doing so, the NAC followed FINRA's Guidelines, which, for excessive trading and churning, recommend that adjudicators consider a suspension or a bar if "aggravating factors predominate," and "[s]trongly consider barring an individual for reckless or intentional misconduct."[46] For making unsuitable recommendations, the Guidelines recommend that adjudicators "strongly consider a bar" if "aggravating factors predominate."[47]

Beyn acted with scienter, and aggravating factors predominate. Beyn intentionally defrauded six customers for more than two years to enrich himself by harming them.[48] And Beyn blames his victims, asserting on appeal that the four who testified "lied under oath."[49] We agree with the NAC that Beyn "is a danger to investors" and "has no place in the securities industry." Accordingly, we conclude that the bar FINRA imposed on Beyn from associating with any member firm in any capacity is neither excessive nor oppressive and is remedial.[50]

Beyn contends that the oversight of Taddonio and the CCOs mitigates his misconduct. According to Beyn, they took steps "to protect client[s'] interests" by reducing commissions and sending the Affidavits of Support, and they authorized all trades and never told him any trades he executed "were prohibited or not in line with CSC's Compliance policies." He contends that CSC, Taddonio, and the CCOs should be the only ones held liable because they were responsible for his actions. These attempts at blame shifting fail because Beyn "is responsible for his actions

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45 *Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 WL 1272876, at *10 (Apr. 1, 2016) (quoting 15 U.S.C. § 78*o*-3(b)(6)).

46 Guidelines at 79.

47 *Id.* at 96.

48 *See id.* at 7-8 (Principal Consideration Nos. 8, 9, 11, 13 & 16 directing adjudicators to consider whether (i) respondent "engaged in numerous acts and/or a pattern of misconduct"; (ii) respondent "engaged in the misconduct over an extended period of time"; (iii) respondent's misconduct was the result of an intentional act, recklessness, or negligence; and (iv) the misconduct resulted in injury to others and the potential for the respondent's monetary gain).

49 *See* Guidelines at 7 (Principal Consideration Nos. 2 & 4 directing adjudicators to consider whether respondent "accepted responsibility for and acknowledged the misconduct to . . . a regulator prior to detection and intervention" and whether respondent "voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct"); *see also supra* note 24 and accompanying text (concerning credibility).

50 *See Rizek v. SEC*, 215 F.3d 157, 162-63 (1st Cir. 2000) (affirming Commission decision imposing bar for churning the accounts of five customers causing losses of $195,000).

and cannot shift that responsibility to the firm or his supervisors."[51] The fact that others also might have been remiss in their duties does not mitigate Beyn's responsibility.[52]

C. We sustain FINRA's findings that Taddonio failed to exercise reasonable supervision and gave false testimony as well as the bars FINRA imposed for these violations.

1. We sustain FINRAs finding that Taddonio failed to exercise reasonable supervision and the bar FINRA imposed for this violation.

a. Taddonio failed to exercise reasonable supervision.

NASD Rule 3010(a) and (b) require firms to "establish and maintain a system," and to "establish, maintain, and enforce written procedures," to "supervise the activities of" registered representatives that are "reasonably designed to achieve compliance with applicable securities laws and regulations, and with" applicable NASD or FINRA rules. "The duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation."[53] A firm's president "is ultimately responsible for supervision, unless he or she has delegated that responsibility to someone else at the firm and does not know or have reason to know that the responsibility is not being properly exercised."[54] A violation of NASD Rule 3010 also violates FINRA Rule 2010.[55]

i. Taddonio engaged in the conduct FINRA found.

CSC's written supervisory procedures ("WSPs") stated that supervisory responsibility for sales practices, including suitability and churning, rested with a "Designated Supervisor." The "Designated Supervisor" section of the WSPs listed Taddonio and Porges as responsible for supervising the "area" of "[s]ales [m]anager"; it did not indicate that Taddonio delegated supervisory responsibility for sales practices. The CCOs and a junior broker testified, consistent with the WSPs, that Taddonio and Porges were responsible for supervising the brokers.

Despite this evidence, Taddonio contends that he was not responsible for supervising the brokers. But the only evidence he cites to support this contention is his own testimony at the hearing and statements he and Porges made to FINRA. We do not credit Taddonio's claim at the

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51 *Rafael Pinchas*, Exchange Act Release No. 41816, 1999 WL 680044, at *4 (Sept. 1, 1999) (rejecting argument that representative "did not have control over [customers'] accounts because the supervisors . . . approved the trading ticket orders for the accounts").

52 *Mike K. Lulla*, Exchange Act Release No. 33765, 1994 WL 91265, at *3 (Mar. 15, 1994).

53 *Michael T. Studer*, Exchange Act Release No. 50543A, 2004 WL 2735433, at *6 (Nov. 30, 2004), *pet. denied*, 260 F. App'x 342 (2d Cir. 2008).

54 *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 WL 4258143, at *9 (Aug. 12, 2016), *pet. denied*, 719 F. App'x 724 (9th Cir. 2018).

55 *See supra* note 23.

hearing that he delegated supervisory responsibilities to the CCOs because the hearing panel found that Taddonio was not credible. And although Taddonio and Porges said in a statement to FINRA in August 2014 that Porges was the sales manager and the CCOs were the designated branch supervisors, Taddonio had previously told FINRA in a signed statement in February 2014 that he was responsible for supervision. We find that Taddonio was responsible for supervision.

Four senior brokers—Beyn, Zachary Bader, David Cannata, and Michael Venturino—traded in the 37 accounts that generated the most revenue for CSC from February 2012 to October 2014. The cost-to-equity ratios for the 37 accounts ranged from 18.1% to 824.6%, with 25 of the accounts having cost-to-equity ratios over 100% and only two having ratios under 20%. The turnover rates for the 37 accounts ranged from 6.6 to 262.12, with 13 accounts having turnover rates over 100. These cost-to-equity ratios and turnover rates meant the trade costs were so high that it was exceedingly unlikely the customers would realize profits even if the trading was otherwise successful in generating gains. Moreover, the brokers marked as solicited 90% of the 9,110 trades in the accounts, which cost the customers $5.9 million in fees, commissions, markups, and markdowns. The accounts had total net losses of $9.2 million.

