

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 101733 / November 25, 2024

Admin. Proc. File No. 3-20380

In the Matter of the Application of

WILFREDO FELIX

for Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY
PROCEEDING

Principal of former FINRA member firm appeals from FINRA disciplinary action finding that he refused to comply with FINRA investigative requests, made false entries in the firm's general ledger, and caused the firm to maintain inaccurate books and records and file inaccurate FOCUS reports. *Held*, FINRA's findings of violations and imposition of sanctions are sustained in part and set aside in part.

APPEARANCES:

Wilfredo Felix, *pro se*.

Alan Lawhead, Andrew Love, and Ashley Martin for FINRA.

Appeal filed: June 28, 2021

Last brief received: September 30, 2021

Wilfredo Felix—who was the sole owner and principal of former FINRA member firm Primex Prime Electronic Execution, Inc. (“Primex”)—seeks review of a FINRA disciplinary action.¹ FINRA found that Felix violated FINRA Rules by refusing to comply with FINRA’s investigative requests; making false entries in Primex’s general ledger; and causing Primex to maintain inaccurate books and records and to file inaccurate quarterly Financial and Operational Combined Uniform Single Report (“FOCUS”) reports.² For the first violation of refusing to comply with FINRA’s investigative requests, FINRA barred Felix from association with any member firm. For the remaining violations, FINRA assessed a \$25,000 fine and 30-business-day suspension from serving as a financial and operations principal (“FINOP”), but did not impose those additional sanctions in light of the bar.

For the reasons provided below, we sustain the violation and the bar imposed for refusing to comply with FINRA’s investigative requests, but we set aside FINRA’s other findings of violations and sanctions.³

I. Background

A. Felix’s role and responsibilities at Primex

Felix purchased Primex in 2001. As relevant here, from 2013 through 2015, Felix served as Primex’s CEO, CFO, chief compliance officer, and FINOP. Felix was the only person at Primex who made entries in the general ledger and prepared and submitted quarterly FOCUS reports. Felix also was the only person who controlled Primex’s bank account and who had a debit card associated with that account.

B. Primex’s outside accountant recommended reclassifying certain Primex business expenses as shareholder distributions.

Between 2002 and 2016, Primex employed an outside accountant (the “Accountant”) to complete the firm’s annual audited reports and provide tax services. In 2014, the Accountant informed Felix that he would begin reviewing Primex’s financial statements more rigorously than he had in prior years because broker-dealer audits had become subject to PCAOB standards. Applying these standards, the Accountant determined that some of Primex’s business expenses reported on its general ledger appeared to be personal in nature and thus should have been classified as shareholder distributions, rather than business expenses. The expenses at issue

¹ *Dep’t of Enf’t v. Felix*, Complaint No. 2018058286901, 2021 WL 2288014 (NAC May 26, 2021). We take official notice of Primex’s BrokerCheck report, which shows that the firm’s FINRA registration was canceled on May 27, 2020, after FINRA filed its complaint in this matter. See *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records pursuant to Rule of Practice 323, 17 C.F.R. § 201.323).

² A FOCUS report is a periodic regulatory summary depicting a firm’s assets, liabilities, and ownership equity. Regulators use the information in the report to monitor periodically a company’s financial and operational soundness.

³ We also sustain, and Felix does not challenge, FINRA’s order to pay costs.

included payments for clothing, toys, entertainment (such as charges at Chuck E. Cheese, movie theaters, and a sports complex), pet care, and tuition payments to Felix's children's school.

For the 2014 audited report, the Accountant recommended reclassifying \$174,066 that Primex had listed as business expenses on its general ledger as shareholder distributions (*i.e.*, compensation) to Felix, and updating Primex's financial statements accordingly. For the 2015 audited report, the Accountant recommended reclassifying \$140,492 listed as business expenses on Primex's general ledger as shareholder distributions, and updating Primex's financial statements accordingly. Felix agreed to the reclassifications and updates, but he later testified at FINRA's hearing that he did so only because Primex was under pressure to file its annual audited reports timely so as not to incur penalties. Felix also testified that some of the reclassified personal expenses were in fact business expenses.

