

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Howard Braff
Holtsville, NY,

Respondent.

DECISION

Complaint No. 2007011937001

Dated: May 13, 2011

Respondent failed to provide written notice of his outside brokerage accounts and broker-dealer employment, and falsely stated that he had no outside brokerage accounts. Held, findings affirmed, sanctions modified.

Appearances

For the Complainant: Samuel Barkin, Esq., Leo Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Howard Braff, Pro Se

Decision

Braff appeals the May 19, 2010 decision of a FINRA Hearing Panel. The Hearing Panel found that Braff violated NASD Rules 3050(c) and 2110 because he failed to provide written notice of his outside brokerage accounts to his employers.¹ The Hearing Panel also found a separate violation of NASD Rules 3050(c) and 2110 because Braff failed to provide written notice of his broker-dealer employment to the brokerage firms where he maintained the accounts. Finally, the Hearing Panel found that Braff violated NASD Rule 2110 because he falsely stated on employment disclosures that he had no outside brokerage accounts. The Hearing Panel fined Braff \$15,000 and suspended him in all capacities for one year. After an independent review of the record, we affirm the Hearing Panel's findings, but increase the sanctions to a \$25,000 fine and a two-year suspension.

¹ We discuss the rules in effect when the conduct occurred.

I. Factual and Procedural Background

A. Braff

Braff entered the securities industry in July 1983, when he associated with a FINRA member firm as a general securities representative. During the period relevant to the conduct in this case, October 2005 through April 2007, Braff was registered with FINRA as a general securities representative, general securities principal, and options principal. He also was associated with three member firms during this period: PGP Financial, Inc., PHD Capital, and Pointe Capital, Inc. Braff is currently registered through PHD Capital.

B. Braff's Accounts at Scottrade and TD Waterhouse

In June 2000, Braff was associated with member firm, Scottrade, Inc. Upon leaving Scottrade, he established an individual retirement account with the firm to rollover his 401(k). In January 2004, Braff completed an application to open an account with TD Waterhouse Investor Services, Inc.² Braff closed his accounts at Scottrade and TD Waterhouse in July 2007.

C. PGP Financial

Braff registered with PGP Financial in November 2005. He did not notify Scottrade or TD Waterhouse of his association with PGP Financial. Shortly before Braff joined PGP Financial, as part of the firm's pre-hire procedures, he completed two disclosures related to outside brokerage accounts. The first disclosure, the "Confidential Questionnaire [for] Registered Representative Applicants," contained PGP Financial's policy for registered representatives that maintained outside brokerage accounts. The policy stated:

Employees of [PGP Financial] are required to disclose any outside brokerage accounts established by either themselves or their immediate family members prior to their employment with the firm.

In addition, no employee may have the authority to effect transactions in a securities or commodities account in an outside brokerage account for [anyone] without first obtaining the prior written consent of the Compliance Department.

Immediately following the policy was a questionnaire, which asked whether the registered representative had brokerage accounts at any firm outside of PGP Financial. If answered in the affirmative, the representative had to provide the name of the firm that serviced the account and the account number and title. Braff drew a line through the questionnaire and wrote "none," representing that he had no outside brokerage accounts.

² Braff testified that he had opened the account at TD Waterhouse some years before he completed the new account application. He testified that, when Toronto-Dominion Bank acquired Waterhouse Securities, the "new" firm, TD Waterhouse, required him to complete the new account application as part of its accounts transition procedures.

The second disclosure, PGP Financial's "Brokerage Account Disclosure Form," served as another notification mechanism for outside brokerage accounts. If a representative maintained outside brokerage accounts, the form required the disclosure of the firm where the account was held and the account name and number. Braff initialed "none," to represent that he had no outside brokerage accounts.

In January 2006, Braff and the owners of PGP Financial executed an agreement for Braff to purchase the entire firm. This purchase would occur through two separate transactions, with Braff purchasing 20 percent of the firm's stock contemporaneously with the execution of the purchase agreement and the remaining 80 percent at a later date. When Braff obtained the 20 percent interest in PGP Financial in January 2006, he also assumed certain supervisory and compliance responsibilities for the Hauppauge, New York, branch of the firm. He served as the branch manager and sole on-site principal and supervisor.

Braff's purchase of PGP Financial, however, was never finalized, and he never acquired more than a 20 percent interest in the firm. In October 2006, Braff left PGP Financial. During the 11-month period that Braff was associated with the firm, he actively traded in his outside brokerage accounts at Scottrade and TD Waterhouse. A number of Braff's trades involved the securities of Document Security Systems. PGP Financial's representatives, including those Braff supervised, were recommending the stock of Document Security Systems to their customers during this period of time.

