BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. NYPPEX, LLC, Laurence Allen, and Michael Schunk, Rye Brook, NY, Respondents.	DECISION Complaint No. 2019064813801 Dated: April 8, 2024

Registered person associated with member firm while statutorily disqualified, and the member firm and the registered person's supervisor allowed the registered person to do so; member firm and registered person made public statements that implied FINRA's endorsement of the member firm's business practices; member firm and registered person failed to completely respond to FINRA Rule 8210 requests. Held, findings of violation and sanctions modified.

Appearances

For the Complainant: Loyd Gattis, Esq., Jennifer Crawford, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Jonathan E. Neuman, Esq.

Table of Contents

Decision

Respondents Laurence Allen, Michael Schunk, and NYPPEX, LLC ("NYPPEX"), appeal an Extended Hearing Panel (the "Hearing Panel") decision finding them liable for violations of the federal securities laws and FINRA's By-Laws and rules. After a de novo review, we modify the Hearing Panel's findings of violation and the sanctions it imposed.

I. Introduction

The Hearing Panel found that Allen, Schunk, and NYPPEX engaged in a range of misconduct between January 2019 and June 2020, the relevant period for this disciplinary proceeding. The Hearing Panel's findings and our findings after our de novo review are summarized below:

- The Hearing Panel found that Allen continued to associate with NYPPEX after becoming subject to a statutory disqualification, and that NYPPEX and Schunk allowed him to do so, in violation of FINRA's By-Laws and rules. We affirm the finding of violation.

- The Hearing Panel found that Allen and NYPPEX made material omissions in offers of securities, in violation of the Securities Act of 1933 (the "Securities Act") and FINRA's rules. We reverse the finding of violation because Enforcement failed to prove that Allen or NYPPEX had a duty to disclose the omitted information.

- The Hearing Panel found that Allen and NYPPEX published a statement on the internet (the "Press Release") that implied FINRA's endorsement of NYPPEX's business practices, in violation of FINRA's rules. We affirm the finding of violation.

- The Hearing Panel found that Allen and NYPPEX made false or misleading statements in the Press Release, in violation of FINRA's rules. We reverse the finding of violation because Enforcement failed to prove that any statement was material.

- The Hearing Panel found that Allen made false and misleading statements in an affidavit that was filed with a New York state court and which NYPPEX later submitted to FINRA, in violation of FINRA's rules. We reverse the finding of violation because Enforcement failed to prove that Allen knowingly made any false statement.

- The Hearing Panel found that Allen, Schunk, and NYPPEX made false or misleading statements in response to a FINRA Rule 8210 request from FINRA's Department of Advertising Regulation ("Advertising Regulation"). We reverse the finding of violation because Enforcement failed to prove that any statement was false or misleading.

- The Hearing Panel found that Allen and NYPPEX provided untimely and incomplete responses to FINRA Rule 8210 requests from FINRA's Member Supervision Department ("Member Supervision"). We affirm, in part, and modify the findings of violation.

- The Hearing Panel found that Schunk and NYPPEX failed to reasonably supervise Allen. We reverse the finding of violation.

- The Hearing Panel barred Allen for his Rule 8210 violation. We affirm the sanction imposed. In light of this bar, we do not impose sanctions on Allen for any other violation.

- The Hearing Panel expelled NYPPEX for its Rule 8210 violation. We modify the sanction imposed. We instead suspend the firm in all capacities for one year.

- The Hearing Panel fined NYPPEX $50,000 and fined Schunk $70,000 and suspended him in all capacities from associating with any FINRA member for 18 months for allowing Allen to associate with the firm while subject to a statutory disqualification. We modify the sanctions imposed. We fine NYPPEX and Schunk $40,000 each and we vacate Schunk's suspension.

- The Hearing Panel fined NYPPEX $100,000 and suspended the firm in all capacities for one year for making material omissions in communications with investors, making false and misleading statements in the Press Release, and implying FINRA's endorsement of its business practices in the Press Release. We modify the sanctions imposed. Because we reverse several findings of violation, we vacate the suspension and reduce the fine to $10,000.

II. Respondents and Other Relevant Entities

NYPPEX was a broker-dealer whose business focused on the secondary market for private equity funds.[1] Allen founded NYPPEX in 1999 and was its managing member during the relevant period. NYPPEX had one office, located in Rye Brook, New York, and had 10 or fewer registered representatives.

Allen first became registered with FINRA in 1982. During the relevant period, Allen was registered through NYPPEX as a general securities representative, general securities principal, investment banking representative, investment banking principal, and operations professional.

Schunk first became registered with FINRA in 1981. During the relevant period, Schunk was registered through NYPPEX as a general securities representative and a general securities

[1] Neither Allen, Schunk, nor NYPPEX is registered with FINRA currently.

principal, and he served as the firm's chief executive officer and chief compliance officer ("CCO"). Schunk was Allen's supervisor.

NYPPEX Holdings, LLC ("NYPPEX Holdings"), is NYPPEX's corporate parent. NYPPEX Holdings describes itself as a financial technology firm focused on providing liquidity and risk analytic services and products to participants in the alternative asset class. During the relevant period, Allen was the managing member of NYPPEX Holdings and Schunk served as its CCO.

ACP Investment Group, LLC ("ACP Advisor"), is a registered investment advisor and a subsidiary of NYPPEX Holdings.

ACP X, LP (the "Fund"), is a private equity partnership. Allen controlled the Fund's general partner, and Schunk had compliance responsibilities for the Fund.

III. Facts

A. The Alleged Statutory Disqualification

1. A New York Court Enters the Order

In December 2018, during an investigation into Allen's management of the Fund, the Attorney General of New York (the "AG") applied to a New York state court for an ex parte order pursuant to Section 354 of New York's General Business Law. Section 354 is part of the Martin Act, New York's "blue sky" law, which "authorizes the [AG] to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 2011 962 N.E.2d 765, 768 (N.Y. 2011). Section 354 empowers the AG, before filing a complaint, to obtain an order compelling testimony and the production of documents. *See* N.Y. Gen. Bus. Law § 354. Upon application by the AG, the court must issue the order, along "with such preliminary injunction or stay as may appear" to the court "to be proper and expedient[.]" *Id.* The court may issue a Section 354 order ex parte, i.e., without first providing the respondent with notice and an opportunity for hearing. *See* N.Y. Civ. P. Law & R. § 6313. When the court does so, the respondent may move at any time to vacate or modify the order. *See Matter of James v. iFinex Inc.*, 2019 NY Slip Op 31403(U), ¶ 6 (Sup. Ct. May 16, 2019); N.Y. Civ. P. Law & R. § 6314.

On December 28, 2018, the court granted the AG's application and entered an order (the "Order") ex parte against Allen, NYPPEX Holdings, the Fund, and certain other entities.[2] The Order required Allen to appear for testimony and to produce certain documents, books, and records. The Order also "preliminarily restrained" Allen "from violating [the Martin Act], and from engaging in fraudulent, deceptive and illegal acts," and "further restrained and enjoined" Allen "from employing any device, scheme or artifice to defraud or to obtain money or property by means of false pretense, representation or promise, including but not limited to . . .

---

[2] NYPPEX was not named as a respondent on the Order.

[f]acilitating, allowing, or participating in, the purchase, sale or transfer of any limited partnership interest in [the Fund]." Allen was served with the Order and Schunk, his supervisor, became aware of it, in January 2019.

2. Allen Amends His Form U4

On January 24, 2019, Allen disclosed the Order in an amendment to his Uniform Application for Securities Industry Registration or Transfer ("Form U4"). In response to Item 14H(1)(a) on Form U4, which asked whether any court had ever "*enjoined* you in connection with any *investment-related* activity," Allen checked the box "Yes."[3] In the "Civil Judicial DRP" section of Form U4, Allen disclosed that the AG had initiated a "court action" in state court seeking a "temporary restraining order." Allen further wrote that the AG had "applied for a court order for pre-litigation discovery and an ex parte preliminary injunction against a private equity investment fund of which I am the managing principal."

3. Allen Continues to Associate with NYPPEX

NYPPEX and Schunk allowed Allen to continue associating with the firm for more than one year after Allen was served with the Order. In February 2020, after the AG obtained a new preliminary injunction against Allen, NYPPEX filed a Membership Continuance Application (MC-400) seeking FINRA's permission to associate with Allen.

B. The Alleged Material Omissions in Offers of Securities

1. Allen Obtains a Valuation of NYPPEX Holdings

In or around January 2019, Allen hired a third-party firm (the "Valuation Firm") to provide a valuation of NYPPEX Holdings. Allen's contact at the Valuation Firm was JV (the "Appraiser"). The Appraiser founded the Valuation Firm in the 1980s and was its managing director. The Appraiser had more than 40 years of experience and was an accredited member of the American Society of Appraisers designated in Business Valuation.

During January and February 2019, Allen provided information to the Appraiser about NYPPEX Holdings' business. Among other things, Allen emailed the Appraiser documents showing NYPPEX Holdings' actual revenue and earnings through 2017, its estimated revenue and earnings for 2018, and its projected revenue and earnings for 2019-21. The documents showed that NYPPEX Holdings estimated that its revenue would decrease from $3.3 million in 2017 to $1.1 million in 2018. However, the projected figures showed that NYPPEX Holdings expected its revenue to grow to $7.1 million in 2019, $27 million in 2020, and $40.1 million in 2021. Allen testified that the projections assumed that NYPPEX Holdings would complete its development of the "next phase of the NYPPEX QMS Platform," which Allen described as "a one hundred percent automated online brokerage system" for NYPPEX's qualified matching

[3] Italicized terms on Form U4 are defined in Form U4's Explanation of Terms. The Explanation of Terms defines "enjoin" as "being subject to a mandatory injunction, prohibitory injunction, preliminary injunction or a temporary restraining order."

service ("QMS").[4] According to Allen, NYPPEX Holdings anticipated a "significant ramp up in revenue once [its] platform was accepted by the market."

The Appraiser asked Allen for more information. Specifically, the Appraiser requested: NYPPEX Holdings' balance sheet as of December 31, 2018; "full income statements" supporting the actual 2016 and 2017 operating results and the "estimated" 2018 operating results; an explanation for the decrease in revenue from 2017 to 2018; the capital expenditures that would be required to bring the company from $1.1 million of revenue in 2018 to $40.1 million in 2021; and a discussion of the factors that would "propel revenue to increase from $1.1 million in 2018 to $7.1 million in 2019."

A few days later, Allen sent the Appraiser an email and attached, among other things, a balance sheet and statement of operations for NYPPEX Holdings as of December 31, 2018. Each of these documents was marked "draft." According to Allen, he marked the documents "draft" because the final accounting for the year had not been completed. The "draft" statement of operations showed a loss of $1.25 million for 2018. Allen testified that the "draft" results included only NYPPEX's revenue and earnings for 2018 and did not include "revenue and profitability from [the ACP Advisor] funds," which would not be available until later in the year. At some point, Allen also provided the Appraiser with "upside" projections for NYPPEX Holdings, which projected revenue of $53 million for 2019 and $55 million for 2020.

Allen did not disclose the Order or the AG's investigation to the Appraiser. Allen testified that NYPPEX Holdings did not believe either was material to its value.

The Appraiser testified that he "very closely" reviewed the financial information Allen provided. He said that he found the revenue projections "optimistic in light of historical performance," and as a result, he "used an extremely high discount rate in order to bring those projections to a level that w[as] supported by my other approaches to the value." He explained that this discount rate was "somewhere up and around the thirty-five percent level, which is clearly second or third stage venture capital." He further testified, however, that "optimistic" financial projections were not unusual for development-stage companies like NYPPEX Holdings. The Appraiser said that he had worked with "a lot of hockey stick companies, early beginnings with a great opportunity," and that NYPPEX Holdings' projections were like "many of the venture companies that [he] appraise[d]."

On February 25, 2019, the Appraiser emailed Allen the valuation report. The Appraiser opined that, as of December 31, 2018, NYPPEX Holdings' "Fair Market Value of Total Equity" was $108,700,000.

Several statements in the valuation report are relevant to Enforcement's allegations of violation. The report stated that the Valuation Firm understood the valuation would be used "in

---

[4] Transferring limited partnership interests through a QMS provides certain tax benefits to the limited partnership and its interest holders. *See* 26 C.F.R. § 1.7704(g).

connection with management planning activities." On a page titled "Limiting Factors and Assumptions," the valuation report contained the following statements:

> Financial statements and other related information provided by the subject Company or its representatives . . . have been accepted, without further verification. . . .
>
> This report and the conclusions arrived herein are for the exclusive use of our client for the sole and specific purposes as noted herein. . . . [T]he report and conclusions are not intended . . . to be investment advice[.]
>
> Neither all nor any part of the contents of this report . . . should be disseminated to the public . . . without the prior written consent and approval of [the Valuation Firm].

At the hearing, the Appraiser reaffirmed his valuation of NYPPEX Holdings. He testified that, although he was unaware of the Order and the AG's investigation at the time he prepared the report, neither would have changed his opinion on the value of NYPPEX Holdings.[5] He also testified that, based on his experience, there was nothing unusual about this assignment. He said that the report's limiting factors and assumptions were standard terms that were included in every valuation report he prepared, and that they were intended to limit the Valuation Firm's liability. He also said that he "almost always" asked the company he was valuing for revenue and earnings projections. When asked whether the valuation was a "fair and accurate appraisal," he replied, "In my opinion it was, yes."

2. Allen Offers an Incentive for Selling NYPPEX Holdings Securities

In early March 2019, Allen emailed registered representatives at NYPPEX regarding a contemplated private placement of NYPPEX Holdings securities. Allen's email explained a sales incentive NYPPEX was offering for "units" sold in the private placement.[6] Each registered representative would receive a certain number of "restricted share participations" ("RSPs") and, for each 100,000 units the registered representative sold, he or she could sell up to $10,000 of RSPs. This was in addition to a production credit and dealer warrants. Allen wrote: "Your goal is to sell $100,000 per month of Units starting in the month of March."

---

[5] The Appraiser testified that, later in 2019, he conducted a second valuation of NYPPEX Holdings, at a time when he was aware of the Order and the AG's investigation, and that his second valuation was virtually unchanged from his first. He later testified in court about the valuation after the AG filed a civil lawsuit against Allen.

[6] A unit comprised one preferred share and one warrant.

3. Allen and NYPPEX Communicate with Investors about the Contemplated Private Placement

In March 2019, Allen created (or directed the creation of) various materials related to the private placement. Over the next several weeks, Allen and NYPPEX provided these materials to prospective investors, all of whom, according to Allen, were institutional investors.[7]

a. The New Investor Email

Allen drafted a template email for NYPPEX registered representatives to send to prospective investors (the "New Investor Email"). The subject line of the email was "$10 MM NYPPEX HOLDINGS SERIES E PFD – NEXT GENERATION ONLINE BROKERAGE." The first page of the email was a cover letter that read:

> I am pleased to invite you to view an investment opportunity in NYPPEX Holdings. If interested, please sign the General Non-Disclosure Agreement and email back to NYPPEX . . . . Thereafter, we can provide you online access to the offering's non-public documents via the NYPPEX QMS Platform.

The next four pages contained bullet-pointed statements that described NYPPEX Holdings' business and the terms of the contemplated private placement.

One of the bullet-pointed statements is relevant to Enforcement's allegations of violation. It read: "The Company's equity was valued at approx. $106 million [sic] as of 12-31-18 by an independent valuation firm." Enforcement alleged this statement was materially misleading because the email did not disclose (1) that "the valuation report and its contents were for exclusive use of NYPPEX Holdings," and the contents of the report "were to be used for management planning purposes only and could not be distributed to the public" without the Valuation Firm's consent; (2) the valuation was dependent on financial projections provided by Allen to the Valuation Firm without independent verification; (3) the valuation "did not take into consideration NYPPEX Holdings'[s] actual financial results, which were negative for the most recent year (2018)"[8]; and (4) the valuation was "predicated on financial projections with imbedded assumptions that revenue would grow at astronomical rates" over the next two years.[9]

Additionally, Enforcement alleged that the email contained material omissions because it did not disclose (1) the AG's investigation; (2) the Order; (3) the sales incentive offered to

---

[7] Enforcement did not dispute this assertion.

[8] In fact, Allen provided the "negative" 2018 results to the Appraiser.

[9] Enforcement alleged that the New Investor Email contained additional misstatements and omissions related to NYPPEX Holdings' management and its involvement in numerous transactions. The Hearing Panel found that Enforcement did not prove any violation based on those alleged misstatements and omissions. Enforcement did not appeal those findings.

NYPPEX registered representatives; or (4) NYPPEX Holdings' "actual financial condition, which demonstrated that it had operated at a net loss of more than $1.25 million in [2018]."

b. The Corporate Overview

Investors who received the New Investor Email and expressed interest in the private placement were given online access to a document titled "NYPPEX QMS Platform Corporate Overview" (the "Corporate Overview"). The Corporate Overview was a 34-page PowerPoint presentation that summarized NYPPEX Holdings' products and services and described the terms of the contemplated private placement.

One page in the Corporate Overview is relevant to Enforcement's allegations of violation. The page contained three graphics depicting, as percentages, NYPPEX Holdings' 2017 revenue growth, its 2017 earnings margin, and its 2017 return on equity. Enforcement alleged this page was misleading because it "focused on NYPPEX Holdings' 2017 financial results," but it "omitted negative financial information," which was "more recent and less favorable," and showed that NYPPEX Holdings' "revenue declined by 66% and it lost more than $1.25 million" in 2018.[10]

c. The Existing Shareholder Email

Allen also directed the creation of an email for NYPPEX registered representatives to send to existing NYPPEX Holdings shareholders (the "Existing Shareholder Email"). The subject line of the email was "NYPPEX Exit Opportunity to Public-Listed Shares." The Existing Shareholder Email was 11 sentences long.

The first sentence of the email is relevant to Enforcement's allegations of violation. It read: "Recently, we received a valuation of approx. $108 million for shares of NYPPEX Holdings or $.83 per share from an independent valuation firm as of December 31, 2018." Enforcement alleged this statement was misleading because the email did not disclose "the limiting factors and assumptions that qualified the valuation."

Enforcement alleged that the email contained additional material omissions because it did not disclose (1) the AG's investigation; (2) the Order; (3) the sales incentive offered to NYPPEX registered representatives; and (4) NYPPEX Holdings' "actual financial condition, which demonstrated that it had operated at a net loss in [2018]."

d. The Webinar

On March 22, 2019, NYPPEX Holdings conducted its 2017 annual shareholders' meeting via a live "webinar" (the "Webinar"). During the Webinar, Allen and others associated with

---

[10] Enforcement alleged that the Corporate Overview contained additional misstatements and omissions related to NYPPEX Holdings' management and its involvement in numerous transactions. The Hearing Panel found that Enforcement did not prove any violation based on those alleged misstatements and omissions. Enforcement did not appeal those findings.

NYPPEX Holdings spoke while a PowerPoint presentation, which was similar to the Corporate Overview, was shown on the screen. Among the topics covered was the contemplated private placement of NYPPEX Holdings securities.

During the Webinar, Allen stated that he had "recently obtained an independent valuation of shares of NYPPEX Holdings which incidentally was $108 million, and that equates to 83 cents a share." Enforcement alleged that Allen's statement was materially misleading because he failed to disclose the valuation report's limiting factors and assumptions.

Allen also stated that, "with respect to financial performance . . . our revenue is up 45 percent year over year. Our earnings margin was approximately 39 percent and . . . our return on equity is—was approximately 37 percent, so those numbers we're pleased with." Enforcement alleged that these statements were misleading because Allen failed to disclose "negative financial information concerning NYPPEX Holdings'[s] more recent and less favorable 2018 performance numbers that were then available."

Enforcement further alleged that the Webinar contained material omissions because it did not disclose (1) the AG's investigation; (2) the Order; or (3) the "sales incentive" offered to NYPPEX registered representatives.[11]

e. The "Summary Valuation Report"

Several prospective investors responded to the communications about the contemplated private placement by requesting a copy of the valuation report, the offering documents, and the 2018 financial statements.[12]

In late March 2019, Allen asked the Appraiser for permission to share with NYPPEX shareholders the report's first five pages (the "Summary Valuation Report"). The first five pages were the report's cover page; a two-page letter from the Valuation Firm to NYPPEX, which showed the $108 million valuation; and the report's two-page table of contents, which showed, among other things, that the full report was 20 pages long, that it included limiting factors and assumptions, and that it contained nine exhibits, including financial statements and projections. The Appraiser approved Allen's request. NYPPEX registered representatives emailed the Summary Valuation Report to several investors.[13]

---

[11] Enforcement alleged that the Webinar contained additional misstatements and omissions related to NYPPEX Holdings' management and its involvement in numerous transactions. The Hearing Panel found that Enforcement did not prove any violation based on those alleged misstatements and omissions. Enforcement did not appeal those findings.

[12] There is no evidence that Allen or NYPPEX provided any offering documents or 2018 financial statements to any investor.

[13] Enforcement alleged that the Summary Valuation Report contained material omissions. The Hearing Panel did not adjudicate that allegation. Enforcement did not appeal that issue and therefore we do not consider it.

4. The Private Placement Is Terminated

Allen testified that there was not enough interest from investors to proceed with the private placement and that no offering documents were drafted. There is no evidence of any transactions involving NYPPEX Holdings stock or interests.

C. The Allegedly False or Misleading Press Release and Affidavit

1. FINRA Concludes Its 2018 Examination of NYPPEX

Between March 2018 and January 2019, Member Supervision examiners conducted a routine cycle examination of NYPPEX. In February 2019, the Member Supervision staff sent a copy of the examination report to NYPPEX along with a cover letter.

The following text in the cover letter is relevant to Enforcement's allegations of violation: "We have recently completed an examination of your firm. . . . The following areas of risk were reviewed . . . Managing Conflicts Arising from Affiliates."

The examination report identified several "exceptions." The cover letter stated that "Member [Supervision's] disposition related to this examination will be communicated to you under separate cover after Management's review" of NYPPEX's written responses to the exceptions. Two of the exceptions are relevant to Enforcement's allegations of violation.

