SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 64486 / May 13, 2011

Admin. Proc. File No. 3-14016

In the Matter of

HARRY FRIEDMAN
c/o Law Offices of Isaac M. Zucker, PLLC
600 Old Country Road, Suite 321
Garden City, New York 11530

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

Failure to Provide Written Notice to Member Firm Employer Regarding Private Securities Transactions

Conduct Inconsistent with Just and Equitable Principles of Trade

Individual registered as a representative and principal of member firm of registered securities association participated in private securities transactions without providing prior written notice to his member-firm employer and, as a result, engaged in conduct inconsistent with just and equitable principles of trade. *Held*, association's findings of violation and the sanctions imposed are *sustained*.

APPEARANCES:

Isaac M. Zucker, of Law Offices of Isaac M. Zucker, PLLC, for Harry Friedman.

Marc Menchel, *Alan Lawhead*, and *Jante C. Turner*, for FINRA.

Appeal filed: August 19, 2010
Last brief received: November 29, 2010

I.

Harry Friedman, a general securities representative and a general securities principal formerly associated with former FINRA member firm First Montauk Securities Corp. ("First Montauk" or "the Firm"), appeals from FINRA disciplinary action against him.[1] FINRA found that Friedman engaged in private securities transactions without prior written notice to First Montauk, in violation of NASD Conduct Rules 3040 and 2110.[2] FINRA fined Friedman $77,500, suspended him in all capacities for nine months, and ordered that Friedman pay costs associated with the hearing and appeal. We base our findings on an independent review of the record.

II.

A. Friedman's Association with First Montauk

Friedman has been a registered representative at several FINRA member firms since October 1994 and a registered securities principal since April 1996. In October 2002, Friedman registered as a representative and a securities principal with First Montauk. Friedman was the branch office manager for the Firm's Office of Supervisory Jurisdiction ("OSJ") in New York City and was responsible for regulatory compliance. Friedman is presently registered with another FINRA member firm, Prestige Financial Center, Inc.

In November 2002, Joseph Schnaier became a registered representative in the First Montauk OSJ. Friedman and Schnaier each owned fifty percent of an entity called Global International Services, LLC ("Global International"). The OSJ's revenues were deposited into

---

[1] On July 26, 2007, we approved a proposed rule change filed by National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and certain member-regulation, enforcement, and arbitration functions of the New York Stock Exchange ("NYSE"). *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Although the investigation into this matter was initiated before the consolidation, the complaint was filed afterwards. References to FINRA, therefore, include NASD actions.

[2] As part of the effort to consolidate and reorganize NASD's and NYSE's rules into one FINRA rulebook, NASD Rule 2110 (which was otherwise unchanged) was codified as FINRA Rule 2010, effective December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). NASD Rule 3040 has not been codified as a FINRA Rule. *See generally Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135 (Dec. 10, 2009), 97 SEC Docket 23299, 23300 n.4 (describing rules consolidation). Because the conduct at issue here occurred before the consolidation, we will continue to refer to the NASD Rules.

NASD Conduct Rule 3040 prohibits involvement by a registered representative of a FINRA member firm in a private securities transaction outside the regular course or scope of employment without providing prior written notice to the member firm. NASD Conduct Rule 2110 requires members to observe high standards of commercial honor and just and equitable principles of trade.

Global International's bank account, and Global International paid all of the OSJ's expenses, including the salaries of Friedman and Schnaier.

B. Friedman and Schnaier Are Introduced to Majesco and Purchase Majesco Shares

At the First Montauk OSJ, Friedman focused on management of the retail brokerage operations, and Schnaier's primary role was development of investment banking business for the Firm. In January 2003, Schnaier became acquainted with Majesco Sales, Inc. ("Majesco"), a private video game company that wanted to raise capital and eventually become a public company. Later in 2003, Friedman and Schnaier met with Majesco's management and toured Majesco's facilities, in an effort to gain Majesco's investment banking business for the Firm.

Although First Montauk did not ultimately provide investment banking services to Majesco, Friedman and Schnaier introduced Majesco management to individuals who provided assistance to the company in its efforts to complete a reverse merger.[3] In October 2003, ConnectivCorp, a public company, announced its intention to enter into a reverse merger with Majesco.

Before the companies completed the reverse merger, Majesco management offered Friedman and Schnaier the opportunity to invest in Majesco at a price of $0.01 per share. On November 27, 2003, Friedman and Schnaier each contributed $12,500 and, through Global International, purchased 2,500,000 shares of Majesco common stock for a total purchase price of $25,000. Friedman, Schnaier, and Global International did not provide First Montauk with prior written notice of this purchase.