C. FINRA investigates Primex's expense entries.

In January 2015, while the Accountant was auditing Primex's 2014 financial statements, FINRA began a cycle examination of Primex for September 2013 to March 2015. During that exam, FINRA requested under FINRA Rule 8210 that Primex provide information about the business purpose for certain of its expenses, as well as copies of Internal Revenue Service ("IRS") Forms 1099 reporting payments Primex made to Felix. Primex responded to FINRA's requests by identifying the business purpose for some, but not all, of the expenses in question. Primex also provided FINRA with a 2013 Form 1099 reporting that the firm had paid Felix \$42,849 in compensation. But during a prior cycle examination, Primex had provided FINRA with a Form 1099 for the same year (2013) indicating that Primex had paid Felix only \$42,200.⁴

In March 2015, the Accountant concluded his audit of Primex's 2014 financial statements. Shortly thereafter, in July 2015, Felix filed an amended FOCUS report for Primex's 2014 fourth quarter that reflected the Accountant's reclassification of expenses. Felix also filed two amended FOCUS reports for Primex's 2015 fourth quarter, reflecting the Accountant's reclassifications.

On April 8, 2016, FINRA sent Felix a letter stating that it had referred possible records violations and deficiencies in Primex's responses during the examination to its Department of Enforcement. FINRA also sent Felix multiple Rule 8210 requests (in May, July, and October 2016) seeking, among other things, to verify the compensation that Primex had paid Felix in 2013 by requesting Felix's 2013 IRS "account transcript" or proof that he had requested this

⁴ At some point, Felix also provided FINRA with a third version of his Form 1099 for 2013, which he had previously submitted to a car dealership, listing his compensation as \$271,883.08.

record from the IRS.⁵ The July and October 2016 letters also cautioned Felix that he could be subject to disciplinary action and sanctions for not complying with the requests.⁶

Felix responded in part to FINRA's Rule 8210 requests and participated in an on-the-record interview in May 2016. But Felix refused to provide his account transcript, asserting through his lawyer that it was unclear how FINRA's requests related to its investigation; that the transcript did not fall within the scope of Rule 8210 because Felix did not have possession, custody, or control over the transcript; and that FINRA lacked authority to compel Felix to request his account transcript because it was an IRS record.

In 2018, Felix participated in another on-the-record interview and FINRA sent him two more Rule 8210 requests (in August and September), this time asking for Felix's IRS "wage and income transcript" for 2013 or proof that he had requested this record from the IRS.⁷ Each letter warned Felix that, if he failed to satisfy the request, he could be subject to sanctions, including a permanent bar or expulsion from the securities industry. FINRA's September request further advised Felix that IRS transcripts fell within Rule 8210's scope because Felix had the right to demand them from the IRS. Felix responded to both Rule 8210 requests by reasserting that tax transcripts did not fall within the Rule's scope and that FINRA could not compel Felix to request the record. Felix never provided FINRA with his wage and income transcript.

C. Procedural History

On July 1, 2019, FINRA filed a complaint against Felix alleging that he violated FINRA Rules 8210 and 2010 by failing to provide his 2013 IRS wage and income transcript in response to the two 2018 FINRA requests. The complaint also alleged that Felix violated FINRA Rule 2010 by making false expense entries in Primex's books and records from 2013 to 2015 and that he violated FINRA Rules 4511 and 2010 by causing Primex to maintain inaccurate books and records and to file inaccurate FOCUS reports from 2013 to 2015.

After holding a hearing, a FINRA extended hearing panel found that Felix engaged in the alleged violations. For failing to comply with FINRA's request, the hearing panel barred Felix from association with any member firm. For the remaining violations, the hearing panel assessed, but did not impose, a \$25,000 fine and 30-business-day suspension from serving as a

⁵ A taxpayer's "account transcript" reflects "basic data such as filing status, taxable income, and payment type." INTERNAL REVENUE SERVICE, Transcript Types and Ways to Order Them, <https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them>; see also Rule of Practice 323, 17 C.F.R. § 201.323 (stating that the Commission may take official notice of any material fact that might be judicially noticed by a federal district court); *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 490 n.12 (5th Cir. 2013) (stating that federal courts may take judicial notice of government websites).

⁶ An attachment to the May 26, 2016, letter contained a similar warning.

⁷ A taxpayer's "wage and income transcript" shows data the IRS receives from information returns including Forms W-2 and 1099. See INTERNAL REVENUE SERVICE, *Transcript Types and Ways to Order Them*, <https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them>.