As a supervisor, Taddonio received numerous red flags of excessive trading in these accounts. First, he reviewed account activity and trade costs daily, and discussed accounts with brokers. Second, he reviewed "active account worksheets," which included for each actively traded account the trade costs, profits and losses, and percentage of solicited trades for the past twelve months. Richard Crockett, who was the firm's CCO until February 2013, provided the worksheets to Taddonio in the spring and fall of 2012. Third, starting in February 2013, after Joseph Gentile became the CCO, Taddonio received a monthly "active account exception report." The report included each account that, for the past month or past three months, had (i) trade costs totaling $2,500 or more; (ii) ten or more trades; (iii) a cost-to-equity ratio of 5% or more; or (iv) a loss of 20% or more of its value. For each such account the report included—explicitly and without the need for Taddonio to perform any calculations—the following: (i) the cost-to-equity ratio, turnover rate, and trade costs for the past month, three months, and twelve months; (ii) the number of solicited and unsolicited trades for the past month; and (iii) the percentage loss for the past month and past four months. Gentile testified, and his contemporaneous memoranda reflect, that he discussed the reports with Taddonio every month.[56] Fourth, from July 2013 to August 2014, four customers filed complaints against CSC with FINRA alleging excessive trading and churning by Beyn, Bader, and Cannata. Taddonio testified that he was aware of the complaints, two of which named him as a respondent.

Taddonio's daily review of account activity and trade costs, review of the "active account worksheets," and review of the "active account exception report" would have revealed the level of trading in the accounts and indicated that excessive trading was occurring. Although Taddonio started receiving some of these red flags of excessive trading in February 2012, he took no responsive steps until May 2013. During this more than one-year period, 23 of the 37 accounts discussed above had significantly high cost-to-equity ratios and turnover rates.

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[56] The Hearing Panel credited the testimony of Crockett and Gentile "insofar as it was consistent with the documentary evidence and the testimony of other witnesses."

In May 2013, at Gentile's recommendation, Taddonio instituted two policies. First, Taddonio reduced the maximum firm commission, markup, or markdown from 5% to 3.2%, and he began approving further maximum rate reductions (ranging from 2% to 0.05%) for 55 actively traded accounts that Gentile identified as performing poorly. Second, Taddonio approved sending "Active Account Letters" and "Affidavits of Support" to CSC customers that Gentile identified. Both documents requested signed attestations. By signing the letter, the customer would "confirm that you are aware of the activity in your account and . . . that the orders we have executed for you are in accordance with your investment objectives." By signing the affidavit, the customer would agree that "trading in the account [was not] excessive" and that "the size and frequency of the transactions are suitable." Although Gentile testified that CSC sent the documents due to concerns that trading in the accounts was excessive, neither document expressed those concerns, provided data on the level of trading, or set forth the costs in the accounts. The letter noted only that the "account is quite active" and that CSC "trust[s] that you are satisfied with your [broker's] efforts . . . and pleased with his servicing of your account."

Taddonio's new policies did not deter excessive trading. Of the 37 accounts discussed above, 15 continued to have high cost-to-equity ratios and turnover rates after CSC lowered commissions and sent customers Active Account Letters and Affidavits of Support. And another 14 developed high cost-to-equity ratios and turnover rates after CSC took those actions.

ii. Taddonio's conduct violated FINRA's rules.

We find that Taddonio, as the supervisor of the brokers, violated NASD Rule 3010 and FINRA Rule 2010 by failing to respond reasonably to red flags of excessive trading. As noted above, trading that results in a cost-to-equity ratio exceeding 20% or a turnover rate of at least 6 generally indicates that excessive trading has occurred.[57] Taddonio reviewed account activity daily and received reports showing that all 37 accounts exceeded at least one of those benchmarks, and that most accounts had cost-to-equity ratios and turnover rates many multiples beyond those benchmarks—in some cases as high as 824.6% and 262.12%, respectively. The reports also showed that the customers suffered large losses and that the brokers solicited the vast majority of trades. Taddonio's awareness of the customer complaints further alerted him to the excessive trading.

Taddonio's only responsive actions—commission reductions and sending Active Account Letters and Affidavits of Support—were not reasonably designed to prevent excessive trading (and in fact did not do so). The commission reductions were not reasonably designed to eliminate excessive trading because brokers could simply trade more often. For example, of the 37 accounts discussed above, 12 had rate reductions to 2% or below, yet 10 of those 12 accounts continued to have high cost-to-equity ratios and turnover rates. The Active Account Letters and Affidavits of Support also were not reasonably designed to eliminate excessive trading because

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[57] *See supra* note 18 and accompanying text. Because excessiveness is measured in reference to a particular customer, it is possible that, for a customer with atypical investment objectives or a unique financial condition, higher cost-to-equity ratios and turnover rates might be reasonable and not excessive. This is not the case here and we find that Beyn excessively traded and churned customer accounts.

they did not adequately inform the customers of the volume of trading in their accounts, the costs of that trading, or even alert the customers that CSC was concerned that the activity might constitute excessive trading in their accounts. Moreover, Taddonio allowed the brokers whose trading raised concerns to contact their customers about those documents, which risked having the brokers pressure the customers to sign them (and Beyn did in fact urge three customers to sign the affidavits, as noted above). And if a customer did not sign the documents, CSC did not restrict trading in the customer's account until at least seven months after CSC first sent the documents to its customers.

Taddonio contends that he did not encounter red flags that required responsive action. According to Taddonio, he was not obligated to address active account exception reports with corrective action because the reports were not "highlighted or marked in any way" to indicate which required additional attention. Taddonio notes that the reports were also included with other reports that "were roughly 6 inches thick and were given, 3-5 weeks AFTER the reported month ended." But the WSPs stated that Taddonio was responsible for reviewing "[a]vailable reports" as to suitability, including excessive trading. Taddonio cannot escape liability by claiming to have neglected that responsibility. Also, Gentile testified that he discussed the monthly reports with Taddonio, and, as noted, Taddonio was aware of other red flags.

Taddonio disputes that the customer complaints constituted red flags because (he claims) all firms receive baseless complaints, the number of complaints in comparison to the 3,700 accounts at CSC was "exceptionally small," and "99% of the accounts and 98% of the brokers at CSC went without issue." But, at least in the context of excessive trading, we have previously considered customer complaints to be red flags.[58] Taddonio was required to investigate those red flags regardless of whether other, or even most, accounts had no issues.[59]

Taddonio also contends that some of the customers' testimony was "inaccurate in terms of previous trading experience and knowledge of the markets or products traded in their accounts." But he provides no examples and we have found none.