The first relevant exception found that NYPPEX was not in compliance with the bookkeeping requirements of the Securities Exchange Act of 1934 (the "Exchange Act") because the firm was "unable to demonstrate that it was entitled to receive [a 2017] payment for carried interest for $324,338" from the Fund.

The second relevant exception, also a bookkeeping violation, identified alleged deficiencies in NYPPEX's affiliate service agreement ("ASA").[14] The exception identified two ASAs, one dated 2012 and the other dated 2017. With respect to the 2012 ASA, the exception stated that the ASA was "not current[.]" It explained that (1) the ASA "was not updated since 2012"; (2) the ASA referenced an allocation of the treasurer's salary, but the firm did not have a treasurer; and (3) the allocated expenses on the firm's general ledger for certain fees and expenses were inconsistent with the ASA, because the ASA "states that 30% of the expenses will be allocated to NYPPEX Holdings, LLC when in fact 30% was allocated to the broker/dealer."

With respect to the 2017 ASA, the exception stated that it was "inadequate[.]" It explained that (1) the ASA was signed by an employee on behalf of NYPPEX, but that employee did not work at the firm on the ASA's effective date; and (2) one paragraph of the ASA incorrectly referred to NYPPEX as a registered investment advisor.

---

[14] An ASA is an agreement between affiliates that provides for the allocation of shared expenses.

2. NYPPEX Disputes the Exceptions In the Examination Report

NYPPEX disputed both of the relevant exceptions in its written response to the examination report.

With respect to the exception related to the carried interest payment, NYPPEX wrote that it was entitled to the payment under its placement agreement with the Fund. NYPPEX wrote that it provided copies of the placement agreement to FINRA staff during the examination.

With respect to the exceptions related to the 2012 ASA, NYPPEX wrote (1) that its "ASA is current and has remained the same since 2017," and the "examiner may be using an older 2012 ASA version in their analysis"; (2) that the allocation of the treasurer's salary was "to the 'position' of the most senior manager in the Firm's finance department"; and (3) that the firm was allowed to record the expenses from the paying entity and re-allocate them later "as per the ASA."

With respect to the exceptions related to the 2017 ASA, NYPPEX wrote that the original 2017 ASA could not be located in time to respond to the examiner's request for it, so a copy of the ASA was "re-executed by current staff which included" the employee who signed it on NYPPEX's behalf. NYPPEX wrote that "a disclosure was added to the document stating in effect that this document was a reproduction of the original document that could not be located at this time." As to the reference to NYPPEX as an investment advisor, NYPPEX wrote, "If true, this has been corrected on the current 2017 ASA – as we do not see the text referenced" in the examination report.

3. FINRA Issues Cautionary Actions to NYPPEX

A few weeks later, at the end of April 2019, the Member Supervision staff notified NYPPEX by letter that it was issuing a "Cautionary Action" to the firm with respect to each of the exceptions noted in the examination report. The letter did not provide any explanation, nor did it respond to any of the points NYPPEX made in its response to the examination report.

4. The AG Files a Civil Complaint Against Allen and NYPPEX Holdings

Several months later, in December 2019, the AG filed a civil complaint in New York state court against Allen, NYPPEX Holdings, and several other entities, related to Allen's management of the Fund.[15] The complaint asserted five causes of action, including securities fraud and breach of fiduciary duty.

Two of the allegations in the AG's complaint are relevant to Enforcement's allegations of violation. First, the AG alleged that, over several years, Allen improperly caused the Fund to distribute $3.4 million in carried interest to the Fund's general partner, which Allen controlled, and "additional entities under [Allen's] control," including NYPPEX. Second, the AG alleged

[15] The complaint named NYPPEX as a relief defendant.

that Allen, over several years, had misappropriated more than $2.5 million from the Fund to pay NYPPEX Holdings' operating expenses.

In the complaint, the AG asked the court to enter a preliminary injunction against Allen, NYPPEX Holdings, and the other defendants.[16]

5. Allen Drafts and Posts the Press Release on the Internet

Around this time, Allen began drafting the Press Release in response to the AG's allegations. Allen sent several drafts of the Press Release to Schunk and the attorney who was representing Allen and his co-defendants in the AG's lawsuit, LB.

At some point on or before January 2, 2020, the Press Release was posted to the internet at the following URL: https://www.nyppex.com/nyag. There was no link to the Press Release from any page in NYPPEX's corporate website.[17] The only way a person could access the Press Release was by typing the exact URL into an internet browser, or by entering the exact search terms, "NYPPEX" and "NYAG," into a search engine. Allen and Schunk testified that NYPPEX provided the URL to reporters who requested NYPPEX's comments on the AG's lawsuit.

The Press Release was more than three pages long; it broadly criticized the AG's allegations while denying liability. Several statements in the Press Release are relevant to Enforcement's allegations of violation. Those statements are reprinted on Attachment A to this decision.[18]

6. Allen Files the Affidavit with the Court

In mid-January 2020, an affidavit signed by Allen was filed with the court in the AG's litigation. Allen's attorney in the litigation, LB, testified that he drafted "a lot of" the affidavit, and that he reviewed the entire affidavit before it was filed with the court. The affidavit was 24 pages long and contained 136 numbered paragraphs. Two paragraphs from the affidavit are relevant to Enforcement's allegations of violation. Those paragraphs are reprinted on Attachment B to this decision.

7. NYPPEX Updates the Press Release

After the court entered the injunction, NYPPEX posted a new press release at the same URL as the Press Release. The new press release was titled "NYPPEX Statement Regarding New York Court's Decision to NYAG Request for a Receiver." The new press release, dated

---

16 The requested preliminary injunction would replace the Order, which was still in effect at the time.

17 NYPPEX and NYPPEX Holdings shared a website.

18 To save space and avoid repetition, we have provided excerpts from certain documents as attachments to the decision.

February 5, 2020, appeared at the top of the webpage, with the Press Release below it. The new press release stated that the court had entered a "new injunction" on February 4, 2020, that was "less restrictive" than the Order entered in December 2018.

8. FINRA Notifies NYPPEX that Allen Is Statutorily Disqualified Based on the Preliminary Injunction

Nine days later, FINRA sent NYPPEX a letter, pursuant to FINRA Rule 9522, informing the firm that Allen was statutorily disqualified. The letter stated that the disqualification arose from the preliminary injunction the court entered on February 4, 2020.

9. NYPPEX Submits an MC-400 and Attaches the Affidavit

The next day, NYPPEX filed an MC-400 with FINRA seeking permission to remain associated with Allen. Question five on the MC-400 asked NYPPEX to provide "a signed statement, from [Allen] that addresses (i.e., describes the circumstances surrounding or provides context for) the event underlying the statutory disqualification." In response to this question, NYPPEX attached a copy of Allen's affidavit.

D. The Allegedly False or Misleading Statements to Advertising Regulation

1. Advertising Regulation Sends NYPPEX a "Do Not Use" Letter About the Press Release

In early March, Stephanie Gregory, an analyst in Advertising Regulation, contacted NYPPEX about the Press Release. In a letter dated March 5, 2020 (the "Do Not Use-Letter"), Gregory wrote that Advertising Regulation had "reviewed the enclosed communication [i.e., the Press Release] that is posted on your firm's website," and had "serious concerns with the FINRA-related content of the communication and its failure to comply with FINRA Rule 2210."[19] The Do Not Use-Letter stated:

> Due to the severity of the violations, you must cease using the material immediately. While this letter specifically addresses the website posting, our comments also apply to any communication with the same or similar language. Thus, any other relevant material, currently in circulation, must also be pulled immediately.
>
> Please note that we have only reviewed the sections cited below. This letter provides no opinion on the remaining substance of the communication.

Next, the Do Not Use-Letter described the results of FINRA's 2018 examination of NYPPEX, and noted that NYPPEX had "received a cautionary action." It then stated:

---

[19] A screen shot of the Press Release was attached to the letter.

> Based on this information, the conclusion in the "Management Team & Regulatory Compliance" section, "In conclusion, FINRA did not find any violation of applicable securities regulations to warrant a fine, censure or disciplinary action of the Company. The [AG's] allegations are in conflict with the facts concluded by FINRA" is false and misleading in violation of FINRA Rule 2210(d)(1)(B).[20]
>
> Notwithstanding the mischaracterization of the exam results cited above, we are also seriously concerned that a false narrative is being used in an attempt to mislead the reader, not only in terms of regulatory compliance, but also, by inference, as a way to sway the reader's assessment of the other statements and claims in the communication, specifically the [AG's] allegations. Using FINRA . . . in a manner that suggests an endorsement, guarantee, or indemnification of business practices . . . is a violation of FINRA Rule 2210(e)(1). In addition, the claim, "Laurence Allen is a financial technology entrepreneur with a 36[-]year track record of exemplary regulatory compliance, having never been fined or censured by any securities regulator" in the section concerning "Laurence Allen" is also a violation of the aforementioned rule.[21]

The Do Not Use-Letter also asked NYPPEX to provide certain documents and information related to the Press Release.

2. Allen Tells Advertising Regulation that the Reference to FINRA's Examination Has Been Removed from the Press Release

The next day, March 6, 2020, Allen and Schunk spoke by telephone with Gregory about Advertising Regulation's concerns. Later that afternoon, Allen emailed Gregory that NYPPEX had asked its "tech team" to remove the "reference to our recent Finra [sic] exam" from the Press Release. Allen wrote:

> Thank you for your time this afternoon to discuss your recent letter.
>
> We have instructed our tech team to delete [the] reference to our recent Finra [sic] exam on or before 6 pm ET Tuesday, March 10.

Three days later, on March 9, 2020, Allen sent Gregory an email confirming that the reference to the examination had been removed from the Press Release. Allen wrote:

> We have removed the text about the Finra [sic] exam on the web.
>
> How about unless we hear otherwise, we will understand that we have fulfilled your instruction.

---

[20] These are numbered sentences 4 and 5 in the Press Release, as shown on Attachment A.

[21] This is numbered sentence 6 in the Press Release, as shown on Attachment A.

You can verify by clicking the link below.

https://nyppex.com/nyag

PS [sic] If you don't mind, please confirm you received this email.

Gregory did not reply to Allen's email.[22]

3. Advertising Regulation Invokes FINRA Rule 8210 to Compel NYPPEX to Respond to the Do Not Use-Letter

On March 30, 2020, Gregory sent NYPPEX a letter stating that the firm had failed to respond to the requests for documents and information in the Do Not Use-Letter. Gregory asked NYPPEX to respond to the letter and invoked FINRA Rule 8210, writing that "[t]his second request is being made pursuant to FINRA Rule 8210."[23]

4. NYPPEX Responds to the Do Not Use-Letter

On April 23, 2020, NYPPEX provided its response to the Do Not Use-Letter (the "Do Not Use-Response"). The Do Not Use-Response included a letter signed by Allen and Schunk and a typed statement from Schunk about his approval of the Press Release. Enforcement alleged that Do Not Use-Response included several false or misleading statements. The statements in the Do Not Use-Response that are relevant to Enforcement's allegations of violation are reprinted on Attachment C to this decision.

E. The Allegedly Untimely and Incomplete Responses to Member Supervision

1. Member Supervision Issues the February 10 Request

On February 10, 2020, Member Supervision sent a letter to NYPPEX and Allen requesting documents and information pursuant to FINRA Rule 8210 (the "February 10 Request"). The letter stated that, to the extent any of the requested documents and information were in Allen's possession, custody, or control, Allen was required to provide them. The February 10 Request contained eight items seeking different categories of documents and information. The following items, in particular, are relevant to Enforcement's allegations of violation:

---

[22] Allen forwarded his email to a Principal Analyst in FINRA's Risk Monitoring department with the message: "Fyi below for your records." The Principal Analyst acknowledged receipt by reply email.

[23] On April 8, 2020, Gregory sent NYPPEX another letter asking the firm to respond to the Do Not Use-Letter. Gregory again invoked Rule 8210. On April 20, 2020, Allen sent Gregory an email requesting an extension of time to respond until April 24, 2020. Gregory granted the extension via email.

- Item 1. Copies of "all account statements for all bank accounts" in the name of NYPPEX Holdings from January 1, 2018, to December 31, 2019.

- Item 2. Account statements for "all bank accounts in the name of Laurence Allen and/or for which Laurence Allen had signatory authority at any point" between January 1, 2018, and December 31, 2019.

- Item 8. "A current listing of all approved Outside Business Activities ('OBAs') and Private Securities Transactions ('PSTs') for Laurence Allen, and all evidence of approval and supervision of Mr. Allen's OBAs and PSTs" between January 1, 2018, and December 31, 2019.

The February 10 Request set a response deadline of February 24, 2020. On February 24, 2020, the FINRA staff extended the deadline to March 2, 2020, at Allen's request.

2. Member Supervision Issues the February 20 Request

On February 20, 2020, Member Supervision sent another letter to NYPPEX and Allen requesting documents and information pursuant to FINRA Rule 8210 (the "February 20 Request"). The letter stated that, to the extent the requested documents and information were in Allen's possession, custody, or control, Allen was required to provide them. The February 20 Request contained two items seeking documents and information. The following item is relevant to Enforcement's allegations of violation:

- Item 1. "For the period of January 1, 2019 to date provide a listing of all loans made from Allen to the firm, NYPPEX Holdings, LLC ('Holdings'), or any other company in which Allen has any ownership interest; and all loans made to Allen from the firm, Holdings, or any other company in which Allen has any ownership interest. Additionally, for all loans listed please provide the loan agreement, and other documentation and evidence of all payments."

The February 20 Request set a response deadline of February 27, 2020.

3. NYPPEX Begins Providing Documents

In early March, NYPPEX began producing documents responsive to the February 10 and 20 requests via FINRA's Request Manager System ("Request Manager").

On March 2, 2020, someone acting on NYPPEX's behalf uploaded documents to Request Manager.[24] In a message on the system, this person wrote: "I have downloaded [sic] NYPPEX Holdings [a]ccount statements for 2018 but am unable to download [sic] 2019, I suspect due to a size restriction. Can you assist?"

[24] Schunk testified that he and others were uploading the documents; he testified that he did not write the message.

On March 5, 2020, someone acting on NYPPEX's behalf uploaded additional documents to Request Manager. In a message on the system, this person wrote: "Attached are bank statements for . . . NYPPEX Holdings for 1-1-2018 through 12-31-2019 . . . ."

4. Member Supervision Issues the March 10 Request

On March 10, 2020, Member Supervision issued another Rule 8210 request to NYPPEX (the "March 10 Request").[25] The March 10 Request contained 29 items seeking documents and information related to the valuation report for NYPPEX Holdings. The March 10 Request set a response deadline of March 20, 2020.

5. Member Supervision Notifies NYPPEX and Allen of Deficiencies in Its Responses to the Requests

On March 13, 2020, an investigator in Member Supervision, David Steinberg, sent an email to NYPPEX's attorney, JH, stating that FINRA had not received a complete response to its February 10 and February 20 Requests.

With respect to the February 10 Request, Steinberg wrote that FINRA had not received, among other things, a response to Items 2 (Allen's bank statements) and 8 (a list of Allen's OBAs and PSTs and evidence of NYPPEX's approval and supervision of them).

With respect to the February 20 Request, Steinberg wrote that FINRA had not received, among other things, a response to Item 1 (a list of loans between Allen and any entity in which he had an ownership interest and copies of the loan agreements).

Steinberg wrote that the deadline for production had passed, and therefore NYPPEX and Allen were in violation of FINRA Rule 8210. The letter set a response deadline of March 20, 2020. On March 20, 2020, JH and Steinberg spoke on the telephone, and Steinberg extended the deadline until March 24, 2020. Steinberg sent JH an email confirming the extension.

6. NYPPEX and Allen Produce Some Loan Agreements and a List of OBAs

On March 21, 2020, JH sent an email to Steinberg that attached three different documents titled "Amended and Restated Credit Facility Agreements," and one document titled "Credit Facility Agreement." All three agreements related to loans made to NYPPEX Holdings by entities in which Allen had an ownership interest (Item 1 on February 20 Request). The same day, JH sent Steinberg an email containing a list of Allen's OBAs (Item 8 on the February 10 Request).

---

[25] On March 7, 2020, an emergency was declared in New York due to COVID-19.

7. FINRA Notifies NYPPEX of Deficiencies in Its Responses to the Requests

On March 27, 2020, an attorney in Enforcement sent JH an email stating that Allen and NYPPEX had not complied with the February 10 and 20 requests. The attorney wrote that FINRA was "expecting NYPPEX and Mr. Allen to complete their production . . . earlier this week," i.e., on March 24, 2020, and FINRA was "still missing certain items, including Mr. Allen's bank statements." The attorney asked to schedule a telephone call to discuss the outstanding requests.

On March 30, 2020, Steinberg spoke by telephone with JH and granted an extension until April 6, 2020, for the February 10 and 20 Requests. Afterwards, Steinberg sent JH an email confirming the details of their conversation. Steinberg wrote that "several items" from the February 10 and 20 Requests were still outstanding for NYPPEX and Allen.

From the February 10 Request, Steinberg wrote that FINRA had not received, among other things, a response to Item 2 (Allen's bank statements).

From the February 20 Request, Steinberg wrote that FINRA had "received documents but still require[d] a written response" from the firm for Item 1 (a list of all loans between Allen and entities in which he had an interest, loan agreements, and evidence of payments).

Steinberg wrote that if NYPPEX and Allen did not "complete the response to FINRA's requests" by April 6, 2020, "the firm and Allen may be subject to institution of a summary proceeding" that could result in suspension and "also could be the subject of formal disciplinary charges pursuant to FINRA Rule 8210."

8. Schunk Tells FINRA that NYPPEX Has Completed Its Production for February 10 and 20 Requests

On March 31, 2020, Schunk emailed the Member Supervision staff that he had "submitted our responses to the February 10th and February 20th inquiries via Request Manager." Schunk wrote that he was "currently working on the [March 10] request regarding [the valuation of NYPPEX Holdings]." Schunk wrote that he was having surgery the next day and needed additional time to respond to the March 10 Request. Schunk asked for an extension until April 13 for the request, which Member Supervision granted.

9. Member Supervision Issues the April 10 Request

On April 10, 2020, Member Supervision issued another Rule 8210 request to NYPPEX (the "April 10 Request"). The April 10 Request contained 14 items seeking different categories of documents and information. The April 10 Request set a response deadline of April 24, 2020.

10. Member Supervision Notifies NYPPEX of Deficiencies in Its Responses to the February 10 and 20 Requests

On April 15, 2020, Steinberg sent JH a letter identifying several items that were outstanding.

From the February 10 Request, Steinberg wrote that FINRA had not received, among other things, any documents for Item 2 (Allen's bank statements).

From the February 20 Request, Steinberg wrote that FINRA had not received, among other things, a complete response to Item 1 (a list of all loans between Allen and entities in which he had an interest, loan agreements, and evidence of payments).

Steinberg wrote that, "[a]s of today's date," Allen and NYPPEX "are both in violation of FINRA Rule 8210 for their failure to respond to multiple Rule 8210 requests[.]"

11. FINRA Grants an Extension Until April 24, 2020

On April 21, 2020, Allen sent an email to an Enforcement attorney asking for an extension of time to respond to the various requests. Allen wrote that "this coronavirus epidemic has caused companies' and their employees to work from home which has caused numerous delays," and that Schunk "had just returned from surgery" and was "catching up on email." Allen continued, "Yet, we continue to get an overwhelming number of requests (and late notices) for the production of documents" from Member Supervision and Advertising Regulation. Allen wrote that NYPPEX was "just about finished" with its response to Advertising Regulation's requests and suggested an extension of time to respond to Member Supervision's requests until April 24.

The next day, the Enforcement attorney responded by email to Allen, writing that FINRA "look[ed] forward to your production by April 24, 2020."

12. NYPPEX Disputes that the Firm or Allen Has Violated Rule 8210

On April 24, 2020, NYPPEX provided a written response to Steinberg's April 15 letter. NYPPEX disagreed with Steinberg's assertion that the firm had not provided responses to items in the various Rule 8210 requests. NYPPEX wrote that the FINRA staff "has continuously issued new requests for documents we already produced[.]"

From the February 10 Request, NYPPEX wrote that it had provided, among other things, documents responsive to Items 1 (NYPPEX Holdings' bank statements) and 2 (Allen's bank statements).

From the February 20 Request, NYPPEX wrote that it had provided, among other things, documents responsive to Item 1 (a list of all loans between Allen and entities in which he had an interest, loan agreements, and evidence of payments), with "some documents still pending."

NYPPEX wrote that, "[g]iven our progress in producing a substantial portion of documents," and the "highly unusual operating environment" due to COVID-19, the firm disagreed with the FINRA staff's view that Allen and the firm were in violation of FINRA Rule 8210.

13. Member Supervision Asks for Passwords Needed to Access Certain Documents Produced by NYPPEX

On April 27, 2020, Steinberg emailed Allen and Schunk in response to NYPPEX's letter. Steinberg wrote that FINRA would provide a "detailed list of the items that remain outstanding" later that week. He also asked Allen to "provide the passwords for encrypted documents previously produced at your earliest convenience."

On May 1, 2020, Steinberg emailed Allen and Schunk again asking for passwords needed to access certain files. Steinberg wrote that, "[w]ith respect to items previously produced, some are password protected," and that "these items can be identified by reviewing the firm's submissions within Request Manager for documents ending with a '(P)'. Please provide the password for the encrypted documents at your earliest convenience."

Allen responded that day, "Will do asap."

On May 6, JH sent an email to Steinberg stating: "I attach a letter addressing our work on the NYPPEX matter."[26]

On May 7, Steinberg sent an email to JH, copying Allen and Schunk. Steinberg wrote, "We acknowledge receipt of your letter," and that FINRA was "anticipating a more substantive response, as multiple items from the staff's prior requests . . . remain outstanding." Steinberg wrote that several of the documents NYPPEX had produced previously were password protected and the FINRA staff needed the passwords.

JH responded by email that he, Allen, and Schunk were "currently working on the production requests and anticipate providing the requested information in the designated time." JH wrote that he would call Steinberg the next day "to ensure that we are properly coordinated on production."