FINOP.⁸ After Felix appealed, FINRA’s National Adjudicatory Council (“NAC”) affirmed the hearing panel’s findings and sanctions. This appeal to the Commission followed.

II. Analysis

Under Exchange Act Section 19(e)(1), we review a FINRA disciplinary action to determine (i) whether the applicant engaged in the conduct FINRA found; (ii) whether that conduct violated the provisions FINRA found the applicant to have violated; and (iii) whether those provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.⁹ We base our findings on an independent review of the record and apply a preponderance of the evidence standard.¹⁰

A. We sustain FINRA’s findings that Felix violated FINRA Rules 8210 and 2010 by failing to comply with FINRA’s requests for his 2013 IRS wage and income transcript.

1. Felix engaged in the conduct FINRA found, and that conduct violated FINRA Rules 8210 and 2010.

The record shows, and Felix admits, that he did not comply with two Rule 8210 requests that asked him to provide FINRA with his 2013 IRS wage and income transcript or proof that he had requested that record from the IRS. Indeed, Felix’s attorney responded to FINRA’s requests by confirming that Felix refused to comply with them. Felix disputes only that his refusal to comply violated FINRA Rules 8210 and 2010. We agree with FINRA that it did.

FINRA Rule 8210 is the principal means by which FINRA obtains information from its member firms and their associated persons for the purpose of an investigation, complaint, examination, or proceeding.¹¹ And, as we have held, that rule is “unequivocal” in its requirement that no member or person shall fail to provide information or testimony in response to a FINRA request under Rule 8210.¹² By refusing to comply with FINRA’s 2018 requests for the wage and income transcripts, Felix plainly failed to comply with Rule 8210’s requirements. Although Felix raises a variety of arguments why his refusal to comply did not violate Rule

⁸ One hearing panelist dissented from the finding of a Rule 8210 violation, opining that IRS wage and income transcripts fall outside the Rule’s intended scope.

⁹ 15 U.S.C. § 78s(e)(1).

¹⁰ *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, 9 (May 27, 2011), *aff’d*, 693 F.3d 251 (1st Cir. 2012).

¹¹ *See, e.g., Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *6 & n.29 (Nov. 8, 2007) (describing the purpose of Rule 8210).

¹² *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *4 (Nov. 14, 2008) (explaining that “[n]o member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to the Rule [8210]”), *aff’d*, 347 F. App’x 692 (2d Cir. 2009).

8210, we find that none has merit. And, by violating Rule 8210, Felix also violated FINRA Rule 2010.¹³

a. FINRA’s request for the transcript was “with respect to” its investigation.

Felix argues that he did not violate Rule 8210 because the IRS wage and income transcript that FINRA sought was not “with respect to any matter involved in [its] investigation,” as Rule 8210 requires.¹⁴ This is because, Felix claims, the transcript would not have shown whether expenses in question on Primex’s general ledger were business or personal.¹⁵ But that is not why FINRA sought the transcripts. Primex had provided FINRA with two Forms 1099, which listed different amounts for what the firm had paid Felix in 2013. And FINRA was attempting to confirm which of those amounts was correct and, as a result, whether Primex’s books, records, and FOCUS reports accurately listed the compensation the firm had paid to Felix.¹⁶

Felix also claims that the Forms 1099 were not “with respect to” the investigation because Primex had already provided FINRA with its own tax forms. But again, the 2013 Forms 1099 that Primex provided were contradictory, and Felix’s wage and income transcripts would have shown the amount that Primex had reported to the IRS.

b. The transcript was in Felix’s “control.”

Felix does not dispute that as a taxpayer, he has a right to request a copy of his wage and income transcript from the IRS.¹⁷ Instead, Felix contends that Rule 8210 did not empower FINRA to compel him to sign the necessary IRS form to request the transcript. We disagree. Rule 8210 applies to records in an associated person’s “possession, custody or control.”¹⁸ And the supplementary material to Rule 8210 explains that this requires an associated person to make

¹³ See *Wilson-Davis & Co.*, Exchange Act Release No. 99248, 2023 WL 9022658, at *3 (Dec. 28, 2023) (observing that the violation of another Commission or FINRA rule constitutes a violation of FINRA Rule 2010).

