BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Kent M. Houston Carlsbad, CA, Respondent.	DECISION Complaint No. 2006005318801 Dated: February 22, 2013

On remand from the Securities and Exchange Commission for reconsideration of sanctions. Held, sanctions modified.

Appearances

For the Complainant: Leo F. Orenstein, Esq. and Joel T. Kornfeld, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

I. Background

This matter is before us on remand from the Securities and Exchange Commission. In a National Adjudicatory Council ("NAC") decision dated December 22, 2010, we found that Kent M. Houston ("Houston") engaged in outside business activities, and violated NASD Rules 3030 and 2110, by acting as a trustee for his great aunt's trust and receiving compensation for his activities. We also found that Houston violated NASD Rules 8210 and 2110 by failing to appear for an on-the-record ("OTR") interview with FINRA staff. We barred Houston in all capacities for his failure to provide testimony. We also determined that a one-year suspension and a $50,000 fine for the outside business activities were appropriate. Due to the imposition of the bar, however, we declined to impose the suspension and fine.

Houston appealed the NAC's decision to the Commission. On appeal, the Commission sustained the NAC's findings of violation. The Commission determined that the record was

replete with evidence that Houston did not give his firm written notice of his outside business activities, in violation of NASD Rules 3030 and 2110. The Commission also found that, despite having notice of the request for his OTR and being advised of the potential disciplinary consequences for failing to appear, Houston failed to appear for testimony, in violation of NASD Rules 8210 and 2110. With respect to sanctions, the Commission determined that FINRA previously issued several Rule 8210 requests seeking written responses and documents as part of a single investigation. The Commission reasoned that because Houston responded to the first two of these written requests and partially to the third request, Houston's failure to appear for testimony was not a complete failure to respond under FINRA's then-current edition of the Sanction Guidelines. The Commission therefore remanded the matter to the NAC to reconsider sanctions consistent with the finding that Houston partially responded to written requests prior to his failure to appear for testimony.

On remand, we find it appropriate to suspend Houston for two years and fine him $25,000 for his failure to provide OTR testimony. We also impose a consecutive one-year suspension and an additional $50,000 fine for Houston's outside business activities as a trustee.

II. Facts

The following facts are pertinent to the Commission findings that Houston engaged in outside business activities and failed to provide OTR testimony, in violation of FINRA rules. We review these facts in connection with the consideration of appropriate sanctions for these violations.

A. Outside Business Activities

1. Houston Was a Trustee

In 1971, VB and WB (together, "the Bs"), Houston's great aunt and uncle, established a trust under which they designated a national bank as trustee and directed the trustee to pay the trust's net income to the Bs on a monthly basis. The trust provided that the trustee was entitled to compensation for its services. WB died in 1986, and the trust was amended several times in the ensuing years. On April 24, 2001, VB appointed Houston to act as co-trustee with her, and she specified that Houston would serve as sole trustee if VB was unwilling or unable to serve.

On April 26, 2001, two days after his appointment as co-trustee, Houston opened an account for the trust at First Wall Street Corp. ("First Wall Street" or the "Firm"), where he had been a registered representative since 1989. The account application listed VB and Houston as co-successor trustees and Houston as the account representative. The account was opened in the name "[VB] & Kent Houston Co-Succ TTEE, [VB] Trust." The mailing address on the application was Houston's business address as shown in the Central Registration Depository ("CRD"®) at that time. Houston had the ability to write checks on the account without VB's signature on the checks.

Houston became the trust's sole trustee in June 2005 after VB's doctors indicated that she could no longer manage her finances. VB died in June 2006.

2. Houston Received Compensation from the Trust

From October 2001 through January 2006, Houston received more than $400,000 in the form of checks drawn on the trust's First Wall Street account.[1] From October 2001 through 2002, Houston received $98,800 in checks from the trust account payable to him that VB signed. Houston's personal notes related to the trust account state that VB agreed to pay him trustee fees and that she also agreed to pay him for "separate trust w[or]k." From 2003 until VB died in 2006, Houston signed all checks drawn on the trust account. In 2003, he wrote checks to himself totaling $41,600. In 2004, Houston wrote seven checks to himself, or to Countrywide Bank for his benefit as payments on his home equity line of credit, totaling $167,000. In 2005, Houston wrote three checks payable to Countrywide Bank for his benefit, totaling $119,000. Houston wrote a final check to Countrywide Bank in the amount of $27,500 in January 2006.