On May 11, Steinberg sent an email to JH that listed the password-protected documents that NYPPEX had provided. The list included several files that appeared to be related to Allen's bank statements and PSTs.

---

[26] The letter that JH attached to his email does not appear to be in the record.

14. NYPPEX's Attorney Claims NYPPEX's Production Is Complete

On May 12, 2020, JH emailed Steinberg a letter, copying Allen and Schunk, which stated that NYPPEX had completed its production in response to the February 10, February 20, March 10, and April 10 Requests.[27]

JH wrote, "[a]dditionally, there are certain bank accounts maintained by" Allen "or in which he has signatory authority that have been requested" in the February 10 Request, and that JH did not believe they were "relevant in this matter." JH wrote that "the Staff has agreed to make a discrete review of these accounts to determine their relevance in this matter. We are currently discussing with the Staff the arrangements for this review."

Steinberg testified that he was not aware of any such discussions about any of Allen's bank statements.

15. Member Supervision Provides a List of Outstanding Items

On May 29, 2020, Steinberg sent an email to JH, copying Allen and Schunk, in which he provided a list of "some of the most pressing items" that remained outstanding from the February 10 and 20 Requests and the April 10 Request.

With respect to the February 10 Request, Steinberg wrote:

> Request #1 – NYPPEX Holdings bank statements for 2019
>
> Request #2 – Allen bank account statements, including accounts where he is a signatory (note that for the few accounts where statements have been produced, Mr. Allen failed to provide the password)[28]
>
> Request # 8 – the response provided is password-protected and NYPPEX/Allen have failed to provide the password[29]

With respect to the February 20 Request, Steinberg wrote:

---

[27] JH's letter also referenced a Rule 8210 request dated April 15, which does not appear to be in the record.

[28] Steinberg's email did not address the claim in JH's May 12 letter that the FINRA staff had "agreed to make a discrete review" of the statements for several accounts for which Allen had signatory authority "to determine their relevance in this matter."

[29] Item 8 on the February 10 Request sought a list of Allen's OBAs and PSTs and all evidence of approval and supervision of them for 2018 and 2019.

> Request #1 – Some loan agreements have been produced, but we have not received a list of all loans and therefore do not know if we have received all loan agreements executed during the relevant time.

JH replied that day, "Thank you, David. I will follow-up on this immediately."

16. Schunk Acknowledges Member Supervision's List

On May 29, 2020, Schunk sent an email to JH, copying Allen, about the outstanding requests identified in Steinberg's email.

Schunk wrote that he had NYPPEX Holdings' 2019 bank statements, but it "appears that they were not [uploaded] to Request Manager along with the rest. I will [upload] them as soon as FINRA opens the 2-10-20 request which is currently closed."[30]

With respect to Items 2 (Allen's bank statements) and 8 (information about Allen's OBAs and PSTs) on the February 10 Request, Schunk wrote that they "require passwords," and that he "spoke to [Allen] and [Allen] will provide and copy you."

With respect to Item 1 on the February 20 Request (a list of all loans between Allen and entities in which he had an interest, loan agreements, and evidence of payments), Schunk wrote that "it appears that they want a list [of loans] plus complete documentation including source of funds for each loan. The original request did not ask for source of funds."

17. FINRA Issues a "Wells Notice" and NYPPEX Responds

About three weeks later, on June 23, 2020, FINRA staff issued a "Wells Notice" to NYPPEX.[31] NYPPEX submitted its response on July 20, 2020. With respect to the Rule 8210 requests, NYPPEX wrote that its attorney, JH, "understood from multiple phone calls with [Enforcement] there was a mutual agreement that certain bank [trust] accounts of the Allen family were to be reviewed in such a manner as to protect their confidentiality," but NYPPEX had received multiple letters that stated that NYPPEX and Allen had refused to provide the bank

---

30 When FINRA staff issues a request via Request Manager system, a "window" is opened that allows the respondent to upload documents to the system. When the respondent indicates that the production is complete, the window closes automatically. Because NYPPEX previously indicated its response was complete, the window for the request had closed.

31 A written "Wells Notice" is a letter sent by the FINRA staff to a prospective respondent, notifying the respondent of the substance of charges that the staff intends to bring against the respondent, and affording the respondent with the opportunity to submit a written statement to the staff.

statements. NYPPEX's response did not address any other category of documents or information sought in the various Rule 8210 requests.[32]

18. Allen and NYPPEX Fail to Make Complete Productions

The record shows that, as of the hearing in this matter, Allen and NYPPEX had not provided:

- numerous monthly bank statements from 2018 and 2019 for six of Allen's bank accounts; any statements for six business-related bank accounts for which Allen was a signatory; or any statements for an indeterminate number of additional bank accounts in Allen's name or for which he had signatory authority;

- statements for any month in 2019 for five of NYPPEX Holdings' bank accounts;

- a list of Allen's PSTs and evidence of NYPPEX's approval and supervision of Allen's PSTs and OBAs;

- a list of all loans entered since January 1, 2019, between Allen and any entity in which he had an ownership interest, evidence of all payments made on such loans, and loan agreements for all such loans;

- passwords for several password-protected documents provided to the FINRA staff.

IV. Procedural History

In May 2021, Enforcement filed a nine-cause complaint against Allen, Schunk, and NYPPEX. An 11-day hearing was held in March 2022. In August 2022, the Hearing Panel issued its decision finding Allen, Schunk, and NYPPEX liable for each violation alleged against them, respectively. Allen, Schunk, and NYPPEX appealed.

V. Discussion

A. Procedural Issues

Respondents' filings raise several procedural issues that we address at the outset.[33]

---

[32] The Wells Notice does not appear to be in the record. It is not clear which specific FINRA Rule 8210 violations the Wells Notice alleged.

[33] Respondents' brief to the NAC does not include any citations to the record, as required by FINRA Rule 9347(a). The NAC may reject any argument that is unsupported by citations to

[Footnote continued on next page]

1. Respondents' Motion to Introduce Additional Evidence Is Denied

When Respondents filed their brief with the NAC in January 2023, they moved to introduce a declaration dated January 12, 2023, which purportedly was made by three investors in NYPPEX Holdings who stated that they also were members of the company's "Shareholders Advisory Committee." The declaration addressed several different issues, including the AG's litigation and the Hearing Panel's findings in this matter.

FINRA Rule 9346 allows the introduction of additional evidence in a matter pending before the NAC only upon a showing that "extraordinary circumstances" exist. Under Rule 9346, a party seeking to introduce additional evidence must file and serve a motion not later than 30 days after the Office of Hearing Officers ("OHO") transmits to the NAC and serves upon all parties the index to the record. The motion must: (1) describe the proposed new evidence; (2) demonstrate that there was good cause for failing to produce the evidence below; and (3) demonstrate why the evidence is material to the proceeding.

After hearing oral argument in February 2023, the NAC Subcommittee empaneled to review this appeal denied Respondents' motion. The Subcommittee found that Respondents made no effort to demonstrate the materiality of most of the statements in the declaration. Respondents did, however, address the materiality of certain statements relating to the Hearing Panel's finding that Allen and NYPPEX made misrepresentations and omissions to prospective investors in the contemplated private placement. The Subcommittee found that, assuming without deciding that these statements could be material, Respondents failed to demonstrate good cause for their failure to produce this evidence during the proceeding below. The Subcommittee noted that Respondents had been aware of the allegations against them since May 2021, when Enforcement served its complaint. Yet Respondents failed to explain why they could not have called the declarants as witnesses to offer testimony about the fraud allegations during the hearing, or at least offered a declaration like the one they sought to introduce on appeal. The Subcommittee therefore found that the respondents had not demonstrated good cause for their failure to produce the evidence during the proceeding below.

Additionally, the Subcommittee found that Respondents' motion was untimely. OHO transmitted the index to the record on November 2, 2022, and served it on the parties. Respondents' motion therefore was due not later than December 2, 2022. Respondents submitted their motion more than one month later, on January 13, 2023. Respondents requested an extension of the period to file their motion, but they failed to demonstrate good cause for their failure to file the motion during the period prescribed. *See* FINRA Rule 9346(b). Respondents stated that they could not file their motion by the deadline because the declaration did not exist until January 12, 2023. The declaration, however, addressed matters known to Respondents

---

[cont'd]
the record. *See Dep't of Enf't v. Sturm*, Complaint No. CAF000033, 2002 NASD Discip. LEXIS 2, at *18 (NASD NAC Mar. 21, 2002). To the extent that facts are relevant and we were able to identify supporting evidence based on Respondents' post-hearing brief or other filings in this matter, we have considered those facts.

before December 2, 2022. Respondents did not explain why they could not have procured the declaration from the investors before the December 2, 2022 deadline.

We agree with the Subcommittee's ruling and we adopt it as our own.

2. The Replacement of a Hearing Panelist Did Not Deprive the Respondents of a Fair Hearing

Respondents contend that they were deprived of a fair hearing because Gregory, a FINRA employee who was scheduled to testify at the hearing, spoke by telephone to a member of the Hearing Panel on the first day of the hearing, which resulted in the panelist withdrawing. The panelist was replaced by someone who, according to Respondents, "was not at all favorable to Respondents." After the new panelist was appointed, Respondents moved to postpone the hearing until a different panelist could be appointed. The Hearing Officer denied the motion and the hearing was re-started with the new panelist the next day. Respondents ask the NAC to set aside the Hearing Panel's decision and either dismiss the complaint or order a new hearing. We deny Respondents' request.

a. The Panelist's Telephone Conversation With Gregory

Following the lunch recess on the first day of the hearing, an Enforcement attorney notified the Hearing Officer and Respondents that Gregory had just finished a telephone conversation with panelist KL regarding FINRA's examination of KL's firm. According to Enforcement's attorney, during FINRA's examination of KL's firm, examiners had identified issues related to FINRA's advertising rules. KL's firm asked to speak to someone from Advertising Regulation, and Gregory was asked to join the call with the firm. During the call, "there were differences of opinion" between KL and the FINRA staff "about certain . . . advertising regulation issues." At the end of the call, KL stated that he would be unable to speak to the FINRA staff about these issues for some time because he was serving as a panelist on a disciplinary matter. Enforcement's attorney said that Gregory "put two and two together and said that well, maybe the hearing [KL] is in might be the hearing that she is going to testify in," and contacted Enforcement. Enforcement's attorney recommended that the Hearing Officer replace KL.

Respondents objected to replacing KL. Respondents argued that they believed, because of KL's background, that he "was going to be very sympathetic" and "very much on our side in this case."

After a brief recess, the Hearing Officer informed the parties that KL had "decided to withdraw." The Hearing Officer stated that KL would be replaced, and that the hearing would start anew once a replacement was located.

Later that day, FINRA's Chief Hearing Officer issued a notice that a new panelist, LH, had been appointed to replace KL.

The next day, Respondents filed a motion, pursuant to FINRA Rule 9222, to postpone the hearing "until a new [p]anel member can be appointed who matches, as closely as possible,

[KL's] profile." Respondents argued that KL "was the perfect [p]anelist for this case," and that it was "fundamentally unfair to Respondents that through the actions of FINRA, [KL] has now been forced off the panel and replaced with another [p]anelist who does not have the profile that would make him as sympathetic and understanding of the situation" as KL.

The Hearing Officer held a hearing on Respondents' motion that day. During the hearing, Respondents' counsel stated that he was "sure" that LH was "qualified to be a panel member," but it was not fair to replace an "individual that was perfectly suited for this" matter with "the first available person whose profile is so drastically different from the panel member being replaced[.]"

Following the hearing, the Hearing Officer issued an order denying Respondents' motion for a postponement. The hearing resumed the next day.[34]

b. The Hearing Officer's Denial of Respondents' Motion Was Not an Abuse of Discretion

We review the Hearing Officer's denial of the request for a postponement for abuse of discretion. *See Edward Beyn*, Exch. Act Release No. 97325, 2023 SEC LEXIS 980, at *42 (Apr. 19, 2023).

FINRA Rule 9222(b) states that a hearing "shall begin" at the time ordered unless, "for good cause shown," the Hearing Officer postpones its commencement for a "reasonable period of time." In evaluating a motion for a postponement, Rule 9222(b) directs the Hearing Officer to consider: (1) the length of the proceeding; (2) the number of prior postponements; (3) the stage of the proceeding at the time of the request; (4) potential harm to the investing public if a postponement is granted; and (5) "such other matters as justice may require."

The Hearing Officer found that several of the factors weighed against granting Respondents' motion because the proceeding had been pending for nine months, the Respondents made the request at a late stage (after the hearing had started), and "there was substantial potential harm to the investing public" from delaying the hearing because the complaint contained fraud allegations. The Hearing Officer noted, however, that no other postponements had been granted, and that "the issue giving rise to the [m]otion had just occurred."

The Hearing Officer found that the "key issue" raised by Respondents was whether LH should be replaced, and therefore he also considered the factors that are relevant when a party moves to disqualify a panelist under FINRA Rule 9234(b). The Hearing Officer found that Respondents' motion was "devoid of any facts suggesting—let alone proving—that [LH] had a conflict of interest or bias or that circumstances otherwise existed where his fairness might have reasonably been questioned." The Hearing Officer found that Respondents had "assumed, without support, that they are entitled to a panelist who they believe is favorably inclined to accept their defenses," and that this was not a basis to disqualify LH under Rule 9234.

---

[34] The hearing was re-started from the beginning.

On appeal, Respondents argue that the Hearing Officer erred because FINRA's "actively investigating and examining" KL's firm in the middle of a hearing for "allegations similar to those alleged against Respondents . . . is one of the most egregious and sanctionable actions that one could imagine." Respondents assert that they were "thrilled to have [KL] on the Hearing Panel" because he "would have current, intimate knowledge of FINRA's at-times overbearing tactics and erroneous positions," while LH "had been retired from the business for over 20 years," and his firm "had not been in existence for over 20 years[.]" Respondents contend this "fundamental deprivation" of "due process mandates a vacatur of the findings" and either a dismissal of the complaint or a new hearing.

As an initial matter, there is no evidence that the FINRA staff acted intentionally to have KL removed from the Hearing Panel. Enforcement's attorney represented to the Hearing Officer that FINRA had been conducting a routine examination of KL's firm when the examiners identified the issue related to FINRA's advertising rules. Enforcement's attorney represented that, at the time Gregory joined the call with KL's firm, she did not know KL was going to be on the call, nor did she know that KL was a hearing panelist in this matter. There is no evidence in the record that contradicts these representations.

The Hearing Officer's denial of Respondents' motion was not an abuse of discretion. It is well established that a respondent does not have the right to dictate the qualifications of the hearing panelists. *Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *38 (NASD NAC Jan. 28, 1999), *aff'd*, 54 S.E.C. 655 (2000). Indeed, we agree with the Hearing Officer that the standard for disqualifying a panelist, in this case a replacement panelist, is not whether the respondent believes that the panelist is sympathetic or favorably inclined to rule for the respondent. Fairness of a panelist is the touchstone and, in this case, Respondents have not shown that reasons existed to question LH's fairness, or that LH lacked the proper expertise to consider their arguments. *See Dep't of Enf't v. Sathianathan*, Complaint No. C9B030076, 2006 NASD Discip. LEXIS 3, at *54 (NASD NAC Feb. 21, 2006).

We therefore deny Respondents' request to vacate the Hearing Panel's findings or order a new hearing in this matter.

3. The FINRA Staff's Communications with Respondents' Attorney Did Not Deprive the Respondents of a Fair Hearing

Respondents assert that the FINRA staff involved in the investigation engaged in "prejudicial conduct" by "contacting Respondents' attorneys for purposes of trying to breach the attorney-client privilege[.]" Respondents contend that these alleged contacts "had the effect of scaring off those attorneys from testifying," which was "a particularly devastating blow to Respondents since there is no is no subpoena power" in a FINRA disciplinary proceeding, and the Hearing Panel "discredit[ed] Respondents' reliance on counsel defense" because "those attorneys did not come to testify."

It appears that the only evidence in the record on this issue is an email that Allen sent to an attorney on June 16, 2020.[35] Allen's email contained the following sentence:

> David Steinberg contacted some of our attorneys such as [Law Firm A] to ask if they were our attorneys and what was discussed. [SN] of [Law Firm A] called me afterward and was very upset with the arrogance and unethical approach of these FINRA enforcement attorneys.

Respondents' objection is moot with respect to SN. SN advised Respondents with respect to the Do Not Use-Response. As discussed below, we have reversed the Hearing Panel's findings of liability related to the Do Not Use-Response. In any event, Respondents do not cite any evidence showing that SN was "scared off" from testifying in this matter. And there is no evidence that any FINRA employee contacted any of Respondents' other attorneys for any allegedly improper purpose.

4. The Hearing Officer's Evidentiary Rulings Were Not an Abuse of Discretion

Under FINRA Rule 9263(a), the Hearing Officer must admit all relevant evidence and has discretion to exclude all evidence that is irrelevant, unduly repetitious, or unduly prejudicial. The Hearing Officer is granted broad discretion to accept or reject evidence under the rule. *Dep't of Enf't v. Brookstone Secs., Inc.*, Complaint No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *110 (FINRA NAC Apr. 16, 2015). "Because this discretion is broad, the party arguing abuse of discretion assumes a heavy burden that can be overcome only upon showing that the Hearing Officer's reasons to admit or exclude the evidence were so insubstantial as to render the admission or exclusion an abuse of discretion." *Id.*

a. The Admission of Evidence Relating to Other Litigation Was Not an Abuse of Discretion

Respondents contend that the Hearing Officer erred by admitting evidence related to the AG's litigation and "a border dispute case in Connecticut involving Allen and his neighbor[.]" Respondents' brief to the NAC does not identify any particular ruling on any particular piece of evidence. It appears, however, that Respondents are challenging the Hearing Officer's rulings that (a) allowed Enforcement to question Allen about credibility findings made by the courts hearing the AG's lawsuit and the Connecticut "border dispute," and (b) allowed Enforcement to introduce and question Allen about documents filed with the court in support of the AG's application for the Order.

Respondents have failed to meet their burden to overturn the Hearing Officer's rulings that allowed Enforcement to question Allen about the credibility findings made by the New York and Connecticut courts. Although the Federal Rules of Evidence ("FRE") do not apply in FINRA disciplinary proceedings, FINRA adjudicators frequently look to them for guidance.

---

[35] Respondents do not cite any other record evidence in support of this allegation and we are not aware of any.

Dep't of Enf't v. North, Complaint No. 2010025087302, 2017 FINRA Discip. LEXIS 7, *35 (FINRA NAC Mar. 15, 2017), *aff'd*, Exch. Act Release No. 84500, 2018 SEC LEXIS 3001 (Oct. 29, 2018). The Hearing Officer explained that he found the evidence about the credibility findings was admissible under FRE 608(b), which provides that, on cross-examination, a court may allow inquiry into a witness's character for truthfulness. Although Enforcement called Allen as a witness, the Hearing Officer reasoned that, because Allen was a respondent, Enforcement's questioning of him was effectively a cross-examination. Enforcement's inquiry into the credibility findings made by the New York and Connecticut courts was probative of Allen's truthfulness. *See United States v. Whitmore*, 359 F.3d 609, 619 (D.C. Cir. 2004) ("Nothing could be more probative of a witness's character for untruthfulness than evidence that the witness has previously lied under oath."). Respondents did not establish that they were unfairly prejudiced by the Hearing Officer's decision to allow this line of questioning. The Hearing Officer's ruling on this evidence was not an abuse of discretion.[36]

Respondents also failed to meet their burden to overturn the Hearing Officer's rulings that allowed Enforcement to introduce evidence related to the AG's litigation. The Hearing Officer allowed Enforcement to introduce into evidence and question Allen about two documents the AG's office filed in support of its application for the Order: an affirmation from an Assistant Attorney General and a memorandum of law in support of the application. The Hearing Officer found that this evidence was relevant because both documents were served on Allen in January 2019, and they were probative of his state of mind when the allegedly fraudulent offers of securities were made. The Hearing Officer explained that the Hearing Panel was "fully capable of focusing on how this evidence relates to the issues at hand," and that the evidence "would be helpful to this panel in making judgments about" Allen's understanding of "what was going on at the time . . . he was engaging in the alleged misconduct, including alleged misrepresentations and omissions here." The Hearing Officer's ruling on this evidence was not an abuse of discretion.

b. The Hearing Officer Did Not Abuse His Discretion by Excluding the Testimony of NYPPEX's General Counsel

Respondents argue that they were prejudiced by the Hearing Officer's ruling to exclude the testimony of NYPPEX's current in-house counsel, JK. Respondents contend JK's testimony was important because they could not compel their former in-house counsel, SS, to testify about the firm's "procedures for how they interacted with their in-house counsel," and therefore JK's testimony on this issue "was of extreme importan[ce] to NYPPEX's reliance on counsel defense."

Respondents have failed to meet their burden to overturn the Hearing Officer's ruling on this evidence. JK testified that he started at NYPPEX in August 2020, which is after the relevant

---

[36] *See United States v. Dawson*, 434 F.3d 956, 959 (7th Cir. 2006) ("The important point is that the decision whether to allow a witness to be cross-examined about a judicial determination finding him not to be credible is confided to the discretion of the trial judge; it is not barred by Rule 608(b), which, to repeat, is a rule about presenting extrinsic evidence, not about asking questions.").

period in this matter. Respondents argued that JK's testimony was intended to establish "what the daily process is, what it has been from the time [JK has] been retained, and then establish with Mr. Allen that was also the process" during the relevant period. After conferring with the other panelists, the Hearing Officer ruled that JK's testimony was not relevant because he did not work at the firm during the relevant period. The Hearing Officer's ruling was not an abuse of discretion.

B. Substantive Findings

1. Allen Associated with NYPPEX While Statutorily Disqualified

The Hearing Panel found that Allen associated with NYPPEX while subject to a statutory disqualification, that NYPPEX and Schunk, who was Allen's supervisor, allowed him to do so, and that, as a result, NYPPEX and Schunk violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rules 8311 and 2010.[37] The Hearing Panel further found that, by remaining associated with NYPPEX after he became statutorily disqualified, Allen violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rule 2010. We affirm these findings of violation.