On December 5, 2003, Majesco completed its reverse merger with ConnectivCorp, forming the publicly traded company called Majesco Holdings, Inc. ("Majesco Holdings"). Upon completion of the reverse merger, all Majesco shares converted, one-for-one, into shares of Majesco Holdings. On the day of the reverse merger, Majesco Holdings' stock opened at $1.01 per share and closed at $1.05 per share. During the first quarter of 2004, the price of Majesco Holdings' stock rose to more than $3.00 per share.

---

[3] A "reverse merger" is a method by which a private company arranges to be acquired by a public company with minimal assets through a merger of the companies, with the shell company surviving and the former shareholders of the private business controlling the surviving entity. *See Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies*, Securities Act Rel. No. 8587 (July 15, 2005), 85 SEC Docket 3698; *see also SEC v. Cavanagh*, 445 F.3d 105, 108 n.4 (2d Cir. 2006) (discussing mechanics of a reverse merger).

C. Friedman and Schnaier Sell Almost Half of Their Majesco Holdings Securities

In April and May 2004, Friedman and Schnaier sold 1,175,000 of their Majesco Holdings shares to three different purchasers. Friedman and Schnaier sold these shares at a significant discount from the then-current market price of the shares. Among other things, the shares were subject to a lockup agreement that prohibited their re-sale until October 2005, one year after Majesco Holdings filed its initial registration statement. Friedman and Schnaier sold their Majesco Holdings shares as follows:

> (1) On April 15, 2004, Friedman and Schnaier sold 100,000 shares of Majesco Holdings, at a price of $1.25 per share, to Joel Gold. Gold was not a First Montauk customer. Friedman explained that, at the time of the transactions, Friedman and Schnaier had hoped that Gold might join them in a new broker-dealer firm they planned to start;
>
> (2) On April 20, 2004, Friedman and Schnaier sold 75,000 shares of Majesco Holdings, at a price of $1.40 per share, to Regina Glick, a First Montauk customer and family friend of Friedman. Friedman initiated contact with Glick, and he set the price of the sales to Glick. Friedman testified that he offered the shares at a discount from the then-current market price in order to help Glick offset losses she had suffered in investments with a different broker-dealer;
>
> (3) On May 24, 2004, Friedman and Schnaier sold 1,000,000 shares of Majesco Holdings, at a price of $1.25 per share, to Trinad Capital, a private investment company. Trinad Capital sought to purchase all 2,500,000 of Global International's Majesco Holdings shares at a price of $1.00 per share soon after the completion of the reverse merger. Although the proposed transaction to purchase all of Global International's shares did not occur, the two sides eventually agreed on the ultimate number of shares and purchase price.

Friedman and Schnaier, through Global International, retained the remaining 1,325,000 Majesco Holdings shares after these three sales.

Friedman, Schnaier, and Global International did not provide prior written notice to First Montauk of their sales of Majesco Holdings shares to Gold, Glick, and Trinad Capital. Friedman and Schnaier together netted approximately $1,470,000 from these sales. After using the proceeds to pay Global International's expenses, Friedman and Schnaier split the remaining profits equally. Friedman's personal net profit from the sales was approximately $550,000.

D. Procedural History

FINRA discovered Friedman's and Schnaier's sales of Majesco Holdings securities in November 2004, when FINRA examiners interviewed them in connection with their application to register a new firm as a broker-dealer. The examiners noticed two substantial deposits in

Friedman's and Schnaier's bank accounts, and Friedman explained that the sales of Majesco Holdings securities were the source of those deposits. When FINRA examiners asked whether they had reported the sales to First Montauk, Friedman stated that he did not realize he was obligated to do so, and Schnaier said nothing. After the interview, the FINRA examiners requested additional information about the sales from Friedman and Schnaier. Friedman and Schnaier provided a written response to a series of questions posed by the FINRA examiners, in which they acknowledged that they had not notified First Montauk of either the purchase or the subsequent sales of the shares. Friedman and Schnaier withdrew their broker-dealer registration application in February 2005.