3. Houston Failed to Disclose His Trustee Activities on Firm Compliance Forms

Houston did not give First Wall Street written notice that he was engaged in an outside business activity or that he was receiving compensation for acting as a trustee for VB's trust.[2] First Wall Street's "Standards of Conduct," contained within the Firm's written compliance and supervisory procedures, required that its registered representatives disclose the name of a potential outside employer, the type of business to be performed, the method of compensation, and the amount of time involved in the outside activity. The Firm also required that a representative receive written approval from the Firm before engaging in the disclosed activity.

Houston failed to disclose his trustee activities on five occasions over the course of four years on Firm forms that expressly stated that acting as a trustee required disclosure. Houston did not disclose his trustee activities on the Firm's "Independent Contractor Agreement" that he signed and dated December 31, 2002 (the "2002 Agreement"). The 2002 Agreement stated that Houston was to notify the Firm of any outside business activities in which he was engaged or intended to engage and expressly delineated acting as a trustee as an example of an outside business activity. Appended to the 2002 Agreement was an "Outside Business Activity Notification Form" ("Notification Form"). Rather than disclose that he was acting as a trustee for VB's trust, Houston left the Notification Form blank and initialed the form.

In 2003 and 2004, Houston again failed to disclose his trustee activities to First Wall Street when he completed the Firm's 2003 and 2004 Independent Contractor Agreements (the

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[1] Because Houston was the registered representative for the trust's First Wall Street account, Houston also received commissions from the Firm for transactions done on behalf of the trust.

[2] For purposes of our discussion infra, we use the term "trustee" to reflect either a co- or sole trustee.

"2003 Agreement" and "2004 Agreement"). In December 2004, Houston also completed First Wall Street's "Outside Business Activities Statement" ("2004 Statement"). Houston acknowledged in the 2004 Statement that he understood the Firm's policies and procedures required disclosure to the Firm of all outside business activities and checked the box next to the statement, "I have NOT conducted any outside business activities during the past year."

In August 2005, First Wall Street's compliance department distributed a memorandum to its registered representatives regarding potential conflicts of interest arising from involvement in a client's personal matters. The memorandum directed recipients to contact the Firm's compliance department "immediately in writing if you are currently listed as a trustee, . . . or if you perform any duties that involve compensation of any kind that does not come through the [F]irm in the form of commissions and is not included on your [Uniform Application for Securities Industry Registration or Transfer ("Form U4")] as an approved outside business activity."[3] Houston did not notify the Firm's compliance department in writing that he was a trustee. The Firm's compliance department issued a follow-up memorandum in September 2005 that reminded its registered representatives that they were required to request written approval for, among other things, acting as a trustee and distributed a "Disclosure of Appointment" form. The Disclosure of Appointment form required registered representatives to disclose all trusteeship appointments irrespective of whether they were approved by the Firm previously. In October 2005, Houston completed the form and checked the box next to the statement, "I have NOT accepted any appointment as trustee, successor trustee, executor, or power of attorney over any client including my immediate family during the past year," despite having served as a trustee for VB's trust for more than four years.

4. First Wall Street Attempted to Investigate Houston's Trustee Activities

In connection with a December 2005 FINRA examination, First Wall Street's chief compliance officer learned that Houston had check writing authority on VB's trust account at the Firm and requested that Houston provide updated account information. At that point, the only documents that the Firm had in VB's client file were the 2001 new account application and the original 1971 trust instrument.

On January 5, 2006, Houston informed the Firm that he had become the trustee of VB's trust. While the Firm was aware prior to this date that Houston received commissions for transactions executed on behalf of VB's trust account, it was unaware of his trustee duties and that he received compensation from the trust for these duties. By February 14, 2006, the Firm had hired a new chief compliance officer, Fred Princiotta ("Princiotta"). Houston informed Princiotta of VB's mental decline and asked if it was permissible for Houston to be appointed as sole trustee. Houston failed to disclose to Princiotta that he had already been acting as sole trustee since June 2005. Princiotta informed Houston that it was rare for the Firm to permit registered representatives to act as trustees, other than for immediate family members, because of the potential conflict of interest and the required heightened supervision.