Article III, Section 3(b) of FINRA's By-Laws provides that "[n]o person shall become associated with a member [or] continue to be associated with a member . . . if such person . . . becomes subject to a disqualification under Section 4" of the By-Laws, and "no member shall be continued in membership, if any person associated with it is ineligible to be an associated person under this subsection." Under Article III, Section 4 of FINRA's By-Laws, a person is subject to a disqualification if he is subject to any "statutory disqualification," as that term is defined in Section 3(a)(39) of the Exchange Act. Exchange Act Section 3(a)(39), in turn, provides that "[a] person is subject to a 'statutory disqualification'" if he "is enjoined from any action, conduct, or practice specified in" Exchange Act Section 15(b)(4)(C). 15 U.S.C. § 78c(a)(39)(F). Among the actions, conduct, or practices specified in that section is any "conduct or practice in connection . . . with the purchase or sale of any security." 15 U.S.C. § 78o.

FINRA Rule 8311 provides that "a member shall not allow [a statutorily disqualified] person to be associated with it in any capacity that is inconsistent with the . . . disqualified status, including a clerical or ministerial capacity."

The Hearing Panel found that the Order subjected Allen to a statutory disqualification because it enjoined him from violating the Martin Act, a securities fraud statute, and specifically enjoined him from undertaking activities in connection with the purchase or sale of securities.[38]

---

[37] A violation of any FINRA rule also is a violation of Rule 2010. *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *13 n.3 (Sept. 30, 2016).

[38] Respondents do not dispute that the conduct enjoined under the Order brought the Order within the scope of Exchange Act Section 3(a)(39)(F).

Respondents argue that the Order did not disqualify Allen because the court entered the Order ex parte, i.e., without first providing Allen with notice and an opportunity to be heard. Respondents further argue that the Order is analogous to a temporary restraining order ("TRO"), and they contend that a TRO cannot cause a statutory disqualification under the Exchange Act. For the reasons stated below, we find these arguments are without merit.

a. Allen Was Provided Notice and an Opportunity to Be Heard

Respondents have not shown that Allen was denied notice and an opportunity to be heard on the Order. Under the Due Process Clause to the United States Constitution, a court must provide notice and an opportunity to be heard when it issues an injunction, but that does not mean the court must do so before it enters its order. A court may, consistent with due process, enter a temporary injunction first, and then provide notice and opportunity to be heard. *See Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974) ("Ex parte temporary restraining orders are no doubt necessary in certain circumstances, but . . . they should be restricted to . . . preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.").

The record shows that Allen had notice and an opportunity to be heard on the Order, but he waived it. The court entered the Order in December 2018. Allen received notice of the Order no later than January 2019. Under New York law, Allen could have moved immediately to vacate or modify the Order. *See* N.Y. Civ. P. Law & R. § 6314.[39] Had Allen done so, he would have been given a hearing on the merits, as required under the Due Process Clause. *See Bradford Audio Corp. v. Pious*, 392 F.2d 67, 72 (2d Cir. 1968) ("[I]t was not a violation of due process for the state court to enter an ex parte order . . . where the appellant was thereafter notified of subsequent proceedings in the case in which its interests in the property were to be determined after full opportunity to be heard."); *Gozelski v. Wyo. Cnty.*, 115 A.D.2d 1000, 1001 (N.Y. App. Div. 1985) ("The fact that the order was issued ex parte does not, by itself, deny plaintiff his property without due process of law. Plaintiff's recourse here was to move to modify or vacate the temporary restraining order."). There is no evidence in the record that Allen, who was represented by counsel in the AG's litigation, filed such a motion.[40] As a result, the Order remained in effect, and Allen remained subject to a statutory disqualification based on the Order, until the court entered the preliminary injunction, after a hearing, in February 2020.

In sum, Allen had notice and an opportunity to be heard on the Order, but by not moving to vacate or modify the Order, he waived it. *See United States v. Batato*, 833 F.3d 413, 427 (4th Cir. 2016) ("The guarantees of due process do not mean that the defendant in every civil case

---

[39] *See also Matter of James v. iFinex Inc.*, 2019 NY Slip Op 31403(U), ¶ 6 (Sup. Ct. May 16, 2019) ("The Court is authorized at any time to vacate or modify a preliminary injunction . . . . [T]hat the . . . Order was obtained in an ex parte proceeding provides a sound reason to take a fresh look . . . with the benefit of the facts and arguments presented by the Respondents.").

[40] The record shows that there were discussions between Allen and his attorneys about whether Allen should move to vacate or modify the Order.

must actually have a hearing on the merits. What the Constitution does require is an opportunity . . . . A party's failure to take advantage of that opportunity waives the right it secures.").[41]

b. The Order Subjected Allen to a Statutory Disqualification

Respondents contend that Congress did not intend for a TRO to give rise to a statutory disqualification because (1) Sections 3(a)(39)(F) and 15(b)(4)(C) do not explicitly reference TROs and (2) even if a TRO could cause a statutory disqualification, a TRO entered ex parte could not because the Exchange Act's "entire statutory scheme" contemplates notice and an opportunity for hearing. We reject both arguments because the relevant statutory provision does not exclude TROs from the injunctions that can cause a statutory disqualification and, as explained above, Allen had notice and an opportunity to be heard on the Order.

Interpretation of a statute begins with the language employed by the legislature and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). If the statutory language is unambiguous, and the statutory scheme is coherent and consistent, the inquiry ends. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016). In this case, the operative statutory language is found in Section 3(a)(39)(F), which provides that a person is subject to a statutory disqualification if he "is enjoined" from any action, conduct, or practice specified in Section 15(b)(4)(C).

The ordinary meaning of "enjoin" is "to 'require,' 'command,' or 'positively direct' an action or to 'require a person to perform, . . . or to abstain or desist from, some act.'" *Garland v. Gonzalez*, 142 S. Ct. 2057, 2064 (2022) (quoting Black's Law Dictionary 529 (6th ed. 1990)). Courts traditionally have used the term "enjoin" to describe the effect of all types of injunctions, including ex parte TROs. *See, e.g., Walker v. Birmingham*, 388 U.S. 307, 321 n.16 (1967) ("The

---

[41] Our finding on this issue is consistent with the Commission's holding in *Nicholas J. Savva*, Exch. Act Release No. 724585, 2014 SEC LEXIS 5100 (June 26, 2014). *Savva* involved another part of Section 3(a)(39)(F), which provides that a person is statutorily disqualified if he is subject to any "final order" of a state securities commission that either bars him from association with any entity regulated by the agency or is based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct. *Id.* at *15. The applicant in *Savva* entered into a consent order with a state securities regulator based on state regulations prohibiting fraudulent, manipulative, or deceptive conduct. *Id.* As part of the order, the applicant agreed to pay a fine and to not seek registration in the state. *Id.* at *7. The applicant argued that the consent order was not a "final order" for statutory disqualification purposes because it was a settlement and the allegations were never litigated. *Id.* at *18. The Commission disagreed. It held that if the applicant had an opportunity to litigate, the order was a "final order." *Id.* The Commission wrote, "in the context of Exchange Act Section 15(b)(4)(H), the definition of 'final order' should be limited to those orders issued under statutory authority providing for notice and an opportunity for a hearing, in order to address fundamental fairness concerns." *Id.* at *16-17.

federal court issued an ex parte restraining order enjoining Kasper from interfering with desegregation.").[42]

Moreover, since Congress introduced the concept of statutory disqualification in 1975, the Commission has used "enjoin" consistent with its ordinary meaning in the statutory disqualification context.[43] For example, Item 11 on the Uniform Application for Broker-Dealer Registration ("Form BD") "elicit[s] information about regulatory actions that may constitute a statutory disqualification." *Form BD Amendments*, Exch. Act Release No. 37431, 1996 SEC LEXIS 1860, at *9 (July 12, 1996). Item 11(H)(1) asks whether any court has "enjoined" the applicant or a control affiliate in connection with any investment-related activity. "For the purpose of Item 11," Form BD's Explanation of Terms defines "enjoined" as "being subject to a mandatory injunction, prohibitory injunction, preliminary injunction, or a temporary restraining order."[44] *Id.* at *30, 34.

Respondents have not met their burden of showing that "enjoin" carries a meaning different from its ordinary meaning in Section 3(a)(39)(F). *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (stating that, when a party urges an "idiosyncratic definition" of a term used in a statute, it must offer "persuasive proof" that Congress intended that definition).[45]

---

[42] *See also, e.g.*, *Manchester v. Burlingame*, 40 App. D.C. 44, 46 (D.C. Cir. 1913) ("[T]he court granted ex parte a temporary restraining order, which enjoined the defendants . . . from filing and prosecuting certain applications for patent in the Patent Office[.]"); *Peterson v. Brotherhood of Locomotive Firemen & Enginemen*, 272 F.2d 115, 116 (7th Cir. 1959) ("[T]he Elkhart Superior Court issued a temporary restraining order without notice enjoining defendants[.]"); *Biehunik v. Felicetta*, 441 F.2d 228, 229 (2d Cir. 1971) ("The District Court thereupon issued an ex parte temporary restraining order . . . enjoining the lineup."); *Burlington N. R.R. Co. v. Brotherhood of Maint. of Way Emps.*, 481 U.S. 429, 433-434 (1987) ("Burlington Northern sought and obtained ex parte a temporary restraining order . . . enjoining BMWE from picketing or striking Burlington Northern.").

[43] *See Notice by Self-Regulatory Organizations of Proposed Admission to, or Continuance in, Membership or Participation of Certain Persons Subject to Statutory Disqualifications*, Exch. Act Release No. 17615, 1981 SEC LEXIS 1872, *2 n.4 (Mar. 10, 1981) ("The 1975 Amendments introduced the concept of a 'statutory disqualification' with respect to membership or participation in an SRO[.]").

[44] *See also Joseph LeDone*, 7 S.E.C. 587, 588-89 (1940) (stating that a person who was subject to an ex parte decree "enjoining him from engaging in the sale of securities in New Jersey" should have disclosed in his application for registration that he had been "enjoined").

[45] *See also Ardestani v. INS*, 502 U.S. 129, 135 (1991) ("The strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed.").

Respondents contend that, despite the statute's plain text, Congress did not intend for TROs to give rise to statutory disqualifications because Sections 3(a)(39)(F) and 15(b)(4)(C) do not explicitly reference TROs. In support of their argument, the Respondents cite Exchange Act Section 21(d), which does explicitly reference temporary restraining orders. *See* 15 U.S.C. § 78u. Respondents assert that this shows "Congress certainly knew how to include the word[s] restraining order [in the Exchange Act] when it wanted to," and "[t]he fact that Congress left the words out of [Sections 3(a)(39)(F) and 15(b)(4)(C)] must therefore be viewed as purposeful."

Respondents' argument invokes the negative-implication canon of statutory construction, also known as "expressio unius est exclusio alterius," which holds that "expressing one item of [an] associated group or series excludes another left unmentioned." *See Wagner Seed Co. v. Bush*, 709 F. Supp. 249, 251 (D.D.C. 1989) (stating that the defendant's argument was "based on the maxim of expressio unius est exclusio alterius, that when Congress wanted to make a provision of [the statute] retroactive, it knew how to do so").[46] This canon is inapplicable here because it "has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). The items expressed in Section 21(d) are not part of the same "associated group or series" as the items expressed in Sections 3(a)(39)(F) and 15(b)(4)(C). The items expressed in Section 21(d) are the types of injunctions ("a permanent or temporary injunction or restraining order") that a court may enter when the Commission shows that a person is engaged or about to engage in conduct that violates the Exchange Act. The items expressed in Sections 3(a)(39)(F) and 15(b)(4)(C), by contrast, are the types of conduct which, when "enjoined," give rise to a statutory disqualification. In fact, unlike Section 21(d), neither Section 3(a)(39)(F) nor 15(b)(4)(C) reference any type of injunction.[47] Because the items expressed in Section 21(d) are not part of the same associated group or series as the items expressed in Sections 3(a)(39)(F) and 15(b)(4)(C), the inclusion of a reference to TROs in Section 21(d), and the absence of such a reference in Sections 3(a)(39)(F) and 15(b)(4)(C), says nothing about Congress's intent.

---

[46] *See also, e.g., Sullivan v. Greenwood Credit Union*, 520 F.3d 70, 75 (1st Cir. 2008) ("Invoking the canon of expressio unius est exclusio alterius, Greenwood argues that if Congress had wanted to require that more specific credit terms be included in a 'firm offer of credit,' it would have said so."); *Am. Fed'n of Gov't Emps. v. Fed. Labor Relations Auth.*, 778 F.2d 850, 859 (1985) (stating that "Congress knew how to exclude certain types of contracts from head of the agency review when it wanted to," and "[u]nder the doctrine of expressio unius est exclusio alterius, Congress's failure to explicitly except Panel-imposed terms from agency review takes on added significance").

[47] As discussed above, the operative term, "enjoined," is contained in Section 3(a)(39)(F), not Section 15(b)(4)(C). Section 15(b)(4)(C) uses the terms "permanently or temporarily enjoined." This does not help the Respondents' case because a TRO "temporarily enjoins." *See, e.g.*, *Lechman v. Ashkenazy Enters., Inc.*, 712 F.2d 327, 328 (7th Cir. 1983) ("[P]laintiffs obtained an ex parte order temporarily enjoining Bear, Stearns and Co. from distributing to the purchasers of the Kennecott call options any monies the purchasers had earned from the purchase and sale of these call options.").

We do not credit Respondents' argument that "the entire statutory scheme" of the Exchange Act "contemplates notice and opportunity for hearing, which obviously is antithetical to the concept of an ex parte order." As discussed above, Allen was provided with notice and opportunity for a hearing on the Order, but he waived it.[48]

Last, the Respondents argue that, regardless of the statute's plain text, their interpretation must be correct because "there is not a single case . . . applying statutory disqualification to an ex parte TRO." That no prior litigated case has involved a statutory disqualification arising from a TRO is hardly surprising. A statutory disqualification based on an injunction ends when the injunction ends. TROs typically are short lived.[49] In Allen's case, the Order lasted for more than a year only because Allen elected not to file a motion to vacate or modify it.[50]

In reaching our conclusion on this issue, we are mindful that the standard the AG must meet to obtain a disqualifying TRO or preliminary injunction under the Martin Act is lower than the one the Commission must meet under the federal securities laws. As noted above, Section 354 provides that the court may grant a TRO or preliminary injunction as long as it appears to be "proper and expedient." New York courts have held that "[b]ecause the purpose of the inquiry [under Section 354] is to preserve the status quo while determining whether a case can be made out, the [AG] need not establish a prima facie case to obtain a section 354 order." *Matter of Schneiderman v. Eichner*, 2016 NY Slip Op 30991(U), ¶ 11, 2016 N.Y. Misc. LEXIS 2003, at *20-21 (Sup. Ct. May 26, 2016). In *Eichner*, the court held that, to obtain a preliminary injunction under Section 354, the AG did not need to show a likelihood of success on the merits, irreparable injury, or that the equities weighed in favor of injunctive relief; the AG needed to show only that the injunctive relief was "proper and expedient." *Id.* at *25.[51]

---

[48] We note, however, that Exchange Act Section 21(d) authorizes federal courts to enter ex parte TROs when necessary to prevent violations of the Exchange Act. *See, e.g., SEC v. Dowdell*, No. 3:01CV00116, 2002 U.S. Dist. LEXIS 18982, at *4 (W.D. Va. 2002) (stating that "the court granted the motion of the plaintiff SEC for an ex parte temporary restraining order" because "the court found that the SEC had met its burden of providing a proper showing, as required by [Section 21(d)]").

[49] Under the Federal Rules of Civil Procedure, for example, when a court enters an ex parte TRO, it must hold a hearing on a preliminary injunction within 14 days. *See* Fed. R. Civ. P. 65(b)(2). At the hearing, the court may enter a preliminary injunction to replace the TRO, or it may deny injunctive relief. Either way, the TRO is no longer in effect, and any statutory disqualification based on it ends.

[50] Respondents also argue that the FINRA staff's failure to issue a FINRA Rule 9522 letter to the firm after receiving Allen's Form U4 amendment shows that the Order was not disqualifying. The staff's application of the Exchange Act to any particular factual circumstance, however, is not binding on the NAC.

[51] *But see iFinex Inc.*, 2019 NY Slip Op 31403(U), ¶ 10 (finding that the AG's "broad authority to enforce the Martin Act does not warrant abandonment of traditional analytical tools for assessing whether preliminary injunctive relief is appropriate").

Federal courts, by contrast, have recognized that "the collateral consequences of an injunction can be very grave" for a securities professional. *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 99 (2d Cir. 1978). Federal courts have noted that an injunction against future securities law violations "subjects the defendant to contempt sanctions" if subsequent securities-related activity is deemed unlawful, and "also has serious collateral effects." *SEC v. Unifund Sal*, 910 F.2d 1028, 1040 (2d Cir. 1990). Because a preliminary injunction against future violations "accomplishes significantly more than preservation of the status quo," federal courts have held that, to obtain such an injunction, "the Commission has to make a substantial showing of likelihood of success as to both a current violation and the risk of repetition." *Id.*[52]

Despite these different standards, the Order still "enjoined" Allen within the meaning of Exchange Act Section 3(a)(39)(F), and we must apply the statute as it is written. *See Dodd v. United States*, 545 U.S. 353, 359 (2005) ("When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). Moreover, it would be inconsistent with the statutory scheme to permit an individual to avoid a statutory disqualification by refusing to challenge a TRO implicating securities-related conduct.

We affirm the Hearing Panel's finding that Allen associated with NYPPEX while subject to a statutory disqualification, that NYPPEX and Schunk, acting in his capacity as Allen's supervisor, allowed Allen to do so without filing an MC-400, and therefore NYPPEX and Schunk violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rules 8311 and 2010. We also affirm the Hearing Panel's finding that, by remaining associated with NYPPEX after he became statutorily disqualified, but at a time when NYPPEX had not filed an MC-400, Allen violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rule 2010.[53]

2. Enforcement Failed to Prove that Allen and NYPPEX Made Material Omissions in Offers of Securities

The Hearing Panel found that Allen and NYPPEX, through Allen, violated Sections 17(a)(1) and (3) of the Securities Act, and violated FINRA Rule 2010, by making material omissions in their communications (i.e., the New Investor Email, Corporate Overview, Existing Shareholder Email, and Webinar) with investors concerning the contemplated private placement of NYPPEX Holding Securities. We reverse the finding of violation because Enforcement failed to establish that Allen and NYPPEX had a duty to disclose the omitted information.

---

[52] To obtain an injunction to preserve the status quo, the Commission "must establish only that it is likely to succeed on the merits." *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998).

[53] Respondents assert that they relied on advice of counsel that the Order did not subject Allen to a statutory disqualification. Advice of counsel is not a defense to the violation, although it is relevant to the appropriate sanction for the violation. *See Nat'l Bus. Cond. Comm. v. Deltavest Fin.*, Complaint No. C02930042, 1994 NASD Discip. LEXIS 221, at *43 (NASD NAC June 27, 1994) (stating that reliance on advice of counsel can only serve as a substantive defense to allegations of violations that have a mental state requirement).

Section 17(a) of the Securities Act prohibits materially false or misleading statements, or material omissions, in the offer or sale of any security. *William R. Hough*, Exchange Act Release No. 42632, 2000 SEC LEXIS 671, at *13 (Apr. 6, 2000). To establish liability under Section 17(a)(1), Enforcement was required to prove that Allen or NYPPEX (1) made a material misstatement of fact or an omission as to which they had a duty to speak, (2) with scienter, (3) in an offer or sale of securities. *See Hough*, 2000 SEC LEXIS 671, at *13; *SEC v. Espuelas*, 698 F. Supp. 2d 415, 424 (S.D.N.Y. 2010). The same elements are required to prove a violation of Section 17(a)(3), except a showing of negligence is sufficient. *Id.*

Making a material omission of fact when there is a duty to speak may also violate FINRA Rule 2010. *Dep't of Enf't v. Meyers*, Complaint No. C3A040023, 2007 NASD Discip. LEXIS 4, at *18 n.6 (NASD NAC Jan. 23, 2007).

A registered person generally has a duty to speak, or a duty to disclose material information, when (a) he is in a fiduciary or similar relationship of trust and confidence with another, or (b) he has made an affirmative statement of material fact which would be misleading without disclosure of the omitted information. *See Dep't of Mkt. Reg. v. Leighton*, Complaint No. CLG050021, 2010 FINRA Discip. LEXIS 3, at *108 (FINRA NAC Mar. 3, 2010) ("Silence may constitute a violation . . . when a duty to speak arises from a relationship of trust and confidence between the parties to a securities transaction."); *Brookstone Secs., Inc.*, 2015 FINRA Discip. LEXIS 3, at *70 (stating that a person has "a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading"). Enforcement does not assert that Allen or NYPPEX had a duty to disclose material information based on a fiduciary or similar relationship of trust and confidence with any recipient of the communications at issue. Accordingly, to prove Allen's and NYPPEX's liability for any alleged material omission, Enforcement had to show that Allen or NYPPEX made an affirmative statement of material fact that was made misleading by the omission.

