

BEFORE THE NATIONAL ADJUDICATORY COUNCIL  
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Jason Lynn DiPaola  
Babylon, NY,

Respondent.

DECISION

Complaint No. 2018057274302

Dated: March 23, 2023

**Registered representative failed to disclose an outside account in which he exercised discretionary trading authority, submitted false and misleading compliance forms to his employer, and failed to provide on-the-record testimony. Held, findings affirmed and sanctions modified.**

**Appearances**

For the Complainant: Jessica Brach, Esq., Gary Chodosh, Esq., Jennifer L. Crawford, Esq., Kay Lackey, Esq., Payne Templeton, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Ernest E. Badway, Esq., Philip Z. Langer, Esq.

**Decision**

The Department of Enforcement appeals, and Jason Lynn DiPaola cross-appeals, a Hearing Panel decision. The Hearing Panel found that DiPaola failed to disclose an outside account in which he exercised discretionary trading authority, failed to accurately complete two compliance questionnaires, and failed to provide on-the-record (“OTR”) testimony pursuant to FINRA Rule 8210. For this misconduct, the Hearing Panel suspended DiPaola for 30 business days and fined him \$5,000.

After an independent review of the record, we affirm the Hearing Panel’s findings, but modify the sanctions imposed.

I. Background

DiPaola first registered with FINRA in August 1995 and joined Chardan Capital Markets LLC (“Chardan”) in May 2013 as a general securities representative. DiPaola’s registration with Chardan was terminated on May 7, 2019, when Chardan filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) shortly after DiPaola’s resignation. DiPaola currently works for a hedge fund that is not a FINRA member.

II. Facts

A. DiPaola’s Role at Chardan

DiPaola worked in a division of Chardan called the Special Equities Group, where he held the title of Senior Vice President – Institutional Sales and Trading. In that role, he was responsible for meeting with executives of publicly traded companies to determine whether those companies might be suitable investments for Chardan’s institutional customers. One of the companies DiPaola introduced to Chardan was Advanced Medical Isotope Corporation (“AMIC”), a medical development company. DiPaola learned about AMIC in 2012 or 2013 through a friend who served as an advisor to AMIC, and DiPaola had an ongoing relationship with the company and corresponded with its Chief Executive Officer (“CEO”). In October 2016, Chardan and AMIC entered into an agreement for Chardan to provide investor relations support to AMIC.

B. DiPaola’s Securities Trading

DiPaola actively traded securities in personal brokerage accounts held outside Chardan, including an E\*Trade account. DiPaola frequently traded stocks of certain issuers with which Chardan had engagements. One of the stocks DiPaola traded most frequently in his E\*Trade account was the common stock of AMIC. DiPaola began trading AMIC stock prior to Chardan’s engagement with the company.

C. DiPaola’s Mother’s E\*Trade Account

In 2013, DiPaola’s mother inherited a brokerage account at a full-service brokerage firm. In response to his mother’s complaints about the account’s low returns and the associated fees, DiPaola recommended his mother invest the money in an E\*Trade account. He helped her open the account because she did not own a computer. DiPaola had the username and password for his mother’s account and accessed it regularly, but he did not have written discretionary authority over the account.

DiPaola’s mother was not an experienced investor, and she asked for DiPaola’s help making investment decisions because he was knowledgeable about securities and she trusted him. She gave DiPaola permission to log into her account and place orders, and she told him to trade in her account as he would trade in his own. Prior to opening the E\*Trade account, DiPaola’s mother traded about four times per year.

DiPaola and his mother spoke almost every morning, and, during these calls, they would discuss which stocks to trade in her account. DiPaola's mother testified that DiPaola would advise her of the trades he was considering, she would say "fine," and he would place the order. Typically, they would discuss amounts of trades in terms of dollars, rather than shares. In some instances, DiPaola might discuss a proposed trade with his mother the day before the trading took place or, if necessary to fulfill a particular order, he would continue to buy a particular stock for a few days after speaking with her. While DiPaola and his mother both stated that she approved every trade before it was made, DiPaola testified that, in the case of AMIC's stock, which was illiquid, a single trade might take place over multiple orders.<sup>1</sup> DiPaola also testified that he did not call his mother every time he changed the price of a limit order. On days in which he both bought and sold a particular stock, DiPaola said he would explain to his mother that the trades would be short in duration, but he did not call her prior to putting in the sell order. DiPaola's mother was comfortable with DiPaola trading in her account in response to movement in the market because he was an experienced financial professional and she did not want to "lose her shirt just because he couldn't make a phone call." When DiPaola's mother needed money, she would sometimes rely on DiPaola to determine which stocks she should sell.

At the hearing, DiPaola testified that his mother independently researched the stocks traded in her account.<sup>2</sup> DiPaola's mother recalled during the hearing that AMIC had developed a treatment for cancer that was showing promising results in testing on animals. She knew that the issuer of a different stock she traded made a low dose nicotine cigarette. She did not recall anything about other stocks frequently bought and sold in her account. She did not recall discussing with DiPaola purchasing stocks on margin or trading on a day order versus a good-til-canceled basis, and she had "no idea about a limit order," "or any kind of order." DiPaola's mother recalled that the substance of their discussions about trading was generally related to the value of the stock at that time.

Over the course of two years—March 2015 to March 2017—DiPaola placed or canceled 4,452 orders in his mother's account.<sup>3</sup> Upon reviewing trading records that included the IP address from which orders were placed, DiPaola acknowledged that he had executed approximately 95% of the trades in the account. Many of the trades he made in his mother's account were similar to those he made in his own account. In some instances, however, the activity between the two accounts differed. For example, there were instances in which he placed a buy order for a security in his own account at or about the same time that he placed a sell order for the same security in his mother's account. In addition, there were instances in

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<sup>1</sup> A FINRA investigator acknowledged during the hearing that it was common for illiquid stocks to trade in small batches.

<sup>2</sup> As discussed below, DiPaola had previously provided contradictory OTR testimony that, to his knowledge, his mother did not research the stocks.

<sup>3</sup> According to DiPaola's testimony, E\*Trade's platform automatically reflects the cancellation of an order when an account holder edits an order to set a new limit price.

which he placed orders in his mother's account for stocks that were on Chardan's restricted list but did not place corresponding orders in his own account.<sup>4</sup>

D. DiPaola's Failure to Disclose His Mother's Account

During the relevant period, Chardan's written supervisory procedures stated that employee and employee-related accounts, which were defined as accounts of "any other related individual over whose account the person associated with the member has control," were subject to review by the firm. DiPaola understood at the time that, in accordance with these procedures, he was required to disclose his mother's account if he had "control" over it. As required by both NASD Rule 3050(c) and Chardan's compliance procedures, DiPaola disclosed his own outside brokerage accounts to Chardan, and Chardan received copies of the statements for these accounts. While the firm was aware of DiPaola's relationship with AMIC, no one at Chardan ever questioned or otherwise expressed concern about his trading activity. DiPaola did not, however, disclose to Chardan his mother's account or his activity therein until August 2017.

Chardan also required DiPaola to complete an annual questionnaire that instructed him to disclose any accounts held outside the firm, including "any securities account in which [he] ha[d] a direct or indirect interest including a financial or fiduciary interest, or which [he] control[led]." DiPaola completed the questionnaires for 2015 and 2016 in May 2016 and November 2016, respectively. In both questionnaires, he disclosed his own accounts, but not his mother's E\*Trade account.

In August 2017, E\*Trade contacted DiPaola's mother after observing that someone else was logging into her account. When she explained that the individual logging into the account was her son, E\*Trade advised her that DiPaola's access would be terminated unless he was added as a co-owner of the account. At that time, DiPaola advised Chardan that his mother was adding him to her account for estate planning purposes. He also advised E\*Trade of his status as an associated person at Chardan.

E. FINRA Investigates DiPaola's Trading Activity

This disciplinary proceeding originated from a FINRA cycle examination of Chardan in the summer of 2017. FINRA's examination focused, in part, on Chardan's supervisory procedures and controls over its brokers' personal outside trading accounts. This led the examiners to focus on DiPaola's and his mother's E\*Trade accounts.

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<sup>4</sup> Firms issue restricted lists to make employees aware of "securities in which proprietary employee and certain solicited customer transactions are restricted or prohibited" as a safeguard against conflicts of interests or rule violations by registered representatives. *NASD Notice to Members 91-45*, 1991 NASD LEXIS 60, at \*5 (June 2021).

1. The 2019 On-the-Record Interviews

As part of the investigation of this case, FINRA’s Department of Enforcement (“Enforcement”) took OTR testimony from DiPaola pursuant to FINRA Rule 8210 on three separate occasions, once in April 2019 and twice in July 2019. The April 2019 OTR was terminated early after the attorney serving as counsel for both DiPaola and Chardan advised that, based on information that came to light during the testimony, there was a potential conflict of interest in his representation of both DiPaola and the firm. Subsequently, on May 7, 2019, Chardan filed a Form U5 in which the firm stated that DiPaola had been permitted to resign on April 26, 2019, after he admitted that, for a period of time, he had traded securities in his mother’s brokerage account at another FINRA member without obtaining written discretionary authority from his mother or disclosing the account to Chardan. DiPaola obtained new counsel, and FINRA staff questioned him again over a two-day period in July 2019.