¹⁴ FINRA Rule 8210(a)(2).

¹⁵ Felix also argues that the transcript was not “with respect to” the investigation because the transcript would not have shown who prepared the conflicting Forms 1099. But this argument appears to pertain only to FINRA’s allegation that Felix gave false or misleading testimony during an on-the-record interview regarding who prepared the forms. Because FINRA dismissed that cause of action, it is not at issue here.

¹⁶ Felix also disputes that his transcript would have shown the compensation that Primex reported on its Form 1099, but this is wrong. Felix’s transcripts would have provided this information. See *supra* note 7 and accompanying text.

¹⁷ INTERNAL REVENUE SERVICE, Transcript Types and Ways to Order Them, <https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them>.

¹⁸ FINRA Rule 8210.

available to FINRA records that are in another person's or entity's possession, where the associated person "controls or has a right to demand them."¹⁹ As we have previously explained, FINRA intended to link this concept of "possession, custody or control" to Federal Rule of Civil Procedure 34.²⁰ And federal courts have interpreted that rule as requiring litigants to sign the necessary IRS form to produce their tax transcripts.²¹ We thus agree with FINRA that Felix had "control" of the transcript for purposes of Rule 8210 because he had the right to obtain it from the IRS.²²

c. The transcript was a record "of" Felix.

Felix finally contends that the transcript does not meet Rule 8210's requirement that the requested record be "of [the FINRA] member or person." This is because, Felix claims, the transcript is only indirectly created by the taxpayer, making it unlike other types of records that a person knowingly causes to be generated by another entity (such as bank statements, telephone records, or accounting papers). We fail to see a meaningful distinction. Felix effectively generated the transcript by working for, and receiving compensation from, Primex. And, as noted, Felix could have obtained the transcript from the IRS. We thus conclude that the tax transcript was "of" Felix for purposes of Rule 8210.

¹⁹ FINRA Rule 8210, Supplementary Material .01; *see also* Gregory Evan Goldstein, Exchange Act Release No. 71970, 2014 WL 1494527, at *4 (Apr. 17, 2014) (finding that FINRA's request for associated person to provide documents from a company in which the person had a controlling interest fell within Rule 8210).

²⁰ *See Trevor Michael Saliba*, Exchange Act Release No. 91527, 2021 WL 1336324, at *16 (April 9, 2021) (citing FINRA Regulatory Notice 13-06 at 2 ("FINRA added the phrase 'possession, custody or control' to link this concept to the existing body of case law that has defined possession, custody or control as used in Rule 34 of the Federal Rules of Civil Procedure.")); *see also Order Granting Accelerated Approval of a Proposed Rule Change*, Exchange Act Release No. 68386 (Dec. 7, 2012), 77 Fed. Reg. 74,253, 74,254 (Dec. 13, 2012) ("This [possession, custody, or control] language parallels the Federal Rules of Civil Procedure regarding document requests and subpoenas for documents.").

²¹ *See, e.g., Eng. v. Tex. Farm Bureau Bus. Corp.*, 462 F. Supp. 3d 667, 673 & n.1 (W.D. Tex. 2020) (ordering party to sign IRS Form 4506-T to obtain tax transcript); *Equal Emp. Opportunity Comm'n v. Brown-Thompson Gen. P'ship*, No. CIV-16-1142-R, 2018 WL 9837991, at *2 (W.D. Okla. Nov. 8, 2018) (same).

²² *See, e.g.,* INTERNAL REVENUE SERVICE, *Transcript Types and Ways to Order Them*, <https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them> (stating that a taxpayer may obtain a wage and income transcript by submitting Form 4506-T); INTERNAL REVENUE SERVICE, *Get Transcript FAQs*, <https://www.irs.gov/individuals/get-transcript-faqs> ("Q1. Can I give my information to a company or a practitioner with a Power of Attorney to request a transcript on my behalf? (updated October 29, 2021). The Get Transcript service is for individual taxpayers to retrieve *their own transcripts* for their own purposes. Use by any other entities is prohibited." (emphasis added)).