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[3] Houston did not report on the two Forms U4 contained in the record, dated July 29, 2005 and October 20, 2005, that he was engaged in an outside business activity.

Following his conversation with Houston, Princiotta reviewed the activity in VB's trust account and noticed large and peculiar withdrawals. Princiotta asked the Firm's back-office staff to provide copies of five checks drawn on VB's trust account. Princiotta determined that three of the five checks were payable to the same account at Countrywide Bank. Countrywide Bank informed Princiotta that Houston held the account and that VB had no interest in it. When Princiotta questioned Houston about the five checks, Houston falsely responded that the funds were deposited into VB's account to pay her home equity loan. The Firm subsequently requested that Houston provide a copy of all of the trust amendments, an accounting of the checks written on the trust account, an explanation for the large disbursements from the trust, and a copy of Houston's Countrywide Bank statements.

On May 4, 2006, after Houston failed to provide the requested items, First Wall Street informed Houston that it had commenced a formal investigation into possible fraudulent activity in VB's trust account and that it was freezing the account until the conclusion of its investigation. The Firm warned Houston that if the documents were not provided by May 8, 2006, he would be suspended from the Firm and his accounts would be frozen pending review. The next day Houston provided the Firm with copies of the trust amendments, but nothing else. The Firm told Houston that he had until May 12, 2006, to provide the accounting of the checks that he wrote. Houston emailed the Firm on May 12, stating that he would not provide the information without first receiving a waiver from VB, and, that pursuant to her direction, he had started the process of transferring the trust account out of First Wall Street. First Wall Street terminated Houston's employment on May 15, 2006, for his failure to cooperate with the Firm's investigation.[4]

B. FINRA's Information Requests and Houston's Failure to Appear for an OTR

1. Requests for Written Information

After First Wall Street terminated Houston in 2006, FINRA staff began an investigation into his possible misconduct while First Wall Street employed him. On May 25, 2006, pursuant to NASD Rule 8210, FINRA staff sent an information request to First Wall Street seeking information about the payments that Houston received from VB's trust. The Firm's June 9, 2006 response letter raised questions about the appropriateness of Houston's withdrawals from the trust. FINRA staff then issued successive NASD Rule 8210 information requests to Houston to gather more information about VB's trust, including how the funds were used.

FINRA's initial Rule 8210 request to Houston, dated June 13, 2006, listed 30 checks drawn from VB's trust account. The request asked Houston to identify who wrote each check and explain how the funds were used for VB's benefit and complied with the covenants of her

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[4] First Wall Street lifted the restriction on VB's trust account in September 2006. Houston thereafter distributed approximately $576,000 in total trust proceeds to the 13 beneficiaries, including $5,000 to himself.

trust. In a written response, Houston identified five checks drawn on the account as "Care provider payments" for VB, 11 checks were "Gifts to family, nieces & nephews," five checks as payments to him for unspecified "Special Trust services provided" and seven others as payments for "Annual Trustee fees."[5] Houston also gave a written description of the "Special Trust services" that he provided. Houston described these services as including portfolio analysis, future gifting, year-end tax analysis, and health care facility analysis. Houston did not provide any explanation for two of the checks.[6] In its request, FINRA had also asked for supporting documentation such as bank statements or other account statements that would clarify for what purpose the funds were used. Houston did not provide any supporting documentation in his response.

In August 2006, FINRA issued a second Rule 8210 request to Houston asking about the suitability of several of the mutual fund transactions that occurred in VB's trust account. Houston responded to this request by providing a signed and dated written statement answering FINRA's questions.[7]

FINRA sent Houston a third Rule 8210 request on September 11, 2006. In that request, FINRA enumerated a detailed list of documents that Houston was to provide. These documents included copies of any agreements between Houston and VB regarding the amount or frequency of payment of the "annual trustee fees"; receipts and invoices evidencing the services that Houston provided in exchange for the annual trustee fees that he received; a description and supporting receipts or invoices of the "special trust services" that Houston provided; receipts, invoices, and cancelled checks evidencing payments made for VB's care; and copies of Houston's 2003, 2004, and 2005 tax returns. Houston provided a written narrative in response on October 5, 2006, but provided none of the requested documentation.