Over the course of the three OTRs, Enforcement questioned DiPaola regarding his relationship with AMIC, his level of involvement in his mother’s account, and specific trading patterns they had observed, such as placing multiple limit orders in a single day, trading on opposite sides of the market, and trading at market close.

a. Testimony Regarding Specific Transactions

As part of their inquiry, Enforcement asked DiPaola about specific transactions he had conducted during the relevant period. DiPaola, however, could only speculate as to the circumstances associated with the trades, and, on at least four occasions, DiPaola stated that he could not answer questions based on “data in a vacuum” or suggested that Enforcement was “cherry picking” and discussing transactions out of context. For example, in the first July OTR, Enforcement asked DiPaola about two May 9, 2016 buy orders for 10,000 shares of AMIC stock at a price of 48 cents that took place at 3:57 pm and 3:59 pm, minutes before the market close. DiPaola did not remember the circumstances of those trades but theorized that he had been purchasing stock for the last half hour of the day and was repeatedly entering orders. He then accused the investigators of “try[ing] to twist things” using “cherry picked data.” In another instance, Enforcement asked DiPaola to explain buy and sell orders that he placed within a minute of each other on June 12, 2015, in his and his mother’s accounts, respectively. DiPaola said that he could not answer questions about that activity without “a videotape of the computer screen and the level two and what was happening in the market at the time,” and that it was “impossible” to speculate based solely on trading records as to why he entered or canceled a particular order.<sup>5</sup> Similarly, in the second July OTR, when asked why, on June 5, 2015, shortly before the close of the market, he placed an order at a higher limit price than several orders

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<sup>5</sup> “Level 2” refers to real time market data that reflects bid and ask prices and sizes to provide insight into market depth and momentum. James Chen, *What Is Level 2? Definition on Nasdaq, How It Works, and Example*, INVESTOPEDIA (Dec. 31, 2021), <https://www.investopedia.com/terms/l/level2.asp>.

executed minutes before, he said he could not explain his reasons for wanting to make the trade in question based on “data in a vacuum” “without seeing what happened that day.”

b. Testimony Regarding DiPaola’s Involvement with His Mother’s Account

DiPaola’s description of his involvement in his mother’s account changed over the course of the OTRs. In April 2019, in response to questioning about whether he had ever traded a particular stock in another person’s account, he initially answered, “I don’t know what other accounts I would be trading for.” After further questioning, DiPaola stated that “maybe” he had traded in his mother’s account, but he “d[id]n’t know.” Enforcement then asked DiPaola directly whether he had traded in his mother’s account, and DiPaola replied that it was “a joint account, so [he] trade[d] in that account on her behalf.” When asked whether he traded in the account before it was a joint account, he replied, “[n]o.” He said that before he became a co-owner of the account, he would tell his mother about the trading he was doing, and she would replicate that on her own. After Enforcement reminded him that he was under oath, however, he stated that he “might have entered an order for her before.” He then admitted that he had done so “on more than one occasion,” but it was his belief, he stated, that the fact that he “entered an order or two” did not require him to disclose the account to Chardan. According to DiPaola, his mother had added him to the account so that he could be more “hands on” due to her lack of investment expertise.

In the July OTRs, DiPaola conceded that he was added as a co-owner only after E\*Trade notified his mother that someone else had been logging into her account. DiPaola again stated that his mother initially placed her own orders in the account, replicating DiPaola’s activity. He said that his mother then asked him to execute the trades on her behalf because she had trouble trading illiquid stocks, which required entering multiple orders. He admitted that he probably made “at least half” of the trades that occurred in the account during the relevant period.<sup>6</sup> During the July OTRs, DiPaola also said that, to his knowledge, his mother was not doing any research on the stocks in which she invested. This contradicted DiPaola’s hearing testimony that his mother independently researched the stocks traded in her account.

c. Testimony Regarding DiPaola’s Relationship with AMIC

With respect to his relationship with AMIC, DiPaola testified at the July OTRs that he was introduced to the company in 2012 or 2013 through a friend, that they “ask[ed his] opinion from time to time,” and that he invested in private placements of AMIC stock in a personal capacity and invited others to invest in the private placements as well. He said that he communicated with AMIC’s CEO when AMIC needed funding but did not recall discussing the price of AMIC’s stock with him.

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<sup>6</sup> As noted above, at the hearing, DiPaola acknowledged that he had been responsible for approximately 95% of the trading in the account.

## 2. FINRA Staff's Investigation Following the 2019 OTRs

Prior to the 2019 OTRs, as part of its investigation into DiPaola's conduct, FINRA staff had received more than one million electronic communications from Chardan. FINRA staff had the ability to perform key word searches of these communications using their document management system. Staff testified, however, that it was not possible for them to review every document in preparation for the 2019 interviews.

FINRA staff testified that, following the 2019 OTRs, they performed additional targeted searches of the electronic communications provided by Chardan to assess the veracity of DiPaola's testimony. During this review, investigators observed frequent communications between DiPaola and associates of AMIC, including the company's CEO and potential "stock promoters."<sup>7</sup> Staff also observed that, prior to AMIC's engagement of Chardan, DiPaola had shared with both Chardan and AMIC a "strategic plan" he had developed for the company and urged AMIC to hire an investor relations consultant. Staff testified that the review had raised concerns that DiPaola was potentially involved in insider trading and market manipulation, and, accordingly, they had additional questions for him. According to staff, these questions were material to their investigation. FINRA staff wanted to ask DiPaola about his trading activity in AMIC stock, including the timing and amounts of the trades in both his and his mother's accounts relative to their substantial cumulative position in the stock and to certain communications between DiPaola and individuals associated with AMIC. FINRA staff also testified that, after the 2019 OTRs, they learned that the share price of AMIC's stock had appreciated in April 2016 and that the price shift coincided with "a number of liquidations and millions of shares" in both DiPaola's and his mother's accounts. This activity, staff testified, raised additional concerns about potential insider trading.

FINRA staff also testified that, in response to DiPaola's complaints regarding "cherry picking" during the 2019 interviews, they had performed further analysis of DiPaola's trading activity, enabling them to provide additional context when questioning DiPaola on specific trades, such as instances in which he had placed buy orders in his own account, while placing corresponding sell orders in his mother's account. Although DiPaola challenged the credibility of FINRA staff and claimed further questioning was unnecessary in light of the answers he had provided in 2019, the Hearing Panel did not find "sufficient grounds to disbelieve the[] [investigators'] testimony."

## 3. The 2021 FINRA Rule 8210 Requests

On March 11, 2021, FINRA sent DiPaola a letter, through counsel, requesting that DiPaola appear on March 26, 2021, and provide testimony pursuant to FINRA Rule 8210. The

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<sup>7</sup> Respondent's counsel objected to the characterization of the company in question as a "stock promoter," and the Hearing Officer, while overruling the objection, observed that the factors on which the investigator based his conclusion that the company was a "stock promoter" did not meet the legal definition of that term.

letter stated that FINRA Rule 8210 required him to “answer the staff’s questions and to answer them truthfully.” Failure to do so, the letter warned, “could be the basis for the initiation of a disciplinary proceeding that could lead to the imposition of sanctions, including a bar from the industry, suspension, censure and/or fine.”

On March 16, 2021, DiPaola’s counsel asked whether the OTR would be a “rehash” of previously covered testimony. Enforcement responded that they were not “looking to rehash,” and would “ask questions as to facts [they had] not covered, largely relating to [AMIC stock] and Mr. DiPaola’s trading in that security.” On March 19, 2021, DiPaola’s counsel advised that DiPaola was not available on the requested date and that counsel was in the process of obtaining alternative dates for the OTR. In response, Enforcement offered three additional dates in late March and early April. DiPaola’s counsel replied that he was unavailable on those dates, and that he would provide some dates later in April. On March 24, 2021, Enforcement requested dates in early April, noting that if counsel did not provide dates that worked, Enforcement would have to issue a notice setting a new date. Counsel replied that he would respond the following week.

On March 26, 2021, FINRA staff sent DiPaola, through counsel, a second letter pursuant to FINRA Rule 8210, requesting that DiPaola appear and provide testimony on April 5, 2021. The letter warned DiPaola that, if he failed to appear on the scheduled date without a rescheduling agreement, “FINRA may commence . . . an expedited or formal disciplinary proceeding that could lead to sanctions, including a bar from associating with any FINRA member in all capacities, suspension, censure and/or fine.” On the same day, FINRA staff also sent DiPaola, through his counsel, a Wells Notice notifying DiPaola that he was “the subject of an investigation,” and that Enforcement had made “a preliminary determination” to recommend disciplinary action for: (1) manipulative trading and trading while in possession of material non-public information; (2) failing to disclose an outside brokerage account and status as an associated person; and (3) submitting false and misleading disclosure forms to Chardan.<sup>8</sup> The notice advised that the opportunity to respond to the violations under consideration by Enforcement did not “preclude Enforcement from ultimately recommending disciplinary action that may include different or additional charges.”