In light of the red flags of excessive trading and Taddonio's failure to take steps reasonably designed to prevent such trading, we agree with the NAC that Taddonio exercised unreasonable supervision and accordingly violated NASD Rule 3010 and FINRA Rule 2010.[60]

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[58] *See Newport Coast Secs., Inc.*, 2020 WL 1659292, at *9 (considering customer complaints to be red flags of excessive trading).

[59] *See La Jolla Capital Corp.*, Exchange Act Release No. 41755, 1999 WL 624046, at *6 n.28 (Aug. 18, 1999) (rejecting argument that red flags concerning trading in issuer's stock did not "require[e] a response" by firm and its president because the trading constituted only "13 transactions over [a] four-month period" at branch office).

[60] *Cf. William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *20 (July 2, 2013) (finding that "doing nothing more than allowing the activity letters to be sent to" a customer, one of which highlighted year-to-date commissions of $250,000, "was wholly inadequate supervision" because supervisors "cannot rely solely upon complaints from customers to bring misconduct of employees to their attention, particularly where customers . . .

iii. The rules Taddonio violated are, and were applied, in a manner consistent with the Exchange Act's purposes.

NASD Rule 3010 is, and FINRA's application of it was, consistent with the Exchange Act's purposes because "the responsibility of broker-dealers to supervise their employees is a critical component of the federal regulatory scheme,"[61] and Taddonio neglected that responsibility. FINRA's application of FINRA Rule 2010 to Taddonio was consistent with the Exchange Act's purpose of "promot[ing] just and equitable principles of trade."[62]

b. The bar FINRA imposed on Taddonio is not excessive or oppressive.

For "egregious cases" of a failure to supervise, the Guidelines recommend suspending or barring the responsible individual.[63] Taddonio's supervisory failures were egregious. The red flags were so clear and numerous, and the cost-to-equity ratios and turnover rates in the accounts were so high, that Taddonio must have known that brokers were excessively trading for more than two years. Yet Taddonio took no steps that reasonably would have prevented the excessive

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may fail to realize that they have been mistreated" (internal quotation and citation omitted)), *pet. denied*, 751 F.3d 472 (7th Cir. 2014); *Bradford John Titus*, Exchange Act Release No. 38029, 1996 WL 705335, at *4 (Dec. 9, 1996) (finding unreasonable supervision where supervisor's instruction, after receiving red flags that representative "slow down" trading, did not "decrease his trading activity"); *Albert Vincent O'Neal*, Exchange Act Release No. 34116, 1994 WL 234316, at *4 (May 26, 1994) (finding that sending activity letters that "did not provide customers with any warning that there might be a problem with the trading in their accounts" was unreasonable supervision where supervisor had received red flags of excessive trading).

61 *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *14 (Feb. 13, 2015) (internal quotations omitted).

62 *See Thaddeus J. North*, Exchange Act Release No. 84500, 2018 WL 5433114, at *7 (Oct. 29, 2018) (finding the application of FINRA Rule 2010 to respondent's "failure to maintain a reasonable supervisory system furthered the [Exchange Act's] objective of promoting just and equitable principles of trade" and therefore was consistent with the Exchange Act's purposes), *pet. denied*, 828 F. App'x 729 (D.C. Cir. Oct. 23, 2020); *supra* note 45 and accompanying text (finding Rule 2010 consistent with Exchange Act).

63 Guidelines at 105.

trading from continuing.[64] The excessive trading also caused millions of dollars in losses to investors, which is an additional aggravating factor.[65]

For these reasons, we agree with the NAC that Taddonio's supervisory failures demonstrate that he "is unable to comply with the standards of conduct expected of securities industry professionals" and that he "presents a danger to the investing public." Accordingly, we conclude that the bar imposed on Taddonio from associating with any firm in any capacity was neither excessive nor oppressive and appropriately remedial.[66]

Taddonio contends that the bar is excessive because there is "no evidence that [he] ever suggested a broker should actively trade or churn a customer's account," and that there is no evidence he gave awards for "active trading." But the absence of even more aggravating factors does not make Taddonio's misconduct any less egregious.[67] And the two mitigating factors Taddonio raises are not compelling. First, Taddonio states that he fired Crockett as CCO despite the firm having just received a "spotless cycle-exam" because he thought Crockett "was not doing enough compliance-wise," and Gentile then enhanced compliance efforts. Second, Taddonio states that after the relevant period of January 2012 through December 2014, Gentile and another employee enhanced compliance efforts further by reaching out to clients more regularly about active trading and Active Account Letters, by placing Beyn on heightened supervision, and by getting "rid of the few brokers we had issue with." These facts, which pertain to either the firm's compliance generally or the period of time after the misconduct at issue, do not outweigh Taddonio's egregious failure to implement any procedures reasonably designed to prevent the excessive trading of which he was aware.

Furthermore, we do not find mitigating Taddonio's statement that he has some responsibility for hiring the people to whom he delegated supervisory responsibility and that he

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64 *See id.* (stating that Principal Considerations for failure to supervise are "[w]hether respondent ignored 'red flag" warnings"; the "[n]ature, extent, size and character of the underlying misconduct"; and the "[q]uality and degree of supervisor's implementation of the firm's supervisory procedures"); *see also id.* at 7-8 (Principal Consideration Nos. 8, 9, & 13) (directing adjudicators to consider whether respondent (i) "engaged in numerous acts and/or a pattern of misconduct"; (ii) "engaged in the misconduct over an extended period of time"; and (iii) committed misconduct as the result of an intentional act, recklessness, or negligence).

65 *See* Guidelines at 7-8 (Principal Consideration No. 11) (directing adjudicators to consider whether the misconduct resulted in injury to other parties).

66 *See Birkelbach v. SEC*, 751 F.3d 472, 480-81 (7th Cir. 2014) (holding that Commission did not abuse its discretion in affirming NAC's decision to increase bar imposed on firm principal from supervisory to all-capacities where principal's supervisory failure was egregious); *Studer v. SEC*, 260 F. App'x 342, 343-44 (2d Cir. 2008) (affirming Commission decision to sustain all-capacities bar for egregious failure to supervise churning in customer account).

67 *See Ted Harold Westerfield*, Exchange Act Release No. 41126, 1999 WL 100954, at * (Mar. 1, 1999) (rejecting argument that, "because [respondent] could have participated in an even more harmful scheme, his violation was not a case of 'truly egregious' behavior").