On April 18 and 23, 2007, FINRA Enforcement conducted on-the-record interviews with Friedman and Schnaier, respectively, in connection with an investigation of the Majesco transactions. Friedman testified consistently with his responses to the FINRA examiners in 2004 and 2005 that, at the time of the Majesco transactions, he did not believe that he was obligated to disclose the transactions to First Montauk because he considered the investment to be passive. He also testified that he did not discuss with Schnaier whether the transactions should be disclosed at that time because of "[his] belief that no disclosure was necessary because of the type of transaction." Friedman further testified that, once he and Schnaier received FINRA's requests to appear for the on-the-record interviews, he discussed the transactions with Schnaier, and only then did Schnaier tell Friedman that Schnaier had allegedly provided written and oral notice to Herbert Kurinsky, First Montauk's President.[4]

On November 14, 2007, FINRA Enforcement filed a complaint against Friedman and Schnaier, alleging that their initial purchases of Majesco and subsequent sales of Majesco Holdings securities violated NASD Conduct Rules 3040 and 2110. Before a FINRA Hearing Panel, Schnaier testified that he had provided oral and written notice of the purchases and sales to Kurinsky. Neither Friedman nor Schnaier produced copies of any written notice to First Montauk of the transactions, claiming that such documents may have been lost or destroyed in a flood at the OSJ's offices. The Hearing Panel found that Schnaier's testimony was not credible and, as a result, that Friedman and Schnaier violated Rule 3040. The Hearing Panel suspended Friedman in all capacities for forty-five days and imposed a $77,500 fine.[5]

---

[4] In his April 2007 on-the-record testimony, Schnaier claimed that he was previously unaware of the earlier written response to FINRA examiners, which stated that there had been no disclosure of the transactions to First Montauk. Schnaier testified that he dealt with the "corporate finance side of the business" and had nothing to do with matters such as responding to FINRA examiners' questions in connection with the broker-dealer registration application, which was Friedman's responsibility at the OSJ.

[5] The FINRA Hearing Panel found that Schnaier, like Friedman, violated Rules 3040 and 2110, and the Hearing Panel fined Schnaier $77,500 and suspended him for ninety days. Schnaier did not appeal the Hearing Panel's decision to the National Adjudicatory Council. FINRA Enforcement initially appealed Schnaier's ninety-day suspension, but subsequently withdrew its appeal after Schnaier agreed to a bar in a separate disciplinary action.

FINRA appealed the Hearing Panel's determination of sanctions to FINRA's National Adjudicatory Council ("NAC"), seeking a longer suspension. Friedman cross-appealed, claiming that he did not commit the alleged violations and arguing that, even if he had committed the violations, the suspension was unnecessarily lengthy.

On July 26, 2010, the NAC affirmed the Hearing Panel's findings of violations and the $77,500 fine. The NAC found that Friedman's violations were "very serious," and it increased the suspension imposed by the Hearing Panel from forty-five days to nine months. This appeal followed.

III.

Exchange Act Section 19(e) provides that, in reviewing a disciplinary proceeding by a self-regulatory organization ("SRO"), we shall determine whether the associated person engaged in the conduct found by the SRO, whether the conduct violated the SRO rules at issue, and whether those rules were applied in a manner consistent with the purposes of the Exchange Act.[6] In conducting our review, we apply a preponderance of the evidence standard to determine whether the record supports FINRA's findings that Friedman's conduct violated FINRA's Rules.[7]

NASD Conduct Rule 3040 provides that "[n]o person associated with a member shall participate in any manner in a private securities transaction" unless he or she provides prior written notice to the member. A "private securities transaction" is defined as "any securities transaction outside the regular course or scope of an associated person's employment with a member."

Friedman concedes that the transactions at issue "involved the purchase and sale of shares in a private company ('Majesco') by Respondent Friedman." Friedman acknowledges that he paid $12,500 for his Majesco shares and subsequently sold a portion of those shares to Gold, Glick, and Trinad Capital. He also admits that he solicited his First Montauk customer, Glick, and established the $1.40 per share price at which she bought the Majesco Holdings shares from Friedman and Schnaier. As an initial matter, our cases have consistently affirmed a broad interpretation of Rule 3040 and its operative phrase, "participate in any manner."[8] We find that Friedman's initial purchase of Majesco shares and three subsequent sales of Majesco Holdings

---

[6] 15 U.S.C. § 78s(e).

[7] *See Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (upholding preponderance of evidence standard in NASD disciplinary proceeding).