On April 1, 2021, Enforcement sent an email to DiPaola’s counsel asking counsel to confirm that DiPaola would appear for the April 5, 2021 OTR. Mr. DiPaola’s counsel replied: “Are you serious? You served a Wells Notice, you cannot take another OTR after serving a Wells Notice. Does your supervisor know what you are doing?” Mr. DiPaola’s counsel later requested the name of the Enforcement attorney’s supervisor. On April 2, 2021, following a phone call between DiPaola’s counsel and the supervisor, during which the supervisor refused a

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<sup>8</sup> FINRA issues a Wells Notice to inform a potential respondent that FINRA has made a preliminary determination to recommend formal disciplinary proceedings. *FINRA Regulatory Notice 09-17*, 2009 FINRA LEXIS 45, at \*5-6 (Mar. 2009). The potential respondent then has an opportunity to submit a response, known as a “Wells Submission,” in which the respondent explains why formal disciplinary proceedings are not appropriate. *Id.* at \*6.



request by DiPaola's counsel that Enforcement withdraw the Wells Notice, DiPaola's counsel sent an email seeking confirmation that Enforcement did not intend to withdraw the Wells Notice pending DiPaola's OTR. Enforcement so confirmed. DiPaola did not appear for the OTR on April 5, 2021. FINRA staff then sent a letter to DiPaola, through counsel, requesting DiPaola appear and provide testimony, pursuant to FINRA Rule 8210, on April 15, 2021. The letter included the same warning about the consequences should he fail to appear that was included in the March 26, 2021 letter. DiPaola did not appear for the April 15, 2021 OTR.

### III. Procedural History

Enforcement initiated the instant disciplinary proceeding on May 3, 2021, when it filed a three-cause complaint alleging that: (1) from March 2015 through March 2017, DiPaola exercised discretionary authority in an account held outside Chardan without disclosing the existence of the account to Chardan or disclosing his status as an associated person of Chardan to the executing firm, in violation of NASD Rule 3050(c) and FINRA Rule 2010;<sup>9</sup> (2) in May and November 2016, DiPaola failed to disclose the outside account at issue in employee compliance questionnaires and certification forms, in violation of FINRA Rule 2010; and (3) in April 2021, DiPaola failed to appear and provide testimony at an OTR, in violation of FINRA Rules 8210 and 2010. DiPaola filed an answer denying the allegations.

In November 2021, a Hearing Panel conducted a two-day hearing. DiPaola argued before the Hearing Panel that disclosure of the outside account was not required under FINRA rules because he did not have discretionary authority over the account. Similarly, he argued that, because he did not control the account, he was not required to identify the account in Chardan's compliance questionnaires. He further argued that he did not violate FINRA Rule 8210 because FINRA lacked authority to require his testimony due to its issuance of a Wells Notice. In a decision issued March 25, 2022, the Hearing Panel rejected these arguments.

For DiPaola's failure to disclose the existence of the outside account to Chardan and his status as an associated person to E\*Trade, and for his failure to identify the outside account on Chardan's compliance questionnaires, the Hearing Panel imposed a fine of \$5,000 as a unitary sanction. For DiPaola's failure to provide OTR testimony, the Hearing Panel suspended him in all capacities for 30 business days.

Enforcement timely appealed the Hearing Panel's decision, and DiPaola filed a cross-appeal. On appeal, Enforcement argues that the Hearing Panel's sanctions determination was insufficient to remediate DiPaola's misconduct or deter future similar misconduct. On cross-appeal, DiPaola argues that the Hearing Panel's decision should be reversed in its entirety. As discussed in detail below, we reject DiPaola's arguments, affirm the Hearing Panel's findings, and modify the sanctions.

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<sup>9</sup> On April 3, 2017, just after the relevant period, NASD Rule 3050 was superseded by FINRA Rule 3210. *See FINRA Regulatory Notice 16-22*, 2016 FINRA LEXIS 19 (June 2016). FINRA applies the rules in effect at the time of the conduct at issue.

#### IV. Discussion

We affirm the Hearing Panel's findings that DiPaola failed to disclose an outside account in which he exercised discretionary authority, in violation of NASD Rule 3050(c) and FINRA Rule 2010; failed to accurately complete two compliance questionnaires, in violation of FINRA Rule 2010; and failed to provide OTR testimony, in violation of FINRA Rules 8210 and 2010. We discuss the violations in detail below.

##### A. DiPaola Failed to Disclose an Outside Account in Which He Exercised Discretionary Authority

NASD Rule 3050(c) prohibits associated persons of member firms from opening a securities account with another member without first notifying, in writing, both the employer member and the executing member of "his or her association with the other member." This rule applies to any account "in which an associated person has a financial interest or with respect to which such person has discretionary authority."<sup>10</sup> NASD Rule 3050(e).

The purpose of NASD Rule 3050(c) is to "prevent associated persons from engaging in improper trading 'by providing the employer member with more complete knowledge of its associated persons' trading activities.'" *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at \*19 (Feb. 24, 2012) (quoting *NASD Notice to Members 91-27*, 1991 NASD LEXIS 44, at \*3 (May 1991)). The rule enables member firms "to create and enforce internal compliance procedures and 'facilitate more direct and early detection of potential rule violations,' such as conflicts of interest." *Id.* at \*20 (quoting *NASD Notice to Members 91-27*, at \*4); *accord Dep't of Enf't v. Ng*, Complaint No. 2009019369302, 2013 FINRA Discip. LEXIS 6, at \*22 (FINRA NAC Apr. 24, 2013) (noting that the purpose of NASD Rule 3050(c) is to prevent "potential and actual conflicts of interest raised through registered representatives' personal trading activities" and "deter insider trading"). "A firm's ability to effectively monitor and address trading activity that may result in violative conduct is therefore highly dependent on the receipt of accurate and comprehensive information about an associated person's brokerage accounts." *Braff*, 2012 SEC LEXIS 620, at \*20.

As noted above, NASD Rule 3050(c) applies, not only to an associated person's own accounts, but also to accounts in which that person exercises discretionary authority. NASD Rule 3050(e). Brokers exercise discretion when they make trades in a customer's account without first consulting the customer. *See, e.g., Guang Lu*, Exchange Act Release No. 51047, 2005 SEC LEXIS 117, at \*17-19 (Jan. 14, 2005) (finding respondent exercised discretionary

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<sup>10</sup> FINRA Rule 3210, which replaced NASD Rule 3050, is similar to its predecessor, however, it does not reference discretionary authority. Supplementary material accompanying Rule 3210 clarifies that "the associated person shall be assumed to have a beneficial interest in, and to have established, any account that is held by . . . (c) any other related individual over whose account the associated person has control."

trading authority when he made all decisions regarding which options to buy and sell and changed the passwords on the customer's account); *Dep't of Enf't v. Mehringer*, Complaint No. 2014041868001, 2020 FINRA Discip. LEXIS 27, at \*37 (FINRA NAC June 15, 2020) (affirming finding of discretionary trading authority with respect to the respondent's sale, without the customer's authorization, of the customer's position in certain funds); *Dep't of Enf't v. Wilson*, Complaint No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at \*30-31 (FINRA NAC Dec. 28, 2011) (finding that respondent exercised discretionary trading authority in customers' accounts when he decided which positions to sell for the purposes of funding early distributions from their retirement accounts without obtaining prior approval).<sup>11</sup> Even in instances in which the broker has communicated with the customer and discussed a general trading strategy, the broker exercises discretion if the broker and customer did not discuss the individual trades. *See Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at \*34-36 (Nov. 8, 2006) (finding that respondent exercised discretion where he and the customer had discussed the "general strategy" of selling a particular stock when the price was high and buying it back when the price was lower), *aff'd*, 304 F. App'x 883 (D.C. Cir. 2008). A broker may exercise discretion as to the price or time of a trade for which the customer has directed the purchase or sale of a definite amount of a specific security without triggering certain obligations associated with discretionary trading; such discretion is only in effect, however, until the end of the business day on which the customer granted it. *See* NASD Rule 2510(d).<sup>12</sup>

We agree with the Hearing Panel that DiPaola exercised discretionary trading authority in his mother's account. DiPaola's mother did not own a computer and therefore asked that DiPaola open an account on her behalf, and she instructed him to trade in the account as he traded in his own. DiPaola's mother was an inexperienced investor, and she trusted her son and deferred to his planned trading activity in her account without providing him with any specific instructions. DiPaola admitted that he placed 95% of the trades in the account on her behalf.

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<sup>11</sup> *Lu*, *Mehring*, and *Wilson* involved allegations that respondents traded with discretion without written authority under NASD Rule 2510(b) (superseded by FINRA Rule 3260 on May 8, 2019), which prohibited the exercise of discretionary power in a customer's account absent prior written authorization. Although these cases did not involve a respondent's failure to disclose accounts under former NASD Rule 3050 or FINRA Rule 3210, they provide useful guidance regarding what constitutes discretionary authority.

<sup>12</sup> NASD Rule 2510(d) carved out an exception to the prohibition against unauthorized discretionary trading that would permit a broker to exercise discretion as to the price or time of a trade for which the customer has directed the purchase or sale of a definite amount of a specific security, however, the exception is only in effect until the end of the business day on which the customer granted such discretion. As noted above, while NASD Rule 2510 is not directly applicable in this case, the rule and cases discussing violations of the rule provide guidance when evaluating whether certain trades were made with discretion.