"should not have sat back and relied on them completely." According to Taddonio, with "the benefit of hindsight," there are areas that he "could have acted on sooner as CEO, and that [he] would act on immediately if they occurred today." As discussed above, the record does not establish that Taddonio delegated his responsibility for supervising the brokers. As a result, these assertions reflect Taddonio's effort to shift blame to the CCOs and are not mitigating. They do not demonstrate that he recognizes and accepts responsibility for his wrongdoing.[68]

Taddonio contends that he has no disciplinary history "related to the management of any client account" and that he has never "received a customer complaint for an account that [he] managed." But the absence of a disciplinary history is not mitigating.[69] And, in any case, Taddonio does have a disciplinary history. In 2016, the Commission sanctioned Taddonio in a settled order for willfully aiding, abetting, and causing CSC's violations of Exchange Act Section 17(a) and Rule 17a-4 thereunder.[70] As for customer complaints, although some have been filed against Taddonio as noted above, we do not consider them to be aggravating.[71]

Taddonio also contends that the sanction imposed on him is harsher than in five FINRA cases involving a failure to supervise. We have recognized that the appropriate sanction "depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action take[n] in other proceedings."[72] In any case, four of those

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68 *See* Guidelines at 7 (Principal Consideration No. 2) (directing adjudicators to consider whether respondent "accepted responsibility for and acknowledged the misconduct to . . . a regulator prior to detection and intervention").

69 *See* Guidelines at 7 & n.1 (Principal Consideration No. 1) (directing adjudicators to consider the "respondent's relevant disciplinary history"); *id.* at 7 n.1 ("[W]hile the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating[.]" (citing *Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006))).

70 *Craig Scott Capital, LLC*, Exchange Act Release No 77595, 2016 WL 1444441 (Apr. 12, 2016).

71 *See* Guidelines at 2 (General Principle No. 2) (stating that "[a]rbitration proceedings, whether pending, settled, or litigated to conclusion," are not "relevant to the determination of sanctions because they do not qualify as disciplinary history").

72 *Murphy*, 2013 WL 3327752, at *28 (internal quotations omitted); *see also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) ("The employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.").

cases were settled,[73] and "comparisons to sanctions in settled cases are inappropriate."[74] The fifth case is distinguishable because it involved different underlying misconduct and no customer losses.[75]

2. We sustain FINRA's finding that Taddonio gave false testimony to FINRA and the bar FINRA imposed for this violation.

a. Taddonio gave false testimony at his OTR.

FINRA Rule 8210(a) requires associated persons to testify "under oath . . . with respect to any matter involved in the investigation, complaint, examination, or proceeding." Providing false testimony violates this rule and FINRA Rule 2010.[76]

i. Taddonio engaged in the conduct FINRA found.

On March 20, 2015, under oath at an OTR, Taddonio testified that CSC did not have recording devices and that CSC and its personnel did not record calls. But the following evidence establishes that Taddonio knew his testimony was untrue:

1. A junior broker emailed Taddonio a recorded call with a customer, and testified that they listened to the call together to improve the broker's sales pitch. The broker testified that Taddonio encouraged him to record calls for "quality and training purposes," that there was a firm-provided recording device on his desk, and that other brokers also recorded calls.

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[73] *Dep't of Enforcement v. Kristopher C. Kessler*, Complaint No. 2010025708501 (FINRA Office of Hearing Officers Sept. 9, 2015) (Order Accepting Offer of Settlement), https://www.finra.org/sites/default/files/fda_documents/2010025708501_FDA_JMX2526%20%282019-1563104966310%29.pdf; *Dep't of Enforcement v. Roman Tyler Luckey*, Complaint No. 2012030564701 (FINRA OHO Aug. 14, 2015) (Order Accepting Offer of Settlement), https://www.finra.org/sites/default/files/fda_documents/2012030564701_FDA_JG41595%20%282019-1563070757197%29.pdf; *Dep't of Enforcement v. William A. Morgan*, Complaint No. 2007007400504 (FINRA Mar. 31, 2010) (Letter of Acceptance, Waiver and Consent) https://www.finra.org/sites/default/files/fda_documents/2007007400504_FDA_VA702014%20%282019-1563209375126%29.pdf; *Dep't of Enforcement v. Melissa A. Strouse*, Complaint No. 2013034966701 (FINRA OHO Mar. 8, 2017) (Order Accepting Offer of Settlement), https://www.finra.org/sites/default/files/fda_documents/2013034966701_FDA_VA701847%20%282019-1563193159512%29.pdf.

[74] *Newport Coast Secs., Inc.*, 2020 WL 1659292, at *14 (internal quotations omitted).

[75] *Dep't of Enforcement v. Merrimac Corporate Secs., Inc.*, Complaint No. 2011027666902r, 2020 WL 1652603 (FINRA NAC Mar. 27, 2020) (imposing 10-month suspension on CCO for failure to supervise the deposit of penny stocks and the firm's use of foreign finders).

[76] *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 WL 7873431, at *8-9 (Dec. 4, 2015), *pet. denied*, 663 F. App'x 353 (5th Cir. 2016).

2. Taddonio emailed Porges a recorded call between Porges and a customer.

3. Taddonio admitted at the hearing that he had a recording device.

4. Photos of CSC's office show recording devices on brokers' desks.

5. Receipts show that CSC purchased 36 recording devices from June 2012 to April 2014.[77] A CSC sales assistant and another individual sent three emails to Taddonio, two of which stated that CSC purchased recording devices or recording controls, and all of which attached receipts showing the purchase of recording devices and recording controls.

6. FINRA staff copied Taddonio's hard drive in 2015 and determined that hundreds of .wav audio files had been deleted. Also, a vendor CSC hired to back-up its computer server copied 5,000 .wav audio files in 2014, but deleted them by the time FINRA staff requested them in 2015. An email from the vendor to CSC in 2014 included a list of file paths for the audio files, which showed that they were created using USB recorders like those purchased by CSC. Some of the file paths also included the names of CSC customers.

The fact that the CCOs testified they never saw recording devices on brokers' desks is insufficient to establish that Taddonio testified truthfully in light of this overwhelming evidence.