D. PHD Capital

When Braff terminated his registration with PGP Financial, he joined PHD Capital in mid-October 2006. He did not notify Scottrade or TD Waterhouse of his association with PHD Capital. Braff completed several disclosures and questionnaires as part of PHD Capital's pre-hire procedures. One disclosure, entitled "Transaction for or by Associated Person – Conduct Rules (NASD)," detailed PHD Capital's policy for registered representatives who had outside brokerage accounts. The policy stated:

All employees must disclose, in writing, to the Compliance Department any securities accounts held by PHD Capital or any other firm . . . The Compliance Department will approve (prior to opening transaction) or reject the account . . . All approved accounts will have duplicate statements and confirmations sent to the Compliance Officer for review.

Braff wrote "none" in the space provided for the registered representative to disclose information about outside brokerage accounts. Braff also signed the form under a section titled, "no disclosure required." His signature affirmed:

I have read the information regarding my obligations in accordance with PHD Capital's and the NASD's Conduct Rules. I do not have any account to disclose at this time. However, I understand that should my situation change, I will comply with the Rule, or be subject to disciplinary action.

Braff actively traded in his Scottrade and TD Waterhouse accounts during the three months that he was associated with PHD Capital. For example, on October 6, 2006, the day after Braff signed the aforementioned affirmation, he effected several trades in his account at TD Waterhouse. His trading activities included the purchase of 2,000 shares of Document Security Systems, which PHD Capital representatives also were recommending to their customers. Braff left PHD Capital in January 2007.

E. Pointe Capital

Braff registered with Pointe Capital in March 2007 to serve as the firm's Bohemia, New York, branch manager and principal. He received a copy of Pointe Capital's policy related to outside brokerage accounts. The policy stated:

Securities Accounts. All personnel must advise [Pointe Capital] of all accounts at "notice-registered broker/dealers" . . . maintained in their name . . . [Pointe Capital] does not as a matter of policy permit any Registered Representative or employee to maintain a securities account with another broker-dealer without express prior written permission of the designated Principal.

Duplicate Confirmations. Duplicate confirmations, statements and/or other information related to all [non-Pointe Capital] account transactions must be sent contemporaneously to the designated Principal.

Braff signed the policy, acknowledging that he had "read and understood, and accept[ed] and agree[d] to abide by, the above policy." Despite this acknowledgement, Braff did not disclose his outside brokerage accounts to Pointe Capital. He also failed to notify Scottrade and TD Waterhouse of his association with the firm. Braff remained at Pointe Capital for approximately two weeks. He left the firm in early April 2007.

F. Procedural Background

FINRA became involved in this matter in March 2007 when a registered representative that Braff supervised resigned from Pointe Capital. Pointe Capital permitted the representative to resign after the firm discovered that he had posted unauthorized messages in a Yahoo chat room, recommending that investors purchase the stock of Document Security Systems. FINRA thereafter initiated an investigation to examine the circumstances surrounding the representative's separation from Pointe Capital. As part of its investigation, FINRA "blue sheeted" Document Security Systems' stock to ascertain the individuals purchasing and selling the company's shares.³ After blue sheeting the stock, FINRA learned that Braff previously had traded Document Security Systems' shares from his personal brokerage accounts, and that the

³ "Blue sheets" are questionnaires that request broker-dealers to identify the buyers and sellers of a particular security during a specified review period. *See Elec. Submission of Sec. Transaction Info. by Exch. Members, Brokers, and Dealers*, Exchange Act Rel. No. 44494, 2001 SEC LEXIS 1308, at *3 (June 29, 2001).

representative currently was purchasing and selling the company's stock. This information led to FINRA's discovery of Braff's brokerage accounts at Scottrade and TD Waterhouse.

In August 2009, Enforcement filed an amended two-cause complaint against Braff.⁴ The first cause of action alleged that Braff violated NASD Rules 3050(c) and 2110 because he failed to provide PGP Financial, PHD Capital, and Pointe Capital with written notice of his outside brokerage accounts, and failed to provide Scottrade and TD Waterhouse with written notice of his employment with a broker-dealer. The second cause of action alleged that Braff violated NASD Rule 2110 because he falsely represented to PGP Financial and PHD Capital that he had no outside brokerage accounts.

A one-day hearing took place in Jericho, New York, in March 2010. The Hearing Panel issued its decision in May 2010, finding that Braff violated FINRA's rules as alleged in the complaint. The Hearing Panel fined Braff \$15,000 and suspended him in all capacities for one year. This appeal followed.