Because Houston did not supply the requested documentation sought in the September 11, 2006 letter, FINRA sent Houston follow-up requests on October 12, and November 2, 2006. FINRA warned Houston that his failure to deliver the requested documentation could result in disciplinary action and sanctions that included a fine, suspension, or bar. Houston ultimately responded and provided copies of his Countrywide account statements; a July 2005 through July 2006 statement of charges and July 2006 invoice from a care facility where VB was living before her death; a $75,000 check, dated August 24, 2006, payable to VB's trust from Houston's corporate checking account; a $1,500 check, dated November 14, 2006, payable to VB's trust

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5 FINRA requested that Houston provide the response by June 27, 2006. FINRA received Houston's response dated July 13, 2006, on July 17, 2006.

6 One check was dated March 23, 2004, and paid to Countrywide Bank in the amount of $39,000. The other check was paid to Houston on May 4, 2004, in the amount of $2,500.

7 Houston's response again was two weeks past the deadline specified by FINRA in its request.

from Houston;[8] and account statements for several of Houston's relatives. Houston did not provide the requested copies of checks written from his Countrywide account, claiming that Countrywide "does not send checks"; documents to substantiate payments made that he claimed were for VB's care; or his tax returns.

2. Requests for Testimony

On September 7, 2007, FINRA staff sent Houston a Rule 8210 request to appear for OTR testimony on September 27, 2007. Houston responded to the letter on September 10, 2007, and requested that FINRA staff provide him with certain information before he would agree to a date.[9] FINRA staff sent Houston a letter dated September 17, 2007, reminding him that he was required by NASD Rule 8210 to testify as requested at the September 27, 2007 OTR, that he could not impose conditions on his testimony, and that his failure to comply could result in a disciplinary action and sanctions, including a bar.[10] On September 21, 2007, Houston requested to postpone his OTR testimony for 30 days while he sought legal counsel to represent him. FINRA staff accommodated Houston's request and rescheduled the OTR for October 19, 2007.

On October 10, 2007, FINRA staff received a phone call from attorney Thomas Fehn ("Fehn"), who told staff that he would be representing Houston and that he was not available to attend the OTR on October 19.[11] FINRA staff again agreed to postpone the OTR, which was rescheduled for November 27, 2007.[12] FINRA staff received a letter from Houston on November 26, 2007, stating that he had "nothing further to add and will not be attending the OTR scheduled on the 27th." Houston did not appear for the OTR.

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8 Houston stated in his July 13, 2006 written response that the $76,500 that he paid to VB's trust represented "annual trust fees" that were returned to VB's trust on advice of Houston's attorney.

9 Houston specifically requested "the wording of the 2110 violation in question," "[s]entencing guidelines on violation 2110 & 3030," and "[r]ecent broker history of sentences handed down and accepted by accused on the above mentioned violations."

10 FINRA staff also directed Houston where he could locate on FINRA's website the text of NASD Rule 2110, FINRA's Sanction Guidelines, synopses of settled disciplinary actions, and the text of Hearing Panel and NAC decisions.

11 Houston denied that he retained counsel or authorized Fehn to seek an extension.

12 FINRA staff sent a copy of the October 10, 2007 letter rescheduling the OTR for November 27, 2007, to both Fehn and Houston.

III. Discussion

We have considered the complete record in this case and the parties' briefs filed on remand. While we find aggravating factors present in this case, we conclude that the record provides support sufficient to modify our prior determination to bar Houston. As discussed below, we instead impose a two-year suspension and $25,000 fine for Houston's failure to provide OTR testimony. We further find that a one-year suspension and a $50,000 fine remain the appropriate sanctions for his outside business activities.