DiPaola maintains that he spoke to his mother almost every day and that his mother approved every trade. While DiPaola acknowledges that he did not call his mother each time he placed an order throughout the day, he states that it was unnecessary to do so given the nature of the trading, i.e., the fact that the securities in which he traded were illiquid stocks that required multiple orders to execute a single trade. Even accepting this explanation with respect to certain of the trading activity occurring in the account, the record reflects that DiPaola, at least in some instances, engaged in discretionary trading triggering disclosure obligations. DiPaola testified, for example, that he did not inform his mother every time he changed a limit order and that, on occasion, he would buy and sell the same stock on the same day. DiPaola stated that, when his mother needed money, she would rely on DiPaola to determine which stocks, and how much, to sell. DiPaola's mother recalled that the substance of their discussion about trading was generally limited to the value of a particular stock at that time. In addition, DiPaola testified that there were instances in which he would speak with his mother over the weekend about a particular trade and subsequently would carry out that trade over the next several days, which precludes a finding of time and price discretion. *See* FINRA Rule 3260(d);<sup>13</sup> *see also* *Michael Pino*, Exchange Act Release No. 74903, 2015 SEC LEXIS 1811, at \*25 (May 7, 2015) (holding that time and price discretion did not apply because discretion was not granted on the same business day the transactions were executed). Under these circumstances, we find that the evidence establishes that DiPaola at times exercised discretionary authority in his mother's account that required him to disclose the account to Chardan and E\*Trade pursuant to NASD Rule 3050(c).

On cross-appeal, DiPaola challenges the Hearing Panel's finding that he had discretionary authority, referencing several instances throughout his and his mother's testimony in which they both denied that DiPaola exercised discretion over her account. The Hearing Panel, however, in finding that "the record [wa]s replete with evidence that DiPaola placed orders in his mother's account without first discussing them with her," chose not to credit these self-serving statements. Instead, the Hearing Panel relied on DiPaola's own testimony about trades he made without consulting his mother and trading records that demonstrated that DiPaola, "on numerous occasions . . . would place, cancel, and execute as many as 15 or more trades in his mother's account on a single day." And, contrary to DiPaola's allegation that the Hearing Panel relied on testimony that was "cherry-picked" and "out-of-context" relating to DiPaola's execution of certain transactions involving illiquid stocks that took place over multiple orders, it was unnecessary for the Hearing Panel to rely solely on trades of this nature because, as described above, there was sufficient evidence of trading activity that did not fall within that specific factual scenario.<sup>14</sup>

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<sup>13</sup> Like NASD Rule 2510(d), FINRA Rule 3260(d) provides that authority to trade under time and price discretion is only in effect until the end of the business day on which the customer granted such discretion.

<sup>14</sup> For example, DiPaola challenged the Hearing Panel's reliance on testimony from DiPaola's mother that, "when there was movement in the price of a stock during the trading day, she relied on Mr. DiPaola to decide whether to buy or sell a given amount." DiPaola argued that this testimony related to DiPaola's "ability to execute [the purchase or sale of a specific dollar amount's worth of stock] over multiple orders, if necessary, particularly given that Mrs.

DiPaola cites *Dep't of Enf't v. Katsock*, Complaint No. C9A020018, 2003 NASD Discip. LEXIS 39 (NASD Hearing Panel Sept. 4, 2003), to justify his failure to disclose his mother's account.<sup>15</sup> This reliance is misplaced. In that case, the respondent was charged with exercising discretion without written authority in violation of NASD Rule 2510(b), and there was a factual dispute: the customer stated that she had never communicated with respondent regarding the trades in question, while the respondent stated that he had multiple meetings with the customer during which he advised her of every trade. *Id.* at \*36-37. The Hearing Panel in *Katsock* did not find it necessary to resolve the factual discrepancy because, in either case, discretionary trading requiring written authority had not occurred. *Id.* The Hearing Panel observed that, if the customer was credited, the trades were simply unauthorized.<sup>16</sup> *Id.* If respondent was credited, the respondent was not acting on discretion because the customer had expressly authorized every trade. *Id.* Here, there is no dispute that the trades that were specifically authorized by DiPaola's mother qualified for the time-and-price exception for discretionary trading. Indeed, the Hearing Panel noted that even Enforcement had not alleged that every order DiPaola placed in the account was discretionary. As described above, however, we find that DiPaola exercised discretion with respect to some of the trades DiPaola executed in his mother's account, which is sufficient to trigger DiPaola's disclosure obligations, as respondent is "required to comply with [FINRA's] high standards of conduct at all times." *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006); *cf. The Dratel Grp.*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035, at \*40 (Mar. 17, 2016) ("The number of cherry-picked trades or percentage of trades that Applicants cherry picked is not a mitigating factor . . . [and] Applicants must 'comply with [FINRA's] high standards of conduct at all times.'")

In finding that DiPaola traded with discretion in his mother's account and was therefore obligated to disclose the account to Chardan, we do not ignore the distinctions cited by DiPaola between the circumstances here and those in unauthorized discretionary trading cases in which the trading took place without the knowledge, or against the wishes, of the customer. It is undisputed that DiPaola had his mother's permission to trade in his account, that he spoke with her frequently about the trading that was occurring, and that she had no complaints about the trades DiPaola made. The fact that DiPaola's mother generally approved of his trading in her account, however, did not negate his obligations under NASD Rule 3050(c). As discussed above, the purpose of NASD Rule 3050(c) is to provide member firms with transparency into the trading activities of associated persons to enable the firms to identify and address potential

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[Cont'd]

DiPaola's stock portfolio consisted of certain illiquid stocks where orders cannot always be filled within a single order due to volume constrictions."

<sup>15</sup> Hearing Panel decisions are not precedent for the NAC.

<sup>16</sup> The *Katsock* decision was not appealed. Accordingly, we did not address the questionable implication that a broker's trade cannot be both unauthorized and a discretionary trade without written authority.

improper trading. *Braff*, 2012 SEC LEXIS 620, at \*19 (citing *NASD Notice to Members 91-27*, at \*3). This transparency comes not only from the registered representatives, who provide their employers with information about their outside brokerage accounts, but also from the firms that execute and maintain the accounts. *See NASD Notice to Members 91-27*. The rule was specifically intended to address the risks implicated here. The record reflects that DiPaola exerted substantial influence over his mother's account and exercised discretion in trade execution. Moreover, a significant element of DiPaola's trading strategy in the account involved stocks of issuers with which Chardan had relationships. DiPaola's failure to report his mother's account and his status as an associated person undermined Chardan's "ability to effectively monitor and address trading activity" that was potentially violative or against the interest of Chardan or the public. *See Braff*, 2012 SEC LEXIS 620, at \*20. We therefore affirm the Hearing Panel's finding that DiPaola violated NASD Rule 3050(c) and FINRA Rule 2010.<sup>17</sup>

B. DiPaola's Failure to Disclose an Outside Account He Controlled Rendered His Compliance Forms False and Misleading

We also affirm the Hearing Panel's finding that DiPaola's failure to disclose an outside account he controlled on two annual compliance questionnaires he completed while associated with Chardan rendered his responses on those forms false and misleading, in violation of FINRA Rule 2010. FINRA Rule 2010 requires that associated persons observe high standards of commercial honor and just and equitable principles of trade. FINRA Rule 2010 applies to all business-related misconduct and encompasses broad ethical principles. *See Timothy L. Burkes*, 51 S.E.C. 356, 360 n.21 (1993), *aff'd*, 29 F.3d 630 (9th Cir. 1994). The rule does not require proof of scienter. *Dep't of Enf't v. Orlando*, Complaint No. 2014043863001, 2020 FINRA Discip. LEXIS 26, at \*32 (FINRA NAC Mar. 16, 2020). Rather, "[u]nethical behavior, even if not undertaken in bad faith, is sufficient to establish liability under FINRA Rule 2010." *Id.* The fundamental consideration of FINRA Rule 2010 is whether the misconduct "reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money." *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). An associated person's failure to disclose material information to his firm violates FINRA Rule 2010 and is misconduct that calls into question his "ability to comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public." *Dep't of Enf't v. Seol*, Complaint No. 2014039839101, 2019 FINRA Discip. LEXIS 9, at \*40 (FINRA NAC Mar. 5, 2019). The evidence establishes that DiPaola provided false statements on Chardan's 2015 and 2016 annual compliance questionnaires in violation of FINRA Rule 2010.

Chardan's annual compliance questionnaires required DiPaola to disclose "any securities account in which [he] ha[d] a direct or indirect interest including a financial or fiduciary interest, or which [he] control[ed]." It is undisputed that DiPaola did not have a financial or fiduciary

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<sup>17</sup> A violation of NASD Rule 3050 is a violation of FINRA Rule 2010, which provides that associated persons "in the conduct of [their] business, shall observe high standards of commercial honor and just and equitable principles of trade." *See Ng*, 2013 FINRA Discip. LEXIS 6, at \*17 n.11.

interest in his mother's account, so he was required to report the account only if he "controlled" it. Control is established when the representative either has discretionary authority, or exercises de facto control, over an account. See *Dep't of Enf't v. Davidofsky*, Complaint No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at \*28 (FINRA NAC Apr. 26, 2013) (in an excessive trading case, defining the first element of broker control over the account in question); *Dep't of Enf't v. Medeck*, Complaint No. E9B2003033701, 2009 FINRA Discip. LEXIS 7, at \*34 (FINRA NAC July 30, 2009) (observing that the element of broker control in a quantitative suitability cause of action is satisfied if the broker has either discretionary authority or de facto control over the account).