[8] *See, e.g., Joseph Abbondante*, 58 S.E.C. 1082, 1098 (2006) (noting that "Conduct Rule 3040 is broad in scope"), *aff'd*, 209 Fed. Appx. 6 (2d Cir. 2006); *Mark H. Love*, 57 S.E.C. 315, 319 (2004) (emphasizing that the phrase "participates in any manner" "should be read broadly"); *Stephen J. Gluckman*, 54 S.E.C. 175, 182-83 (1999) (stating that "[t]he reach of Conduct Rule 3040 is very broad").

shares constitute "participat[ion] in any manner in private securities transactions" under Rule 3040.

We reject Friedman's argument that Schnaier, not Friedman, was responsible for disclosing the transactions to First Montauk because he "was the individual through whom all relevant conversations with Majesco occurred" and because Schnaier "concentrat[ed] upon investment banking, of which Respondent Friedman was largely unaware." Regardless of whether Friedman and Schnaier initially sought Majesco's investment banking business for the Firm, the transactions at issue constitute private securities transactions by Friedman under Rule 3040.

Friedman also argues, contrary to his earlier answers to FINRA examiners in connection with the broker-dealer application, his on-the-record interview in connection with FINRA's investigation of the conduct at issue here, and his testimony at the hearing, that when he decided not to disclose the transactions to First Montauk, he believed that Schnaier had provided oral and written notice of the transactions to First Montauk. Friedman cites Schnaier's testimony "that **he** [*i.e.*, Schnaier] had numerous conversations with the President of First Montauk, Herbert Kurinsky, in which permission was sought and given for Mr. Schnaier and Respondent Friedman to engage in the Majesco transactions."[9] Even if Schnaier had disclosed the transactions in conversations with Kurinsky, this would not satisfy Schnaier's Rule 3040 reporting obligation. The Rule states that an associated person "shall provide written notice," not oral notice, to the FINRA member firm with which he or she is associated before engaging in a private securities transaction.[10]

In any event, the Hearing Panel did not credit Schnaier's testimony that he had provided written notice to Kurinsky disclosing the transactions, or that he had provided either oral or written notice to First Montauk. While a First Montauk vice president testified that Schnaier had received approval from a First Montauk regional supervisor, the Hearing Panel concluded that the vice president was a friend of Friedman and Schnaier, advocated on their behalf, and was therefore not credible as a witness. The Hearing Panel also found that Kurinsky, who Schnaier testified approved the transactions, was suffering from memory problems and was therefore unable to remember specific events and people, which made him an unreliable witness as to his interactions with Friedman and Schnaier. We have consistently held that "credibility determinations of an initial fact finder are entitled to considerable weight because they are based on hearing the witnesses' testimony and observing their demeanor."[11] We find no basis to overturn FINRA's credibility determinations here.

---

[9] Emphasis in Friedman's brief.

[10] *See Joseph J. Vastano*, 57 S.E.C. 803, 811 (2004).

[11] *See, e.g., Janet Gurley Katz*, Exchange Act Rel. No. 61449 (Feb. 1, 2010), 97 SEC Docket 25074, 25094 n.22 (citing *Abbondante*, 58 S.E.C. at 1091 n.21), appeal filed, No. 10-1068 (D.C. Cir. Mar. 26, 2010).

In addition, evidence in the record corroborates the Hearing Panel's credibility determinations. Although Schnaier testified that he had provided written notice of the transactions to First Montauk, there is no evidence of such written notice in the record, and Friedman testified that he never saw any written notice. Several First Montauk registered representatives testified at the hearing that approvals for private securities transactions did not come directly from Kurinsky, as Schnaier's testimony suggested, but typically from the compliance department. Furthermore, Friedman and Schnaier never mentioned the existence of any written notice during FINRA's review of their broker-dealer registration application, when FINRA examiners made clear that whether or not Friedman and Schnaier had provided written notice of the transactions would be a key determinant of whether the registration request would be granted.

Further, even if Friedman had, contrary to his earlier testimony, relied on a belief that Schnaier had provided written disclosure of the transactions to First Montauk, any written disclosure by Schnaier would not be sufficient. Rule 3040 applies to all registered persons associated with FINRA member firms and requires each person who participates in a private securities transaction to provide prior written notice to his or her member firm.[12] Thus, Friedman had an independent obligation to provide First Montauk prior written notice of his private securities transactions. Schnaier's investment banking responsibility at the OSJ and his alleged oral and written disclosure of the transactions to First Montauk are irrelevant to Friedman's obligation to disclose the transactions to First Montauk.