2. FINRA’s rules are, and were applied in a manner, consistent with the Exchange Act.

Rule 8210 is consistent with the purposes of the Exchange Act because it “is essential to FINRA’s ability to investigate possible misconduct by its members and associated persons.”²³ Rule 2010 is consistent with the purposes of the Exchange Act because it reflects the mandate of Exchange Act Section 15(A)(b)(6) that FINRA adopt rules to promote just and equitable principles of trade.²⁴ FINRA applied Rules 8210 and 2010 consistently with the Exchange Act’s purposes because Felix’s failure to produce his transcript hampered FINRA’s investigation into possible misconduct by Felix and Primex.

Felix suggests that FINRA did not act in accordance with the Exchange Act because, he argues, FINRA’s investigation was racially biased against him. But he forfeited this claim by not raising it before FINRA.²⁵ In any event, based on our review, we find that the proceeding against Felix was fair and consistent with the Exchange Act’s purpose that FINRA provide a fair procedure for disciplining its associated persons.²⁶

3. We sustain the bar imposed for violating FINRA Rules 8210 and 2010.

Under Exchange Act Section 19(e)(2), we sustain FINRA’s sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.²⁷ We consider any aggravating or mitigating factors,²⁸ and whether the sanctions imposed are remedial or impermissibly punitive.²⁹ In imposing sanctions, FINRA relied on its Sanction Guidelines.³⁰ Although not binding on us, we use the Guidelines as a benchmark.³¹

²³ *Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 WL 5693099, at *5 (Sept. 29, 2015).

²⁴ *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at *17 (Sept. 28, 2017); 15 U.S.C. § 78o-3(b)(6).

²⁵ *See, e.g., Newport Coast Sec., Inc.*, Exchange Act Release No. 88458, 2020 WL 1659292, at *16-17 (Apr. 3, 2020) (rejecting argument because applicant failed to raise it before FINRA).

²⁶ *Mark H. Love*, Exchange Act Release No. 49248, 2004 WL 283437, at *4 (Feb. 13, 2004).

²⁷ 15 U.S.C. § 78s(e)(2). The record does not show, nor does Felix claim, that FINRA’s sanctions impose an unnecessary or inappropriate burden on competition.

²⁸ *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013).

²⁹ *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065-66 (D.C. Cir. 2007).

³⁰ FINRA Sanction Guidelines (2019).

³¹ *See, e.g., John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 & n.68 (June 14, 2013) (citing cases).

In barring Felix, FINRA reasonably applied the guideline for providing a partial but incomplete response to Rule 8210 requests because Felix partially cooperated with the investigation by complying with two on-the-record interview requests and by submitting documents on behalf of Primex in response to some of FINRA's Rule 8210 requests, even though he did not comply with FINRA's multiple requests to produce his 2013 IRS wage and income transcript.³²

The guideline for a "partial but incomplete response" to a Rule 8210 request provides that a bar is "standard" in such circumstances, "unless the person can demonstrate that the information provided substantially complied with all aspects of the request."³³ Where mitigation exists, or the person did not respond in a timely manner to a request, the guideline recommends considering suspending the individual in any or all capacities for up to two years. The guideline also identifies three principal considerations relevant to assessing what sanction is appropriate: (i) the importance 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; (ii) the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and (iii) the reasons offered for the deficiencies in the response.

Here, these considerations support FINRA's determination to impose a bar. Felix has not demonstrated that the information he provided substantially complied with all aspects of FINRA's requests. Nor could he, as Felix refused to comply with FINRA's multiple requests for his 2013 IRS wage and income transcript. The transcript was important to FINRA's investigation because it would have provided information about whether Primex's books, records, and FOCUS reports accurately reflected Felix's compensation.³⁴ And although Felix attempted to explain his refusal to cooperate, as discussed, none of his explanations had merit.

Felix argues generally that a bar is excessive, but he does not identify, and the record does not reflect, any mitigating factors. Refusals to cooperate with FINRA investigations are serious. Without subpoena power, FINRA must rely on Rule 8210 requests to obtain information for its investigations and fulfill its mandate to police its members and associated persons.³⁵ Failures, like Felix's, to comply with Rule 8210 undermine FINRA's ability to do

³² *Felix*, 2021 WL 2288014, at *16; *see also Kent A. Houston*, Exchange Act Release No. 66014, 2011 WL 6392264, at *8 (Dec. 20, 2011) (remanding bar based on a complete failure to respond where applicant had, in fact, responded to some of FINRA's Rule 8210 requests).