II. Discussion

A. Braff Failed to Provide Written Notice of His Outside Brokerage Accounts and Broker-Dealer Employment

NASD Rule 3050(c) details the disclosure requirements for associated persons who have outside brokerage accounts:

A person associated with a member, prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with the other member; provided, however, that if the account was established prior to the association of the person with the employer member, the associated person shall notify both members in writing promptly after becoming so associated.

NASD Rule 3050(c) required that Braff provide written notice of his outside brokerage accounts to the firms that employed him, PGP Financial, PHD Capital, and Pointe Capital (collectively, the "employer members"). The record, however, demonstrates that Braff did not make the required disclosures to the employer members in this case. Braff stipulated that he did not provide PHD Capital with written notice of his accounts at Scottrade and TD Waterhouse, and the documentary evidence establishes that Braff did not disclose the brokerage accounts to any of the three firms at issue.⁵ Indeed, when Braff completed the employer members' outside

⁴ Enforcement filed the original complaint against Braff in July 2009. The original complaint contained the same allegations as the amended complaint, but presented the allegations as a single cause of action.

⁵ Braff left PHD Capital in January 2007, but rejoined the firm five months later, in June 2007. Braff disclosed his outside brokerage accounts to PHD Capital during this second tenure with the firm.

brokerage account disclosures, he wrote “none” in three separate instances. Braff’s failure to provide the employer members with written notice of his outside brokerage accounts violated NASD Rules 3050(c) and 2110. *See Brian Prendergast*, Exchange Act Rel. No. 44632, 2001 SEC LEXIS 1533, at *34-35 (Aug. 1, 2001).⁶

Braff also failed to provide Scottrade and TD Waterhouse (collectively, the “executing members”) with written notice of his broker-dealer employment. Braff admitted that he did not notify the executing members of his employment with PGP Financial and PHD Capital, and the record supports that he similarly failed to make the necessary disclosure of his employment with Pointe Capital.⁷ Braff’s failure to provide the executing members with written notice of his employment with other broker-dealers presents a separate violation of NASD Rules 3050(c) and 2110. *See Guang Lu*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *13-15 (Jan. 14, 2005), *aff’d*, 179 Fed. Appx. 702 (2006); *Dep’t of Enforcement v. Duma*, Complaint No. C8A030099, 2005 NASD Discip. LEXIS 46, at *16-17 (NASD NAC Oct. 27, 2005).

B. Braff’s Explanations Do Not Absolve His Misconduct

Braff offers several explanations to defend his failure to provide the requisite written notice regarding his outside brokerage accounts to the employer and executing members. Braff’s explanations, however, have no bearing on our findings and do not remedy his liability for the misconduct. NASD Rule 3050(c)’s disclosure requirements turn solely on whether a registered representative provides written notice of his or her outside brokerage accounts and employment with a broker-dealer. Once Braff failed to make the necessary written disclosures regarding his outside brokerage accounts to the employer and executing members, he was liable for violating the rule.

Despite this fact, Braff suggests that his purported oral notice to PGP Financial’s president, Ellen Lozinski, and Pointe Capital’s director of compliance, Paul Chuzi, excuses his misconduct. It does not. As an initial matter, oral notice does not satisfy the requirements of NASD Rule 3050(c). *See Dist. Bus. Conduct Comm. v. Crute*, Complaint No. C05950018, 1997 NASD Discip. LEXIS 51, at *11-12 (NASD NBCC Aug. 28, 1997), *aff’d*, 53 S.E.C. 870 (1998), *aff’d*, 208 F.3d 1006 (5th Cir. 2000). Moreover, Lozinski and Chuzi each testified at the hearing and refuted Braff’s claims of oral notice. Lozinski and Chuzi stated that they recalled no conversations with Braff concerning his outside brokerage accounts, and added that, if Braff had

⁶ A violation of any FINRA rule, including NASD Rule 3050(c), constitutes a violation of NASD Rule 2110. *See Lu*, 2005 SEC LEXIS 117, at *14, *15 n.17 (finding that applicant’s violation of NASD Rule 3050(c) violated just and equitable principles of trade articulated under NASD Rule 2110).

⁷ We buttress our finding regarding Pointe Capital with evidence that Braff previously had disclosed his broker-dealer employment to the executing members. In the proceedings below, Braff produced letters that he had sent to the executing members in July 2003, to disclose his registration with Milestone Group Management LLC as a general securities representative. Although Braff produced the letters to demonstrate his general compliance with NASD Rule 3050(c), he failed to offer any evidence that he had notified the executing members of his employment with Pointe Capital.

disclosed the brokerage accounts to them, they would have required him to do so in writing and to arrange for duplicate confirmations to be sent directly to the firms. The Hearing Panel found that Lozinski and Chuzi were credible witnesses, and we find no basis to overturn that credibility determination. *See Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004) (stating that, “[c]redibility determinations of an initial fact-finder, which are based on hearing the witnesses’ testimony and observing their demeanor, are entitled to considerable weight and deference”).