Friedman also claims that he was not aware that he was required to report the transactions pursuant to Rule 3040. Instead, he asserts that he believed that NASD Conduct Rule 3030,[13] which was in effect at the time of the violations and required registered representatives to provide written disclosure of their outside business activities to their member firm employers, governed the Majesco transactions. Rule 3030 contained an exception to the written disclosure obligation for "passive investments." According to Friedman, he considered the purchases and sales of Majesco securities to be a "passive investment" under Rule 3030, and he therefore believed that he was not obligated to report the transactions to First Montauk.

Rule 3030 applies only to transactions involving non-securities products.[14] Because Friedman's purchase and sales of Majesco were securities transactions, his conduct was not an outside business activity under Rule 3030. However, even if Friedman had been correct in his belief that Rule 3030 was the applicable provision, Friedman's activities here were not passive.

---

[12] *Gluckman*, 54 S.E.C. at 184 n.29 ("[Respondent] cannot shift responsibility for compliance with Conduct Rule 3040 to [his supervisor at member firm].") (citing *Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995)).

[13] NASD Rule 3030 has been codified as FINRA Rule 3270. FINRA Regulatory Notice 10-49 (Dec. 2010). *See supra* note 2.

[14] *See* NASD Notice to Members 01-79 (Dec. 2001).

Although Schnaier provided the initial introduction to Majesco, Friedman toured Majesco's facilities, met with management, and provided funds for the specific purpose of purchasing the shares. Friedman also initiated contact with Glick and set the purchase price for the shares Glick purchased from Friedman and Schnaier. Friedman received half of the proceeds from the sales for his personal benefit. Such conduct constitutes active participation in the transactions.[15]

In addition, Friedman's faulty understanding of FINRA rules does not excuse his violations. At the time of the transactions at issue, Friedman had nine years of securities industry experience, was the registered principal and branch manager at the OSJ, and was responsible for the OSJ's compliance with FINRA rules, including ensuring that First Montauk received prior written notice of any private securities transactions by registered representatives, pursuant to Rule 3040. Friedman failed to consult FINRA rules or the Firm's compliance personnel before engaging in the transactions, and the Firm's compliance procedures would have put Friedman on notice, had he consulted them, of his obligation to report the transactions. He acknowledged in testimony that, instead, he unilaterally made the determination that it was not necessary to report the transactions to First Montauk. In light of these facts, Friedman's ignorance of the proper application of Rule 3040 does not excuse his violations.[16]

The record supports FINRA's finding that Friedman participated in private securities transactions outside the scope of his employment with First Montauk and that Friedman did not provide written notice to First Montauk before engaging in those transactions. Accordingly, we find that Friedman violated NASD Conduct Rule 3040. A violation of a Commission or NASD Rule or regulation also constitutes a violation of Conduct Rule 2110.[17] Therefore, we also find that Friedman violated Rule 2110.

---

[15] *See Abbondante*, 58 S.E.C. at 1109 n.68 (finding that respondent's outside business activities were not "passive investments" because of his material participation in the transactions, evidenced by respondent's intentional involvement in the outside business activity at issue, his distribution of proceeds from the transaction, and his receipt of a portion of the proceeds for his personal benefit) (citing *Micah C. Douglas*, 52 S.E.C. 1055, 1058-59 (1996) (finding that completion of a questionnaire in an effort to solicit business constitutes an outside business activity)).

[16] *See, e.g., Phillipe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.18 (noting that registered representative's "claimed ignorance of his obligations is only aggravated in light of his fifteen years experience in the securities industry"); *see also Ryan R. Henry*, Exchange Act Rel. No. 53957 (Jun. 8, 2006), 88 SEC Docket 592 n.13 ("A registered representative is assumed as a matter of law to have read and have knowledge of [SRO] rules and requirements") (citing *Carter v. SEC*, 726 F.2d 472, 473-74 (9th Cir. 1983); *Walter T. Black*, 50 S.E.C. 424, 426 (1990) ("[L]ack of familiarity with the NASD's rules cannot excuse [registered representative's] conduct.")).

[17] *Gluckman*, 54 S.E.C. at 185.

IV.