De facto control exists when the customer "routinely follows the broker's advice 'because the customer is unable to evaluate the broker's recommendations and to exercise independent judgment.'" *Medeck*, 2009 FINRA Discip. LEXIS 7, at \*34 (citing *Harry Glikman*, 1999 S.E.C. 2685, 475 (1999)). Other factors used to determine whether de facto control exists include whether the customer "relied on [the representative] in determining the frequency and volume of transactions," whether the broker "dictated the strategy for the account," and whether the customer "deferred to [the representative] with respect to establishing (and altering) account strategy, selecting securities, and determining when and in what quantities to trade them." See *Ralph Calabro*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175, at \*13-14 (May 29, 2015).

Here, DiPaola exercised both discretionary authority, as discussed above, and de facto control over his mother's account. DiPaola's mother was not an experienced investor. She testified that, prior to opening her E\*Trade account, she traded approximately four times per year. DiPaola executed almost all the trades in the account and employed a trading approach similar to that which he employed in his own account. When DiPaola spoke with his mother to advise her of his planned trades, she replied "fine." While DiPaola stated during the hearing that his mother independently researched the stocks she traded (directly contradicting his previous OTR testimony), his mother did not provide any specific instructions on how DiPaola should place orders and her testimony demonstrated that her knowledge about trading, and the stocks in which she had invested, was limited.

The fact that DiPaola's mother did not object to the trades DiPaola made, and that she was aware of what was happening in her account, does not mean, as argued by DiPaola, that there was not de facto control. While proceedings involving de facto control may frequently involve fact patterns in which the representative conducted transactions without the customer's knowledge or against their wishes, those are not required elements of de facto control. As DiPaola unquestionably "dictated the strategy for the account," and DiPaola's mother deferred to him with respect to which securities to purchase and when and in what quantities to trade them, we find that DiPaola exercised de facto control over the account and was required to disclose the account on Chardan's compliance questionnaires. *Calabro*, 2015 SEC LEXIS 2175, at \*13-14.

DiPaola, however, disclosed only his own accounts on Chardan's compliance questionnaires and did not list his mother's account. We find that omission from Chardan's forms constitutes conduct that is inconsistent with the high standards of commercial honor and just and equitable principles of trade in violation of FINRA Rule 2010. See *Braff*, 2012 SEC

LEXIS 620, at \*17 (finding that failure to disclose outside accounts on member firm's compliance questionnaires violates FINRA Rule 2010); *see also Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at \*39-41 (Mar. 27, 2017) (finding false statements on compliance questionnaire violated FINRA Rule 2010), *aff'd*, 733 F. App'x 571 (2d Cir. 2018); *Dep't of Enf't v. Kielczewski*, Complaint No. 2017054405401, 2021 FINRA Discip. LEXIS 22, at \*33 (FINRA NAC Sept. 30, 2021) (finding failure to disclose involvement in private security transactions on compliance questionnaire violated FINRA Rule 2010), *appeal docketed*, SEC Admin. Proceeding No. 3-20636 (Oct. 27, 2021).

C. DiPaola's Failure to Participate in OTRs Violated FINRA Rule 8210

Finally, we affirm the Hearing Panel's finding that DiPaola's failure to participate in OTRs violated FINRA Rule 8210. FINRA Rule 8210 authorizes FINRA, for the purpose of an investigation, to require associated persons to provide information and respond completely and truthfully to FINRA's information requests. Specifically, FINRA Rule 8210(a) requires associated persons to "provide information orally [or] in writing . . . and to testify at a location specified by FINRA staff . . . with respect to any matter involved in [a FINRA] investigation, complaint, examination, or proceeding." FINRA Rule 8210(c) states that "[n]o . . . person shall fail to provide information or testimony . . . pursuant to this rule." FINRA Rule 8210 "is at the heart of the self-regulatory system for the securities industry." *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at \*13 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). An associated person's "failure to respond [to a Rule 8210 request] impedes [FINRA's] ability to detect misconduct that threatens investors and markets." *Id.* at \*14.

A violation of FINRA Rule 8210 occurs when an associated person fails to provide full and prompt cooperation to FINRA in response to a request for information. *See Brian L. Gibbons*, 52 S.E.C. 791, 794 n.11 (1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997). "[A]ssociated persons may not ignore [FINRA] inquiries; nor take it upon themselves to determine whether information is material to an . . . investigation of their conduct." *CMG Inst. Trading*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at \*21 (Jan. 30, 2009) (internal quotation marks and citations omitted). Rather, they have an obligation to respond fully to FINRA's inquiries. *See id.*

We agree with the Hearing Panel that DiPaola's failure to appear for an OTR in 2021 constituted a partial but incomplete response to FINRA's Rule 8210 requests. FINRA was investigating multiple issues relating to DiPaola's trading activity, including whether he improperly traded in his mother's account without providing the requisite disclosures and whether he engaged in other types of violations, such as insider trading or market manipulation. DiPaola testified in three OTRs in 2019, during which he provided information about topics such as his role at Chardan and his trading activity and accounts. DiPaola, however, stated that he could not answer certain questions because he lacked sufficient context, and staff had doubts regarding the veracity of some of his statements as the result of inconsistencies in his testimony on topics such as his involvement in his mother's account and his relationship with AMIC. Subsequent to the 2019 interviews, FINRA staff continued their investigation and, based on DiPaola's responses, performed a more targeted review of electronic communications and DiPaola's trading history. As a result of this review, FINRA staff issued follow-up requests for



OTR testimony to cover additional areas of inquiry such as DiPaola's level of involvement with AMIC and specific transactions investigators believed may have violated securities laws. They also sought to determine the veracity of certain answers he had previously provided. DiPaola's failure to respond to these requests impeded FINRA's investigation into whether, and the extent to which, DiPaola may have committed additional violations.

The requirement under FINRA Rule 8210 to provide information to FINRA is "unqualified and unequivocal." See *Dep't of Enf't v. Asensio Brokerage Servs., Inc.*, Complaint No. CAF030067, 2006 NASD Discip. LEXIS 20, at \*44 (NASD NAC July 28, 2006), *aff'd*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014 (June 17, 2010). A failure to comply with FINRA's requests for information "frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at \*13 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009). We find that DiPaola's failure to appear at the 2021 OTR violated both FINRA Rule 8210 and the important policies that underlie the rule.<sup>18</sup> See *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at \*12-19 (Apr. 17, 2014). As DiPaola complied with the 2019 OTR requests, however, we find that the violation is only a partial failure to comply with FINRA Rule 8210. See *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at \*55-57 (June 14, 2013).

1. Issuance of a Wells Notice Does Not Preclude a Request Pursuant to FINRA Rule 8210

DiPaola argues that FINRA lacked authority to issue a FINRA Rule 8210 request after it issued the Wells Notice. He contends that there is no precedent for a post-Wells Rule 8210 request in the absence of a Wells Submission responding to the Wells Notice. The issuance of the Wells Notice, DiPaola argues, signaled the conclusion of the investigation and was evidence that FINRA already had all the information it needed.

We find DiPaola's argument to be without merit. Initially, there is no basis for concluding that FINRA's authority to issue a Rule 8210 request is limited—or in any way impacted—by a Wells Notice. As discussed above, the obligation to respond to a Rule 8210 request is unequivocal and unqualified. See *Asensio Brokerage Servs., Inc.*, 2006 NASD Discip. LEXIS 20, at \*44. The plain language of the rule authorizes FINRA to require associated persons to testify with respect to "any matter involved in the investigation, complaint, examination, or proceeding," and specifically states that "[n]o person shall fail to provide information or testimony . . . pursuant to the rule." FINRA Rule 8210(a), (c). The rule contains no exception for circumstances in which a Wells Notice has been issued or the information sought was covered by previous Rule 8210 requests. Moreover, it contemplates Rule 8210

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<sup>18</sup> We also find that this misconduct violated FINRA Rule 2010. A violation of FINRA Rule 8210 constitutes a violation of FINRA Rule 2010. See *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at \*41 n.49 (Sept. 24, 2015).

requests throughout the entirety of a proceeding, including in furtherance of a complaint or examination. *See* FINRA Rule 8210(a).