Braff contends that providing written notice of the outside brokerage accounts to PGP Financial also would have served no purpose. Braff asserts that he was the person responsible for reviewing outside brokerage account confirmations and statements when he assumed supervisory and compliance responsibilities for the firm in January 2006, and sending his own brokerage account records to himself would have been redundant.⁸ NASD Rule 3050(c) contains no exemption for principals, supervisors, or compliance personnel. Regardless of Braff’s role at PGP Financial, NASD Rule 3050(c) obligated him to disclose the Scottrade and TD Waterhouse accounts and, in accordance with PGP Financial’s policy, to arrange for the executing members to send duplicate confirmations and statements directly to the firm.

At the hearing below, PGP Financial’s owner and president, Lozinski, outlined the firm’s procedures that address this specific issue. Lozinski testified that she and her husband were principals of PGP Financial with supervisory and compliance responsibilities when Braff joined the firm. She also stated that both she and her husband maintained an account for an outside open-ended mutual fund during that same period. Lozinski arranged for the executing member of the mutual fund account to send duplicate statements directly to PGP Financial. Once the statements arrived at the firm, a designated principal (neither Lozinski nor her husband) reviewed the statements. Lozinski testified that, had Braff disclosed his outside brokerage accounts to her (he did not), she or the designated principal would have reviewed Braff’s account confirmations and statements. She emphasized the point, stating she would never have allowed Braff to review his own outside brokerage account statements.

Braff also suggests that “sloppiness” and poor recordkeeping at PHD Capital and a brief tenure with Pointe Capital prevented him from providing the firms with information concerning the outside brokerage accounts. Braff’s purported “sloppiness” has no bearing on this matter. Regardless of his intent, Braff’s misconduct had the same outcome, the concealment of his trading activities from the employer and executing members.

In addition, while we acknowledge that Braff remained at Pointe Capital for only two weeks, we also note that the disclosure of outside brokerage accounts is a matter of due course for registered representatives. By the time Braff had joined Pointe Capital in March 2007, he was a seasoned securities professional. He had 24 years of industry experience and had associated with 13 FINRA member firms. Braff also was a registered general securities principal and subject to a heightened level of licensing. In our estimation, Braff knew the type of information he would be required to provide when he associated with a FINRA member firm,

⁸ Braff joined PGP Financial in November 2005, but did not acquire any supervisory or compliance responsibilities until January 2006. Braff’s explanation, therefore, has no bearing on his failure to disclose the accounts to PGP Financial during November and December 2005.

and upon reading, acknowledging, and agreeing to abide by Pointe Capital's policies, he should have contemporaneously disclosed the Scottrade and TD Waterhouse accounts to the firm. *Cf. Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *21 (Nov. 8, 2006) (considering representative's 15 years of securities industry experience to determine that it was implausible for him to be unaware of FINRA's prohibition on selling away).⁹

Finally, Braff argues that Scottrade should have known that he was a licensed registered representative because he was associated with the firm for seven years before the conduct at issue occurred.¹⁰ Braff's prior association with Scottrade is irrelevant. Once Braff left Scottrade and gained employment with another FINRA member firm, he was obligated to disclose the open Scottrade account to his new employer and to notify Scottrade (as the executing member) that he had registered with another broker-dealer. *See Duma*, 2005 NASD Discip. LEXIS 46, at *16-17.

The evidence in this case demonstrates that Braff failed to provide the employer members with written notice of his outside brokerage accounts and, conversely, failed to provide the executing members with written notice of his broker-dealer employment. Accordingly, Braff violated NASD Rules 3050(c) and 2110. *See Lu*, 2005 SEC LEXIS 117, at *13-15.

C. Braff Falsely Stated that He Had No Outside Brokerage Accounts

Braff also falsely stated on PGP Financial's and PHD Capital's disclosures that he had no outside brokerage accounts. In October 2005, as part of PGP Financial's pre-hire procedures, Braff completed a "Confidential Questionnaire [for] Registered Representative Applicants" and "Brokerage Account Disclosure Form." In response to questions concerning his outside brokerage accounts, Braff drew a line through the first disclosure and wrote "none," and initialed "none" on the second disclosure. While at PHD Capital in October 2006, Braff completed an outside brokerage accounts disclosure titled, "Transaction for or by Associated Person – Conduct Rules (NASD)." Braff wrote "none," where the disclosure requested a listing of the registered representative's outside brokerage accounts. Braff also signed the form under a section titled, "no disclosure required."