Taddonio contends that FINRA staff asked him at the OTR if "the firm" provided or used recording devices, and that he truthfully denied that it had done so because only the brokers, and not the firm, requested or used recording devices and CSC had no policy that brokers could get recording devices. But the firm provided the devices regardless of its policy or who requested them. In any case, FINRA staff asked Taddonio whether "anyone at the firm ever use[d]" devices to record conversations, to which Taddonio answered "no." Taddonio contends that this question only "make[s] sense" in the context of whether "CSC had a firm-wide recording system that recorded all brokers[']s calls," but the question was plainly not so limited.

Taddonio argues further that (1) he did not encourage recording, and (2) his recording of Porges' call with a customer was only one instance. Even if these arguments are true, they do not make Taddonio's response to FINRA's question true. Taddonio also states that recording calls was against the firm's WSPs, and suggests that the junior broker attempted to avoid "potential liability" for violating the WSPs by lying at the hearing when he said that Taddonio encouraged him to record calls. But the firm's WSPs did not forbid recording calls. No more persuasive is Taddonio's contention that he does not remember recording the call between Porges and a customer or receiving a recording from the junior broker. Even if true, the other evidence that Taddonio knew the firm and its brokers used recording devices is overwhelming.

Taddonio also contends that the photos of recording devices on brokers' desks do not demonstrate that he knew that brokers were recording calls because (i) there is no evidence that

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[77] The Hearing Panel found that CSC purchased 50 recording devices, but Taddonio pointed out correctly that recording controls were included in that number. Taddonio also counted only 12 recording devices in the receipts, but there are actually 36 such devices in the receipts.

any devices remained on the desks "for longer than th[e] day" the photos were taken and (ii) one photographed device would have been difficult for Taddonio to see because it was "hidden amongst multiple other items behind large screens and a divider wall" and was "50 feet beyond [Taddonio's] office." But Taddonio cites no evidence to support his suggestion that CSC purchased recording devices over a nearly two-year period and installed them for only one day. And Taddonio appears in one of the photos in which a recording device is in plain sight.

Taddonio contends further that the instructions for some recording devices stated that they could be used for "simple and easy note taking," and that brokers may have used the devices for that purpose instead of recording calls. But there is substantial evidence, including actual recordings, that the devices were used to record calls. And although Taddonio contends that "[t]here was not a single recording of a conversation . . . on any of the 10 hard drives copied by FINRA in their unannounced visit" to the firm, it is unclear how this contention helps Taddonio because CSC and its vendor deleted thousands of audio files, including hundreds on Taddonio's hard drive. Taddonio also contends that the file paths for .wav audio files copied by the vendor included the names of three customers and one broker from his prior firms. That may be, but those four individuals were also at CSC. More than 1,000 of the file paths were dated from 2012 to 2014, when CSC was in business, and some included the names of CSC customers. Finally, Taddonio contends that Porges "intercepted" CSC's April 2014 order of five recording devices and stored them "unopened . . . in the firm's IT room," and that Porges told the sales assistant that "she could not order recorders." Even if true, CSC had an additional 31 recording devices.

ii. Taddonio's conduct violated FINRA's rules.

Taddonio's false testimony under oath at an OTR violated FINRA Rules 8210 and 2010. Taddonio contends that his testimony could not have been important to FINRA's investigation because any recordings had already been deleted by the time of his OTR. But the record shows only that the recordings had been deleted by March 26, 2015—the date of FINRA staff's unannounced visit to copy CSC's hard drives.[78] Taddonio's OTR was six days earlier; it is possible recordings still existed then. The sooner FINRA got truthful testimony, the more likely it was to get useful evidence. In any case, as a FINRA examiner testified, Taddonio's false testimony "made it very difficult to finish [the] examination" and resulted in substantial additional work to determine that CSC did, in fact, record calls.

iii. The rules Taddonio violated are, and were applied in a manner, consistent with the Exchange Act's purposes.

FINRA Rule 8210 is, and its application was, consistent with the Exchange Act's purposes because the rule "is essential to FINRA's ability to investigate possible misconduct by

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[78] The record does not show when or why the recordings were deleted from CSC's server or hard drives. A FINRA staff member testified that the vendor CSC hired to back-up its server told him that it deleted the back-up files because of "nonpayment" by CSC.

its members and associated persons,"[79] and Taddonio's false testimony impeded FINRA's investigation. Also, FINRA's application of FINRA Rule 2010 to Taddonio was consistent with the Exchange Act's purpose of "promot[ing] just and equitable principles of trade."[80]

b. The bar FINRA imposed on Taddonio is not excessive or oppressive.

For failing to respond truthfully to a FINRA Rule 8210 request, the Guidelines state that "a bar should be standard" but that adjudicators should consider a suspension "[w]here mitigation exists." No mitigation exists here. Indeed, there are aggravating rather than mitigating factors. Taddonio lied about information that was important to FINRA's investigation.[81] As the NAC stated, the "existence and content of taped conversations was important to determining whether" excessive trading and churning occurred at CSC.

We conclude that the bar imposed on Taddonio from associating with any firm in any capacity is neither excessive nor oppressive and is appropriately remedial. Individuals who supply false information to FINRA during an investigation are "presumptively unfit for employment in the securities industry" because their misconduct "can conceal wrongdoing" and thereby "subvert" FINRA's ability to "perform its regulatory function and protect the public interest."[82] Barring Taddonio is necessary to protect the public from an individual who would prevent FINRA from performing its self-regulatory function by lying during an investigation.

Taddonio contends that the sanction imposed on him is harsher than in *Merrimac Corporate Secs., Inc.*, in which the NAC suspended a CCO for sending document productions to FINRA that he knew included more than 30 forms with forged signatures.[83] As discussed above, the appropriate sanction "depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action take[n] in other proceedings."[84] In

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79 *Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 WL 5693099, at *5 (Sept. 29, 2015).

80 *See Elgart*, 2017 WL 4335050, at *7 (finding FINRA Rule 2010, and its application in a case involving the provision of false information to FINRA, to be consistent with the purposes of the Exchange Act); *supra* note 45 and accompanying text (finding Rule 2010 consistent with the Exchange Act).

81 Guidelines at 33 (Principal Consideration No. 1) (directing adjudicators to consider the "[i]mportance of the information requested as viewed from FINRA's perspective").

82 *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 WL 3891311, at *9 (Aug. 22, 2008) (internal quotations omitted).