An affirmative statement of fact is misleading "if it would give a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists." *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275 (9th Cir. 2017). A registered person may be liable for a truthful statement of material fact if his failure to disclose related content makes the statement misleading. *See In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 160 (S.D.N.Y. 2008); *Louis Ottimo*, Exch. Act Release No. 3-17930, 2018 SEC LEXIS 1588, at *31 (June 28, 2018) (stating that a person has "a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading"). However, in the absence of a fiduciary or similar relationship of trust and confidence, a registered person does not have a duty to disclose a material fact solely because an investor would like to know it. *See Dalberth v. Xerox Corp.*, 766 F.3d 172, 183 (2d Cir. 2014) (stating that a person "is not required to disclose a fact merely because a reasonable investor would very much like to know that fact," and "an omission is actionable . . . only when the [speaker] is subject to a duty to disclose the omitted facts").

a. Enforcement Failed to Prove that Allen or NYPPEX Had a Duty to Disclose the Order, the Investigation, or the Sales Incentive

The Hearing Panel found that Allen and NYPPEX violated Section 17(a) and FINRA Rule 2010 by not disclosing, in any of the communications at issue, the Order, the AG's investigation, and the sales incentive. Respondents argue that Enforcement "categorically failed in its burden" to establish that Allen or NYPPEX had a duty to disclose this information. We agree with the Respondents that Enforcement did not meet its burden of proof on this issue.[54]

Enforcement never identified, in its complaint or in any of its briefs, the basis of Allen's or NYPPEX's duty to disclose the Order, the AG's investigation, or the sales incentive in any of the communications at issue. As discussed above, Enforcement did not assert that Allen or NYPPEX had a fiduciary or similar relationship of trust and confidence with any of the investors who received any of the communications at issue. Accordingly, to establish Allen's or NYPPEX's liability, Enforcement had to identify an affirmative statement that was made misleading by the non-disclosure of the Order, the AG's investigation, or the sales incentive. Enforcement failed to do so in its complaint or in any of its briefs.[55]

We cannot conclude that Enforcement met its burden of establishing, by a preponderance of the evidence, that Allen or NYPPEX had a duty to disclose the Order, the AG's investigation, or the sale incentive in any of the communications at issue. We do not find, however, that no statement in any of the materials was made misleading by these omissions. We find only that Enforcement failed to prove any violation because it did not identify any affirmative statement and explain how it was made misleading by any of these omissions. *See Rameses Te Lomingkit v. Apollo Educ. Grp. Inc.*, 275 F. Supp. 3d 1139, 1150-51 (D. Ariz. 2017) ("The [c]ourt will not attempt to sua sponte propose reasons why any of [d]efendants' statements are false or misleading and, thus, will not consider whether statements are actionable unless [p]laintiffs explicitly provided a basis for why a statement was false or misleading."); *Erie Grp. LLC v. Guayaba Cap., LLC*, 110 F. Supp. 3d 501, 509 (S.D.N.Y. 2015) ("Because the [c]omplaint fails to identify any misleading statements made by defendants, and instead forces the [c]ourt to speculate about what statements . . . were allegedly misleading, the [c]ourt cannot determine whether disclosure of any of the alleged omissions would have made any of those statements not misleading."). We therefore reverse the finding of violation as to these alleged omissions.

---

[54] The Hearing Panel did not address the "duty to speak" in its decision.

[55] An institutional investor receiving any of the communications at issue would have recognized that the communications related to a contemplated private placement in which no affirmative disclosures were required. An institutional investor also would have recognized that these communications were informal and preliminary and would not have assumed that such communications triggered a duty to disclose material negative information such as the Order.

b. Enforcement Failed to Prove that Allen or NYPPEX Had a Duty to Disclose the 2018 Financial Results

The Hearing Panel found that Allen and NYPPEX violated Section 17(a) and FINRA Rule 2010 by not disclosing NYPPEX Holdings' 2018 "draft" financial results in the New Investor Email, the Corporate Overview, the Existing Shareholder Letter, and the Webinar, because the non-disclosure "left prospective investors with an overly rosy view of [NYPPEX Holdings'] financial picture." We reverse the Hearing Panel's findings of violation because Enforcement failed to prove that Allen or NYPPEX had a duty to disclose the "draft" 2018 results.

Enforcement did not contend that the 2017 results were inaccurate. Instead, Enforcement alleged that, by disclosing the accurate 2017 financial results, "which were positive," but omitting "the company's 2018 financial results, which were negative," Allen and NYPPEX "create[d] . . . a distorted financial picture" of NYPPEX Holdings, and that this was a "quintessential material omission."

Enforcement's allegations based on Allen's and NYPPEX's failure to disclose the 2018 results in the New Investor Email and the Existing Shareholder Letter fail for the same reason as its allegations regarding the Order, the AG's investigation, and the sales incentive: Enforcement did not identify any affirmative statement in those communications that was made misleading by Allen's and NYPPEX's failure to disclose the 2018 results.

There were affirmative statements in the Corporate Overview and the Webinar that Enforcement contends were made misleading by the failure to disclose the "draft" 2018 results. Specifically, the Corporate Overview included a page with a graphic titled "2017," which showed, by percentage, NYPPEX Holdings' revenue increase from 2016 to 2017, its earning margin in 2017, and its return on equity in 2017. Allen presented similar information during the Webinar.[56]

Still, there are two flaws with Enforcement's theory of liability. First, Enforcement failed to prove the premise of its allegation, i.e., that the disclosure of the 2017 results without the "draft" 2018 results presented a "distorted financial picture" of NYPPEX Holdings, because Enforcement did not show that the "draft" 2018 results reflected NYPPEX Holdings' "financial picture" as of December 31, 2018. Allen testified the "draft" results were not complete because they did not include all of NYPPEX Holdings' revenue and earnings. Enforcement did not challenge Allen's testimony on that issue.[57] We cannot conclude that the "draft" 2018 results showed NYPPEX Holdings' "financial picture" as of December 31, 2018, and therefore cannot

---

[56] The Webinar was billed as NYPPEX Holdings' 2017 annual meeting of shareholders, although it occurred in March 2019.

[57] Presumably, Enforcement could have requested the final 2018 results from NYPPEX pursuant to FINRA Rule 8210. The final results would have shown whether the "draft" results actually reflected NYPPEX Holdings' "financial picture" as of December 31, 2018.

conclude that Allen's or NYPPEX's failure to disclose the "draft" 2018 results with the 2017 results presented a "distorted financial picture" of NYPPEX Holdings.

The second flaw with Enforcement's theory is that Enforcement did not establish that the disclosure of the accurate 2017 financial results—in March 2019—would have misled a reasonable investor. A reasonable investor receiving 2017 financial results in March 2019 would understand that those results already were more than one-year old, and thus they were not an indicator of the current "financial picture" at a development-stage company like NYPPEX Holdings. In fact, several investors who received the communications at issue responded by asking for the 2018 financial results. A reasonable investor would understand that the 2017 results were the 2017 results, not the 2018 results, and that the 2018 results might be less favorable. *See In re Verifone*, 784 F. Supp. 1471, 1481 (N.D. Cal. 1992), *aff'd.*, *Halkin v. VeriFone Inc.*, 11 F.3d 865 (9th Cir. 1993) (stating that "hard" information, such as sales and profit data, "when accurately reported, is rarely subject to misinterpretation, even if the disclosure is accompanied by general optimistic statements about the future by corporate officers"); *Coll. Ret. Equities Fund v. Boeing Co.*, No. 22 CV 3845, 2023 U.S. Dist. LEXIS 164802, at *34 (N.D. Ill. Sept. 18, 2023) (finding that the defendant did not mislead investors by disclosing accurate financial results but not disclosing existing problems with the company's sales and production because "an accurate report of past successes does not contain an implicit representation that the trend is going to continue"); *In re Omega Healthcare Inv'rs Sec. Litig.*, 563 F. Supp. 3d 259, 277 (S.D.N.Y. 2021) ("[I]t is black letter law in this Circuit that the disclosure of accurate historical data does not become misleading even if less favorable results might be predictable by the company in the future.").

Because Enforcement failed to prove that the statements about the 2017 financial results were misleading without the "draft" 2018 financial results, and failed to establish any other basis on which Allen and NYPPEX had a duty to disclose the omitted information, it failed to prove that Allen and NYPPEX were liable for the violation alleged.

c. Enforcement Failed to Prove that Allen or NYPPEX Had a Duty to Disclose the Omitted Information about the Valuation

The Hearing Panel found that Allen's and NYPPEX's statements about the valuation in the New Investor Email, the Corporate Overview, the Existing Shareholder Letter, and the Webinar were misleading because Allen and NYPPEX did not disclose (1) the report's limiting factors and assumptions or (2) that the Appraiser had relied on Allen's unverified projections.[58] We reverse the Hearing Panel's findings of violation because Enforcement failed to establish that Allen and NYPPEX had a duty to disclose that information.

---

[58] Enforcement did not allege that Allen had obtained a fraudulent valuation by providing false or misleading information to the Appraiser. Enforcement stated at the hearing that it was "not contesting the $108 million valuation. It could have been $58 million; it could have been $208 million. It doesn't matter. Enforcement's allegations focus on misconduct related to Mr. Allen and NYPPEX's disclosure of the valuation."

The Hearing Panel found that Allen's failure to disclose the additional information about the valuation violated Section 17(a) and Rule 2010 because it "deprived prospective investors from evaluating the weight that they should place on the valuation." Even if true, this would make the statements incomplete, but not necessarily misleading. *See Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) ("Often, a statement will not mislead even if it is incomplete or does not include all relevant facts.").[59] To establish liability, Enforcement had to show that the omissions made the statements misleading.

The statements about the valuation were statements of opinion. *See, e.g.*, *SEC v. Rio Tinto PLC*, 17 Civ. 7994 (AT), 2019 U.S. Dist. LEXIS 43986, at *27 (S.D.N.Y. Mar. 18, 2019), *aff'd*, 41 F.4th 47 (2d Cir. 2022) ("It is well-settled in the Second Circuit that a company's assessment of the value of an asset and its determinations about impairment are statements of opinion, not fact.").[60] A statement of opinion is false if the speaker does not hold the opinion stated or if it contains an embedded statement of fact that is untrue. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 184-85 (2015).[61] Enforcement does not assert that Allen or NYPPEX did not believe the $108 million valuation at the time the statements were made.[62] Nor does Enforcement assert that the statements contained embedded statements of fact that were untrue.[63]

To establish that the opinion statements about the valuation were misleading, Enforcement had to prove that the statements reasonably implied the existence of facts that were

---

[59] *See also Winer Family Tr. v. Queen*, 503 F.3d 319, 330 (3d Cir. 2007) ("Liability may exist . . . for misleading or untrue statements, but not for statements that are simply incomplete."); *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1201 (10th Cir. 2013) ("[T]he test for whether a statement is misleading is not whether in retrospect an investor might have wanted to know the omitted information, but whether additional material information was necessary at the time to make a statement reflect the true state of affairs.").

[60] *Kairos Inv. Mgmt. Co. LLC v. J.P. Morgan Sec. LLC*, No. 8:23-cv-01124-DOC-ADSx, 2023 U.S. Dist. LEXIS 221325, at *8 (C.D. Cal. Dec. 11, 2023) ("[T]he $12-billion valuation hinged on two opinions—uncertain future revenue projections and unverifiable company comparators—so that valuation, itself, was an opinion[.]"); *Ortiz v. Canopy Growth Corp.*, 537 F. Supp. 3d 621, 667 (D. N.J. 2021) ("There is . . . typically no objective measure of what constitutes the 'fair value' of Company Y's assets.").

[61] *SEC v. Thompson*, 238 F. Supp. 3d 575, 601 n.13 (S.D.N.Y. 2017) (noting that, although "[t]he Second Circuit has not directly held that *Omnicare* applies to . . . Section 17(a) claims, several recent cases suggest that *Omnicare* would apply to all antifraud provisions of the securities laws").

[62] Enforcement did not assert that Allen did not believe the projections that he provided to the Valuation Firm.

[63] The only embedded statement of fact in any of the statements about the valuation was indisputably true: a third-party firm had valued NYPPEX Holdings at $108 million.

untrue, or that the valuation did not "fairly align" with the information in Allen's and NYPPEX's possession. *See Omnicare*, 575 U.S. at 189; *City of Warren Police & Fire Ret. Sys. v. Prudential Fin., Inc.*, 70 F.4th 668, 685 (3d Cir. 2023). Enforcement did not show that the statements reasonably implied the existence of any facts that were not true. The statements did not imply that the valuation did not contain any limiting factors or assumptions (the Appraiser testified that the limiting factors and assumptions were standard terms in every valuation), nor did the statements imply that the Valuation Firm did not consider projections provided by NYPPEX Holdings (the Appraiser testified that there was nothing unusual about considering a company's "optimistic" projections). Enforcement did not show that Allen or NYPPEX knew but failed to disclose to investors facts that did not "fairly align" with the $108 million valuation. *See Omnicare*, 575 U.S. at 189-90. Certainly, Allen and NYPPEX knew about the Order and the AG's investigation, but the Appraiser stated that neither would have influenced his valuation of NYPPEX Holdings.

Because Enforcement failed to prove that the statements about the valuation were misleading without the omitted information, and failed to establish any other basis on which Allen and NYPPEX had a duty to disclose the omitted information, it failed to prove that Allen and NYPPEX were liable for the violation alleged.

3. Enforcement Failed to Prove that the Communications with Investors Violated FINRA's Advertising Rules

The Hearing Panel found that Allen's and NYPPEX's communications with investors about the NYPPEX Holdings securities violated FINRA Rules 2210(d)(1)(A), 2210(d)(1)(B), 2210(d)(1)(D), and 2210(f)(1). We reverse the finding of violation.

FINRA Rule 2210 contains a series of content standards for members' communications with the public.[64] Enforcement alleged that Allen and NYPPEX violated Rule 2210 due to the alleged material omissions discussed above. The Hearing Panel found that, "at a minimum" the communications "were not fair and balanced," but it did not provide an explanation for that finding other than its finding that the communications contained material omissions in violation of Section 17(a) and Rule 2010. Enforcement did not apply any one of the numerous content standards under Rule 2210 to any one of the communications at issue, nor did it explain how Allen and NYPPEX could be liable for an omission under Rule 2210's content standards if they were not liable for the same omission under Section 17(a) and Rule 2010. Enforcement's failure

[64] FINRA Rule 2210 provides, among other things, that communications "must be based on principles of fair dealing and good faith," "must be fair and balanced," "must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service," may not "omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading," may not be "false, exaggerated, unwarranted, promissory or misleading," may not "contain[] any untrue statement of a material fact or is otherwise false or misleading," must be "clear and not misleading within the context in which they are made," and must "provide balanced treatment of risks and potential benefits."

to do so is fatal to its allegation of violation. In making this finding, we do not hold that a member's obligations under FINRA Rule 2210, when making a statement that offers securities, are coextensive with its obligations under Section 17(a) and Rule 2010. We hold only that, given how Enforcement alleged the violations and briefed the issue, it failed to prove any violation under FINRA Rule 2210. *See Estate of Haight v. Robertson*, No. 3:03-CV-885 RM, 2008 U.S. Dist. LEXIS 30262, at *22-23 (N.D. Ind. Mar. 31, 2008) ("The plaintiffs may have been able to mount a stronger argument for liability, but it's not the court's job to figure out what that argument would have been.").[65]

4. The Press Release Implied FINRA's Endorsement of NYPPEX's Business Practices

The Hearing Panel found that Allen and NYPPEX, through Allen, violated FINRA Rules 2210(e) and 2010 by posting the Press Release to the internet. We affirm the Hearing Panel's findings of violation.

FINRA Rule 2210(e)(1) prohibits a member or associated person from stating or implying, in "any communication," that FINRA "endorses, indemnifies, or guarantees the member's business practices, selling methods, the class or type of securities offered or any specific security." *Jorge A. Reyes*, Complaint No. 2016051493704, 2021 FINRA Discip. LEXIS 29, at *42 (FINRA NAC Oct. 7, 2021).

Rule 2210(e) applies to the Press Release because it is a "communication." The rule defines "communications" as "correspondence, retail communications, and institutional communications." FINRA Rule 2210(a)(1). The rule defines "retail communication" as "any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30-calendar day period." FINRA Rule 2210(a)(5). The rule defines "retail investor" as "any person other than an institutional investor, regardless of whether the person has an account with a member." FINRA Rule 2210(a)(6).

The Press Release is a retail communication because it was "made available" to more than 25 retail investors within a 30-calendar day period.[66] The Press Release was posted to the internet in or around early January 2020, and it remained on the internet, in its original form, for at least 30 days. The Press Release was "made available" to all persons on the internet because, as the Respondents concede, any person on the internet could have viewed the Press Release if

---

[65] *See also, e.g.*, *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) ("It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones."); *Vasquez v. Holder*, 416 F. App'x 565, 568 (6th Cir. 2011) ("To the extent that identifying the correct legal standard somehow constitutes an argument, it is still insufficient.").

[66] Even if the Press Release had been made available to fewer than 25 retail investors, it still would have been a "communication" because it would have qualified as "correspondence." Rule 2210 states that "correspondence" is "any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period."

he or she knew the URL. Because the Press Release is a retail communication, Rule 2210(e) applies to it.

Respondents contend that Rule 2210 does not apply to the Press Release because it "was not a statement promoting any security or service, but rather was clearly a response to the [AG's] allegations and publicly made statements." In support of their argument, Respondents point to Rule 2210(b)(1)(D)(iii), which states that Rule 2210(b)(1)(A) does not apply to communications that do not "make any financial or investment recommendation or otherwise promote a product or service of the member." Respondents' argument fails because Rule 2210(b)(1)(D)(iii) does not exclude such communications from the requirements of Rule 2210(e); rather, it provides only that such communications need not be approved by a registered principal before use or filing with FINRA, as required for other communications under Rule 2210(b)(1)(A).

Respondents also assert that "[a] firm is allowed to defen[d] itself in the public eye without implicating FINRA's rules on communications." Rule 2210(e) does not prevent a member from defending itself in the public eye; it prohibits a member from implying FINRA's endorsement. A member can defend itself without implying FINRA's endorsement.

The Press Release violated Rule 2210(e) because it implied FINRA's endorsement of NYPPEX's business practices by stating that (1) following FINRA's 2018 examination of NYPPEX, FINRA "did not find any violation of the applicable securities regulations to warrant a fine, censure or disciplinary action of the Company," and (2) "[t]he ASA has been reviewed and approved by FINRA throughout its periodic examinations of the Company for over 15 years." *See Pacific On-Line Trading & Secs., Inc.*, 56 S.E.C. 1111, 1119-20 (2003) (finding that the applicants' statement that a seminar provided "8 Hours of Professional Instruction, Supervised by NASD Series 24 Registered Principal" implied NASD's endorsement of the seminar).[67]

We therefore affirm the Hearing Panel's finding that Allen and NYPPEX violated FINRA Rules 2210(e) and 2010 by posting the Press Release on the internet.[68]

5. Enforcement Failed to Prove that the Press Release Contained False or Misleading Statements of Material Fact

The Hearing Panel found that Allen and NYPPEX violated FINRA Rules 2010 and 2210(d) by posting the Press Release to the internet because the Press Release contained false or

---

[67] Enforcement also alleged that the Press Release's assertion that "Professionals at NYPPEX Holdings, LLC and its subsidiaries have years of exemplary regulatory compliance" implied FINRA's endorsement of NYPPEX's business practices. The Hearing Panel found that this statement did not violate Rule 2210(e) and Enforcement did not appeal that finding.

[68] Respondents assert that they relied on advice of counsel in drafting the Press Release. Advice of counsel is not a defense to the violation. *See Deltavest Fin.*, 1994 NASD Discip. LEXIS 221, at *43.

misleading statements. We reverse the finding of violation because Enforcement did not establish that the Press Release contained a false or misleading statement of material fact.

The Hearing Panel found that sentences 1, 2, 4, 5, and 11 in the Press Release were false or misleading.[69] The relevant sections of the Press Release are printed below:

> Management Team & Regulatory Compliance
>
> [1] Professionals at NYPPEX Holdings, LLC and its subsidiaries have years of exemplary regulatory compliance, and typically have 12 years or more experience with leading financial and alternative investment firms . . . .
>
> [2] On April 30, 2019, FINRA concluded its latest-year long examination of NYPPEX and its Affiliates. [3] Detailed reviews included the following areas of risk . . . Managing Conflicts Arising from Affiliates . . . .
>
> [4] In conclusion, FINRA did not find any violation of applicable securities regulations to warrant a fine, censure, or disciplinary action of the Company. [5] The [AG's] allegations are in conflict with the facts concluded by FINRA.
>
> . . .
>
> Operating Expenses
>
> [10] Operating expenses have been properly and consistently allocated for years among Affiliates according to the Company's Affiliate Service Agreement (the "ASA"), which is required by FINRA.
>
> [11] The ASA has been reviewed and approved by FINRA throughout its periodic examinations of the Company for over 15 years.

FINRA Rule 2010 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." The rule applies to associated persons of FINRA member firms, and to all business-related conduct, regardless of whether it involves securities or customers. *Michael Joseph Clarke*, Exch. Act Release No. 97860, 2023 SEC LEXIS 1756, at *22 (July 10, 2023). To establish an "independent" Rule 2010 violation, i.e., a Rule 2010 violation that is not based on a violation of any other FINRA rule or federal securities law, Enforcement must prove that the respondent acted unethically or in bad faith. *Edward S. Brokaw*, Exch. Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013) (discussing FINRA Rule 2010's predecessor, NASD Rule 2110). Conduct is unethical when it is "not in conformity with moral norms or standards of professional conduct," while bad faith means "dishonesty of belief or purpose." *Id.* at *21.

A registered person violates Rule 2010 when he unethically or in bad faith makes false or misleading statements of material fact to investors. *See, e.g., Dep't of Enf't v. Pellegrino*,

---

[69] Sentence numbers have been added for clarity.

Complaint No. C3B050012, 2008 FINRA Discip. LEXIS 10, at *14 n.13 (FINRA NAC 2008); *Dep't of Enf't v. Niekras*, Complaint No. 2013037401001, 2018 FINRA Discip. LEXIS 25, *36 (FINRA NAC Oct. 4, 2018).

FINRA Rule 2210(d)(1)(A) prohibits members and associated persons, in any communication, from "omit[ting] any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading."

FINRA Rule 2210(d)(1)(B) prohibits members and associated persons from publishing or distributing any communication that the member or associated person "knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading."