Braff's responses on PGP Financial's and PHD Capital's outside brokerage account disclosures were patently false. His Scottrade and TD Waterhouse accounts were not only open when he completed the disclosures, but he also was actively trading in the accounts during these same periods. Braff's false statements to PGP Financial and PHD Capital concerning his outside brokerage accounts called into question his ability to comply with regulatory requirements, were inconsistent with the high standards of commercial honor required of registered persons, and violated NASD Rule 2110. *See Duma*, 2005 NASD Discip. LEXIS 46, at *18 (finding that

⁹ Braff's written notice of his association with Milestone Group Management to the executing members illustrates our point. Braff notified the executing members that he had registered with Milestone Group Management as a general securities representative two weeks before he joined the firm.

¹⁰ Braff offers no explanation for his failure to notify TD Waterhouse of his employment with PGP Financial, PHD Capital, and Pointe Capital.

respondent's misrepresentation of his employment with a FINRA member firm, in violation of NASD Rule 3050(c), presented an independent violation of NASD Rule 2110); *Dep't of Enforcement v. Davenport*, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *9-10 (NASD NAC May 7, 2003) (explaining that registered representative's failure to disclose material information to his firm violated NASD Rule 2110).

D. Braff's Purported "Errors of Fact" Are Irrelevant

Braff argues that the Hearing Panel's decision contained "numerous errors . . . some of [which] are so substantial that they could not do anything other than cause an erroneous decision . . ." Of these "numerous" errors, Braff specifies nine "significant errors" for our consideration.

Several of the purported errors Braff highlights in the Hearing Panel decision are not errors, but facts soundly rooted in the record.¹¹ For example, Braff objects to the Hearing Panel's finding that he *falsely* identified himself as a self-employed solar engineer on the TD Waterhouse application. To rebut the Hearing Panel's finding, Braff asserts there was an "approximate one year time period that I was not employed in the securities industry and I [was] a solar engineer at that time." Braff was employed with Milestone Group Management when he completed the TD Waterhouse application, but the record in this case demonstrates that he identified himself as a self-employed solar engineer on the application and responded "no," to a specific application question asking whether he was employed with a broker-dealer. The Hearing Panel did not err in finding that Braff misrepresented his securities-related employment on the TD Waterhouse application.

In addition, to the extent that any of the nine purported errors are true, they are irrelevant to the misconduct alleged in the complaint and our findings of liability.¹² The complaint alleges, and we must determine, whether Braff provided written notice of his outside brokerage accounts to the employer members, whether he provided written notice of his broker-dealer employment to the executing members, and whether he misrepresented the existence of his outside brokerage accounts to PGP Financial and PHD Capital. None of Braff's purported errors assist his position in this regard. To the contrary, the errors are irrelevant to the misconduct alleged in the complaint, have no bearing on our findings of liability, and are remedied through our de novo

¹¹ Braff highlights, as an "error," the Hearing Panel's statement that Braff opened the account at Scottrade *upon leaving* the firm. Braff claims that he opened the Scottrade account "long before [he] left Scottrade." The evidence in the record, however, demonstrates that Braff left Scottrade on June 12, 2000, and completed the application for the Scottrade account three days later, on June 15, 2000.

¹² Of the nine errors Braff specified in his appeal, we have identified only two that have any support in the record. First, the Hearing Panel incorrectly stated that *two* compliance officers testified against Braff at the hearing below. The record indicates that only one compliance officer (Chuzi) testified. The Hearing Panel mischaracterized the other witness, PGP Financial's owner and president, Lozinski, as a compliance officer. Second, the Hearing Panel found that Braff did not disclose his outside brokerage accounts to PHD Capital when he rejoined the firm in June 2007. The parties' stipulations and the record in this matter, however, support that Braff made the necessary disclosures when he began his second tenure with the firm.

review of this matter. *See Dep't of Enforcement v. Erenstein*, Complaint No. C9B040080, 2006 NASD Discip. LEXIS 31, at *10 (NASD NAC Dec. 18, 2006) (holding that the NAC's de novo review of a Hearing Panel's decision "cures any drafting deficiencies or errors that may exist in the Hearing Panel decision"), *aff'd*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596 (Nov. 8, 2007), *aff'd*, 2008 U.S. App. LEXIS 19746 (11th Cir. Sep. 16, 2008).

E. Sanctions

The Hearing Panel fined Braff \$15,000 and suspended him in all capacities for one year. As explained in further detail below, we conclude that the gravity of Braff's misconduct in this case calls for more serious sanctions, and we accordingly increase the fine to \$25,000 and the suspension to two years.