In reviewing a disciplinary proceeding pursuant to Exchange Act Section 19(e), we must sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive, oppressive, or impose an unnecessary or inappropriate burden on competition.[18] The recommended suspension under the FINRA Sanction Guidelines for violations of Rule 3040 depends partly on the dollar amount of the sales at issue: for sales of a dollar amount over $1,000,000, as here, the Sanction Guidelines recommend a suspension of twelve months to a bar.[19] Under the Sanction Guidelines for Rule 3040 violations, FINRA also considers the number of customers involved and the length of time over which the selling away occurred. The recommended fine is $5,000 to $50,000, subject to increase by adding the amount of the respondent's financial benefit from the violation.[20]

Friedman argues that FINRA abused its power when the NAC increased the length of the suspension that the Hearing Panel initially imposed from forty-five days to nine months. Friedman describes the NAC's decision as a "complete usurpation of the Hearing Panel's authority." He complains, "Neither the NAC nor [FINRA] Enforcement assert that the Hearing Panel erred as a matter of law or made a decision with respect to sanctions that was beyond its authority to make – they have simply stated that they disagree with the Hearing Panel's decision." Friedman further contends that, even if we sustain FINRA's findings of violation, the appropriate suspension for this violation would be fifteen days.

"It is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of FINRA which is subject to Commission review."[21] We have repeatedly held that the NAC reviews the Hearing Panel's decision *de novo* and has broad discretion to modify the Hearing Panel's decisions and sanctions.[22] In addition, FINRA Rules 9348 and 9349 state that,

---

[18] 15 U.S.C. § 78s(e)(2). Friedman does not allege, and the record does not show, that FINRA's sanctions imposed an undue burden on competition.

[19] *FINRA Sanction Guidelines* at 15 (2007). Although the Commission is not bound by the Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *Wanda P. Sears*, Exchange Act Rel. No. 58075 (July 1, 2008), 93 SEC Docket 7395, 7403.

[20] *Id.*

[21] *Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22035 n.16 (citing *Keyes*, 89 SEC Docket at 800 n.17), *aff'd*, 2011 WL 1086638 (2d Cir. 2011).

[22] *Id.* at 22035 n.17 (citing *Michael B. Jawitz*, 55 S.E.C. 188, 200 & n.24 (2001) (stating that the NAC conducts a *de novo* review and has broad discretion to review any finding in the Hearing Panel decision) (citing *Timothy L. Burkes*, 51 S.E.C. 356, 359 (1993), *aff'd*, 29 F.3d 630 (9th Cir. 1994) (Table)); *see also Morton Bruce Erenstein*, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3126 (acknowledging NAC's power to conduct a *de novo* review and make its own independent

(continued...)

on appeal from a Hearing Panel decision, the NAC "may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction."[23] FINRA is not required to state why a lesser sanction would be insufficient in order to justify the sanction it imposed as being remedial.[24] A sanction is appropriate "so long as its choice meets the statutory requirements that a sanction be remedial and not 'excessive or oppressive.'"[25]

Applying the Sanction Guidelines to the facts presented in this appeal, we find that FINRA's sanctions were neither excessive nor oppressive. The dollar amount of the transactions at issue exceeded $1,000,000, which supports a suspension of twelve months to a bar. The NAC increased the suspension initially imposed by the Hearing Panel, but the resulting sanction, contrary to Friedman's contention, is shorter than the minimum suspension recommended under the Sanction Guidelines. The NAC found that the transactions occurred over a relatively short period of time, between a single purchase in November 2003 and sales to three parties in April and May 2004. Further, Friedman received no commissions for the transactions.

The NAC, however, also found several aggravating factors present in this case. One of the customers to whom Friedman sold the Majesco Holdings securities was a First Montauk customer.[26] Friedman's misconduct had the potential for monetary gain and did, in fact, produce

---

[22] (...continued)
findings), *petition denied*, No. 07-15736 (11th Cir. 2008) (unpublished); *Chris Dinh Hartley*, 57 S.E.C. 767, 776 (2004) (finding FINRA's sanctions were not excessive or oppressive where the NAC increased a suspension imposed by Hearing Panel from thirty days to ninety days for violations involving registered representative selling away from his member firm employer); *James B. Chase,* 56 S.E.C. 149, 162 (2003) (finding FINRA's sanctions not excessive or oppressive where NAC increased Hearing Panel's suspension from six months to one year for violations involving unsuitable investment recommendations); *Jim Newcomb*, 55 S.E.C. 406, 418 (2001) (finding FINRA's sanctions not excessive or oppressive where NAC increased Hearing Panel's suspension from ninety days to two years for violations involving registered representative selling away from his member firm employer).

[23] These rules were also quoted in the May 8, 2009 letter from FINRA delivering the Hearing Panel decision to Friedman and informing him of his right to appeal the decision to the NAC.