Nor can such an exception be found outside of the rule. DiPaola claims that, if FINRA had the ability to continue an investigation after the issuance of a Wells Notice, it would be “enshrined in the Wells Process.” In fact, there is no codified set of rules that governs a Wells Notice. The term “Wells Notice” originated in 1972 from a committee chaired by former Senator John Wells that had been appointed to review and evaluate SEC enforcement policies and practices. *FINRA Regulatory Notice 09-17*, at \*6 n.2. The Committee recommended providing notice to prospective respondents of charges under consideration by the SEC. *Id.* While the Wells process is common practice, it is discretionary, and there is no requirement that FINRA issue a Wells Notice. *See id.* at \*6. The stated purpose of the Wells Notice, according to FINRA Regulatory Notice 09-17, which provides guidance on FINRA’s enforcement process, is to “give the potential respondent an opportunity to submit a writing, called a Wells Submission, which discusses the facts and applicable law and explains why formal charges are not appropriate.” *Id.* The notice is a procedural safeguard for the respondent, not a constraint on FINRA’s ability to continue gathering information related to the potential violations. Indeed, the Wells Notice issued to DiPaola specifically stated that Enforcement had made only a “preliminary determination” to bring disciplinary action and noted that the opportunity to respond did not “preclude Enforcement from ultimately recommending disciplinary action that may include different or additional charges.” It also requested the letter be treated as written notification that DiPaola was “the subject of an investigation.”

FINRA has previously issued Rule 8210 requests after issuing a Wells Notice. *See, e.g., Plunkett*, 2013 SEC LEXIS 1699, at \*33-36 (finding a FINRA Rule 8210 violation for failure to appear after issuance of a Wells Notice); *Dep’t of Enf’t v. Legacy Trading Co.*, Complaint No. 2005000879302, 2010 FINRA Discip. LEXIS 20, at \*18 (FINRA NAC Oct. 8, 2010) (same). There is no regulation or other authority that precludes issuance of a Rule 8210 request after a Wells Notice. *See SEC v. Sears*, No. 05-728-JE, 2005 U.S. Dist. LEXIS 44854, at \*4-5 (D. Or. 2005) (rejecting defendants’ argument that the SEC’s investigation ended when the agency issued a Wells Notice and that the SEC therefore no longer had a valid basis to enforce investigative subpoenas). Contrary to DiPaola’s argument, “[e]ven when no Wells submission is made in response to the Wells notice, the [investigating body] may thereafter learn of additional facts that warrant investigation, or seek additional documents or testimony to confirm its preliminary understanding of the facts or to clarify any lingering confusion.” *Id.*

In addition, while DiPaola was required to respond to the OTR requests regardless of whether he believed FINRA had all the information it needed, the record supports that FINRA staff, following further analysis of DiPaola’s trading activity and related electronic communications, sought additional information from DiPaola that was not duplicative of information obtained during the 2019 OTRs. *See Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at \*13 (Nov. 8, 2007) (stating that “[FINRA Rule 8210] does not require that NASD explain its reasons for making the information request or justify the relevance of any particular request”), *aff’d*, 316 F. App’x 865 (11th Cir. 2008). Notably, on multiple occasions in the 2019 OTRs, DiPaola suggested that FINRA staff had “cherry-picked” certain transactions and did not provide sufficient context in their questioning.

It makes sense, then, that FINRA staff wanted to question DiPaola again once they had obtained a more holistic view of what was occurring in the market and at Chardan at the time of those transactions. The Hearing Panel found no reason to doubt the investigators' testimony regarding the need for the information sought in the 2021 OTR request, and the record supports the panel's assessment.

2. FINRA's Refusal to Withdraw the Wells Notice Does Not Excuse DiPaola's Failure to Appear

DiPaola also argues that he never refused to appear for his OTR. Rather, he claims, he expressed that he was willing to testify if Enforcement would withdraw the Wells Notice, and it was therefore Enforcement's fault that DiPaola did not attend the interview. We reject this argument. Compliance with FINRA Rule 8210 is compulsory, and it is not up to the recipient of the request to dictate the terms under which he will comply. *See Erenstein*, 2007 SEC LEXIS 2596, at \*13.

V. Sanctions

For DiPaola's failure to disclose an outside account in which he exercised discretion and for his failure to accurately complete Chardan's 2015 and 2016 compliance questionnaires, the Hearing Panel fined DiPaola \$5,000. For his failure to provide OTR testimony in violation of FINRA Rule 8210, the Hearing Panel suspended DiPaola in all capacities for 30 business days. After an independent review of the record and careful consideration of the FINRA Sanction Guidelines ("Guidelines"),<sup>19</sup> we modify these sanctions. We impose a \$25,000 fine and suspend DiPaola from associating with any member firm in any capacity for two years as a unitary sanction for his failure to disclose an outside account and submission of false and misleading compliance forms. For violating FINRA Rule 8210, we impose a \$15,000 fine and suspend DiPaola from associating with any member firm in any capacity for an additional two years. The suspensions are to be served consecutively. In modifying the sanctions, we find that the Hearing Panel committed several errors in evaluating sanctions, which we discuss below.

A. DiPaola's Failure to Disclose an Outside Account and Submission of Misleading Compliance Questionnaires

The Guidelines state that, in certain instances, it may be appropriate to aggregate violations for purposes of imposing sanctions.<sup>20</sup> We agree with the Hearing Panel that it is appropriate to assess a unitary sanction for the misconduct alleged in causes one and two of the

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<sup>19</sup> *FINRA Sanction Guidelines* (2021), [https://www.finra.org/sites/default/files/2022-09/2021\\_Sanctions\\_Guidelines.pdf](https://www.finra.org/sites/default/files/2022-09/2021_Sanctions_Guidelines.pdf) [hereinafter "*Guidelines*"]. On September 29, 2022, the NAC issued revised Sanction Guidelines, however, we apply the Guidelines in effect at the time of the Hearing Panel's decision.

<sup>20</sup> *Id.* at 4 (General Principles Applicable to All Sanction Determinations, No. 4).

complaint because they both relate to DiPaola's failure to disclose information about his mother's E\*Trade account. Like the Hearing Panel, we have considered the specific Guidelines for violations of NASD Rule 3050 and for forgery and falsification of records to determine the appropriate sanction. *See Braff*, 2012 SEC LEXIS 620, at \*31 (applying the Guidelines for forgery, unauthorized use of signatures, and falsification of records in a case involving misleading compliance questionnaires).

The Guidelines recommend a fine of \$1,000 to \$39,000 for violations of NASD Rule 3050.<sup>21</sup> Additionally, in egregious cases, the Guidelines recommend a suspension in any or all capacities for a period of up to two years or a bar.<sup>22</sup> The Guidelines also instruct us to evaluate three violation-specific considerations, two of which are relevant here: (1) whether the violative accounts presented real or perceived conflicts of interest for the employer firm or customers; and (2) whether the respondent provided oral notice of the violative transactions to the employer member firm or executing member, and whether the employer firm orally acquiesced.<sup>23</sup> The Guidelines for forgery, unauthorized use of signatures, and falsification of records recommend a fine of \$5,000 to \$155,000.<sup>24</sup> In the absence of other violations or customer harm, the Guidelines recommend a suspension of two months to two years.<sup>25</sup> When the violation was in furtherance of another violation, or when there is customer harm or significant aggravating factors, a bar is standard.<sup>26</sup> The Guidelines advise, in relevant part, that adjudicators consider the nature of the falsified documents and whether the respondent had a good-faith, but mistaken, belief of express or implied authority.<sup>27</sup>

Applying the Guidelines to this case, we find that the sanctions imposed by the Hearing Panel are insufficient to protect the investing public and deter similar misconduct. We find several guideline-specific considerations and Principal Considerations in Determining Sanctions to be aggravating. First, because Chardan was doing business with several of the issuers of the stocks DiPaola traded most frequently, DiPaola's activity in his mother's account at the very

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<sup>21</sup> *See id.* at 16. We apply the Guidelines for FINRA Rule 3210, which, as discussed above, superseded NASD Rule 3050 on April 3, 2017. *See FINRA Regulatory Notice 16-22.*

<sup>22</sup> *Guidelines*, at 16.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 37. The Guidelines distinguish between violations involving a transaction, for which the upper range is \$11,000, and those involving a document. We find the latter is most analogous here.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

least presented a risk of perceived conflicts of interest for Chardan.<sup>28</sup> Indeed, the evidence demonstrated that DiPaola, on his mother's behalf, bought and sold stocks that were at the time on Chardan's restricted lists, the very purpose of which is to avoid trading that might present a conflict of interest to the firm. Moreover, DiPaola did not provide oral notification to either Chardan or E\*Trade prior to 2017, when E\*Trade discovered that DiPaola had been logging into his mother's account.<sup>29</sup> With respect to DiPaola's submission of misleading compliance questionnaires, we find that DiPaola's misstatements regarding the nature of his involvement with his mother's account when he ultimately disclosed the account to Chardan preclude a determination that DiPaola's failure to list his mother's account on the compliance questionnaires was based on a mistaken belief that disclosure was not required.<sup>30</sup> The omission of his mother's account in the compliance questionnaires undermined an important control function Chardan employed to help identify potential compliance risks.<sup>31</sup>

DiPaola's misconduct continued over an extended period of time, from account opening in 2015, through E\*Trade's discovery of the activity in 2017, despite multiple opportunities to disclose the account, including the 2015 and 2016 compliance questionnaires.<sup>32</sup> We also find that DiPaola attempted to conceal his involvement in the account from both Chardan and FINRA staff.<sup>33</sup> DiPaola had been in the securities industry for 20 years when the misconduct began, and there is no dispute that he understood the disclosure requirements relating to outside accounts. *See Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at \*21 (Nov. 8, 2006) (considering representative's lengthy securities industry experience in determining sanctions). Nonetheless, in addition to omitting the account on Chardan's compliance questionnaires, when DiPaola ultimately advised Chardan of the account, he did not admit to having previously traded in the account, but instead stated that his mother was adding him for estate planning purposes. Indeed, Chardan did not learn that DiPaola had been trading in the account until the first OTR, at which point counsel terminated the interview having concluded that, due to DiPaola's involvement in his mother's account, there was a potential conflict of interest in his representation of both DiPaola and the firm. DiPaola's "dishonesty to his firm reflects directly on his ability to abide by his firm's policies, many of which are designed to protect the public and the firm, and to deal responsibly with the public." *Dep't of Enf't v. Davenport*, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at \*9-10 (NASD NAC May 7, 2003). DiPaola also misrepresented his involvement in his mother's account at his

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<sup>28</sup> *See id.* at 16.