To establish Allen's or NYPPEX's liability for any allegedly false or misleading statement under FINRA Rules 2010 or 2210(d), Enforcement was required to prove that the statement was false or misleading as to a material fact. The NAC has stated expressly that "Enforcement *must prove materiality* for liability under FINRA Rule 2010 for misrepresentations." *Niekras*, 2018 FINRA Discip. LEXIS 25, at *37 n.26 (emphasis added).[70] Although we are not aware of any prior decision in which the NAC stated that materiality is required to prove a violation of Rule 2210(d), the rule's text makes clear that it is. Rule 2210(d)(1)(A) prohibits "omit[ting] any *material* fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading." Rule 2210(d)(1)(B) prohibits distributing a communication that "contains any untrue statement of *material* fact or is otherwise false or misleading." We further note that in one prior case, the NAC declined Enforcement's invitation to find that materiality was not required to establish a violation of former NASD Rule 2210(d)(1)(B). *See Dept't of Enf't v. Asenio Brokerage Servs., Inc.*, Complaint No. CAF030067, 2006 NASD Discip. LEXIS 20 (NASD NAC July 28, 2006). In *Asenio*, Enforcement argued that materiality was "legally irrelevant" under former NASD Rule 2210(d)(1)(B).[71] The NAC found that respondents' statements were material, and therefore it did not need to decide the issue. Nevertheless, the NAC expressed skepticism about Enforcement's argument, writing that "[w]ithout citation to any authority, Enforcement claims that materiality is 'legally irrelevant.'" *Id.* at *33 n.20.

In this context, a fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making a decision. *Dep't of Enf't v. Faber*, Complaint No. CAF10009, 2003 NASD Discip. LEXIS 3, at *21 (NASD NAC May 7, 2003), *aff'd*, 57 S.E.C. 297, 306 (2004). Put differently, a fact is material if a reasonable investor would view it as significantly altering the total mix of information available. *Dep't of Enf't v. Golub*, Complaint No. C10990024, 2000 NASD Discip. LEXIS 14, at *20 n.14 (NASD NAC Nov. 17, 2000).

---

[70] *See also Niekras*, 2018 FINRA Discip. LEXIS 25, at *37 n.26 ("A finding of materiality is necessary in order to find that a respondent made a misrepresentation of fact in violation of FINRA Rule 2010.").

[71] Former NASD Rule 2210(d)(1)(B) is identical to FINRA Rule 2210(d)(1)(B).

Enforcement did not allege in its complaint that any of the statements at issue was material, nor did it discuss the materiality of any of the statements in any of the briefs it submitted to the Hearing Panel or the NAC.[72] In the absence of any argument or citations to the record to support a finding of materiality, we cannot conclude that a reasonable investor would view the five statements at issue in the Press Release as "significantly altering the total mix of information available." On its face, the Press Release made clear that the AG had filed a civil complaint alleging that Allen had engaged in illegal conduct relating to NYPPEX Holdings and the Fund. Indeed, the Press Release was titled "NYPPEX Statement Regarding New York Attorney General Civil Complaint." The first sentence read: "The New York Attorney General's case is misleading and misrepresents numerous issues[.]" It continued, "We are confident in the facts and look forward to seeing our subsidiaries . . . exonerated in court." The Press Release then provided a multi-page, topic-by-topic response to the AG's allegations against Allen and NYPPEX Holdings, and specifically referenced the AG's "allegations regarding Mr. Allen's integrity[.]" In this context, it is not apparent that the statements in the Press Release about years of "exemplary regulatory compliance," the results of FINRA's 2018 examination, or FINRA's purported "approval" of the ASA would have significantly altered "the total mix of information" available.

Because Enforcement did not establish that any of the allegedly false or misleading statements was material, we reverse the finding of violation.

6. Enforcement Failed to Prove that Allen Knowingly Made a False Statement of Material Fact in the Affidavit

The Hearing Panel found that Allen violated FINRA Rule 2010 because he "knowingly, or at a minimum recklessly, made false and misleading statements in the affidavit," and then provided the affidavit to the court and to FINRA. We reverse the Hearing Panel's finding of violation because Enforcement failed to prove that Allen acted knowingly.[73]

The Hearing Panel found that Allen knew paragraphs 56 and 76 in the affidavit were false. Those paragraphs are printed below:

> NYAG IS IGNORING SIMULTANEOUS GOVERNMENT REVIEWS
>
> 56. NYAG's speculative allegations conflict with FINRA's April 30, 2019 conclusions, after its latest year-long examination of NYPPEX and Affiliates, that *did not find any violation* of applicable securities regulations to warrant a fine, censure or disciplinary action of the NYPPEX or Allen.

---

72 The Hearing Panel did not address the materiality of the statements in its decision.

73 The Hearing Panel did not explain its finding that Allen acted recklessly. Enforcement asserted in its briefs that Allen acted knowingly, not recklessly. We therefore do not consider whether Allen acted recklessly, or whether a finding of recklessness would establish a violation of Rule 2010 under the circumstances of this case.

. . .

> 76. Operating expenses were properly and consistently allocated for over 14 years among Affiliates pursuant to the Company's [ASA], which is required by FINRA, and which was reviewed and approved by FINRA during periodic examinations for over 14 years.

Enforcement did not prove that Allen knew paragraph 56 was false. Paragraph 56 is a statement of opinion because it expressed Allen's view about the AG's allegations in comparison to the results of FINRA's 2018 examination of "NYPPEX and its affiliates." *See, e.g.*, *Crutchfield v. Match Grp., Inc.*, 529 F. Supp. 3d 570, 594 (N.D. Tex. 2021) ("[D]istrict courts have routinely found that a company-issued statement regarding its belief that a pending lawsuit is unfounded or without merit is an opinion that is generally not actionable as a misstatement of fact[.]") Allen, however, provided two supporting facts for his opinion: (1) that FINRA examined "NYPPEX and its Affiliates" in 2018 and (2) that FINRA's examination "did not find any violation of applicable securities regulations to warrant a fine, censure or disciplinary action of the NYPPEX or Allen." To establish Allen's liability for knowingly making a false statement in paragraph 56, Enforcement had to prove that at least one of those supporting facts was untrue, and that Allen knew it was untrue when he submitted the affidavit to the court or to FINRA. *See Omnicare*, 575 U.S. at 185-86 (stating that a speaker would be liable for a false statement "not only if the speaker did not hold the belief she professed but also if the supporting fact she supplied were untrue").

Enforcement did not prove that Allen knew the first supporting fact, that FINRA had examined "NYPPEX and its Affiliates," was untrue.[74] Allen testified that he believed FINRA had examined "NYPPEX and its Affiliates" during the 2018 examination because the examiners requested and obtained from NYPPEX numerous documents belonging to NYPPEX's affiliates during the examination. According to Allen, the examiners obtained "many documents, including, in [Allen's] view, an extensive review of [the Fund][.]" Allen's testimony was corroborated by Schunk. Schunk testified that he believed FINRA examiners had "asked for documentation from the affiliates so that they could examine them." Testimony from two FINRA employees was consistent with Allen's and Schunk's on this point. One of the employees, Stacey Hoffmann, worked on the 2018 examination. Hoffmann testified that she was aware that examiners had requested "numerous" documents belonging to NYPPEX's affiliates during the 2018 examination, and she agreed that "FINRA had been asking for documentation on affiliates for years[.]" Another employee, Steinberg, worked on the investigation that led to the filing of the complaint in this matter. Steinberg agreed that FINRA examiners had requested a "multitude" of documents belonging to NYPPEX's affiliates during the 2018 examination.

The only evidence Enforcement offered to establish that Allen knew FINRA had not examined "NYPPEX and its Affiliates" when he submitted the affidavit to the court in January 2020 was the disposition letter that Member Supervision staff sent to NYPPEX following the

---

[74] NYPPEX's affiliates were not FINRA members, and FINRA does not have jurisdiction to examine nonmembers.

examination. Enforcement pointed out that the subject line of the disposition letter was "Examination Disposition Letter, 2018 Examination of NYPPEX, LLC," and that the letter thanked NYPPEX for its cooperation "during [FINRA's] examination of your firm." We do not agree that Allen's receipt of this letter establishes that Allen knew for a fact that FINRA had not examined "NYPPEX and its Affiliates" at the time he submitted the affidavit to the court.

Enforcement contends that, by the time his affidavit was submitted to FINRA in February 2020, he knew that FINRA had not examined "NYPPEX and its Affiliates" because he was present in the courtroom in January 2020, when Hoffmann testified in the AG's case and "explained why certain statements in [the] [a]ffidavit . . . were inaccurate." At the hearing in this matter, Hoffmann testified that she told the New York court that "FINRA does not examine—did not examine affiliates." We do not agree that Hoffmann's testimony establishes for a fact that Allen knew FINRA did not examine "NYPPEX and its Affiliates." Hoffmann's testimony establishes that Allen knew Hoffmann had a different view about whether FINRA had examined "NYPPEX and its Affiliates," but it does not establish that Allen knew FINRA had not done so.[75]

Enforcement did not prove that the second supporting fact, that FINRA's examination "did not find any violation of applicable securities regulations to warrant a fine, censure or disciplinary action of the NYPPEX or Allen," was false. The Hearing Panel found this supporting fact was false because FINRA's examination "found seven violations of the securities rules and regulations that led to an informal disciplinary action against NYPPEX[.]"[76] We do not agree. Allen did not state that FINRA found no violations during its 2018 examination of NYPPEX; Allen stated that FINRA found no violations "to warrant a fine, censure or disciplinary action." That is a true statement. A Cautionary Action, or "informal disciplinary action," is not a disciplinary action. "A disciplinary action is generally one in which a . . . sanction is sought or intended." *Tague Secs. Corp.*, 47 S.E.C. 743, 745 (1982); *see also Morgan Stanley & Co.*, 53 S.E.C. 379, 383 (1997) ("In a disciplinary action, a sanction is imposed following a determination of wrongdoing."); *see also Savva*, 2014 SEC LEXIS 5100, *13 n.29 ("A Cautionary Action is a warning that similar violations in the future could result in formal disciplinary action."). No disciplinary sanction was sought or intended following FINRA's 2018

---

[75] Parties in litigation and in FINRA disciplinary proceedings frequently take different views on factual and legal issues. That does not make their testimony or statements on these issues false. *See, e.g.*, *Jordan v. Sprint Nextel Corp.*, 3 F. Supp. 3d 917, 934 n.60 (D. Kan. 2014) ("Defendants are entitled to defend themselves in litigation . . . . The mere fact that they are making an argument against Plaintiff or taking a different view than Plaintiff's does not make their argument misleading or false."); *Davis-Guider v. City of Troy*, No. 1:17-CV-1290 (DJS), 2023 U.S. Dist. LEXIS 53457, at *19-20 (N.D.N.Y. Mar. 29, 2023) ("What the record shows is not that the evidence which Plaintiff characterizes as 'false and misleading,' was in fact fabricated, but simply that Plaintiff has a different view of that evidence.").

[76] *See FINRA Provides Guidance on its Enforcement Process*, Regulatory Notice 09-17, 2009 FINRA LEXIS 45, at *5 (Mar. 18, 2009) (stating that an Enforcement matter "may be resolved with an informal disciplinary action, such as the issuance of a Cautionary Action").

examination of NYPPEX. FINRA may impose a disciplinary sanction after a proceeding that complies with the FINRA Rule 9000 Series. *See* FINRA Rule 8310(a). The Member Supervision staff did not follow the FINRA Rule 9000 Series when it issued the Cautionary Actions to NYPPEX. Because the Cautionary Action was not a disciplinary action, Allen's assertion that FINRA "did not find any violation of applicable securities regulations to warrant a fine, censure or disciplinary action" was not false.[77]

Enforcement did not prove that Allen knew paragraph 76, which stated that FINRA had "reviewed and approved" NYPPEX's ASA, was, in fact, false when he submitted the affidavit to the court or to FINRA. Allen testified that he believed FINRA had "reviewed and approved" NYPPEX's ASA during its examinations of the firm because examiners had reviewed the ASA repeatedly without directing NYPPEX to make any changes to it. Enforcement did not dispute this testimony. Nor did Enforcement assert that Allen knew paragraph 76 was false when he submitted the affidavit to the court. Enforcement asserted only that Allen knew paragraph 76 was false when he submitted the affidavit to FINRA in February 2020. Enforcement argued that Allen knew paragraph 76 was false once he heard Hoffmann testify in court in January 2020 that "we [FINRA] do not approve [ASAs]," and "there were some findings with respect to the ones [the ASAs] that were reviewed during the course of the exam." Hoffmann's testimony in court establishes that Allen knew Hoffmann had a different view about whether FINRA had approved NYPPEX's ASA, but it does not establish that Allen knew that FINRA had not done so.

7. Enforcement Failed to Prove that the Do Not Use-Response Contained False or Misleading Statements

The Hearing Panel found that Allen, Schunk, and NYPPEX violated FINRA Rule 8210 by making false or misleading statements in the Do Not Use-Response. We reverse the Hearing Panel's finding of violation.

FINRA Rule 8210 provides that FINRA may require a member or associated person to provide information in writing with respect to any matter involved in an investigation. FINRA Rule 8210 prohibits a member or associated person from providing false or misleading information to FINRA in connection with an investigation. *Dep't of Enf't v. Masceri*, Complaint

---

[77] The Hearing Panel also found that the heading to paragraph 56 was false because "FINRA's and [the AG's] matters were not 'simultaneous'. . . FINRA's examination was limited to 2017 and 2018 and to the broker-dealer, while the NYAG's allegations covered misconduct spanning from 2008 through March 2019 that involved various NYPPEX affiliated entities." We disagree. "Simultaneous" means "existing or occurring at the same time." Enforcement does not dispute that FINRA's 2018 examination existed at the same time as the AG's investigation. That the AG's examination existed before and after FINRA's examination does not mean FINRA's examination did not occur simultaneously with it. *Cf. Brown v. Parker*, 771 F.3d 1270, 1272 (10th Cir. 2014) ("A [prison] sentence is considered 'concurrent' when it is to be served simultaneously with another sentence. . . . But, that does not mean the sentences will end at the same time. When the sentences are to end at the same time, the second one is called 'coterminous.'").

No. C8A040079, 2006 NASD Discip. LEXIS 29, at *36 (NASD NAC Dec. 18, 2006) (applying NASD Rule 8210).

a. Enforcement Failed to Prove that NYPPEX's Context Statements Were False or Misleading

The Hearing Panel found that sentences 1, 2, 3, and 4 in the Do Not Use-Response were false or misleading.[78] Those sentences are printed below:

> [1] The communication that is the subject of the [Do Not Use-Letter] is a press release that was provided to members of the media. [2] After the Staff notified the Firm that the Staff had a concern regarding the press release, the firm promptly removed it. [FN1]
>
> [3] The FINRA Reference was contained in the [Press Release] which was only posted to https://nyppex.nyag [sic], a web page that was provided to reporters upon request for our comments regarding the NYAG press releases. [4] The web page is *not available* to the public when accessing www.nyppex.com.
>
> [FN1] We immediately instructed our web developers to make the appropriate deletions. The deletions were accomplished within 2 business days, which was 1 day ahead of the 3 business days we mutually agreed.

The Hearing Panel found that sentences 1, 3, and 4 were false or misleading because the Press Release was "viewable by anyone who looked at the nyppex.com/nyag web page, which could be found by anyone entering the terms 'nyppex' and 'nyag' in a search engine."

Sentences 1, 3, and 4 were not false or misleading. Each sentence was true. The Press Release was a "press release that was provided to members of the media." The press release "was only posted to https://nyppex[/nyag]."[79] NYPPEX provided the URL for the Press Release to reporters upon request. And the Press Release was not available to the public when accessing www.nyppex.com because there was no link to the Press Release from that page or any page linked to it. These statements were not misleading because the Do Not Use-Response made clear that the Press Release was available on the internet to anyone who knew the URL.

The Hearing Panel found that sentence 2 in the Do Not Use-Response was false or misleading because NYPPEX "never removed the [Press Release.]" This statement was not false or misleading. Although this statement suggested that NYPPEX had removed the entire Press Release, the footnote at the end of that sentence made clear that NYPPEX had not done that (and FINRA never asked the firm to do that), but instead had deleted the specific content it was asked to remove in the Do Not Use-Letter.

---

[78] Sentence numbers have been added for clarity.

[79] The URL appears to be an inadvertent error. Allen provided the proper URL to FINRA in his March 9, 2020 email.

The Hearing Panel also found that sentence 2 in the Do Not Use-Response was false or misleading because, as of the date of the Do Not Use-Response, NYPPEX had not removed the specific content it was asked to remove in the Do Not Use-Letter. We reverse the Hearing Panel's finding on this issue.

The Do Not Use-Letter asked NYPPEX to remove sentences 4, 5, and 6 from the Press Release. The relevant sections of the Press Release are printed below:

> [2] On April 30, 2019, FINRA concluded its latest-year long examination of NYPPEX and its Affiliates. [3] Detailed reviews included the following areas of risk . . . Managing Conflicts Arising from Affiliates . . . . [4] In conclusion, FINRA did not find any violation of applicable securities regulations to warrant a fine, censure, or disciplinary action of the Company. [5] The [AG's] allegations are in conflict with the facts concluded by FINRA.
>
> . . .
>
> [6] Laurence Allen is a financial and technology entrepreneur with a 36 year [sic] track record of exemplary regulatory compliance, having never been fined or censured by any securities regulator.

To prove the falsity of NYPPEX's representation that it had "made the appropriate deletions" from the Press Release, Enforcement had to prove that sentences 4, 5, and 6 remained in the Press Release on the date of the Do Not Use-Response, April 23, 2020.

Enforcement, however, admitted in its pre-hearing brief that NYPPEX removed sentences 4 and 5 from the Press Release shortly after the firm received the Do Not Use-Letter. Specifically, Enforcement wrote in its brief that, "in the days following" NYPPEX's receipt of the Do Not-Use Letter, NYPPEX "removed a portion of the [Press Release] that described FINRA's 2018 examination of the firm." This statement is a judicial admission that conclusively establishes that NYPPEX removed the sentences about the examination from the Press Release, i.e., sentences 4 and 5, within days after the firm received the Do Not Use-Letter. *See Dep't of Enf't v. Respondent 1*, Complaint No. C9A980032, 2000 NASD Discip. LEXIS 20, at *16-17 (NASD NAC June 19, 2000) ("A judicial admission is an express unilateral statement made during a proceeding by a party or his or her counsel that conclusively establishes a fact, thereby withdrawing it from contention.").

Enforcement's judicial admission about sentences 4 and 5 is consistent with the allegations in its complaint and other record evidence. Enforcement alleged in its complaint that, after NYPPEX received the Do Not Use-Letter, "[s]ome alterations were made, but the [Press Release], even as revised, still contained language cited in the [Do Not Use-Letter] as violating FINRA Rule 2210." The record shows that, as of the date of the hearing in this matter, of the three sentences NYPPEX was asked to remove in the Do Not Use-Letter, only sentences 4 and 5 had been removed; only sentence 6 remained. Because NYPPEX never removed sentence 6

from the Press Release, the "alterations" that NYPPEX made to the Press Release after it received the Do Not Use-Letter must have been the removal of sentences 4 and 5.[80]

Additionally, Enforcement's admission is consistent with Allen's contemporaneous emails. On March 6, 2020, the day after NYPPEX received the Do Not Use-Letter, Allen and Schunk spoke by telephone with Gregory. Following that conversation, Allen emailed Gregory that NYPPEX had asked its "tech team" to remove the "reference to our recent Finra [sic] exam" from the Press Release. Three days later, on March 9, 2020, Allen emailed Gregory to notify her that "the text about the Finra [sic] exam" had been removed from the Press Release, and further wrote that NYPPEX understood that it had "fulfilled [Gregory's] instruction." Allen wrote, "How about unless we hear otherwise, we will understand that we have fulfilled your instruction." Allen even provided a link to the Press Release and told Gregory she could "verify by clicking the link below."

The only evidence that NYPPEX had not removed sentences 4 and 5 from the Press Release by the date of the Do Not Use-Response is Gregory's testimony. According to Gregory, when she received Allen's email on March 9, 2020, she checked the internet and the reference to the 2018 examination (i.e., sentences 4 and 5) was still there. She further testified that the reference to the examination remained in the Press Release through the end of April 2020. Gregory, however, testified that she could not recall whether she cleared the cache of her internet browser before viewing the Press Release after March 9, 2020. It therefore is possible that, to the extent Gregory saw the sentences about the 2018 examination in the Press Release after March 9, 2020, she was viewing a temporary internet file that contained a pre-March 9 version of the Press Release.

We cannot conclude from this record that Enforcement proved NYPPEX had not removed sentences 4 and 5 by the date of the Do Not Use-Response, April 23, 2020.[81] We therefore reverse the Hearing Panel's finding that sentences 1, 2, 3, and 4 in the Do Not Use-Response were false or misleading.

b. Enforcement Failed to Prove that NYPPEX's Response to Item 1 Was False or Misleading

The Hearing Panel found that NYPPEX's response to Item 1 was false or misleading because Schunk did not approve the press release in writing in December 2019. We disagree.

---

[80] Sentences 2 and 3, which also related to FINRA's 2018 examination, also had been removed from the Press Release as of February 2022.

[81] Although NYPPEX apparently had not removed sentence 6 from the Press Release by the date of the Do Not Use-Response, Enforcement made no effort to establish a violation of Rule 8210 based on the firm's failure to remove that sentence.

Item 1 asked:

> Was the communication approved in writing and dated, prior to use by a registered principal of your firm in accordance with FINRA Rule 2210(b)(1)? If the communication was approved, please provide the actual evidence of approval, including the name and title of the principal who approved the communication and the date of approval.

NYPPEX responded:

> Yes. Please see Exhibit 1. As stated previously, the NYPPEX Legal and Compliance Committee approved the communication. The Committee's members include registered principals [Schunk and Allen]. The Committee's approval occurred on December 20, 2019.

Exhibit 1 to the Do Not Use-Response is Schunk's undated written statement, which read:

> The [Press Release] was reviewed and approved by the NYPPEX Legal and Compliance Committee on or about December 20, 2019.