³³ FINRA Sanction Guidelines at 33.

³⁴ *See James Allen Schneider*, Exchange Act Release No. 37463, 1996 WL 408056, at *4 (July 22, 1996) (stating that that self-regulatory organizations "must be able to rely on the accuracy and truthfulness of documents filed with them").

³⁵ *See, e.g., CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *6 (Jan. 30, 2009) (explaining that FINRA must rely on Rule 8210 to obtain information "to carry out its investigations and fulfill its regulatory mandate" and its "obligation to police the activities of its members and associated persons").

this.³⁶ Further, a bar will serve the remedial purposes of protecting the industry from an individual who refuses to cooperate with FINRA’s investigative requests and deterring others from similar misconduct. We accordingly sustain FINRA’s imposition of a bar.

B. We set aside FINRA’s other findings of violations and sanctions.

The NAC found that Felix violated FINRA Rule 2010 by categorizing his personal expenses as Primex business expenses and violated FINRA Rules 4511 and 2010 by causing Primex to maintain inaccurate books and records and file inaccurate FOCUS reports. In reaching those conclusions, the NAC improperly deferred to the hearing panel’s findings that Felix did not credibly identify a business purpose for many of the expenses at issue. Thus, we set aside the related findings of violations and sanctions.

The NAC may not defer to a hearing panel’s credibility determinations that are based on “objective inconsistency or fundamental implausibility”—*e.g.*, testimony found not credible given objective evidence in the record (such as documents) or given internally inconsistent or implausible statements within the testimony.³⁷ In such circumstances, a factfinder “has no special advantage . . . in determining credibility.”³⁸ Yet that is exactly the type of credibility finding the hearing panel made here, to which the NAC deferred.

The hearing panel, for example, found Felix’s testimony not credible because he “often was unable to recall whether an expense was personal or business,” at times “changed his testimony from one day to the next about the purpose of an expense,” and offered explanations that appeared inconsistent with “the nature and amount of the expense and vendor involved.”³⁹ The hearing panel further cited fundamental implausibility when finding Felix’s testimony about several specific expenses not credible.⁴⁰ For example, the hearing panel found it implausible that

³⁶ See, *e.g.*, *Plunkett*, 2013 WL 2898033, at *3 (“Failures to comply are serious violations because they subvert [FINRA’s] ability to carry out its regulatory responsibilities, threatening investors and the markets.” (internal quotations omitted)).

³⁷ *John Thomas Capital Mgmt. Group LLC*, Exchange Act Release No. 89775, 2020 WL 5291417, at *8 n.42 (Sept. 4, 2020) (reviewing *de novo* ALJ’s credibility determinations based on objective inconsistency or fundamental implausibility and quoting *Dray v. RR. Ret. Bd.*, 10 F.3d 1306, 1314 (7th Cir. 1993)), *vacated on other grounds*, 34 F.4th 446 (5th Cir. 2022).

³⁸ *Id.*; *cf. Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (explaining that a trial judge cannot “insulate his findings from review by denominating them credibility determinations” where “factors other than demeanor and inflection go into the decision whether or not to believe a witness,” such as “[d]ocuments or objective evidence” that “contradict the witness’ story,” or a story that is “so internally inconsistent or implausible . . . that a reasonable factfinder would not credit it”); *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *11 n.81 (Nov. 15, 2013) (“The NAC’s decision to credit Tang’s testimony is not entitled to any deference, because, unlike a credibility finding by an initial fact finder, the NAC did not base its decision on a first-hand observation of Tang’s demeanor.”).

³⁹ *Felix*, 2020 WL 6955484, at *14-15.