We begin our analysis by considering whether the circumstances in this case lend themselves to an aggregation of Braff's violations.¹³ Our consideration of the record and the evidence presented suggest that Braff's misconduct stems from a single source, which is his failure to disclose the existence of his outside brokerage accounts. Because we conclude that Braff's three violations are related and derive from the same underlying problem, we impose a single, unitary sanction. *See Dep't of Enforcement v. Fox & Co. Inv., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at*37 (NASD NAC Feb. 24, 2005) ("where multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve NASD's remedial goals"), *aff'd*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *36 (Oct. 28, 2005).

We next turn to FINRA's Sanction Guidelines ("Guidelines"). The Guidelines for violations of NASD Rule 3050(c) recommend a fine of \$1,000 to \$25,000.¹⁴ In egregious cases, the Guidelines suggest a suspension of up to two years, or a bar.¹⁵ Although there are no specific Guidelines applicable to Braff's false statements on PGP Financial's and PHD Capital's outside brokerage account disclosures, we conclude that the Guidelines for Forgery and/or Falsification of Records under NASD Rule 2110 are the most analogous, and we utilize those Guidelines to assist our formulation of sanctions.¹⁶ The Guidelines for Forgery and/or Falsification of Records

¹³ *See FINRA Sanction Guidelines 4* (2011) (General Principles Applicable to All Sanction Determinations, No. 4) (discussing when aggregation may be appropriate), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter *Guidelines*].

¹⁴ *See id.* at 16 (Transactions for or by Associated Persons – Failure to Comply with Rule Requirements).

¹⁵ *See id.*

¹⁶ *See id.* at 1 (Overview) ("For violations that are not addressed specifically, [a]djudicators are encouraged to look to the guidelines for analogous violations"); *see also id.* at 37 (Forgery and/or Falsification of Records). Braff "strongly objects" to the Hearing Panel's reliance on the Guidelines for Forgery and/or Falsification of Records to assess sanctions for his false statements to PGP Financial and PHD Capital. He explains that he did not forge or falsify "anything," and further states, forgery is "the crime of falsely and fraudulently making or altering a document. That is NOT what I did at all." Braff's position is misguided. His false statements about the

recommend a fine between \$5,000 to \$100,000 and a suspension in any and all capacities for up to two years, if mitigation exists.¹⁷ In egregious cases, the Guidelines for Forgery and/or Falsification of Records suggest a bar.¹⁸ Within the parameters of these Guidelines, we consider the “Principal Considerations in Determining Sanctions” specific to each of the Guidelines noted above, in addition to the ones applied in every disciplinary case.¹⁹

We consider the regulatory objectives of NASD Rule 3050(c) and evaluate how Braff’s misconduct thwarted the rule’s proper functioning in this case. NASD Rule 3050(c) assists in the prevention of potential and actual conflicts of interests raised through registered representatives’ personal trading activities. *See NASD Notice to Members 91-27* (May 1991). Specifically, the rule acts to prevent insider trading through its notification requirements. *See id.* When adhered to, the notification requirements ensure that employer members receive complete information concerning the trading activities of their registered representatives. *See id.*

The accuracy and completeness of this information comes not only from the registered representatives, who provide information about their outside brokerage accounts to their employers, but also from the firms that execute the transactions and maintain the accounts. *See id.* When provided with information concerning a representative’s personal trading activities, employer members can protect material nonpublic information and create and enforce internal compliance procedures to facilitate the direct and early detection of potential and actual conflicts of interests. *See id.* At its core, NASD Rule 3050(c) provides member firms with the opportunity to detect trading activity, which could present conflicts of interest with the firm or the firm’s customers.

[cont’d]

existence of the Scottrade and TD Waterhouse accounts on PGP Financial’s and PHD Capital’s disclosures caused the firms’ records to contain false information concerning those accounts. We therefore find that the Guidelines for Forgery and/or Falsification of Records are helpful and the most analogous under the facts presented. *See Duma*, 2005 NASD Discip. LEXIS 46, at *27 n.15 (applying Guidelines for falsification of records in the context of false statements under NASD Rule 3050(c)).

¹⁷ *See Guidelines*, at 37 (Forgery and/or Falsification of Records).