We cannot conclude that NYPPEX's response to Item 1 was false or misleading. Item 1 misstated the requirements of FINRA Rule 2210(b)(1) and asked a compound question. Item 1 incorrectly implied that, under Rule 2210(b)(1), a principal had to pre-approve the Press Release in writing. In fact, Rule 2210(b)(1) requires only a principal's pre-approval; it does not require a principal's written pre-approval.[82] Item 1 therefore asked two separate questions: (1) was the Press Release approved "in writing and dated prior to use," and (2) was the Press Release approved "in accordance with FINRA Rule 2210(b)(1)." NYPPEX answered "yes" to Item 1, and attached Schunk's written statement. Schunk's written statement did not purport to be a contemporaneous written pre-approval for the Press Release. Schunk's statement was undated and stated that Schunk approved the Press Release "on or about December 20, 2019." *See David B. Tysk*, Exch. Act Release No. 91268, 2021 SEC LEXIS 534, at *16 (Mar. 5, 2021) (finding that the applicant's after-the-fact editing of his notes about his conversations with customers was not

---

[82] NASD Rule 2210(b)(1) required that a principal "approve by signature or initial and date each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with NASD's Advertising Regulation Department." FINRA Rule 2210 replaced NASD Rule 2210 in 2013. *See generally FINRA Regulatory Notice* 12-29, 2012 FINRA LEXIS 36 (June 2012). FINRA Rule 2210(b)(1)(A) requires that a principal "approve each retail communication before the earlier of its use or filing with FINRA's Advertising Regulation Department."

Additionally, Rule 2210(b)(1)(D) provides that the approval requirements under Rule 2210(b)(1)(A) do not apply to "any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member."

misleading because the applicant "did not explicitly or implicitly represent that he made those entries on the dates of the events to which they pertained"). Indeed, Gregory testified that she "knew that [Schunk's statement] wasn't the approval itself," and she was not "tricked into thinking this was some sort of contemporaneous [written] approval[.]" In sum, NYPPEX's response to Item 1 makes clear that Schunk approved the Press Release on or about December 20, 2019, in accordance with Rule 2210(b)(1), but that Schunk did not approve the Press Release in writing at that time. Enforcement does not dispute the accuracy of these assertions. We therefore cannot conclude that NYPPEX's response to Item 1 was false or misleading.

c. Enforcement Failed to Prove that NYPPEX's Response to Item 3 Was False or Misleading

The Hearing Panel found that NYPPEX's response to Item 3 was false or misleading. We disagree.

Item 3 asked:

> Please provide the date the communication went live on the website. . . . [P]lease provide . . . a summary of how and to what extent those communications were distributed. Please be as specific as possible regarding . . . to whom the communications were distributed.

NYPPEX responded:

> The communication went live on December 23, 2019. However, the communication was only available at https://nyppex.nyag [sic], a page that was not available to the public at www.nyppex.com.

NYPPEX's response was not false or misleading. As discussed above, there was no link to the Press Release from any page of NYPPEX's public website, and therefore the Press Release was not available at NYPPEX's website. And the Do Not Use-Response made clear that anyone who knew the URL for the Press Release could access it.

8. Allen and NYPPEX Failed to Provide Complete Responses to FINRA's Requests for Documents and Information

The Hearing Panel found that Allen and NYPPEX violated FINRA Rules 8210 and 2010 by failing to provide timely and complete responses to the February 10 and 20 Requests.[83] We modify the Hearing Panel's finding of violation.

FINRA Rule 8210 provides that FINRA may require a member, associated person, or other person subject to its jurisdiction to provide information with respect to any matter involved in an investigation or examination. *Bradley C. Reifler*, Exch. Act Release No. 94026, 2022 SEC

---

[83] The Hearing Panel found Allen and NYPPEX jointly liable for the Rule 8210 violations. Respondents do not contest that finding.

LEXIS 167, at *13 (Jan. 21, 2022). The obligation to comply with such a request is "unequivocal." *Id.*

a. Allen and NYPPEX Failed to Provide Complete Responses

1. NYPPEX Holdings' 2019 Bank Statements

Allen and NYPPEX failed to provide all of the NYPPEX Holdings' bank statements requested by FINRA. Item 1 on the February 10 Request asked Allen and NYPPEX to provide "all account statements in the name of [NYPPEX] and/or NYPPEX Holdings, LLC for the period of January 1, 2018 to December 31, 2019."

The Hearing Panel found that NYPPEX Holdings had five bank accounts in 2019, and that Allen and NYPPEX did not produce any 2019 monthly statements for those accounts. Respondents do not dispute this finding. The Hearing Panel's finding of violation is supported by the record, and we affirm it.

The Hearing Panel also found that Allen and NYPPEX failed to provide three 2018 monthly statements for these same NYPPEX Holdings accounts. We reverse this finding of violation, however, because Enforcement did not allege any violation based on Allen's and NYPPEX's failure to provide 2018 bank statements for NYPPEX Holdings.

The Hearing Panel further found that Allen and NYPPEX failed to provide any 2018 statements for one of NYPPEX's two bank accounts. We reverse this finding of violation, however, because Enforcement did not allege any violation based on Allen's and NYPPEX's failure to provide NYPPEX's bank statements.

2. Allen's Bank Statements

Allen and NYPPEX failed to provide all of Allen's bank statements requested by FINRA. Item 2 in the February 10 Request asked Allen and NYPPEX to provide "all account statements for all bank accounts in the name of Laurence Allen and/or for which Laurence Allen had signatory authority at any point" in 2018 or 2019.

The Hearing Panel found that Allen and NYPPEX failed to provide all account statements for six bank accounts that Allen held in 2018 and 2019. Specifically, the Hearing Panel found that Allen and NYPPEX provided fewer than 40 of 144 of the requested monthly statements for these accounts during this period. Respondents do not dispute this finding. The Hearing Panel's finding of violation is supported by the record, and we affirm it.

The Hearing Panel further found that Allen and NYPPEX failed to provide any 2018 or 2019 statements for six business-related accounts that Allen held. Respondents do not dispute this finding. The Hearing Panel's finding of violation is supported by the record, and we affirm it.

The Hearing Panel further found that Allen and NYPPEX failed to provide statements for "an additional unspecified number" of bank accounts. Respondents do not dispute this finding. The Hearing Panel's finding of violation is supported by the record, and we affirm it.

3. Information Related to Allen's OBAs and PSTs

Allen and NYPPEX failed to provide all of the information related to Allen's OBA's and PST's requested by FINRA. Item 8 in the February 10 Request asked Allen and NYPPEX to provide a "current listing of all approved Outside Business Activities ('OBAs') and Private Securities Transactions ('PSTs') for Laurence Allen, and all evidence of approval and supervision of Mr. Allen's OBAs and PSTs" between January 1, 2018, and December 31, 2019.

The Hearing Panel found that Allen and NYPPEX failed to provide a list of Allen's PSTs and documents evidencing NYPPEX's approval and supervision of Allen's OBAs and PSTs. Respondents do not dispute this finding. The Hearing Panel's finding of violation is supported by the record, and we affirm it.

4. Information Related to Loans

Allen and NYPPEX failed to provide all of the information related to loans requested by FINRA. Item 1 on the February 20 Request asked Allen and NYPPEX to provide a list of all loans made since January 1, 2019, between Allen, NYPPEX, NYPPEX Holdings, or any other company in which Allen had an ownership interest, as well as the "the loan agreement, and other documentation and evidence of all payments."

The Hearing Panel found that Allen and NYPPEX failed to provide (1) a list of the loans; (2) loan agreements for two loans between Allen and NYPPEX Holdings in 2019 and 2020; (3) three of four original loan agreements for loans that were modified after January 1, 2019; (4) and "evidence of all payments made to fund the loans and repayments." Respondents do not dispute these findings. The record supports the Hearing Panel's finding of violation, and we affirm it, except that we reverse the finding of violation based on Allen's and NYPPEX's failure to provide "evidence of all payments made to fund the loans[.]" Item 1 in the February 20 Request does not appear to ask for evidence of all payments made to fund the loans; rather, it appears to ask for evidence of all payments made to repay the loan.

5. Passwords for Password-Protected Documents

The Hearing Panel found that Allen and NYPPEX failed to provide passwords for nine password-protected documents that NYPPEX provided to FINRA in response to the Rule 8210 requests. Respondents do not dispute this finding. We modify the Hearing Panel's finding of violation. Three of the password-protected documents appear to be statements for Allen's personal bank accounts. We already have found Allen and NYPPEX liable for not providing these statements, and therefore we do not find them liable for not providing passwords for these three documents. One of the password-protected documents appears to contain information concerning Allen's OBAs and/or PSTs. We already have found Allen and NYPPEX liable for not providing this information, and therefore we do not find them liable for not providing a

password for this document. We affirm the Hearing Panel's finding of violation as to the remaining password-protected documents.

b. Enforcement Failed to Prove that Allen and NYPPEX Did Not Provide Timely Responses to the February 10 and February 20 Requests

We reverse the Hearing Panel's finding that Allen and NYPPEX violated FINRA Rule 8210 by not providing timely responses to the Rule 8210 requests. There were numerous requests issued, deadlines set, and extensions granted in this matter. Other than the documents and information that Allen and NYPPEX did not provide, for which we already have found them liable, Enforcement did not identify any particular document or piece of information that Allen and NYPPEX failed to provide by a particular deadline. We cannot make a finding as to the timeliness of Allen's and NYPPEX's response to any particular request on this record. We therefore reverse the Hearing Panel's finding of violation.

In summary, we affirm, with modifications, the Hearing Panel's finding that Allen and NYPPEX violated FINRA Rules 8210 and 2010 by failing to provide complete responses to FINRA's Rule 8210 requests, but we reverse the finding that Allen and NYPPEX violated Rule 8210 by failing to provide timely responses.

9. Enforcement Failed to Prove that Schunk and NYPPEX Failed to Supervise Allen Reasonably

The Hearing Panel found that Schunk and NYPPEX failed to supervise Allen reasonably. We reverse the finding of violation.

FINRA Rule 3110(a) requires members to "establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules." "[T]he duty of supervision includes the responsibility to investigate 'red flags' that suggest misconduct may be occurring and to act upon the results of such investigation." *Michael T. Studer*, 57 S.E.C 1011, 1023-24 (2004), *aff'd*, 148 F. App'x 58 (2d Cir. 2005). One element of a reasonably designed supervisory system, set forth in FINRA Rule 3110(a)(5), is "[t]he assignment of each registered person to an appropriately registered representative[] or principal[] who shall be responsible for supervising that person's activities."

The Hearing Panel found that Schunk and NYPPEX failed to supervise Allen reasonably because "Schunk failed to reasonably respond to red flags that Allen was engaged in conduct violating applicable securities laws, regulations, and FINRA rules," and that he "failed to take reasonable steps to ensure [NYPPEX's] communications complied with all applicable federal and state securities laws and regulations." The red flags were the allegedly misleading communications related to the contemplated private placement, the allegedly false and misleading Press Release, and the allegedly false and misleading affidavit. We have reversed the Hearing Panel's findings of liability as to each of those purported red flags except for the finding that the Press Release violated Rule 2210(e). The record shows that Schunk reviewed the Press Release in accordance with NYPPEX's supervisory procedures, but that he failed to detect that it

implied FINRA's endorsement of NYPPEX's business practices. *See Dist. Bus. Conduct Comm. v. Lobb*, Complaint No. C07960105, 2000 NASD Discip. LEXIS 11, at *22 n.20 (NASD NAC Apr. 6, 2000) ("A supervisor's adherence to his or her firm's supervisory procedures will not necessarily shield the supervisor from liability, but it is a factor to be considered in determining whether supervision was reasonable."). On these facts, we do not find that Schunk and NYPPEX failed to supervise Allen reasonably, and we reverse the Hearing Panel's finding of violation.

VI. Sanctions

A. Statutory Disqualification

For allowing Allen to associate with NYPPEX while subject to a statutory disqualification, the Hearing Panel fined Schunk $70,000 and suspended him in all capacities from associating with any FINRA member for 18 months. The Hearing Panel fined NYPPEX $50,000 for this violation. For remaining associated with NYPPEX after he became subject to a statutory disqualification, the Hearing Panel fined Allen $50,000 and suspended him in all capacities from associating with any FINRA member for 18 months. We modify the sanctions the Hearing Panel imposed.

For violations of Article III, Section 3 of FINRA's By-Laws, the FINRA Sanctions Guidelines (the "Guidelines") recommend a fine of $5,000 to $77,000 for the firm and the supervisory principal, and a fine of $5,000 to $77,000 for the disqualified person.[84] In egregious cases, the Guidelines recommend that we consider suspending the firm with respect to any or all activities or functions for up to two years, consider suspending the supervisory principal in any or all capacities for up to two years, or consider barring the supervisory principal where he knowingly allowed the disqualified person to become associated.[85] For the disqualified person, the Guidelines recommend that we consider a bar in egregious cases. The principal considerations under the Guidelines are: (1) the nature and extent of the disqualified person's activities and responsibilities; (2) whether a Form MC-400 was pending; and (3) whether the disqualification resulted from financial and/or securities misconduct.[86]

The Hearing Panel found that Respondents' misconduct was serious but not egregious, and therefore warranted sanctions at the high end of the Guidelines. The Hearing Panel identified several aggravating factors. The Hearing Panel noted: (1) Allen had significant responsibilities at NYPPEX; (2) NYPPEX never filed an MC-400 based on the Order; (3) the disqualification resulted from an injunction based on allegations of financial and/or securities misconduct; (4) Allen and Schunk "filed a Form U4 amendment that failed to accurately describe the Order, thereby concealing that Allen had been enjoined and restrained from selling certain

---

84 *FINRA Sanction Guidelines*, at 43 (Oct. 2021), https://www.finra.org/sites/default/files/2022-09/2021_Sanctions_Guidelines.pdf [hereinafter Guidelines] (Oct. 2021).

85 *Id.*

86 *Id.*

securities"; (5) Respondents knew about the disqualifying event; and (6) Allen engaged in fraud in connection with the contemplated private placement during the time he was disqualified.

The Hearing Panel found mitigating, however, that Allen and Schunk "genuinely, but mistakenly, believed that all they needed to do as a result of the Order was to disclose it to FINRA in an amendment to Allen's Form U4," and that NYPPEX did file an MC-400 after the New York court entered the preliminary injunction in February 2020. Additionally, the Hearing Panel considered the firm's small size in determining the appropriate sanction.

The Hearing Panel rejected Respondents' argument that they were entitled to mitigation based on reliance on counsel. The Hearing Panel found that Respondents failed to prove reliance on counsel because they "offered no evidence showing that they made full disclosure of all relevant facts to an attorney who then specifically advised them that the Order did not constitute a statutorily disqualifying event."

On appeal, Respondents argue that the Hearing Panel erred by not giving them credit for their reasonable reliance on counsel. Respondents contend that they "consulted multiple attorneys to interpret the law for them," "made filings with FINRA fully disclosing the matter," and then "made appropriate filings once [Allen was] clearly statutorily disqualified." Respondents assert that they could not have done anything more, and that the sanctions imposed for this violation are punitive rather than remedial.

We agree with Respondents that, under the unusual circumstances of this case, they are entitled to additional mitigation based on their reliance on counsel. "[F]or a reliance on the advice of counsel claim to be successful mitigation under the Guidelines, [the Respondents] must demonstrate [their] reasonable reliance on competent legal advice." *Dep't of Enf't v. Reifler*, 2016050924601r, 2023 FINRA Discip. LEXIS 1, at *24-25 (FINRA NAC Jan. 17, 2023). "[E]ven if a respondent cannot meet the requirements necessary to invoke reliance on counsel as an affirmative defense, adjudicators may still consider reasonable reliance on counsel as a mitigating factor." *Dep't of Enf't v. Erenstein*, Complaint No. C9B040080, 2006 NASD Discip. LEXIS 31, at *19 (NASD NAC Dec. 18, 2006), *aff'd*, Exch. Act Release No. 56768, 2007 SEC LEXIS 2596 (Nov. 8, 2007). "To constitute mitigation, however, the claim must have sufficient content and sufficient supporting evidence." *Reifler*, 2023 FINRA Discip. LEXIS 1, at *24-25.

Respondents maintain that they are entitled to mitigation because, when Allen received the Order in January 2019, his attorneys advised him that he could continue doing business at NYPPEX as long as he disclosed the Order on his Form U4. Respondents' claim that they received this advice is plausible. As the Hearing Panel noted in its decision, "[w]hether an ex parte temporary restraining order [like the Order] triggers a statutory disqualification appears to be an issue of first impression." Indeed, the Hearing Panel's decision in this matter is the only authority cited in a treatise on broker-dealer regulation for the proposition that "an ex parte temporary restraining order may trigger a statutory disqualification under Section 3(a)(39)." *See* 1 James A. Fanto, Jill I. Gross & Norman S. Poser, *Broker-Dealer Law and Regulation* § 5.04 (Fifth Edition, 2024-1 Supp.). We cannot conclude that, in January 2019, a reasonable attorney could not have determined that an appropriate course of action would be to disclose the Order to

FINRA via a Form U4 filing and then wait to see whether the FINRA staff issued a Notice of Disqualification pursuant to FINRA Rule 9522.

Respondents' claim also is supported by factual evidence. Documents show that, in January 2019, Allen was consulting regularly with two experienced attorneys about the AG's investigation, the Order, and their effect on Allen's business. Allen had retained RR to represent him and NYPPEX in connection with the AG's investigation. Another attorney, SS, also was advising Allen and NYPPEX. Allen exchanged numerous emails with RR and SS about the Order in January 2019. Additionally, RR's billing records show that Allen and RR spoke on the telephone frequently that month. Both RR and SS were aware of all of the facts relevant to Allen's eligibility to continue associating with NYPPEX.

Allen testified that when he received the Order, he "deferred to our counsel to advise me." Allen said the "only thing I was concerned about was could we continue to do business as before[.]"[87] Documentary evidence is consistent with Allen's testimony on this issue. In mid-January 2019, Allen sent an email to RR and SS asking whether, in light of the Order, he could continue to manage two private investment funds and raise capital for them. Allen's attorneys advised him that he could. Although there is no written evidence that Allen asked his attorneys a similar question about his role at NYPPEX, under the circumstances, we credit his testimony that he did.

Allen testified that his attorneys told him that he could continue working at NYPPEX, but that he should disclose the Order to FINRA via a Form U4 amendment. Documentary evidence shows that RR advised Allen about amending his Form U4. Allen filed the Form U4 amendment on January 24, 2019. The invoice from RR's law firm shows that, on the same day, RR "review[ed] U4," "discuss[ed] U4 changes," and discussed the U4 "with compliance expert." We disagree with the Hearing Panel that Allen's Form U4 amendment "failed to accurately describe the Order, thereby concealing that Allen had been enjoined and restrained from selling certain securities." In response to Item 14H.(1)(a) on Form U4, which asked whether any court had ever "enjoined you in connection with any investment-related activity," Allen checked the box "Yes." Allen further disclosed that, in December 2018, the AG had obtained a temporary restraining order in the "ex Parte Part of the Supreme Court of the State New York," and he provided the docket and case numbers.

There is no evidence in the record that the FINRA staff issued a Notice of Disqualification pursuant to Rule 9522 after Allen amended his Form U4 in January 2019.

Based on these facts, we find that Respondents have established that, for some period in 2019, they reasonably relied on advice of counsel that the Order did not disqualify Allen, and we consider that a mitigating factor in determining sanctions for this violation.[88]

---

[87] Allen admitted that he did not use the term "statutory disqualification" in his discussions with RR and SS.

[88] Our finding that Respondents reasonably relied on counsel supersedes the Hearing Panel's finding that they were negligent. Because the Respondents reasonably relied on advice

[Footnote continued on next page]

Like the Hearing Panel, we find it aggravating that Allen had significant responsibilities at NYPPEX, and that the statutory disqualification resulted from an injunction based on allegations of financial and/or securities misconduct. Additionally, Allen remained associated with NYPPEX for more than a year after the Order was entered.

After considering all the relevant factors, including NYPPEX's small size, we find the following sanctions are appropriately remedial. For allowing Allen to associate with NYPPEX while subject to a statutory disqualification, Schunk is fined $40,000 and NYPPEX is fined $40,000. For remaining associated with NYPPEX after he became subject to a statutory disqualification, Allen is fined $40,000. Considering the bar that we impose on Allen for his violation of Rule 8210, we do not impose this fine on him. *See infra* Part VI.C.

B. Violation of FINRA Rule 2210

The Hearing Panel imposed a unitary sanction for all the violations of FINRA's advertising rules found. The Hearing Panel fined Allen and NYPPEX, jointly and severally, $100,000; it suspended Allen in all capacities from associating with any FINRA member for one year; and it suspended NYPPPEX for one year. Because we have reversed all of these findings of violation except for the finding that the Press Release implied FINRA's endorsement of NYPPEX's business practices, we modify the sanctions the Hearing Panel imposed.

For failing to comply with FINRA Rule 2210's standards, the Guidelines recommend a fine of $1,000 to $31,000.[89] The Guidelines instruct us to consider whether the violative communication with the public was circulated widely.[90] On balance, we find this factor mildly aggravating. The Press Release was publicly available on the internet, but there was no link to the Press Release on NYPPEX's homepage; the only way a member of the public could access the Press Release was by entering its URL into an internet browser or searching for "NYPPEX" and "NYAG" in a search engine. Although Allen consulted with an attorney while drafting the Press Release, Respondents do not identify any credible evidence that the attorney advised Allen that the Press Release complied with Rule 2210(e).

After considering all the relevant factors, including NYPPEX's small size, we find the following sanctions are appropriately remedial. For violating FINRA Rule 2210(e) by implying FINRA's endorsement of NYPPEX's business practices in the Press Release, NYPPEX is fined $10,000 and Allen is fined $10,000. Considering the bar that we impose on Allen for his violations of FINRA Rule 8210, we do not impose this fine on him. *See infra* Part VI.C.

[cont'd]
of counsel, they were not negligent. We do not find mitigating the Respondents' filing of an MC-400 application in February 2020. Respondents did so after receiving a Notice of Disqualification from FINRA.

89 *Guidelines*, at 80.

90 *Id.*

C. Violations of FINRA Rule 8210

The Hearing Panel barred Allen and expelled NYPPEX for violating FINRA Rule 8210. We modify the sanctions the Hearing Panel imposed.