A. Failure to Provide Testimony

The FINRA Sanction Guidelines ("Guidelines") state that, if a person does not respond to a request for information in any manner, a bar should be the standard sanction.[13] The Commission determined that because Houston responded to two of FINRA's written requests for information and at least partially to a third request, Houston's failure to provide OTR testimony in connection with the same investigation was not a complete failure to respond. We therefore find that his prior partial responses provide him with some mitigation when applying the 2007 version of the Guidelines. The Guidelines state that if there are mitigating factors present, adjudicators should consider suspending the individual in any or all capacities for up to two years.[14] For failure to respond fully to requests for information, the Guidelines also recommend a fine of $10,000 to $25,000.[15]

The Guidelines list two principal considerations for adjudicators to assess in determining appropriate sanctions for violations of Rule 8210 in addition to the principal considerations

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13 *FINRA Sanction Guidelines* 35 (2007) [cited hereinafter as "*Guidelines*"]. In 2011, FINRA revised its Guidelines, including those applicable to Rule 8210 violations. *See FINRA Regulatory Notice 11-07*, 2011 FINRA LEXIS 5 (Feb. 2011). As part of these revisions, FINRA revised the principal considerations particular to the Guidelines for failing to respond to Rule 8210 requests, increased the high end of the fine range for providing an incomplete response, and recommended that a bar is the standard sanction for a partial but incomplete response, unless the person can demonstrate that the information provided substantially complied with all aspects of the request. *Id.*

In the usual case, we apply the revised version of the Guidelines. *See Guidelines*, at 8 (explaining that the 2011 version supersedes prior editions of the Guidelines). Because the 2007 version of the Guidelines were in effect at the time the NAC issued its initial decision in December 2010 (and during Houston's appeal to the Commission), we again apply the 2007 Guidelines on remand to impose sanctions for Houston's misconduct.

14 *Guidelines*, at 35.

15 *Id.*

applicable to all violations.[16] We first consider the nature of the information requested.[17] Here, Enforcement's investigation was undertaken in response to First Wall Street's termination of Houston based on his failure to cooperate in the Firm's investigation of his sizeable withdrawals made from VB's trust account. The nature of the information requested, specifically Houston's testimony, was important because Enforcement was attempting to investigate whether Houston was misappropriating funds from VB's trust. Enforcement was attempting to independently substantiate Houston's representations regarding the hundreds of thousands of dollars that he paid to himself and others from assets that he controlled for his elderly great aunt. Ultimately, the information that Enforcement received in response to its written requests from Houston, along with that from the Firm, was sufficient to prove that Houston engaged in undisclosed outside business activities when acting as a trustee. Houston's refusal to provide investigative testimony, however, impeded Enforcement from determining whether Houston engaged in other serious misconduct such as misappropriation or conversion. Enforcement also could not observe Houston's demeanor and assess his credibility when he responded to questions. Houston's decision to delay and ultimately avoid testifying is "especially troubling given the importance of Rule 8210." *Toni Valentino*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330, at *15 (Feb. 13, 2004). "The rule is at the heart of the self-regulatory system for the securities industry" and is an essential cornerstone of FINRA's ability to police the securities markets and should be rigorously enforced. *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009).

Adjudicators are also advised to consider whether the information was provided and, if so, the number of requests made, the time it took the respondent to respond, and the degree of regulatory pressure required to obtain a response.[18] Houston argues that he produced "all the documents requested" by Enforcement, cooperated fully, and never avoided his responsibility.[19] The record shows, however, that although Houston eventually provided FINRA with significant segments of the written and documentary information that it requested, Houston's cooperation was incomplete.[20] It is undisputed that Enforcement charged Houston with a failure to appear to

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16 *Id.*

17 *Id.*

18 *Guidelines*, at 35.

19 Houston points to his attendance at the NAC oral argument and appeal to the Commission as evidencing his "aggressive" efforts to fulfill his responsibilities before FINRA. Houston's choice to pursue the appellate remedies available to him under FINRA rules is different than his obligation to testify and provides him with no mitigation. *See Morton Bruce Erenstein*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596, at *19 (Nov. 8, 2007).