¹⁸ *See id.*

¹⁹ *See id.* at 6-7 (Principal Considerations in Determining Sanctions). Braff asks us to consider the sanctions imposed in a settled FINRA matter to inform our determination of sanctions in this case. It is well settled, however, that the “appropriate sanction[s] [in a FINRA disciplinary proceeding] depend on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with the action taken in other proceedings.” *Paz Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *30-31 (Apr. 11, 2008). In addition, the Commission consistently has discounted the relevance of settled matters to the sanctions imposed in litigated cases. *See Prime Investors, Inc.*, 53 S.E.C. 346, 349 (1997) (finding that applicants who offer to settle may receive lesser sanctions based on “pragmatic considerations such as the avoidance of adversary proceedings”).

While at PGP Financial, Braff purchased and sold shares of Document Security Systems. PGP Financial representatives, whom Braff supervised, were contemporaneously recommending the stock of Document Security Systems to their customers. Braff's trading in Document Security Systems continued when he joined PHD Capital for the first time. Again, representatives of PHD Capital also were simultaneously recommending Document Security Systems to their customers. Finally, while Braff engaged in no trading while he was at Pointe Capital, it does not escape notice that a registered representative that Braff supervised was permitted to resign from Pointe Capital after the firm discovered that he had posted unauthorized messages to solicit purchasers of shares of Document Security Systems.

Although Enforcement did not charge, and we do not find, that Braff engaged in insider trading or manipulative market activities, his purposeful concealment of his trading activity deprived the employer members of the rule's intended benefits. Braff's failure to disclose the outside brokerage accounts to the employer members, his failure to disclose his broker-dealer employment to the executing members, his misrepresentations about the existence of the brokerage accounts, and his persistent and contiguous trading in the stock of Document Security Systems, when taken together, created the potential for conflicts of interests, which could have harmed customers. We find these factors to be aggravating under the facts presented.²⁰

We also find aggravating that Braff's misconduct was intentional.²¹ Braff was no newcomer to the securities industry or his disclosure requirements under NASD Rule 3050(c). *See Keyes*, 2006 SEC LEXIS 2631, at *21 (considering representative's securities industry experience in determining sanctions). He had been employed in the securities industry for nearly 22 years when the misconduct in this case began, and he knew that FINRA required registered representatives to disclose their outside brokerage accounts to their employers. NASD Rule 3050(c) itself, and the employer members' policies and procedures, informed Braff of his reporting requirements under the rule.

Braff also knew the rule had an additional obligation, which required him to provide the executing members with written notice of his association with a broker-dealer. NASD Rule 3050(c) put him on notice of this requirement, and the Scottrade and TD Waterhouse account applications each reinforced the requirement when it asked applicants to disclose their association with a broker-dealer or securities firm. Indeed, Braff previously had complied with this prong of the rule when he registered with Milestone Group Management in August 2003. Two weeks before joining the firm, Braff wrote to the executing members to provide notice of his change in registration. Braff's false statements to both the employer members and executing

²⁰ *See Guidelines*, at 16 (Transaction for or by Associated Persons – Failure to Comply with Rule Requirements) (considering whether transactions presented real or perceived conflicts of interest for employer firm and/or customers).

²¹ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13) (considering whether misconduct was the result of an intentional act, recklessness, or negligence).

members,²² his continuous failure to disclose the information as he moved from firm to firm,²³ and the length of time over which the misconduct occurred (18 months)²⁴ demonstrate that Braff's misconduct was not the result of a momentary lapse in judgment. To the contrary, Braff's misconduct represented a concerted attempt to avoid regulatory supervision and oversight of his personal trading activities. The intentional nature of Braff's misconduct is aggravating.

We find it further aggravating that Braff has refused to acknowledge and accept responsibility for his misconduct.²⁵ At the proceedings below, when the Enforcement attorney asked Braff about Pointe Capital's procedures, and emphasized that the procedures required associated persons to obtain written permission to maintain outside brokerage accounts, Braff dismissed the matter as "semantics." And later, despite this exchange, Braff continued to insist that the onus was on the employer member to notify the executing member of a representative's association.²⁶ Braff's persistent refusal to acknowledge the requirements of NASD Rule 3050(c) and continued failure to appreciate the seriousness of his misconduct are striking and aggravate the misconduct presented.

Braff offers several arguments in favor of mitigation. Each of them fails. We reject Braff's argument that his disclosure of the outside brokerage accounts to PHD Capital, in June 2007, should constitute corrective measures.²⁷ As an initial matter, Braff's compliance with FINRA's rules in a single instance does not constitute corrective measures within the meaning of the Guidelines. In addition, in order to qualify as corrective measures under the Guidelines, Braff was required to employ corrective measures *prior to* FINRA's detection of the

²² Solely for purposes of sanctions, we consider Braff's false statements on the TD Waterhouse application, his statements that he was not employed by a broker-dealer and that he was a self-employed solar engineer. Although this evidence was not alleged in the complaint, it "is similar to the misconduct charged in the complaint [and] is admissible to determine sanctions." *Dep't of Enforcement v. Vincent P. McCrudden*, Complaint No. 2007008358101, 2010 FINRA Discip. LEXIS 25, at *26 n.20 (FINRA NAC Oct. 15, 2010) (citing *Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, at *22 n.33 (July 1, 2008)).

²³ See *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 8) (considering whether respondent engaged in pattern of misconduct).

²⁴ See *id.* (Principal Considerations in Determining Sanctions, No. 9) (considering whether respondent engaged in misconduct over extended period of time).

²⁵ See *id.* (Principal Considerations in Determining Sanctions, No. 2) (considering whether respondent has acknowledged the misconduct).

²⁶ Braff failed to address how an employer member could do this if the representative did not provide the employer members with information about the brokerage accounts.

²⁷ See *id.* (Principal Considerations in Determining Sanctions, Nos. 2, 3) (considering whether respondent employed subsequent corrective measures prior to detection).

misconduct.²⁸ Braff, however, failed to timely implement such measures in this case. Braff did not disclose the outside brokerage accounts to PHD Capital until FINRA had commenced its investigation. Finally, Braff's disclosure to PHD Capital was simple compliance with a rule to which he had agreed to abide when he entered the securities industry. His compliance with standard industry rules is not mitigating. *See Dep't of Enforcement v. DaCruz*, Complaint No. C3A040001, 2007 NASD Discip. LEXIS 1, at *52 (NASD NAC Jan. 3, 2007) ("Subsequent compliance with the federal securities laws and NASD's rules is not mitigating, but conduct consistent with a registered representative's obligations as an associated person.").

We reject Braff's "errors of fact," discussed *supra* Section II.D., as a basis to reduce sanctions, finding that the alleged errors are either baseless or immaterial to our sanctions determination. We also reject Braff's request that we consider his lack of disciplinary history, the effect of sanctions on his employees and business, and the absence of customer harm in this case. Such factors have no bearing on our determination of sanctions. *See Michael Frederick Siegel*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459, at *42 (Oct. 6, 2008) (lack of disciplinary history is not mitigating); *Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971, at *20 (May 9, 2007) (economic hardship and impact on business have no bearing on sanctions); *Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NASD NAC Dec. 21, 2004) (absence of customer harm is not mitigating), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005).

Our consideration of the evidence in the record convinces us that Braff's misconduct is egregious. Braff's misrepresentations on PGP Financial's and PHD Capital's outside brokerage account disclosures and his testimony at the proceedings below reinforce that his failure to disclose the brokerage accounts was not a matter of mere administrative oversight. To the contrary, the record in this case establishes that Braff made a concerted effort to conceal his outside brokerage accounts and personal trading activities from the employer and executing members. Indeed, this is what we find troubling about this case. Braff purposely thwarted safeguards intended to protect the integrity and transparency of the securities industry, and in so doing, created an environment ripe for customer abuse. Furthermore, Braff has not demonstrated remorse for his actions, and he has attempted to underplay the significance of NASD Rule 3050's protections. Based upon the record before us, we have concluded that the Hearing Panel's sanctions are inadequate to remedy Braff's misconduct and insufficient to deter Braff from engaging, again, in the type of misconduct presented here.²⁹ Accordingly, we increase the fine in this case to \$25,000 and the suspension to two years.

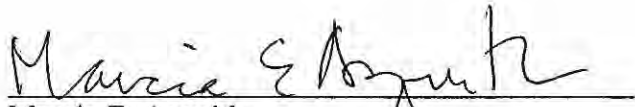
²⁸ *See id.*

²⁹ Braff testified that he would "never open a personal account at the same brokerage firm that I work at . . . It's a terrible idea to do that. It's all your eggs in one basket . . . [Y]our account can be frozen. I wouldn't put my family at that risk of that happening."

III. Conclusion

Braff violated NASD Rules 3050(c) and 2110 because he failed to provide written notice of his outside brokerage accounts to his employers, and failed to provide written notice of his broker-dealer employment to the brokerage account servicers. Braff also violated NASD Rule 2110 because he falsely stated on employer disclosures that he had no outside brokerage accounts. For these violations, we fine Braff \$25,000 and suspend him in all capacities for two years. We affirm the Hearing Panel's order to pay costs of \$1,856.80, and assess appeal costs of \$1,419.15. We have considered, and reject without discussion, all other arguments of the parties.³⁰

On behalf of the National Adjudicatory Council,



Marcia E. Asquith,
Senior Vice President and Corporate Secretary

³⁰ Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.