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 37.

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 9).

<sup>33</sup> *See id.* (Principal Considerations in Determining Sanctions, No. 10).

OTRs, initially denying that he had traded in his mother's account before becoming a co-owner and only admitting the full extent of his trading activity when confronted with evidence that a significant number of the trades had been made from his IP address. We find these factors to be aggravating under the Guidelines.

We disagree with the Hearing Panel's determination that DiPaola's nondisclosure of his mother's account, including on Chardan's annual compliance forms, was not egregious. The Hearing Panel relied in part on the fact that there was no evidence that Chardan objected to DiPaola's trading activity in his own accounts, and that he traded in his mother's accounts similarly. While it is true that DiPaola traded many of the same stocks in both accounts, the trading activity was not always the same. For example, there were instances in which DiPaola was trading in the same stock in both accounts, but on opposite sides of the market. Additionally, there were instances in which DiPaola traded in stocks that were on Chardan's restricted lists in his mother's account but did not do so in his own account. Both examples represent trading activity that could constitute potential red flags requiring further investigation, and DiPaola's failure to disclose his mother's account deprived Chardan of its ability to effectively identify and address trading they deemed improper based on a holistic view of his trading activity. Moreover, while DiPaola may have wanted to assist his mother in managing her inheritance, as found by the Hearing Panel, we decline to assume that there was no benefit to DiPaola given his close relationship with AMIC. This is an issue that FINRA staff sought to explore further in the 2021 OTRs.

We conclude that a fine greater than that imposed by the Hearing Panel, as well as a suspension, is appropriate in this case. While the record does not show that customers were harmed as a result of DiPaola's FINRA rule violations, lack of customer harm is not mitigating, and we do not believe that the sanctions the Hearing Panel imposed capture the seriousness of DiPaola's misconduct.<sup>34</sup> As discussed above, the purpose of NASD Rule 3050(c) is to provide employer members with transparency into associated persons' trading activities to enable them to identify potential violative conduct. Likewise, compliance questionnaires are a critical means by which firms gain assurance that they possess all the information needed to identify activity that might pose a conflict of interest or otherwise harm the firm or investing public. *See Dep't of Enf't v. McGee*, Complaint No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at \*88 (FINRA NAC July 18, 2016) (discussing the importance of compliance questionnaires and noting that respondent's failure to answer the questionnaires truthfully "impeded [the firm's] ability to monitor [respondent]"), *aff'd*, 2017 SEC LEXIS 987, *aff'd*, 733 F. App'x 571. This transparency is only achieved if member firms receive complete and accurate information about associated persons' brokerage accounts, including not only the individual's own accounts, but outside accounts in which they exercise discretion or control. DiPaola's failure to disclose his mother's account made it impossible for Chardan to make an informed determination of potential risks associated with DiPaola's trades.

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<sup>34</sup> Absence of customer harm is not a mitigating factor for sanctions. *See Coastline Fin., Inc.*, 54 S.E.C. 388, 395 (1999).

The Hearing Panel’s unsupported conclusions that DiPaola’s only motive in trading in the account was “assisting his mother” and that DiPaola had “mistakenly” failed to disclose the account, which the Hearing Panel relied on to justify a fine at the low end of the recommended Guidelines, are belied by DiPaola’s repeated attempts to conceal the fact that he traded in his mother’s account—including misrepresenting to Chardan the reason he was added to the account, omitting his prior activity in the account once he disclosed it, and equivocating about his involvement with the account in the OTRs. It is DiPaola’s dishonesty, coupled with the fact that his misconduct continued for two years and only came to light after E\*Trade identified his involvement with the account, and the fact that the nature of his trading presented a risk of conflicts of interest, that make his failure to disclose his mother’s account egregious. For these reasons, we fine DiPaola \$25,000 and suspend him from associating in any capacity with any FINRA member for two years.

B. DiPaola’s FINRA Rule 8210 Violation

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 their 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*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285 (Apr. 1, 2016). A failure to comply with FINRA Rule 8210 therefore constitutes a serious violation that subverts FINRA’s ability to carry out its regulatory responsibilities “to detect misconduct that threatens investors and markets.” *Berger*, 2008 SEC LEXIS 3141, at \*14.

For individuals who provide a partial but incomplete response to a request made pursuant to FINRA Rule 8210, the Guidelines instruct that “a bar is standard” unless the respondent can demonstrate that the information provided substantially complied with all aspects of the request.<sup>35</sup> When mitigation exists, adjudicators should consider suspending the individual in any or all capacities for up to two years.<sup>36</sup> The Guidelines also identify three violation-specific considerations that apply when an individual has provided a partial but incomplete response to FINRA Rule 8210 requests: (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.”<sup>37</sup>

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<sup>35</sup> *Guidelines*, at 33.

<sup>36</sup> The Guidelines also recommend a fine of \$10,000 to \$77,000 for providing a partial but incomplete response. *See id.*

<sup>37</sup> *Id.*

As an initial matter, we find that DiPaola failed to demonstrate that he substantially complied with all aspects of FINRA’s Rule 8210 requests. In declining to impose a bar, the Hearing Panel relied on the fact that DiPaola’s refusal to testify was not a “complete failure,” in that DiPaola participated in three OTRs in 2019 and provided significant information about his role at Chardan, his accounts, and his trading activity that overlapped with information FINRA sought in the 2021 Rule 8210 requests. The Hearing Panel placed significant weight on Enforcement’s issuance of the Wells Notice that included manipulative trading and trading while in possession of material nonpublic information, finding that it constituted “an implicit concession” by FINRA staff that it had gathered sufficient evidence to support those allegations, which, in turn, suggested that staff found DiPaola’s previous testimony “significantly, if not substantially, compliant.”<sup>38</sup>

While we agree that DiPaola’s previous OTRs, the content of which overlapped with the topics that were the subject of the 2021 Rule 8210 requests, render DiPaola’s refusal to testify a partial failure to respond, we do not find that DiPaola’s 2019 testimony constituted substantial compliance. FINRA staff testified that, based on the answers DiPaola provided at the 2019 interviews, they had additional areas of inquiry regarding specific transactions investigators believed may have violated securities laws, DiPaola’s involvement with AMIC, and the veracity of certain of his previous answers. The record supports this testimony. For example, on multiple occasions during the 2019 OTRs, DiPaola stated that he could not answer questions regarding certain transactions in his outside accounts without additional context. In addition, electronic communications provided by Chardan indicated that DiPaola may not have been completely forthcoming about his relationship with AMIC. DiPaola’s involvement with the issuer, which included developing a strategic plan for the company, appears to have gone beyond the provision of occasional advice he described in the 2019 OTRs. FINRA staff stated that they had planned to ask DiPaola about several email communications they had not discussed with him during the 2019 interviews. Moreover, DiPaola falsely testified at his OTRs that he had engaged in de minimis trading in his mother’s account when in fact the record shows his activity was substantial. The ability to delve deeper into these topics after performing additional analysis into the circumstances surrounding DiPaola’s investments was material to FINRA’s investigation into whether DiPaola engaged in improper trading. Indeed, finding substantial compliance here—when DiPaola stated that he was unable to answer certain questions because he had insufficient context only to refuse to testify once FINRA staff had gathered additional information that enabled them to provide the requisite context—would create a damaging incentive for respondents to evade their FINRA Rule 8210 obligations by providing misleading testimony or falsely claiming an inability to recall the events in question.

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<sup>38</sup> We note that the Hearing Panel did not go so far as to find that DiPaola substantially complied with the Rule 8210 requests, but rather treated DiPaola’s previous testimony, the overlap of information sought, and the inclusion of market manipulation and insider trading in the Wells Notice as reasons to support its 30-business-day suspension, essentially treating them as mitigating circumstances.