20 The Commission noted that Houston's responses to the first two written requests were "apparently to NASD's satisfaction" and the failures to respond in full to the third request and two follow-up requests were not charged in FINRA's complaint. We consider Houston's failure to respond fully to the third request for sanctions purposes. *See, e.g., Dep't of Enforcement v.*

[Footnote continued on next page]

provide testimony and Houston did not appear and testify as requested. We find this fact highly aggravating in determining sanctions. Moreover, as the record shows, Houston did not produce all the documents that Enforcement requested in its written requests and follow-up letters. For example, FINRA asked Houston to produce documentation, including receipts, invoices, and cancelled checks, to reflect care that Houston's mother purportedly provided to VB and payment of VB's expenses. Houston initially ignored the request and provided no documents. When FINRA followed up with a second request for the information, Houston produced an invoice and what he called a "billing doc" from the care facility where VB lived before she died. While this showed payments made for VB's care during one year's time, it did not reflect the source of those payments or evidence payments purportedly made for VB's care before July 2005. In another follow-up request, FINRA highlighted the deficiencies in Houston's response and asked that he produce responsive documents or state that he had none. Houston never produced documentation to substantiate his representations regarding the payment of VB's care expenses. Houston also refused to produce requested copies of his tax returns, questioning FINRA's "legal authority" for doing so.[21]

Houston asserts that he misunderstood the purpose of the OTR testimony, which he believed was to set forth a defense to engaging in outside business activities. He states that he admitted his guilt and asked to "move on to the Sentencing phase." Houston, however, had an obligation to appear and testify even if he believed he had already provided FINRA with relevant information. *See Ashton Noshir Gowadia*, 53 S.E.C. 786, 790 (1998). He argues that Enforcement should have stated its reasons for requesting the testimony and rescheduled the interview. Such assertions have been consistently rejected by the Commission. Rule 8210 precedent makes abundantly clear that Houston was obligated to cooperate and provide testimony after FINRA's first request of him, that he had no right to set conditions on his cooperation, and that Enforcement had no obligation to explain its reasons for the request. *See Berger*, 2008 SEC LEXIS 3141, at *13 & n.20 (explaining that the obligation to cooperate after FINRA's first request for testimony is unequivocal); *Erenstein*, 2007 SEC LEXIS 2596, at *13 (stating that a "member or an associated person may not second guess[ ] an NASD information

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McCrudden, Complaint No. 2007008358101, 2010 FINRA Discip. LEXIS 25, at *26 n.20 (FINRA NAC Oct. 15, 2010) ("Evidence of misconduct that is not alleged in the complaint, but is similar to the misconduct charged in the complaint, is admissible to determine sanctions.").

21 "We have found numerous times that, contrary to what may be the case in civil litigation, tax returns must be produced if requested by the staff during the course of an investigation." *Dep't of Enforcement v. Erenstein*, Complaint No. C9B040080, 2006 NASD Discip. LEXIS 31, at *13-14 (NASD NAC Dec. 18, 2006) (collecting cases), *aff'd*, 2007 SEC LEXIS 2596. FINRA is not "required to justify its information requests," and "members and associated persons may not impose conditions . . . under which they will respond to NASD requests for information." *Valentino*, 2004 SEC LEXIS 330, at *11 & n.7; *Robert Fitzpatrick*, 55 S.E.C. 419, 425 n.16 (2001), *aff'd*, 2003 U.S. App. LEXIS 8767 (2d Cir. May 9, 2003).

request or set conditions on their compliance" and that a "belief that NASD does not need the requested information provides no excuse for a failure to provide it" (internal quotations omitted)). Indeed, "[t]he determination of when it is appropriate for an investigation to proceed is a matter for the NASD to decide, not the respondent." *Michael J. Markowski*, 54 S.E.C. 830, 838 (2000). As a result of its written inquiries, FINRA had a reasonable basis to investigate further whether Houston had taken VB's money as his own rather than for her benefit and demand his testimony. Moreover, as a seasoned securities professional with more than two decades' experience, Houston should have understood his obligation to appear.[22]

Houston repeatedly frustrated FINRA's attempt to obtain his testimony and forced FINRA to make numerous requests for the information. FINRA requested that Houston provide OTR testimony on three separate occasions, and he received each of these requests. Houston, however, did not provide the requested testimony. The degree of regulatory pressure exerted by FINRA in its fruitless effort to obtain Houston's testimony was significant. In response to FINRA's first request for his testimony, Houston attempted to condition his appearance on FINRA supplying him with information. FINRA reminded Houston of his obligation to provide testimony, advised Houston that his failure to appear could result in disciplinary action and a bar, requested that Houston confirm that he would appear, and accommodated Houston's request to supply him with information even though it was under no obligation to do so. On the day that FINRA had scheduled Houston's on-the-record interview to take place, Houston faxed a letter to FINRA requesting a 30-day extension for his testimony. FINRA agreed to the extension, but Houston nevertheless refused to appear for testimony that FINRA had rescheduled to accommodate him. Houston was warned that his failure to testify could have regulatory consequences and yet he ignored these warnings.[23]