83 *Dep't of Enforcement v. Merrimac Corporate Secs., Inc.*, Complaint No. 2011027666902, 2017 WL 2351436 (FINRA NAC May 26, 2017), *aff'd in relevant part*, Exchange Act Release No. 86404, 2019 WL 3216542 (July 17, 2019).

84 *Murphy*, 2013 WL 3327752, at *28.

any case, the misconduct at issue in *Merrimac* is not the same as the misconduct at issue here. In a case of providing false testimony to FINRA, we have previously sustained a bar.[85]

III. Applicants' procedural contentions

A. Enforcement's document production did not deny Applicants a fair hearing.

Applicants contend that because Enforcement's electronic document production was 5,000,000 pages, not indexed, and contained some documents that could not be opened, they did not have a fair opportunity to review the production before the hearing in violation of their due process rights. Constitutional due process does not apply to FINRA proceedings.[86] Nonetheless, Exchange Act Section 15A requires that such proceedings be fair.[87]

FINRA Rule 9251 provides that Enforcement must make available for inspection and copying all documents prepared or obtained in connection with its investigation.[88] Here, Enforcement complied with Rule 9251 by producing an electronic copy of its file in this matter to Applicants' attorneys on June 1, 2016. They did not file any motions concerning the production by the July 1, 2016 deadline set by the Hearing Officer. Applicants also had ample opportunity to review the production before the hearing. As noted, they had possession of the production as of June 1, 2016, eight months before the scheduled hearing. They also received

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85 *Ortiz*, 2008 WL 3891311, at *9.

86 *William H. Murphy & Co., Inc.*, Exchange Act Release No. 90759, 2020 WL 7496228, at *17 (Dec. 21, 2020). Beyn contends that FINRA is a state actor but courts have rejected the contention, at least for purposes of the due process clause. *See, e.g.*, *Murphy*, 2020 WL 7496228, at *17 n.88 (citing *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("Epstein cannot bring a constitutional due process claim against the NASD [FINRA's predecessor], because '[t]he NASD is a private actor, not a state actor.'") (alterations in original) (citation omitted); *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) (finding that "NASD is a private actor, not a state actor")). Beyn also contends that FINRA is a state actor for purposes of this case because it and the Commission "were involved in the [investigation of] CSC together." But the record does not indicate any such Commission involvement. Finally, Beyn contends that FINRA violated the Federal Rules of Civil Procedure. But those rules do not apply here. *See* FINRA Rule 9200, *et seq.* (procedural rules for FINRA disciplinary proceedings).

87 15 U.S.C. § 78*o*-3(b)(8) (requiring that FINRA's rules be "in accordance with the provisions of subsection (h) of this section, and, in general, provide a fair procedure for the disciplining of . . . persons associated with members"); *id.* § 78*o*-3(h)(1) (requiring that in disciplinary proceedings, FINRA "bring specific charges, notify [the person associated with a member] of, and give him an opportunity to defend against, such charges, and keep a record"); *see also David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *6 n.35 (July 27, 2015) (stating that "the Exchange Act provisions requiring fair procedures in FINRA disciplinary proceedings give rise to 'due-process like' requirements" (quoting *D'Alessio v. SEC*, 380 F.3d 112, 121, 123 (2d Cir. 2004))).

88 FINRA Rule 9251(a).

the subset of the production that Enforcement planned to introduce at the hearing on December 15, 2016, over a month before the hearing commenced on January 24, 2017.[89]

On January 5, 2017, three weeks before the hearing, Beyn requested a 30-day postponement, stating that he had been unaware of the size of the production and was having "problems opening up many files." The Hearing Officer denied the motion in part because "many of the key documents appear[ed] to be included in Enforcement's proposed exhibits" and "Beyn d[id] not identify any documents or classes of documents not included in Enforcement's proposed exhibits that he believe[d] he need[ed] to locate in Enforcement's production in order to defend himself." To the extent Beyn argues that the Hearing Officer erred in denying his postponement request under FINRA Rule 9222(b), we find no abuse of discretion in light of the timing of the request and Beyn's failure to justify the need for a postponement.[90]

Moreover, the Hearing Officer ordered (i) that Enforcement make itself available for a week after the hearing to assist Applicants in accessing the production at FINRA's office; and (ii) that the record remain open for 30 days after the hearing to allow Applicants to request that additional exhibits be introduced into evidence and to request that witnesses be recalled. Both Applicants visited FINRA's office after the hearing to access the production, and the Hearing Officer granted Taddonio a one-week extension "to complete his review and to identify any documents that he believes are relevant." Only Taddonio introduced additional exhibits into evidence, and neither Applicant sought to recall witnesses. Given these circumstances, we find that FINRA did not deny Applicants a fair opportunity to defend against the charges.[91]

Beyn contends that he was unable to access the production at FINRA's office after the hearing because it "was not compatible with [his] Apple MAC." But Beyn has failed to support

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89 Beyn contends that he was not given access to the documents Enforcement intended to use at the hearing, but the record contradicts that contention.

90 *See* FINRA Rule 9222(b) (requiring "good cause" to postpone a hearing); *Richard Allen Reimer, Jr.*, Exchange Act Release No. 84513, 2018 WL 5668898, at *6-7 (Oct. 31, 2018) (recognizing that in FINRA proceedings the hearing panel has broad discretion in determining whether to grant a request for a continuance and finding no abuse of discretion in denying FINRA Rule 9222(b) motion to postpone hearing because, among other things, applicant "was aware of the date of the hearing for four months yet waited until less than a month before the hearing to request a postponement" and applicant did not show "that the denial prejudiced him").