FINRA Rule 8210 is the primary means by which FINRA obtains the information necessary to carry out its investigations and fulfill its regulatory mandate to ensure that members and its associated persons adhere to FINRA's rules. *Dep't of Enf't v. Jarkas*, Complaint No. 2009017899801, 2015 FINRA Discip. LEXIS 50, at *46 (FINRA NAC Oct. 5, 2015), *aff'd*, Exch. Act Release No. 77503, 2016 SEC LEXIS 1285 (Apr. 1, 2016). 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." *Robert Marcus Lane*, Exch. Act Release No. 74269, 2015 SEC LEXIS 558, at *50-51 (Feb. 13, 2015). A failure to comply with FINRA Rule 8210 therefore constitutes a "serious violation" that subverts FINRA's ability to carry out its regulatory responsibilities and thereby threatens the investing public and the markets. *John Joseph Plunkett*, Exch. Act Release No. 69766, 2013 SEC LEXIS 1699, at *33 (June 14, 2013).

For individuals who provide a partial but incomplete response to a request made pursuant to Rule 8210, the Guidelines instruct us that a bar is standard, unless the respondent can demonstrate that the information provided substantially complied with all aspects of the request.[91] Where mitigation exists, adjudicators should consider suspending the individual in any or all capacities for up to two years.[92]

For firms that provide a partial but incomplete response to a request made pursuant to Rule 8210, the Guidelines instruct us to expel the firm in an egregious case.[93] Where mitigation exists, the Guidelines instruct us to consider suspending the firm with respect to any or all activities or functions for up to two years.[94]

The Guidelines provide three violation-specific considerations in determining sanctions where an individual or firm has provided a partial but incomplete response to a FINRA Rule 8210 request, including: (1) the "[i]mportance of the information requested that was not provided as viewed from FINRA's perspective, and whether the information provided was relevant and responsive to the request;" (2) the "[n]umber of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response;" and (3) "[w]hether the respondent thoroughly explains valid reason(s) for the deficiencies in the response."

---

91 *Guidelines*, at 33.

92 *Id.*

93 *Id.*

94 *Id*.

Although we found Allen and NYPPEX jointly liable for the Rule 8210 violations, we find it appropriate to sanction them separately based on their respective responsibility for providing the documents and information at issue.

1. Allen Is Barred for Failing to Respond Completely to FINRA's Requests

Allen did not substantially comply with all aspects of FINRA's Rule 8210 requests directed to him. Of the five categories of documents and information at issue, Allen had control over two of them: (1) his bank statements and (2) information about the loans between him and entities in which he had an ownership interest. Allen provided only a handful of the bank statements requested. Allen owned or had signatory authority on more than 12 bank accounts in 2018 and 2019. He therefore should have provided more than 288 monthly statements for these accounts. He provided less than 20 percent of them.[95] He provided no statements whatsoever for six specific bank accounts, and no statements whatsoever for an indeterminate number of other bank accounts. With respect to information about loans, Allen did not provide the list of loans that was requested, which made it impossible for the FINRA staff to determine whether he had provided complete responses to the requests for all loan agreements and evidence of all loan payments made. The FINRA staff was able to identify two specific loans Allen made to NYPPEX Holdings for which Allen did not provide loan agreements, and it identified three specific loans for which Allen did not provide all of the requested loan agreements.[96] Allen also failed to provide evidence of all payments made on these loans.

Allen's failure to substantially comply, without more, warrants a bar under the Guidelines. Nevertheless, we address the three violation-specific considerations.

The documents and information Allen failed to provide were important to FINRA. At the time of FINRA's requests, January and February 2020, Allen and NYPPEX Holdings had been accused by the AG of engaging in illegal conduct related to the Fund, including securities fraud and breach of fiduciary duty. Steinberg testified that the FINRA staff was particularly concerned that Allen and NYPPEX apparently had participated in a private placement of NYPPEX Holdings securities in early 2019, shortly after the New York court entered the Order. Steinberg said the staff requested Allen's bank statements because of concerns "related to money movements between [Allen] and the various entities" he owned or controlled, and that the staff "wanted to be able to see if there w[ere] any money movements" among Allen and those entities in 2018 and 2019. With respect to the information about loans, Steinberg testified that two loans between Allen and NYPPEX Holdings were disclosed on the MC-400 that NYPPEX and Allen submitted earlier that month, and the staff wanted to know about any other loans between Allen and entities in which he had an ownership interest. *See N. Woodward Fin. Corp.*, Exch. Act

---

95 Allen provided three monthly statements that were password protected. Even if we credit him with providing those statements, he still provided less than 20 percent of the statements requested.

96 The FINRA staff knew about these two loans because they were disclosed on the MC-400 application that NYPPEX submitted in February 2020, but Allen did not provide the loan agreements for either loan.

Release No. 74913, 2015 SEC LEXIS 1867, at *42 (May 8, 2015) (finding that the information the applicants failed to provide was important because it was necessary to determine whether they had engaged in other serious misconduct).

FINRA applied a significant amount of regulatory pressure on Allen to obtain the information at issue. After sending the initial requests for Allen's bank statements on February 10 and the loan information on February 20, the FINRA staff made several additional requests for this information in the following months.

Allen has not provided a valid reason for not providing a complete response to FINRA's requests. Allen did not explain why he could not have obtained all of the account statements from his bank, or why he could not have obtained the information about the loans to which he was a party. *See id.* at *43 ("And for the information that Applicants claim they did not have, Applicants made no attempt to obtain it elsewhere or explain to FINRA why the information was not available."). Allen and NYPPEX generally blame the firm's attorney, JH, for all their incomplete responses. But it is well settled that an associated person or firm cannot shift responsibility for complying with Rule 8210 to any other person. *See, e.g.*, *Dep't of Enf't v. Eplboim*, Complaint No. 2011025674101, 2014 FINRA Discip. LEXIS 8, at *22-23 (FINRA NAC May 14, 2014) (stating that a person who receives a Rule 8210 request "is responsible for responding directly to the FINRA requests for information and cannot abdicate his duty by relying on others to perform it"). Moreover, there is no credible evidence that Allen or NYPPEX provided all the missing documents and information to JH, or that JH failed to provide responsive documents and information to FINRA.

Allen also argues that, based on the letter JH sent to Steinberg on May 12, 2020, Allen was "justifiably under the good-faith belief that all of the 8210 demands had been complied with," with the "exception of the bank records, which were going to be made available to FINRA for viewing on an online portal." In his May 12 letter, JH wrote that NYPPEX had completed its production except for "certain bank accounts maintained by" Allen "or in which he has signatory authority," which JH and NYPPEX did not believe were "relevant in this matter." JH wrote that "the Staff has agreed to make a discrete review of these accounts to determine their relevance in this matter. We are currently discussing with the Staff the arrangements for this review."

JH's letter did not give Allen any reason, much less a good-faith reason, to believe that he did not need to provide any more information to FINRA. First, two weeks after JH sent the May 12 letter, Steinberg sent an email to Allen, Schunk, and JH that made clear that Allen and NYPPEX had not fully complied with the Rule 8210 requests. Steinberg's email specifically identified Allen's bank statements and the loan information among the documents and information that Allen and NYPPEX had failed to provide. Second, NYPPEX's Wells submission made clear that the "certain bank accounts" mentioned in JH's May 12 letter were trust accounts owned by the Allen family; they were not the personal or business-related accounts specifically identified by the FINRA staff during its investigation. *See N. Woodward Fin. Corp.*, 2015 SEC LEXIS 1867, at *43 (rejecting applicants' reliance on counsel argument because there was no evidence that their attorney advised them not to respond to Rule 8210 requests).

Allen also argues that it was not until the FINRA staff issued the Wells Notice that "there was any inkling that there was an issue, at which point Respondents consulted new counsel who informed them that everything had been properly complied with." Allen's assertion that he had no inkling of any issue until he received the Wells Notice is belied by Steinberg's email, sent on May 29, 2020, which clearly stated that Allen and NYPPEX had not fully complied with the Rule 8210 requests. There is no credible evidence that any attorney told Allen that "everything had been properly complied with." *See id.*

In addition to these considerations, we are deeply disturbed by Allen's disregard for his obligations under FINRA Rule 8210. When asked if he understood that Rule 8210 required him to respond to FINRA's requests truthfully and thoroughly, he replied: "My understanding of 8210 is that FINRA uses it to provide a record that's inaccurate so that, when you get to a hearing, they can accuse you of not providing documents. That's my new understanding of 8210." When asked if it was his "testimony before this hearing panel that you don't understand that FINRA Rule 8210 requires you to give truthful and accurate information to FINRA," he responded: "I'm not testifying one way or the other." He then said: "I'm not an expert at knowing what the rules are of FINRA. That's what I rely on our legal counsel for." Allen's cavalier attitude about his failure to comply with Rule 8210 raises grave concerns about the likelihood of future misconduct. *See Dep't of Enf't v. N. Woodward Fin. Corp.*, Complaint No. 2011028502101, 2016 FINRA Discip. LEXIS 35, at *47 (finding that a bar was warranted because the respondent's "refusal to acknowledge that he is required to respond fully and timely to FINRA investigation requests demonstrates a misunderstanding of, or total lack of regard for, his obligations as a securities professional").

Allen has not identified any additional mitigating factors, and we are not aware of any.[97]

In light of Allen's disregard for his obligation to comply with FINRA Rule 8210, we find that a bar is necessary for the protection of investors. *See N. Woodward Fin. Corp.*, 2015 SEC LEXIS 1867, at *49 (affirming a bar for the applicants' Rule 8210 violations because a "failure to fully respond to FINRA's Rule 8210 requests threatens the self-regulatory system and, in turn, investors by impeding FINRA's detection of violative conduct."). The information sought by FINRA staff was important to FINRA's investigation into possible securities fraud. Allen failed to respond completely to the Rule 8210 requests despite FINRA staff's repeated attempts to obtain documents and information from him. Indeed, even after receiving a written Wells Notice informing him that he was in violation of Rule 8210, Allen failed to provide a complete response. FINRA staff could not have applied any more regulatory pressure on Allen than it did, and it still was not enough to compel Allen's cooperation. *See David Kristian Evansen*, Exch. Act Release No. 75531, 2015 SEC LEXIS 3080, at *37 (July 27, 2015) (finding that the applicant's "longstanding failure to cooperate demonstrates that permitting him to associate would present a continuing danger to the public interest in securing voluntary cooperation with

---

[97] We do not credit Allen for NYPPEX's responses to the Rule 8210 requests. The FINRA staff asked NYPPEX to provide a broad array of documents and information, and NYPPEX provided a significant amount of it. In comparison, the requests directed to Allen sought a relatively limited range of documents and information, and Allen provided little of it.

investigations and, ultimately, detecting and preventing industry misconduct"). Allen's conduct raises substantial doubt about whether he would respond completely to any future Rule 8210 requests issued to him. Because any failure to comply with Rule 8210 subverts FINRA's ability to carry out its regulatory responsibilities, and thereby threatens the investing public, we find that Allen poses a continuing danger to the investing public, and that a bar is necessary to protect investors. *See John M.E. Saad*, Exch. Act Release No. 86751, 2019 SEC LEXIS 2216, at *7 (Aug. 3, 2019) ("A FINRA bar may be imposed, not as punishment, but as a means of protecting investors."), *aff'd*, 980 F.3d 103 (D.C. Cir. 2020). Accordingly, we bar Allen from associating with any FINRA member in any capacity for violating FINRA Rules 8210 and 2010.

2. NYPPEX Is Suspended for One Year for Failing to Respond Completely to FINRA's Requests

NYPPEX's violation was serious but not egregious, and therefore we suspend the firm with respect to all activities and functions for one year. Of the five categories of documents and information that were not provided, NYPPEX had direct control over three of them: (1) NYPPEX Holdings' 2019 bank statements; (2) the list of Allen's PSTs and evidence of the firm's supervision of Allen's OBAs and PSTs; and (3) the password-protected files for which passwords were not provided.

The documents and information NYPPEX failed to provide were important to FINRA. As noted above, at the time of the staff's requests, Allen and NYPPEX Holdings had been accused of engaging in illegal, investment-related misconduct, and the staff had concerns that Allen and NYPPEX apparently had participated in a private placement of NYPPEX Holdings securities. With respect to NYPPEX Holdings' bank statements, specifically, Steinberg testified that the staff wanted to "get the statements preceding and following the alleged misconduct [i.e., the private placement] time period" to "get a full picture of the activity that occurred." With respect to the request for information about Allen's OBAs and PSTs, Steinberg testified that, given the allegations in the AG's civil lawsuit, the staff had "concerns related to the inter dealings between the entities that Mr. Allen owned or controlled and wanted to see . . . if they were properly disclosed and if they were properly supervised."

We note that there was little regulatory pressure applied to NYPPEX for the NYPPEX Holdings bank statements. The FINRA staff requested those statements in the February 10 Request. The FINRA staff did not make a second request for those statements until May 29, 2020. There is no evidence in the record that the staff made any additional requests for the NYPPEX Holdings bank statements before or after May 29, 2020.[98]

There was some regulatory pressure applied to NYPPEX regarding the need for passwords to access certain files, including a file that appeared to contain information related to

[98] The staff issued a Wells Notice to NYPPEX on June 23, 2020. The Wells Notice does not appear to be in the record. While NYPPEX's Wells submission mentions the Rule 8210 violations, it does not specifically address the NYPPEX Holdings bank statements. We cannot determine whether the NYPPEX Holdings statements were addressed in the Wells Notice.

Allen's OBAs and PSTs, but it appears that NYPPEX was confused about which passwords were needed. Steinberg explained that there were two separate password issues with NYPPEX's production. The first password issue involved NYPPEX's emails. The FINRA staff requested NYPPEX's emails in early 2020. NYPPEX's email vendor created a file that contained the emails and password protected it. The file was provided to the FINRA staff with the password. While reviewing the emails, the FINRA staff found what appeared to be an inadvertently produced communication. The staff gave the file back to NYPPEX to remove any other inadvertently produced communications. NYPPEX did so, and then it provided the file to FINRA again. By that time, the password for the file had expired. The staff asked NYPPEX for a new password for the email file. A new password was provided to the FINRA staff on or around April 20, 2020.[99]

The second password issue, which is the relevant one here, involved PDF files. Schunk testified that a member of NYPPEX's staff created PDF files that contained information responsive to FINRA's requests. The staff member apparently password protected some of those files. NYPPEX provided the files to FINRA through the Request Manager system without providing the passwords. Nine of the PDF files NYPPEX provided to FINRA were password protected.

There is no evidence in the record that the second password issue was explained directly to NYPPEX. Steinberg sent several emails asking for passwords for files that NYPPEX had provided, but he listed the password-protected PDF files in only one email: the May 11 email he sent to JH.

At the hearing, Schunk apparently did not understand that there were two separate password issues with the files NYPPEX produced. Schunk repeatedly insisted that NYPPEX had provided the password necessary to open the PDF files several times, but he pointed to the files NYPPEX had uploaded to the Request Manager system that contained the password for the email file.

While the confusion over the passwords does not mitigate NYPPEX's failure to provide the 2019 bank statements for NYPPEX Holdings, which was not password related, we do consider it relevant to the issue of whether NYPPEX provided a valid reason for the deficiencies related to the OBA/PST issue and its failure to provide passwords for three other PDF files.

We also give NYPPEX some credit for providing a substantial amount of the documents and information requested by the FINRA staff in the early months of 2019. Between February 10 and April 10, 2020, the FINRA staff issued at least four different Rule 8210 requests to NYPPEX. These requests sought a total of more than 50 different categories of documents and information. Often, these categories included multiple sub-categories. NYPPEX apparently provided satisfactory responses to the overwhelming majority of these requests. *See Plunkett*, 2013 SEC LEXIS 1699, at *55-56 (holding that the determination of sanctions for a failure to respond violation must consider the extent to which the respondent complied with other requests

[99] It is not clear whether NYPPEX or the vendor provided the password to the staff.

made in the same investigation). With respect to the bank statements, specifically, NYPPEX Holdings and NYPPEX had a total of seven bank accounts in 2019 and 2020. NYPPEX produced more than half of the statements requested for those accounts.[100]

Because we find that NYPPEX's violation of Rule 8210 was serious but not egregious, we suspend NYPPEX with respect to all activities and functions for one year.

VII. Conclusion

NYPPEX and Schunk allowed Allen to associate with the firm while subject to a statutory disqualification without filing an MC-400, in violation of Article III, Section 3(b) of FINRA's By-Laws and FINRA Rules 8311 and 2010. For this misconduct, NYPPEX is fined $40,000 and Schunk is fined $40,000. Allen associated with NYPPEX while subject to a statutory disqualification, in violation of Article III, Section 3(b) of FINRA's By-Laws and FINRA Rule 2010. For this misconduct, Allen is fined $40,000. Considering the bar we impose on Allen for violating Rule 8210, we do not impose this fine on him. NYPPEX and Allen violated FINRA Rules 2210(e) and 2010 by posting the Press Release on the internet. For this misconduct, NYPPEX is fined $10,000 and Allen is fined $10,000. Considering the bar we impose on Allen for violating Rule 8210, we do not impose this fine on him. NYPPEX and Allen violated FINRA Rules 8210 and 2010 by failing to provide complete responses to FINRA's Rule 8210 requests. For this misconduct, NYPPEX is suspended with respect to all activities and functions for one year, and Allen is barred from associating with any FINRA member in any capacity. Allen's bar is effective on service of this decision. We affirm the Hearing Panel's imposition of $28,054.03 in hearing costs on NYPPEX, Allen, and Schunk, jointly and severally.

On behalf of the National Adjudicatory Council,

_____

Jennifer Piorko Mitchell, Vice President and
Deputy Corporate Secretary

---

[100] Steinberg testified that FINRA received some of the missing NYPPEX Holdings bank statements from the AG. We do not consider that mitigating.

Attachment A: Press Release Excerpts

NYPPEX Statement Regarding
New York Attorney General Civil Complaint[101]

January 2, 2020

The New York Attorney General's case is misleading and misrepresents numerous issues . . . .

. . .

Management Team & Regulatory Compliance

[1] Professionals at NYPPEX Holdings, LLC and its subsidiaries have years of exemplary regulatory compliance, and typically have 12 years or more experience with leading financial and alternative investment firms . . . .

[2] On April 30, 2019, FINRA concluded its latest-year long examination of NYPPEX and its Affiliates. [3] Detailed reviews included the following areas of risk . . . Managing Conflicts Arising from Affiliates . . . .

[4] In conclusion, FINRA did not find any violation of applicable securities regulations to warrant a fine, censure, or disciplinary action of the Company. [5] The [AG's] allegations are in conflict with the facts concluded by FINRA.

. . .

Laurence Allen

[6] Laurence Allen is a financial and technology entrepreneur with a 36 year track record of exemplary regulatory compliance, having never been fined or censured by any securities regulator. [7] Mr. Allen has acquired and/or developed companies whose businesses provide a service or product at the intersection of alternative assets and financial technology (the 'Affiliates'). [8] Mr. Allen received his BS in Economics with honors and MBA in finance from the Wharton School at the University of Pennsylvania.

[9] The [AG's] allegations regarding Mr. Allen's integrity are false and defamatory.

---

101 Sentence numbers have been added for clarity.

Operating Expenses

[10] Operating expenses have been properly and consistently allocated for years among Affiliates according to the Company's Affiliate Service Agreement (the "ASA"), which is required by FINRA.

[11] The ASA has been reviewed and approved by FINRA throughout its periodic examinations of the Company for over 15 years.

Attachment B: Excerpts from Allen's Affidavit

NYAG IS IGNORING SIMULTANEOUS
GOVERNMENT REVIEWS

56. NYAG's speculative allegations conflict with FINRA's April 30, 2019 conclusions, after its latest year-long examination of NYPPEX and Affiliates, that *did not find any violation* of applicable securities regulations to warrant a fine, censure or disciplinary action of the NYPPEX or Allen.

. . .

76. Operating expenses were properly and consistently allocated for over 14 years among Affiliates pursuant to the Company's [ASA], which is required by FINRA, and which was reviewed and approved by FINRA during periodic examinations for over 14 years.

Attachment C: Excerpts from the Do Not Use Response

Context Statements[102]

[1] The communication that is the subject of the [Do Not Use-Letter] is a press release that was provided to members of the media. [2] After the Staff notified the Firm that the Staff had a concern regarding the press release, the firm promptly removed it. [FN1]

[3] The FINRA Reference was contained in the [Press Release] which was only posted to https://nyppex.nyag [sic], a web page that was provided to reporters upon request for our comments regarding the NYAG press releases. [4] The web page is *not available* to the public when accessing www.nyppex.com.

[FN1] We immediately instructed our web developers to make the appropriate deletions. The deletions were accomplished within 2 business days, which was 1 day ahead of the 3 business days we mutually agreed.

Responses to Specific Requests

Item 1: Was the communication approved in writing and dated, prior to use by a registered principal of you firm in accordance with FINRA Rule 2210(b)(1)? If the communication was approved, please provide the actual evidence of approval, including the name and title of the principal who approved the communication and the date of approval.

NYPPEX's Response to Item 1: Yes. Please see Exhibit 1. As stated previously, the NYPPEX Legal and Compliance Committee approved the communication. The Committee's members include registered principals [Schunk and Allen]. The Committee's approval occurred on December 20, 2019.

After the Staff notified the Firm that the Staff had a concern regarding the press release, the firm promptly removed it.

Item 2: If the communication was not approved, please provide a written statement from the individual responsible for the communication.

NYPPEX's Response to Item 2: The communication was pre-approved as stated above.

Item 3: Please provide the date the communication went live on the website. . . . [P]lease provide . . . a summary of how and to what extent those communications were distributed. Please be as specific as possible regarding . . . to whom the communications were distributed.

---

102 Sentence numbers have been added for clarity.

NYPPEX's Response to Item 3: The communication went live on December 23, 2019. However, the communication was only available at https://nyppex.nyag [sic], a page that was not available to the public at www.nyppex.com.

Schunk's Statement

Review and Approval of the NYPPEX Statement
Regarding the New York Attorney General Civil Complaint

The [Press Release] was reviewed and approved by the NYPPEX Legal and Compliance Committee on or about December 20, 2019. (See attached Statement).

Michael J. Schunk, Chief Compliance Officer