Houston makes various mitigation claims. Houston argues that his sanctions should be reduced when compared with the sanctions imposed in other FINRA disciplinary proceedings involving other associated persons. We disagree that sanctions imposed in other cases are mitigating as to Houston. The Commission previously has stated that the appropriate remedial sanction depends on the facts and circumstances of the particular case at issue. *Dennis S. Kaminski*, Exchange Act Rel. No. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011); *see also Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997) ("It is well recognized that the appropriate sanction depends upon the facts and circumstances of each particular case and cannot

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22 Houston's contractual relationship with FINRA, entered into when he became an associated person in 1988, included his agreement to abide by all its rules, including Rule 8210's requirement to provide testimony. *See Erenstein*, 2007 SEC LEXIS 2596, at *19.

23 For example, in FINRA's September 17, 2007 correspondence with Houston, FINRA warned him that he "was not permitted to impose conditions on [his] obligation to provide information and/or testimony," and that pursuant to NASD Rule 8210, his "failure to appear and testify truthfully" was grounds for "formal disciplinary action that [could] result in a fine, suspension, and/or bar from associating with any FINRA member."

be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding.").

We likewise find no mitigation in Houston's assertion that the NAC should not impose any sanctions because he has no disciplinary history over the course of his 20-year career. As we have emphasized many times, the absence of disciplinary history is not mitigating. *See Dep't of Enforcement v. Winters*, Complaint No. E102004083704, 2009 FINRA Discip. LEXIS 5, at *21 (FINRA NAC July 30, 2009); *see also Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (determining that the lack of disciplinary history is not mitigating and the representative "was required to comply with the NASD's high standards of conduct at all times").

Houston also argues that any sanction is excessive and should be limited to "time served" because he has already spent his time and money defending this matter and needs to resume working.[24] The economic hardship that results from disciplinary sanctions and the impact that this matter may have upon Houston do not mitigate his misconduct. *See Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971, at *20 (May 9, 2007); *see also Gowadia*, 53 S.E.C. at 793 (holding that "economic harm alone is not enough to make the sanctions imposed upon [respondent] by the NASD excessive or oppressive"); *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *40-41 (NASD NAC July 26, 2007) (determining that the impact that a matter has upon a respondent's career does not mitigate sanctions).

For the reasons set forth above, we suspend Houston for two years and fine him $25,000 for his failure to provide testimony.

B. Outside Business Activities

The Guidelines for outside business activities recommend a fine of $2,500 to $50,000 and a suspension of up to 30 business days where the misconduct does not involve aggravating factors.[25] The Guidelines recommend a suspension up to one year where aggravating factors are present.[26] In an egregious case, the Guidelines recommend a suspension of more than one year

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24 Houston asserts that he is currently serving "his suspension" from all business activity. Houston misunderstands the consequence of the Commission's order. The Commission's order vacating the bar and remanding the case to us eliminated any suspension upon Houston while we redetermined sanctions consonant with the Commission's decision.

25 *Guidelines*, at 14.

26 *Id.*

or a bar.[27] We find that Houston's misconduct was serious, involving several aggravating factors.[28]