The Hearing Panel relied heavily on the SEC's decision in *Plunkett*, 2013 SEC LEXIS 1699, in its reasoning for its sanctions determination. We find that the Hearing Panel erred in its reasoning for two reasons. First, the facts cited by the Hearing Panel—the fact that Plunkett had responded to previous Rule 8210 requests and that there was overlap between the information sought in the previous and subsequent requests—primarily served as the basis for finding that Plunkett's violation was a partial, rather than a complete, failure to respond to the Rule 8210 request. Here, however, that DiPaola partially responded to FINRA's Rule 8210 requests is not in dispute, and the fact that he partially responded does not preclude the imposition of higher sanctions. *See, e.g., CMG Inst. Trading*, 2009 SEC LEXIS 215, at \*21 (finding a sanction at the high end of the Guidelines' recommendation appropriate remedial where applicants' incomplete and untimely responses "impeded NASD's detection of violative conduct"); *Dep't of Enf't v. Larson*, Complaint No. 2014039174202, 2020 FINRA Discip. LEXIS 44, at \*113 (FINRA NAC Sept. 21, 2020) (assessing an 18-month suspension where the limited information provided by respondent in his first three responses "shed no meaningful light" on the activity under investigation and included false and misleading information); *Dep't of Enf't v. Gallagher*, Complaint No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at \*51 (FINRA NAC Dec. 12, 2012) (imposing a bar on respondent who appeared for scheduled testimony pursuant to FINRA Rule 8210 but refused to answer questions concerning matters other than his outside business activities).

Second, *Plunkett* is distinguishable because, in that case, the respondent ultimately responded to the Rule 8210 requests and the information he provided was in large part duplicative of information he had submitted previously. *See Dep't of Enf't v. Plunkett*, Complaint No. 2006005259801, 2013 FINRA Discip. LEXIS 32, at \*13 (FINRA NAC Dec. 17, 2013) ("While Plunkett's responses to FINRA's requests for information were dilatory and his deficient document production without excuse, we acknowledge that he ultimately provided information that complied with the requests."). Here, DiPaola avoided testifying in response to the 2021 Rule 8210 requests entirely. Enforcement never obtained answers to their questions about certain of DiPaola's electronic communications regarding AMIC, nor did they have an opportunity, after conducting further research and analysis, to ask follow-up questions regarding DiPaola's trading activity.

Nor does FINRA's issuance of a Wells Notice demonstrate substantial—or significant—compliance. Enforcement was able to make a preliminary determination to bring disciplinary proceedings against DiPaola for market manipulation and insider trading based on documentation in their possession, including electronic communications and DiPaola's trading history, *despite* DiPaola's failure to provide complete information during the OTRs. While the Hearing Panel believed the issuance of the Wells Notice was an "implicit concession" by Enforcement that it had obtained adequate information in the 2019 OTRs, we find no support for the proposition that information DiPaola provided during the investigation enabled Enforcement to include market manipulation and insider trading violations in the Wells Notice. The Hearing Panel accepted FINRA staff's contention that they had additional questions for DiPaola and correctly noted that Enforcement had the right to amend the causes cited in the Wells Notice. It therefore is flatly inconsistent to also find the issuance of the Wells Notice mitigating. Indeed, DiPaola's subsequent refusal to testify may well have contributed to Enforcement's ultimate determination not to allege market manipulation or insider trading in the complaint. *See Dep't of*

*Enf't v. Eplboim*, Complaint No. 2011025674101, 2014 FINRA Discip. LEXIS 8, at \*35 (FINRA NAC May 14, 2014) (“FINRA staff sought documentation to determine whether Eplboim committed serious infractions of FINRA rules, and they were unable to do so because they did not have the requested documents.”). DiPaola’s partial but incomplete responses therefore failed to materially satisfy all of FINRA’s Rule 8210 requests.

From FINRA’s perspective, the information sought was important.<sup>39</sup> DiPaola was using his mother’s account to engage in unmonitored trading of stocks the issuers of which were clients of his employer firm and in which he appeared to have a personal interest. FINRA staff had noted red flags for potential market manipulation and insider trading—serious violations of federal securities laws. FINRA staff therefore sought a better understanding of the purpose behind certain transactions executed in the outside account and the connection, if any, between those transactions, trading occurring in DiPaola’s own account, DiPaola’s communications with AMIC, and the concurrent market activity. DiPaola’s refusal to testify at the 2021 OTRs frustrated staff’s ability to determine whether he had engaged in illegal trades.

We agree with the Hearing Panel that the number of Rule 8210 requests and the length of time of the Rule 8210 process were not “inordinate” and did not “constitute an aggravating circumstance.”<sup>40</sup> We do not find this consideration mitigating, however, given that DiPaola never agreed to a date and, following the issuance of the Wells Notice, refused to provide any testimony whatsoever, failing to respond to or appear at two separate OTRs. Nor did DiPaola offer a valid explanation for his refusal to testify.<sup>41</sup> Neither an erroneous belief that FINRA lacked authority to issue a Rule 8210 request after a Wells Notice nor his claim that he was willing to testify if FINRA would withdraw the Wells Notice excuses DiPaola’s disregard for the Rule 8210 process. *See, e.g., Berger*, 2008 SEC LEXIS 3141, at \*20 (rejecting the argument on remand that a bar is excessive because respondent had a purported “objectively reasonable” belief that he was not subject to NASD’s jurisdiction).

Furthermore, DiPaola has not accepted responsibility for his failure to respond to the OTRs and, in fact, continues to assert that Enforcement is to blame because it refused to withdraw the Wells Notice.<sup>42</sup> *See, e.g., Geoffrey Ortiz*, Exchange Act Release 58416, 2008 SEC LEXIS 2401, at \*28 (Aug. 22, 2008) (finding that the fact that respondent blamed others for what occurred supported a serious sanction); *Michael G. Keselica*, 52 S.E.C. 33, 37 (1994) (determining that “attempts to blame others for his misconduct . . . demonstrate that [the respondent] fails to understand the seriousness of [his] violations”), *aff’d*, No. 95-1012, 1995 U.S. App. LEXIS 40288 (D.C. Cir. 1995); *Dep’t of Enf’t v. Evansen*, Complaint No.

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<sup>39</sup> *See Guidelines*, at 33.

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See Guidelines* at 7 (Principal Considerations in Determining Sanctions, No. 2).

2010023724601, 2014 FINRA Discip. LEXIS 10, at \*55 (June 3, 2014) (“Evansen does not accept responsibility for his actions, blaming others, namely FINRA staff . . .”). DiPaola does not claim that his refusal to comply was based on legal advice, and we therefore do not consider this mitigating factor.<sup>43</sup> None of the other potentially mitigating Principal Considerations are applicable here.<sup>44</sup>

We conclude that a sanction greater than the 30-business-day suspension imposed by the Hearing Panel is required here. In its decision, the Hearing Panel initially correctly set forth the Guidelines for FINRA Rule 8210 violations but, after finding that a bar was inappropriate, proceeded to impose a suspension at the low end of the recommended range without explaining how it arrived at this determination or why, given the gravity of DiPaola’s failure to testify, this was an appropriate sanction under the Guidelines. To the extent the Hearing Panel’s sanctions determination rested on Enforcement’s issuance of a Wells Notice, we correct that error. As discussed above, the Hearing Panel’s treatment of the Wells Notice as an “implicit concession” by Enforcement and the significant weight the Hearing Panel assigned the Wells Notice in finding mitigation was incorrect. We acknowledge that DiPaola had already participated in several OTRs and that the testimony he provided in 2019 overlapped with that sought in 2021. His participation in the prior OTRs, however, did not absolve him of his obligation to comply with the 2021 OTR. *CMG Inst. Trading*, 2009 SEC LEXIS 215, at \*21.

For the foregoing reasons, we determine that DiPaola’s refusal to cooperate with FINRA’s Rule 8210 requests about potential securities-related wrongdoing merits a sanction at the high end of the Guidelines’ recommendation. *See id.* at \*30 (finding that a two-year suspension for a partial but incomplete response to a FINRA Rule 8210 request “serve[d] the public interest and the protection of investors” where respondents’ failure to provide complete and timely information prevented NASD from determining whether misconduct occurred). Accordingly, we fine DiPaola \$15,000 and suspend him from associating with any member firm in any capacity for two years. This sanction is consistent with the Guidelines for a partial but incomplete response and appropriately remediates DiPaola’s misconduct and discourages future wrongdoing.

## VI. Conclusion

We find that DiPaola violated NASD Rule 3050(c) and FINRA Rule 2010 by failing to disclose an outside account to his employer firm and the executing firm and failing to list the account on annual compliance questionnaires. We also find that DiPaola violated FINRA Rules

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<sup>43</sup> Although a valid reliance on advice of counsel showing can have a mitigating effect on sanctions, consideration of such a claim requires a respondent to provide evidence that the respondent consulted with and made full disclosure to counsel; asked for advice on the legality of a proposed course of action; received advice that it was legal; and relied on the advice in good faith. *See Berger*, 2008 SEC LEXIS 3141, at \*40-41. DiPaola offered no evidence on any of these points.

<sup>44</sup> *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 7).

8210 and 2010 when he failed to respond to FINRA's requests for OTR testimony. For causes one and two, relating to DiPaola's failure to disclose an outside account, we impose a two-year suspension from associating in any capacity with any FINRA member and a \$25,000 fine. For failing to respond to FINRA's request for OTR testimony, we impose an additional two-year suspension from associating in any capacity with any FINRA member and a \$15,000 fine. The suspensions are to be served consecutively. DiPaola is further ordered to pay hearing costs of \$2,848.09 and appeal costs of \$1,542.08.

On behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell, Vice President and  
Deputy Corporate Secretary