91 *See, e.g., Gateway Stock & Bond, Inc.*, Exchange Act Release No. 8003, 1966 WL 84124, at *3 (Dec. 8, 1966) (rejecting argument that NASD proceeding was unfair because "[a]pplicants have not shown that they were prejudiced by the manner in which evidence was presented or . . . that any material evidence was not produced"); *see also Bernerd E. Young*, Exchange Act Release No. 774421, 2016 WL 1168564, at *20 (Mar. 24, 2016) (finding no denial of due process to respondent from having limited access to documents held by receiver because respondent failed to show "why the access provided was insufficient, how any of the other records the receiver held might have been relevant, or identified any categories of documents that were relevant to his defense"), *pet. dismissed*, 956 F.3d 650 (D.C. Cir. 2020).

this contention with evidence.[92] And even if true, Beyn has not shown prejudice because (i) he did not request an extension of time to access the documents after the hearing; and (ii) he spent only one day at FINRA's office after the hearing to access the production.[93]

B. FINRA's procedural rulings did not deny Applicants a fair hearing.

Beyn contends that his due process rights were violated because he was not given more time to "get up to speed" after his counsel withdrew on October 26, 2016, and that the scheduling order "should have been altered" at that time. But Beyn did not request a postponement at that time; he stated that he did not want the hearing postponed on November 9, 2016.[94] Beyn waited until January 5, 2017, 19 days before the scheduled hearing, to request a postponement. As discussed above, the Hearing Officer did not err in denying that request.[95]

Beyn also contends that the Chief Hearing Officer erred by consolidating his case with that of CSC, Taddonio, and Porges and denying his subsequent motion to sever.[96] FINRA Rule 9214 authorizes consolidation where it "would further the efficiency of the disciplinary process" and where the "subject complaints involve common questions of law or fact."[97] In determining whether to consolidate or sever, FINRA considers: "(1) whether the same or similar evidence reasonably would be expected to be offered at each of the hearings; (2) whether the proposed consolidation would conserve the time and resources of the [p]arties; and (3) whether any unfair prejudice would be suffered by one or more [p]arties as a result of the consolidation."[98]

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92 A FINRA staff member testified that, before the hearing, he helped Beyn access the production with Beyn's "Windows 10 computer," and that Beyn told him "he was able to access the files." The staff member testified that there were "two encrypted zip files that were not accessible and we worked through those issues in supplying him with unencrypted zip files to download." At the hearing, Beyn claimed that his Windows computer stopped working and he had to use his MAC instead. As discussed above, the Hearing Panel found Beyn not credible.

93 *See, e.g.*, *Roe v. Operation Rescue*, 920 F.2d 213, 217 (3rd Cir. 1990) ("[I]ndifference or inaction, when the defendant is fully aware of his due process rights to be present at the contempt hearing, constitutes the intentional relinquishment of such rights."); *Benson v. United States*, 421 F.2d 515, 518-19 (9th Cir. 1970) (affirming finding that no prejudice resulted to appellant from failure to produce a witness where "appellant made no attempt to personally obtain the presence of the witness or to obtain his affidavit or other admissible testimony").

94 *See Benson*, 421 F.2d at 518 (affirming finding that appellant was not denied right to adequate representation of counsel by hearing officer's failure to grant a continuance where "no motion for continuance or objection to the proceedings was made during the hearing").

95 *See supra* note 90 and accompanying text.

96 The Hearing Officer assigned to the matter made most of the procedural rulings in the case, but FINRA Rule 9214 provides that the Chief Hearing Officer for all FINRA hearings rules on motions for consolidation and severance. *See* FINRA Rule 9214.

97 FINRA Rule 9214(a) & (b).

98 *Id.*; FINRA Rule 9214(d) & (e).

We find that consolidation was proper under the circumstances. As the Chief Hearing Officer found, the cases involved common questions of law and fact, "such as whether Beyn engaged in excessive trading." We also agree that consolidation furthered the efficiency of the disciplinary process because there was "substantial overlap in the documentary evidence and the witnesses"; it would have been "burdensome to ask the customer witnesses" to testify in two separate hearings "about the same matters"; and it might have lessened the witnesses' willingness to provide testimony. As for Beyn's concern that consolidation would taint his case through the introduction of evidence relevant to charges against others, we further agree with the Chief Hearing Officer that members of FINRA hearing panels can appropriately "distinguish between relative levels of culpability" in order "to avoid attributing any wrongdoing by one party to another." Finally, our review of the record reveals no prejudice to Beyn's case before either the Hearing Panel or the NAC because of the consolidation.[99]

Beyn contends that, in denying his motion to sever, the Chief Hearing Officer could not have concluded that the cases involved "substantial overlap of evidence" because he could not have known what evidence Beyn was going to introduce. But under FINRA Rule 9214, the Chief Hearing Officer need not know the exact evidence to be offered; the Chief Hearing Officer need consider only "whether the same or similar evidence reasonably would be expected to be offered for each case," which can be discerned from the nature of the claims.

Separately, Taddonio contends that the NAC denied him the opportunity to withdraw the appeal of his supervisory violations because, when he stated during oral argument that he wanted to do so, the NAC informed him that it would review the issue on its own accord pursuant to FINRA Rule 9312(d) if he withdrew his appeal.[100] This exchange did not deny Taddonio the opportunity to withdraw his appeal; it simply conveyed the futility of filing a notice of withdrawal. Ultimately, it was Taddonio's choice not to file a withdrawal notice.

Taddonio also contends that the NAC did not follow the procedure under FINRA Rule 9312(d) for reviewing an issue on its own motion. But the NAC did not need to call the issue for review on its own motion because Taddonio did not file a withdrawal notice. Taddonio further contends that Enforcement should have been given an opportunity to withdraw its cross-appeal, but Enforcement had no cross-appeal to withdraw.

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99 *See, e.g.*, *Donner Corp. Int'l.*, Exchange Act Release No. 55313, 2007 WL 516282, at *17 (Feb. 20, 2007) (rejecting argument that motion to sever should have been granted where there were common issues of law and fact and the record showed that the "NASD judged each Applicant solely on the record evidence pertaining to that Applicant"); *Carlton Wade Fleming, Jr.*, Exchange Act Release No. 36215, 1995 WL 539462, at *3 (Sept. 11, 1995) (rejecting argument that consolidation prejudiced respondent by preventing the District Business Conduct Committee "from fairly considering the charges against him" as a result of "testimony concerning other respondents" because the "NASD frequently holds disciplinary hearings involving multiple respondents" under a Commission-approved procedure).

100 FINRA Rule 9312(d) provides that, if a party withdraws an appeal, "a member of the [NAC] . . . shall have the right to call for review a [Hearing Panel] decision."