⁴⁰ *Id.*

Felix purchased toys and indoor batting cage expenses as gifts for brokers (and their children), given that Felix himself had young children at the time, and the batting cage visits occurred around his son's birthday and coincided with the purchase of a birthday cake from the same facility.⁴¹ The hearing panel also rejected as unsubstantiated Felix's testimony that certain expenses had business purposes—including, for example, loan payments for a Mercedes, where the "car was not identified in the Firm's annual audit as a Primex asset."⁴²

In short, these credibility determinations appear to be based on fundamental implausibility or objective inconsistency with other record evidence, and thus none is entitled to the deference given to it by the NAC. Because FINRA relied on that deference when finding that Felix had committed violations related to misclassifying Primex business expenses and causing Primex's books and records to be inaccurate, rather than making independent findings under its *de novo* standard of review, we set aside those findings.⁴³ FINRA did not, however, impose sanctions for those violations in light of the bar it imposed for Felix's refusal to comply with its investigative requests (which we sustain above). Therefore, we exercise our discretion not to remand for further proceedings in light of our decision setting aside certain of FINRA's findings.⁴⁴

An appropriate order will issue.⁴⁵

By the Commission (Chair GENSLER and Commissioners CRENSHAW, UYEDA and LIZÁRRAGA; Commissioner PEIRCE concurring).

Vanessa A. Countryman
Secretary

⁴¹ *Id.*

⁴² *Id.* at *12, 14-15; *see also Kopack v. NLRB*, 668 F.2d 946, 955 (7th Cir. 1982) (finding that an ALJ credibility determination was "not demeanor based" but rather based on a "lack of corroboration").

⁴³ *See Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 WL 3652429, at *6 (Nov. 4, 2009) ("We have repeatedly held that the NAC reviews the Hearing Panel's decision *de novo* . . ."), *pet. denied*, 416 F. App'x 95 (2d Cir. 2011).

⁴⁴ *See* 15 U.S.C. § 78s(e)(1)(B).

⁴⁵ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

Commissioner PEIRCE, concurring:

In response to FINRA’s requests for information, sent under FINRA Rule 8210, Felix produced three different IRS Forms 1099 for the year 2013, each reporting different amounts of compensation received by Felix from Primex.¹ Seeking to resolve this discrepancy, FINRA in 2018, again under Rule 8210, requested that Felix provide his IRS “wage and income transcript” for 2013.² A taxpayer’s wage and income transcript “shows data from information returns [the IRS] receives such as Forms W-2, 1098, 1099, and 5498. The transcript is limited to approximately 85 income documents.”³

Because the transcript would include information from the Form 1099 Felix submitted to the IRS, presumably it could resolve the conflict among the three versions of the 2013 Form 1099 Felix already had provided to FINRA. However, Felix’s 2013 IRS wage and income transcript may have included additional information unrelated to the Form 1099. Rule 8210 authorizes FINRA to “require a member, [or] person associated with a member, . . . to provide information orally, in writing, or electronically . . . *with respect to any matter involved in the investigation, complaint, examination, or proceeding.*” (emphasis added). Under the plain language, FINRA’s authority to obtain information under Rule 8210 is not unbounded; rather, it is limited to information that bears some reasonable connection to the matter under investigation or examination. For this reason, I agree that FINRA’s use of Rule 8210 to request the 2013 Form 1099 contained in Felix’s wage and hour transcript was proper. The Commission’s opinion does not conclude, however, that FINRA was entitled to obtain the full, unredacted wage and hour transcript. FINRA was not entitled to records included in the wage and hour transcript that were unrelated to FINRA’s investigation.

With that understanding, I concur in the Commission’s opinion and order.

¹ *Supra* at p.3 and n.4 (noting that Felix submitted three different forms that listed his Primex-related compensation as \$42,849, \$42,200, and \$271,883,08).

² FINRA at one point also requested Felix’s IRS “account transcript.” His refusal to provide that document is not at issue in this proceeding.

³ See <https://www.irs.gov/individuals/transcript-types-for-individuals-and-ways-to-order-them> (last visited Nov. 8, 2024).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
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Admin. Proc. File No. 3-20380

In the Matter of the Application of

WILFREDO FELIX

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART AND SETTING ASIDE IN PART DISCIPLINARY
ACTION TAKEN BY FINRA

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

ORDERED that FINRA's findings that Wilfredo Felix violated FINRA Rules 8210 and 2010 by refusing to cooperate with investigative requests, and the sanctions it imposed for those violations, are sustained; and it is further

ORDERED that FINRA's findings that Wilfredo Felix violated FINRA Rules 2010 and 4511 by making false entries in the member firm's general ledger, and causing the member firm to maintain inaccurate books and records and file inaccurate FOCUS reports, and the sanctions for those violations, are set aside.

By the Commission.

Vanessa A. Countryman
Secretary