Houston's outside business activities involved a First Wall Street customer, VB's trust.[29] The purpose of NASD Rule 3030 is to ensure that firms "receive prompt notification of all outside business activities of their associated persons so that the member's objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law." *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Rel. No. 26063, 1988 SEC LEXIS 1841, at *3 (Sept. 6, 1988); *see also NASD Notice to Members 88-86* (Nov. 1988) (introducing the substance of NASD Rule 3030 in Article III, Section 43 of the NASD Rules of Fair Practice and explaining that the rule "intended to improve the supervision of registered personnel by providing information to member firms concerning outside business activities of their representatives"). The record shows that Houston's misconduct undermined First Wall Street's efforts to prevent potential conflicts of interest arising from involvement in a customer's personal matter, despite the Firm's efforts to raise awareness of the requirement to disclose immediately and in writing to the Firm's compliance department if listed as a trustee. *See, e.g.*, *Micah C. Douglas*, 52 S.E.C. 1055, 1060 (1996) (finding that applicant's failure to inform his employer firm of his outside business activities "deprived potential customers of the oversight and supervision provided by [the] employer firm"). Instead, he completed the Firm's 2002, 2003, and 2004 Agreements, Notification Forms, 2004 Statement, and 2005 Disclosure of Appointment without disclosing that he was involved in any outside business activities. And with respect to the 2004 Statement and 2005 Disclosure of Appointment, Houston falsely stated that he had not conducted any outside business activities, including accepting an appointment as a trustee.

Moreover, as the Commission emphasized, Houston did not provide First Wall Street with many of the relevant trust documents until the Firm requested them from Houston in 2006 during its internal investigation of him. Houston maintains that his failure to disclose his trustee activities was merely negligent and that he never intended to mislead or hide anything from the

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27 *Id.*

28 *See id.* The specific principal considerations set forth in the Guidelines for outside business activities are: (1) whether the outside activities involved customers of the firm; (2) whether the outside activities resulted directly or indirectly in injury to customers of the firm and, if so, the nature and extent of the injury; (3) the duration of the outside activities, the number of customers, and the dollar volume of sales; (4) whether the respondent's marketing and sale of the product or service could have created the impression that the employer (member firm) had approved the product or service; and (5) whether the respondent misled his employer member firm about the existence of the outside activities or otherwise concealed the activities from the firm. *Id.*

29 *See id.*

Firm. We disagree and determine that the record supports a finding that Houston purposefully attempted to conceal his trustee activities from the Firm by intentionally completing disclosure forms inaccurately.[30] Houston repeatedly misled First Wall Street by failing to disclose the activities on annual questionnaires, falsely certifying that he had not engaged in any outside business activity, and falsely representing that he had not accepted any appointment to serve as a trustee. Houston also lied to Princiotta when initially questioned about the checks made payable to the Countrywide Bank account. When the Firm finally learned of Houston's status as a trustee and attempted to investigate his activities in that capacity, Houston refused to cooperate and stonewalled the Firm.

We also find aggravating that Houston acted as a trustee for several years while receiving substantial compensation from the trust. From 2001 to 2006, Houston also received more than $400,000 in the form of checks drawn from VB's trust during the time that he acted as a trustee.[31]

For these reasons, we suspend Houston for one year and fine him $50,000 for his violation of NASD Rules 3030 and 2110.[32]

IV. Conclusion

Accordingly, for the failure to appear for testimony, we suspend Houston for two years and fine him $25,000. For his outside business activities, we suspend Houston for one year and fine him an additional $50,000.[33] We order that Houston serve the suspensions consecutively.

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30 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13), 14.

31 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 9), 7 (Principal Considerations in Determining Sanctions, No. 17).

32 The Hearing Panel fined Houston $100,000, in addition to suspending him for one year, for his outside business activities. We determine, instead, that a $50,000 fine is the appropriate fine. While the evidence readily establishes that Houston failed to meet his obligations under NASD Rules 3030 and 2110, the record does not support a fine exceeding the range recommended by the Guidelines. For example, the record is unclear as to whether Houston's withdrawals from the trust account were in contravention of the trust agreement. In addition, the record shows that the Firm may have had some indications that Houston was potentially engaging in trustee activities. VB's trust account was opened in the name "[VB] & Kent Houston Co-Succ TTEE, [VB] Trust," the trust account was held at First Wall Street, and the Firm was paying Houston commissions on the account. Even if the Firm knew that Houston was receiving commissions from transactions in the trust account, however, that did not relieve him of his obligation to inform First Wall Street promptly and in writing of his trustee activities, which he admits he did not do.

33 We also have considered and reject without discussion all other arguments of the parties.

[Footnote continued on next page]

See, e.g., Siegel v. SEC, 592 F.3d 147, 157-58 (D.C. Cir. 2010) (affirming imposition of consecutive suspensions for violations involving different kinds of misconduct).

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith
Senior Vice President and Corporate Secretary

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Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for nonpayment.