C. The Hearing Officer's evidentiary rulings did not deny Applicants a fair hearing.

Applicants contend that CSC's cycle exam exit letters should have been admitted into evidence because they show that, at the time of the exam, FINRA did not raise concerns about excessive trading, suitability, or supervision. Beyn contends that FINRA cannot "retroactively" and "arbitrarily decide when to state [that an] infraction . . . has occurred." And Taddonio contends that if FINRA had raised compliance issues in those letters CSC "certainly would have made additional adjustments." But FINRA's failure to identify a deficiency during an examination does not excuse a violation.[101] An exam's failure to note exceptions is not tantamount to a finding that a member firm complied with FINRA's rules and does not prevent FINRA from bringing a disciplinary action for a violation of those rules.[102] As a result, the Hearing Officer did not abuse his discretion in excluding the letters from the record.[103]

Beyn contends further that he was denied due process because Enforcement did not obtain all trade confirmations for his six customers during its investigation. According to Beyn, these trade confirmations were necessary to show the number of solicited trades and whether customers "had an opportunity to object to the contents of the confirmation[s]," and for Beyn to examine customers "who alleged at the hearing that [they] didn't know about the commissions." But FINRA was not required to obtain additional documentation before issuing its complaint.[104] And after FINRA issued the complaint Beyn could have filed a motion under FINRA Rule 9252 to request that Enforcement invoke FINRA Rule 8210 to obtain the trade confirmations.[105] Beyn failed to do so by the July 22, 2016 deadline set in the scheduling order.

Moreover, Beyn does not establish that the Hearing Officer erred in denying the motion that Beyn filed on December 4, 2016, to compel Enforcement to produce the trade confirmations. The Hearing Officer denied the motion because: (i) Enforcement had "complied with its

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101 *Lane*, 2015 WL 627346, at *9.

102 *Commonwealth Capital Sec. Corp.*, Exchange Act Release No. 89260, 2020 WL 3868981, at *5 & n.21 (July 8, 2020) (citing *Boruski v. SEC*, 289 F.2d 738, 740 (2d Cir. 1961) ("Nor did the failure of the NASD to advise petitioner of non-compliance operate as an estoppel or an implied admission that his books were in approved form."); *Rita H. Malm*, Exchange Act Release No. 35000, 1994 WL 665963, at *8 n.40 (Nov. 23, 1994) (rejecting contention that "because the NASD noted no markup, pricing, or other 'exceptions' during its audit . . . NASD was subsequently precluded from bringing markup or supervisory charges").

103 *See* FINRA Rule 9263(a) (affording a Hearing Officer discretion in determining whether to exclude evidence "that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial").

104 *Cody*, 2011 WL 2098202, at *16.

105 *See* FINRA Rule 9252 (providing that a respondent may request that FINRA invoke Rule 8210 to compel the production of documents and that the hearing officer shall grant the request "only upon a showing that: the information sought is relevant, material, and non-cumulative; the requesting Party has previously attempted in good faith to obtain the desired Documents and testimony through other means but has been unsuccessful in such efforts; and each of the persons from whom the Documents and testimony are sought is subject to FINRA's jurisdiction").

discovery obligations" under FINRA Rule 9251 by producing a "copy of its file"; (ii) Beyn's "counsel did not object to the discovery" or file a FINRA Rule 9252 motion by the scheduling order's deadline; and (iii) it was not the case that Beyn required additional discovery in order to defend himself. The last point is sufficient for us to find that Beyn was not denied due process. Beyn has not shown that the record contained insufficient information about commissions and solicitations; he does not contend that the more than 50 trade confirmations in evidence were not representative of the commission information that customers received; and the record includes CSC's trade blotter, which states for each trade whether the broker marked it as solicited or unsolicited. Accordingly, Beyn has not established "that any of the additional documentary evidence he sought would have aided in his defense of this proceeding."[106]

Beyn also contends that his due process rights were violated because Enforcement did not produce its correspondence with customers from the investigation or its notes from interviewing customers. FINRA Rule 9251(a)(1) requires Enforcement to "make available for inspection and copying" documents "in connection with the investigation," including written requests to and all documents obtained from persons not employed by FINRA.

Enforcement represented to the Hearing Officer that it complied with FINRA Rule 9251 by producing its entire file in this matter on June 1, 2016. Beyn's counsel then failed to file a motion relating to Enforcement's production by the July 1, 2016 deadline in the scheduling order, and Beyn waited until January 4, 2017 to request the correspondence and investigative notes. The Hearing Officer denied that request because Beyn (i) "offer[ed] no justification for his delay" in filing the "untimely" motion; (ii) "offer[ed] no basis to conclude that Enforcement ha[d] failed to produce all of the documents required" by FINRA Rule 9251; and (iii) "failed to demonstrate that he [was] entitled to additional documents." Enforcement subsequently confirmed during the hearing that it had produced its investigative notes taken when speaking with customers. Beyn has not established that the Hearing Officer erred in denying his request.

Taddonio contends that he was denied a fair hearing because two witnesses, Beyn and Bader, gave false testimony against him and CSC. Taddonio also argues that the default decision against CSC should not have been included in the record because it could prejudice the decision against him. But the NAC did not rely on Beyn's testimony or the default decision in making findings as to Taddonio. And although it relied on Bader's OTR testimony to support its finding that Taddonio testified falsely about recording devices, we need not and do not rely on Bader's testimony to find that the record supports the NAC's conclusion that Taddonio testified falsely. As indicated above, ample other evidence supports this conclusion.

Finally, Taddonio contends that it was improper for a FINRA staff attorney to advise the NAC and then handle this appeal. But we have found no conflict of interest where staff

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106 *Cody*, 2011 WL 2098202, at *17 & n.61 (rejecting argument that proceeding was unfair because hearing officer denied applicant's request that Enforcement produce order tickets).

participates in a decision and its defense.[107] In any event, we have conducted our own independent review of the record and have determined based on that review that Beyn and Taddonio committed the violations FINRA found and that the sanctions are not excessive.[108]

An appropriate order will issue.[109]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa Countryman
Secretary

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[107] *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 WL 1892137, at *15 (June 29, 2007) (finding no conflict where an NASD attorney "work[ed] on a brief [to the SEC] defending [an] earlier decision" he participated in as chairman of the NAC panel).

[108] *Asensio & Co., Inc.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *13 (Dec. 20, 2012) (finding no improper contact between FINRA's Office of the General Counsel and its Department of Member Regulation but finding in any event that the Commission's independent review of the record supported FINRA's decision).

[109] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97325 / April 19, 2023

Admin. Proc. File Nos. 3-19007, 3-19012

In the Matter of the Application of

EDWARD BEYN and CRAIG S. TADDONIO

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against Edward Beyn and Craig S. Taddonio is sustained.

By the Commission.

Vanessa A. Countryman
Secretary