[24] *Paz Sec., Inc. v. SEC,* 566 F.3d 1172, 1176 (D.C. Cir. 2009). *Cf. Horning v. SEC*, 570 F.3d 337, 346 (D.C. Cir. 2009) (holding that Commission need not state why a lesser sanction would be insufficient as long as it "articulated a reasonable, protective rationale for the penalties it selected").

[25] *Id.* at 1176.

[26] Principal Consideration 8 for Rule 3040 violations is "whether respondent sold away to customers of his or her employer (member firm)." Principal Consideration 11 under Rule 3040 is "whether respondent participated in the sale by referring customers or selling the product directly to customers." *Sanction Guidelines* at 16.

large profits that were deposited into Global International's bank account for Friedman's and Schnaier's use.[27]

FINRA also found aggravating that Friedman was employed for many years as a registered representative and principal with several FINRA member firms and that he supervised compliance and regulatory matters at First Montauk's OSJ. Friedman contends that his securities industry experience is not an aggravating factor because industry experience is not included on the Sanction Guidelines' list of Principal Considerations with respect to a violation of Rule 3040. However, the Principal Considerations generally applicable to all sanction determinations specifically state, "The list is illustrative, not exhaustive; as appropriate, Adjudicators should consider case-specific factors in addition to those listed here and in the guidelines." According to the Sanction Guidelines, "The presence of one or more mitigating or aggravating factors may either raise or lower the [recommended] sanctions."

Friedman also objects to the NAC's reliance on our decision in *Keyes*,[28] which found that industry experience might serve to contradict claims of ignorance, but did not hold that industry experience is an aggravating factor. However, the fact that we did not find industry experience to be an aggravating factor in setting sanctions in that case does not mean that industry experience can never be an aggravating factor.

We agree with FINRA that Friedman's industry experience and compliance responsibility at the Firm are aggravating factors here. First Montauk's compliance manual and Friedman's written employment agreement with the Firm put him on notice of his obligation to notify the Firm of the transactions at issue. These documents also clearly state the Firm's prohibition on sales by registered representatives of products that have not been previously approved by the Firm. Despite his extensive securities industry experience and responsibilities for regulatory compliance at the Firm, Friedman unilaterally determined that he did not need to provide prior written notice of the transactions to First Montauk.

Friedman claims that certain facts mitigate his misconduct. He contends that the purchase and sale of the securities in question did not violate state or federal securities laws or FINRA rules and that he did not lead anyone to believe that the transactions were sanctioned by First Montauk. FINRA considered this claim and appropriately concluded that, while actively misleading the purchasers regarding whether the transactions were sanctioned by First Montauk might have been aggravating, the absence of such conduct does not mitigate the violations.[29]

---

[27] Principal Consideration 17 generally applicable to all sanction determinations is "whether the respondent's misconduct resulted in the potential for respondent's monetary or other gain." *Sanction Guidelines* at 7.

[28] *See supra* note 16.

[29] *Michael Frederick Siegel*, Exchange Act Rel. No. 58737 (Oct. 8, 2008), 94 SEC Docket

(continued...)

This is because an associated person should not be rewarded for acting in compliance with the securities laws and with his duties as a securities professional.[30]

Friedman also notes that the Hearing Panel specifically found that there was no evidence that Friedman misled First Montauk or attempted to conceal the transactions from First Montauk, and he complains that the NAC rejected this as a mitigating factor, instead noting that Friedman's failure to report the transactions as required under Rule 3040 "had the effect of concealing the activity from the appropriate Firm personnel." Every violation of Rule 3040, by definition, involves the failure to provide the requisite prior written notice of a private securities transaction. Such violations may be aggravated by a registered representative taking affirmative actions to mislead the member firm, but this does not mean that the absence of misleading conduct is mitigating.[31]

Friedman also contends that it is a mitigating factor that the Hearing Panel found that he did not intend to violate Rule 3040 and that his violation of Rule 3040 was a result of his negligent failure to understand the rule. Friedman characterizes the Hearing Panel's finding that he acted negligently as a credibility determination, to which the NAC should have deferred. The NAC did not, however, dispute the Hearing Panel's finding that Friedman was unaware of his obligations. Rather, it found that this lack of awareness was not mitigating, especially in light of Friedman's significant industry experience. Further, we have consistently held that registered representatives are responsible for understanding their regulatory obligations, and ignorance of those obligations does not excuse a violation of an SRO's Rules.[32]

Contrary to Friedman's claim, the fact that the customers did not lose money or complain about the transactions does not mitigate Friedman's misconduct.[33] Even if the customers profited from the transactions at issue, the failure of a registered representative to adhere to the

---

[29] (...continued)
10519 n.45 (finding, in a Rule 3040 case, among other things, that it was not mitigating that transactions at issue did not violate securities laws or FINRA rules and that registered representative did not give impression that member firm sanctioned transactions. "While the presence of any of these factors could constitute aggravating circumstances justifying an increase in sanctions, their absence is not mitigating."), *petition denied in part and remanded in part*, 592 F.3d 147 (D.C. Cir. 2010).

[30] *Id.* at 10519 n.45 (citing *Keyes*, 89 SEC Docket at 801 & n.20).

[31] *Id.* at 10519 n.45.

[32] *Keyes*, 89 SEC Docket at 801 n.19; *Siegel*, 94 SEC Docket at 10518 n.42 (citing *Prime Investors, Inc.*, 53 S.E.C. 1, 5 & n.12 (1997) (finding a claimed ignorance of the law not mitigating)).

[33] *See Ronald J. Gogul*, 52 S.E.C. 307, 312 n.20 (1995) (finding the fact that no customer complained about an investment was "not persuasive" in support of respondent's argument that sanctions should be reduced).

requirements of Rule 3040 undermines the ability of member firms to monitor effectively the securities activities of their associated persons.

The Sanction Guidelines recommend a fine of between $5,000 and $50,000 for violations of Rule 3040. The Sanction Guidelines further state that "Adjudicators should increase the recommended fine amount by adding the amount of a respondent's financial benefit." FINRA initially determined that a $25,000 fine, in the middle of the recommended range, was appropriate for Friedman's violations. Then, FINRA determined that Friedman received $550,000 from the transactions at issue. FINRA could have increased the fine by this amount, which would have resulted in a $575,000 fine. Instead, FINRA determined only to increase the fine by $52,500, the amount of Friedman's proceeds from the sale to First Montauk customer Glick. This determination was appropriate because Friedman's misconduct deprived the customer of the Firm's oversight with respect to this transaction. We do not find that this determination resulted in an excessive or oppressive fine, especially considering the total amount of Friedman's financial gain from the three sales.

We agree with FINRA that Friedman's conduct indicates a "very serious violation" and warrants the imposition of meaningful sanctions. We repeatedly have stated that the prohibition on private securities transactions is fundamental to an associated person's duty to his customers and his firm.[34] Such misconduct deprives investors of a brokerage firm's oversight, due diligence, and supervision, protections investors have a right to expect.[35] Friedman continues to be employed as a registered representative with a FINRA member firm, and the securities industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants."[36] Given Friedman's lack of understanding of his obligations as a securities professional and his continued employment in the securities industry, a nine-month suspension will have the remedial effect of protecting the investing public from harm by impressing upon Friedman and other registered representatives the importance of complying with Rule 3040 by providing written notice before engaging in private securities transactions.[37]

---

[34] *See Keyes*, 89 SEC Docket at 800 n.18 (citing *Gluckman*, 54 S.E.C. at 192; *Gerald James Stoiber*, 53 S.E.C. 171, 180 (1997)).

[35] *Anthony H. Barkate*, 57 S.E.C. 488, 501 n.27 (2004) (citing *Ronald W. Gibbs*, 52 S.E.C. 358, 365 (1995)).

[36] *Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995). *See also, e.g.*, *Frank Kufrovich*, 55 S.E.C. 616, 627 (2002) ("A propensity for dishonest behavior is of particular concern in the securities industry, an industry that presents numerous opportunities for abuses of trust."); *Mayer A. Amsel*, 52 S.E.C. 761, 768 (1996) (noting that the securities industry is "rife with opportunities for abuse").

[37] *See Paz*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (stating that "general deterrence" may be "considered as part of the overall remedial inquiry" (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

We find that the nine-month suspension and $77,500 fine achieve the goals of being remedial and deterring future violations, without being excessive or oppressive.[38]

An appropriate order will issue.

By the Commission (Commissioners CASEY, WALTER, AGUILAR and PAREDES); Chairman SCHAPIRO not participating.

Elizabeth M. Murphy
Secretary

[38] We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or are in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 64486 / May 13, 2011

Admin. Proc. File No. 3-14016

In the Matter of

HARRY FRIEDMAN
c/o Law Offices of Isaac M. Zucker, PLLC
600 Old Country Road, Suite 321
Garden City, New York 11530

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING ACTION OF REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the disciplinary action taken by FINRA against Harry Friedman, and FINRA's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary