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OFFICE OF GENERAL COUNSEL
Regulatory/Appellate

In the Matter of the Application of

ANTHONY A. GREY

For Review of Disciplinary Action Taken By

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Violations of Securities Laws and Conduct Rules

Unfair and Fraudulent Markups

Interpositioning

Registered securities association found that registered representative, while associated with a member firm, interpositioned personal accounts between member firm and its customers, resulting in excessive and, in some instances, fraudulent markups to the customers. *Held*, registered securities association's findings of violations and sanctions are *sustained*.

APPEARANCES:

Peter J. Aldrich, Palm Beach Gardens, FL, for Anthony A. Grey

Alan Lawhead and *Lisa Jones Toms*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: October 31, 2014
Last brief received: February 23, 2015

I. Introduction

Anthony A. Grey, a registered General Securities Representative holding Series 3, 4, 5, 8, 24, 53, and 63 licenses,[1] formerly associated with Gardnyr Michael Capital, Inc. ("GMCI" or the "Firm"),[2] a FINRA member, appeals from FINRA disciplinary action based on his sales of municipal bonds to three retail customers between October 2008 and July 2009.

FINRA found that, with respect to each of the ten transactions involved, Grey violated MSRB[3] Rule G-17 by interpositioning and failing to disclose his deceptive and unfair practices and MSRB Rules G-17 and G-30 by charging customers unfair prices and excessive markups (ranging from 5.36% to 19.12%). In seven of those transactions, FINRA found that Grey also violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder[4] by charging fraudulently excessive markups (ranging from 8.62% to 19.12%) that he willfully failed to disclose to customers.

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1 National Commodities Futures (Series 3); Registered Options Principal (Series 4); Interest Rate Option (Series 5); General Securities Sales Supervisor (Series 8); General Securities Principal (Series 24); Municipal Securities Principal (Series 53); Uniform Securities Agent (Series 63).

2 Grey is no longer registered with any FINRA member firm. He nonetheless remains subject to FINRA's jurisdiction for purposes of this proceeding pursuant to Article V, Section 4 of FINRA's By-Laws, because: (1) he was registered and associated with GMCI when the Complaint was filed; and (2) the Complaint charges him with misconduct committed while he was registered and associated with GMCI.

3 Rules of the Municipal Securities Rulemaking Board ("MSRB") apply because this case involves municipal securities subject to MSRB regulation. The MSRB is the self-regulatory organization charged with primary rulemaking authority for the municipal securities activities of broker-dealers, municipal securities dealers and municipal advisors. The MSRB does not have enforcement authority. FINRA administers and enforces its members' compliance with the MSRB Rules. FINRA's By-Laws provide that its members and persons registered with members agree to comply with MSRB Rules, and FINRA is authorized to impose sanctions for violations of MSRB Rules. Article IV, § 1(a)(1) (agreement by firms); Article V, § 2(a)(1) (agreement by registered persons); Article XIII, § 1(b) (authorization to impose sanctions for violation of MSRB Rules). The MSRB Rules are found at www.msrb.org.

4 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

For these violations, FINRA suspended Grey from associating with any FINRA member firm in any capacity for eighteen months, fined him $30,000, and ordered him to disgorge $15,750 (plus prejudgment interest) to FINRA.[5]

On appeal, Grey argues that he sold the bonds to customers at "wholesale" prices that were fair and reasonable and that he purchased the bonds at such distressed prices in unusual market conditions that his acquisition costs could not have represented the true prevailing market price. Grey asserts that the prevailing market price of the bonds should be based on the yield curve of bonds of like quality, rather than contemporaneous cost.

We base our findings on an independent review of the record. For the reasons set forth below, we sustain FINRA's findings and the sanctions imposed.

II. Factual Background

Grey entered the securities industry in the early 1980s and, in May 1994, became associated with the Winter Park, Florida office of GMCI. Grey was registered with GMCI until October 2012.[6] During his tenure at GMCI, Grey spearheaded the Firm's municipal bond practice, engaging in thousands of bond transactions a year and generating approximately half of his income from his personal bond trading.[7] Between October 2008 and July 2009, he conducted 99% of GMCI's municipal bond business.

In 2009, FINRA's Department of Member Regulation conducted a routine cycle examination that reviewed GMCI's municipal business from August 2008 through September 2009. During the exam, a FINRA examiner discovered a pattern of trades Grey had routed to retail customers through two personal accounts—a personal prime brokerage account with Triad Securities Corporation and an IRA account with GMCI. The examination revealed that in ten

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[5] Because FINRA found that Grey's misconduct was willful, he is also statutorily disqualified. *See* 15 U.S.C. § 78c(a)(39)(F) (an applicant who "has willfully violated any provision of the Exchange Act" is subject to statutory disqualification). FINRA also assessed hearing costs.

[6] Grey voluntarily ended his employment with GMCI on October 25, 2012 and, since then, has not been associated with a FINRA member firm.

[7] When asked what percentage of his income he attributed to his personal bond trading in 2008 and 2009, Grey testified, "somewhere in the vicinity of 50/50, 40/60, depending upon, you know, the month."

transactions involving six municipal bonds,[8] Grey followed the same three or four-step pattern of intermediate activity before selling the bonds to three retail customers.

The pattern began with Grey purchasing the bonds from the street either for his personal account, or through GMCI at a designated price, generally as odd-lot purchases in bid-wanted auctions. If he had originally purchased the bonds through GMCI, he then sold the bonds to his own personal account at a higher price within one business day of his initial wholesale purchase.[9] Next, Grey sold the bonds from his personal account (back) to GMCI at a higher price. Finally, on the same day, he sold the bonds from GMCI to his retail customers[10] at an even higher price. Grey alone determined the price for each transaction, and, in each transaction, the customers purchased the bonds at prices 5.36% to 22.92% higher than what Grey had paid for them no more than five trading days earlier.[11]

For each of the six bonds at issue, Grey levied the bulk of the cumulative increase in price in the sale of bonds from his personal account back to GMCI, and that sale immediately preceded his sale of the bonds to the relevant retail customer.[12] In doing so, Grey created the

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[8] The transactions at issue involved six different municipal bonds: (1) OCALA FL UTILITY SYSTEM (674564CZ0) (hereinafter, "Ocala"); (2) OSCEOLA CNTY FL IDA IDR (19464HBV2) (hereinafter, "Osceola"); (3) COLLIER CNTY FL HSG FIN (19464HBV2) (hereinafter, "Collier"); (4) FLORIDA ST MUN LN (342815KE6) (hereinafter, "Florida State"); (5) HIGHLANDS CNTY FL HEALTH (431022PT3) (hereinafter, "Highlands (Health)"); and, (6) HIGHLANDS CNTY FL SCH (43102DDK1) (hereinafter, "Highlands (School)"). FINRA examiner Barbara Walley, who discovered the pattern, testified to producing a schedule of customer transactions involving 36 municipal bonds that were executed through Grey's personal accounts during the review period. FINRA's Division of Enforcement determined to charge Grey in connection with the six municipal bonds listed on the schedule.

[9] Grey purchased Osceola from the "street" through GMCI on Wednesday, October 22, 2008, at $71.250 and sold the bonds to his personal account that same day at $72.250. He purchased Collier on the "street" through GMCI on Thursday, November 6, 2008, at $76.880 and sold the bonds to his personal account that same day at $77.880. He purchased Florida State from the "street" through GMCI on Tuesday, December 16, 2008, at $59.000 and sold the bonds to his personal account that same day at $60.000. Finally, he purchased Highlands (School) from the "street" on Thursday, July 23, 2009, at $85.569 and sold the bonds to his personal account the following day (Friday, July 24, 2009) at $91.250.

[10] Grey actively recruited the customers for the relevant bond investments and in some cases had discretionary authority to buy bonds from, and sell bonds to, the customers' accounts without speaking with them first.

[11] Grey sold the bonds to customers one to five business days after he purchased them in inter-dealer trades on the open market.

[12] For instance, the markup in price in the sale of bonds from his personal account back to GMCI constituted : (1) 12.35% of the 18.13% cumulative increase on Osceola; (2) 2.99% of the 5.36% cumulative increase on Ocala; (3) 15.79% of the 19.89% cumulative increase on Collier;

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illusion that he (through GMCI) was selling the bonds to customers with markups at or around three percent, consistent with GMCI's written supervisory procedures ("WSPs").[13]

Grey conceded that he never disclosed to customers that his personal accounts were interpositioned between the interdealer market and their retail purchases, and that, as a result, he was charging much higher prices than he had paid in interdealer transactions a few days earlier. No significant movements in the prices of any of the bonds at issue or the market at large occurred between Grey's acquisition of the bonds and the sale to retail customer, nor did any interdealer trades occur on any of the bonds during the interim period.

III. Procedural Background

On December 2, 2011, FINRA's Division of Enforcement ("Enforcement") filed a complaint alleging that Grey engaged in interpositioning and charged unfair and unreasonable markups without disclosing that he had done so in violation of MSRB Rule G-17 (fair dealing) and MSRB Rule G-30 (fair pricing).[14] Enforcement further alleged that Grey's actions violated the antifraud provisions of Exchange Act Section 10(b) and Rule 10b-5.

FINRA held a hearing on February 5 and 6, 2013, before a three-person Hearing Panel. Both Enforcement and Grey presented numerous witnesses and exhibits, and Grey was called to testify. On June 20, 2013, the Hearing Panel found that Grey committed the alleged violations and imposed sanctions including a two-year suspension, fines, disgorgement, and costs. Grey timely appealed the Hearing Panel decision to the National Adjudicatory Council ("NAC").

On October 3, 2014, the NAC issued a decision affirming the findings of violations and imposing modified sanctions. The NAC reduced the term of Grey's suspension from two years to 18 months, reduced the disgorgement amount from $16,000 to $15,750 (plus prejudgment interest), and affirmed the Hearing Panel's order for Grey to pay a fine of $30,000 and hearing costs of $5,267.32.

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(4) 17.54% of the 22.94% cumulative increase on Florida State; (5) 6.99% of the 9.88% cumulative increase on Highlands (Health); and (6) 4.93% of the 6.64% cumulative increase on Highlands (School).

13 *See* text accompanying note 48, *infra*.

14 In addition to Grey, Enforcement alleged violations against GMCI and two other general securities representatives who eventually settled the proceedings. *See Gardnyr Michael Capital, Inc.*, No. 2009016034101 (OAO Dec. 19, 2012), *available at* http://disciplinaryactions.finra.org.

IV. Analysis

A. Standard of Review

We base our findings on an independent review of the record and apply the preponderance of the evidence standard for self-regulatory organization ("SRO") disciplinary actions.[15] Pursuant to Exchange Act Section 19(e)(1),[16] in reviewing an SRO disciplinary action, we determine whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violates the relevant provisions, and whether the relevant provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.[17] We may sustain the judgment upon our independent review of the record, notwithstanding any deficiencies in the SRO's analysis.[18]

B. Grey's undisclosed interpositioning of his personal accounts to inflate the sales prices of the bonds violated MSRB Rule G-17's fair dealing requirements.

We sustain FINRA's findings that Grey willfully engaged in interpositioning in violation of MSRB Rule G-17, which provides that municipal securities dealers "shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice." Grey violated that Rule in each of the ten municipal bond transactions at issue when he interposed accounts controlled and maintained by him between his retail customer and the intermarket seller of the bonds without disclosing his personal involvement to the customers. In each step of the transactions, Grey incrementally increased the prices as the bonds were moved to and from his personal accounts, and ultimately sold them to his retail customers at prices 5.36% to 22.92% above his initial purchase prices. These trades are outlined in *Table I* below.

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15 *See David M. Levine*, Exchange Act Release No. 48760, 81 SEC 1782, 2003 WL 22570694, at *9 n.42 (Nov. 7, 2003).

16 15 U.S.C. § 78s(e)(1).

17 *See, e.g.*, *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 WL 6985131, at *5 (Dec. 11, 2014).

18 *See Heath v. SEC*, 586 F.3d 122, 142 (2d Cir. 2009) ("[B]ecause the SEC conducted a thorough, de novo review of the record, any procedural errors that may have been committed by the Chief Hearing Officer are cured."); *McCarthy v. SEC*, 406 F.3d 179, 187 (2d Cir. 2005) ("The Commission independently evaluated the extensive factual record developed by the Hearing Panel and the Board and provided a lengthy analysis of [the] case, ultimately reaching a reasoned decision upholding the Board's decision. There is thus no need for us to review the lack of reasons for the Board's decision, because the due process afforded [respondent] before the Commission cured any alleged defect.").

Table I

Bond	Seller	Buyer	Date	Par	Price	Total Cost	Step Increase	Cumulative Increase
Osceola	Street	GMCI	W 10/22/08	20000	$71.250	$14250.00	N/A	N/A
	GMCI	Grey	W 10/22/08	20000	$72.250	$14450.00	1.40%	1.40%
	Grey	GMCI	M 10/27/08	20000	$81.170	$16234.00	[illegible]	13.92%
	GMCI	Customer	M 10/27/08	20000	$84.170	$16834.00	[illegible]	[illegible]
Ocala	Street	Grey	W 10/29/08	50000	$84.250	$42125.00	N/A	N/A
	Grey	GMCI	Th 10/30/08	50000	$86.770	$43385.00	[illegible]	2.99%
	GMCI	Customer	Th 10/30/08	10000	$88.770	$8877.00	[illegible]	[illegible]
	GMCI	Customer	Th 10/30/08	40000		$35508.00		
Collier	Street	GMCI	Th 11/06/08	35000	$76.880	$26908.00	N/A	N/A
	GMCI	Grey	Th 11/06/08	35000	$77.880	$27258.00	1.30%	1.30%
	Grey	GMCI	Tu 11/11/08	35000	$90.174	$31560.90	[illegible]	17.29%
	GMCI	Customer	Tu 11/11/08	10000	$92.174	$9217.40	[illegible]	[illegible]
	GMCI	Customer	Tu 11/11/08	25000		$23043.50		
Florida State	Street	GMCI	Tu 12/16/08	5000	$59.000	$2950.00	N/A	N/A
	GMCI	Grey	Tu 12/16/08	5000	$60.000	$3000.00	1.69%	1.69%
	Grey	GMCI	M 12/22/08	5000	$70.525	$3526.25	[illegible]	19.53%
	GMCI	Customer	M 12/22/08	5000	$72.525	$3626.25	[illegible]	[illegible]
Highlands (Health)	Street	Grey	Th 12/18/08	80000	$69.194	$55355.20	N/A	N/A
	Grey	GMCI	M 12/22/08	80000	$74.030	$59224.00	[illegible]	6.99%
	GMCI	Customer	M 12/22/08	40000	$76.030	$30412.00	[illegible]	[illegible]
	GMCI	Customer	M 12/22/08	15000		$11404.50	[illegible]	[illegible]
	GMCI	Customer	M 12/22/08	25000		$19007.50		
Highlands (School)	Street	GMCI	Th 07/23/09	15000	$85.569	$12835.35	N/A	N/A
	GMCI	Grey	F 07/24/09	15000	$86.250	$12937.50	.80%	.80%
	Grey	GMCI	M 07/27/09	15000	$90.500	$13575.00	[illegible]	5.76%
	GMCI	Customer	M 07/27/09	15000	$91.250	$13687.50	[illegible]	[illegible]

Grey neither disclosed to the customers that his personal accounts were involved, nor that the customers were paying a much higher price than he had paid one to five trading days earlier. To the contrary, Grey actively concealed the true size of the markups. As illustrated in *Table I* above, Grey invariably charged the bulk of the markups on the step of the transaction immediately preceding the sale of the bonds to a retail customer (*i.e.*, when Grey sold the bonds from his personal account back to GMCI). This practice made it appear as though GMCI had sold the bonds to customers with markups of around three percent—consistent with the stated maximum in the firm's WSPs.[19] Because the customer account statements for these transactions provided only the price that the customers paid for the bonds, the customers remained unaware of the markups.

Grey does not dispute his pattern of trading in these transactions, the prices he charged, or that trading in this manner generated profits for him. He also admits that he did not disclose to the customers that he routed the bonds through his personal accounts or that he incrementally increased the prices of the bonds at intermediate steps of the transactions. Instead, Grey asserts that he routed the bonds through his personal accounts only because GMCI did not have a proprietary trading account. He maintains that his interpositioning was the economic equivalent of a firm trading through a proprietary trading account. Grey argues that it is "unfair" to label his interpositioning a "scheme" when "the undisputed evidence was that the routing was the [F]irm's decision to avoid exposure [and t]here was not one particle of evidence that interpositioning was [his] idea."

We are unpersuaded by this argument. We find that Grey executed an interpositioning scheme through a series of successive, intermediate transactions designed to incrementally increase—and artificially inflate—the price of the bonds and conceal the true size of the markups he charged his retail customers. The Firm's WSPs explicitly prohibited both interpositioning and the sale of municipal securities to customers with markups exceeding three percent. Indeed, even if GMCI had a proprietary account, the trading would not have followed this pattern. If Grey's personal accounts were merely serving the Firm's need for a place to hold the bonds, as Grey states, the markups should have been in line with what the Firm would have charged—*i.e.*, a three-percent maximum markup without any of the intermediate markups—and Grey should not have enjoyed the added advantage over his customers by virtue of his concealed conflict of interest.[20]

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[19] *See* text accompanying note 48, *infra*.

[20] Equally unpersuasive is Grey's suggestion that unlawful interpositioning could not have occurred because his practice "was fully disclosed to the [F]irm and to FINRA through years of audits." Grey does not provide any evidence that he had previously disclosed his interpositioning scheme to either the Firm or FINRA, but even if he had, such disclosure would not have absolved him of his continuing obligations under the Exchange Act or the MSRB rules. We have consistently rejected similar arguments because "associated persons cannot shift their compliance burden to FINRA." *Robert Marcus Lane*, Exchange Act Release No. 74269, 110 SEC 17, 2015 WL 627346, at *13 (Feb. 13, 2015) (rejecting argument that a firm's written

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C. Grey charged the Firm's retail customers excessive markups in violation of MSRB Rules G-17 and G-30.

We sustain FINRA's findings that Grey charged his retail customers excessive markups in violation of MSRB Rules G-17 and G-30, which require municipal securities dealers to charge customers fair and reasonable prices. Rule G-30(a) provides: "No broker, dealer or municipal securities dealer shall purchase municipal securities for its own account from a customer or sell municipal securities for its own account to a customer except at an aggregate price (including any mark-down or mark-up) that is fair and reasonable, taking into consideration all relevant factors . . . ."[21] Similarly, under the duty of fair dealing imposed by Rule G-17, dealers are prohibited from charging retail customers "prices not reasonably related to the prevailing market price at the time of sale."[22]

Determining whether a dealer charged customers markups that exceeded fair and reasonable prices requires a two-step analysis. First, because "[t]he markup on a security is the difference between the price charged to the customer and the prevailing market price,"[23] we must determine the appropriate prevailing market price. When a dealer acquired the bonds in inter-dealer trades closely related in time to the customer transactions, we assume the dealer's contemporaneous cost is the best measure of prevailing market price, and it is the dealer's burden to overcome that presumption.[24]

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policies could not have been deficient because they "had been tested and approved by the NASD District Office in its Annual Examinations"); *cf. Rita H. Malm*, Exchange Act Release No. 35000, 58 SEC 131, 1994 WL 665963, at *8 n.40 (Nov. 23, 1994) (rejecting contention that "because the NASD noted no markup, pricing, or other 'exceptions' during its audit . . . NASD was subsequently precluded from bringing markup or supervisory charges").

21 MSRB Manual (CCH) ¶ 3646, p. 5159 (1989). On May 8, 2014, we approved a rule filing to amend MSRB Rule G-30. *See* Exchange Act Release No. 72129 (May 8, 2014), File No. SR-MSRB-2014-01 (Jan. 29, 2014). The amendments were designed to streamline and codify existing guidance regarding MSRB fair-pricing standards previously set forth in MSRB Rules G-30 and G-18 and in interpretive guidance under those rules and Rule G-17 into a single fair-pricing rule, MSRB Rule G-30. As amended, MSRB Rule G-30 includes language similar to the above quoted text under Supplementary Material .01(d): "As part of the aggregate price to the customer, the mark-up or mark-down also must be a fair and reasonable amount, taking into account all relevant factors."

22 *SFI Inv., Inc.*, 2000 WL 33299598, at *10.

23 *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 189 (2d Cir. 1998) (citations omitted).

24 *See, e.g., Alstead, Dempsey & Co., Inc.*, Exchange Release Act No. 20825, 47 SEC 1034, 1984 WL 50800, at *1 (Apr. 5, 1984).

Second, we must determine whether the markups, as calculated based on prevailing market price, were fair and reasonable. Once the relevant enforcement party presents evidence demonstrating that the markups were excessive, the dealer may introduce evidence to attempt to justify the markups.[25] Under Rule G-30(a), we must "tak[e] into consideration all relevant factors" in assessing whether the dealer has met this standard.

1. Contemporaneous cost is the best measure of prevailing market price for the transactions at issue in this matter.

The main dispute in this appeal is the appropriate measure of prevailing market price. Absent countervailing evidence, the prevailing market price is "the price at which dealers trade with one another, *i.e.*, the current inter-dealer market."[26] We consider "a dealer's contemporaneous cost" to be "the best evidence of the current market" because "prices paid for a security by a dealer in actual transactions closely related in time to its sales are normally a highly reliable indication of the prevailing market."[27] We have looked to a dealer's purchases occurring within five business days of the retail transaction at issue for determining contemporaneous

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[25] *See Donald T. Sheldon*, Exchange Act Release No. 31475, 51 SEC 59, 1992 WL 353048, at *12 (Nov. 18, 1991) (holding that once the Division of Enforcement presented evidence of excessive markups on municipal bonds, the burden shifted to respondent to introduce evidence refuting the excessiveness), *aff'd* 45 F.3d 1515 (11th Cir. 1995).

[26] *Alstead, Dempsey & Co.*, 1984 WL 50800, at *1; *accord Michael H. Novick*, Exchange Act Release No. 34640, 51 SEC 1258, 1994 WL 499291, at *3 (Sept. 2, 1994) ("[T]he prevailing market price (on the basis of which retail markups are computed) means the contemporaneous price at which dealers are trading with one another (*i.e.*, the current inter-dealer market).").

[27] *First Honolulu Sec., Inc.*, Exchange Act Release No. 32933, 51 SEC 695, 1993 WL 380039, at *2 (Sept. 21, 1993). *See also Grandon*, 147 F.3d at 189 ("When a dealer is not a marketmaker, and absent countervailing evidence, the SEC has announced that: 'a dealer's contemporaneous cost is the best evidence of the current market. That standard, which has received judicial approval, reflects the fact that prices paid for a security by a dealer in actual transactions closely related in time to his retail sales are normally a highly reliable indication of prevailing market price.'" (citing *Alstead, Dempsey & Co.*, 1984 WL 50800, at *1; *Nicholas A. Codispoti*, Exchange Act Release No. 24946, 48 SEC 842, 1987 WL 755546, at *3 (Sept. 29, 1987) ("[W]e have consistently held that, absent countervailing evidence, a dealer's contemporaneous cost is the best evidence of [the current, inter-dealer] market, a standard that has received judicial approval."))). "Contemporaneous cost" is generally defined as "the retail market price that the dealer paid for the securities in actual transactions close in time to its retail sales." *Grandon*, 147 F.3d. at 187.

costs.[28] When a dealer asserts a different prevailing market price for a bond sold to a customer, the dealer must provide sufficient evidence to overcome the presumption that contemporaneous cost is the best measure of prevailing market price.[29]

Grey argues that because he purchased the bonds at such distressed prices in unusual market conditions, it is inconceivable that his acquisition costs could have represented the true prevailing market value. Under the circumstances, he contends that the prevailing market price of the bonds should be based on the yield curve of other bonds of like quality and not contemporaneous cost. Nevertheless, we agree with the NAC that Grey failed to provide sufficient evidence that the prevailing market price differed from his contemporaneous cost, and thus, he failed to overcome the presumption that contemporaneous cost should determine the prevailing market price.

a. The circumstances of this case do not warrant a deviation from contemporaneous cost as the best measure of prevailing market price.

Grey acknowledges that "[o]rdinarily, the prevailing market price to the customer is deemed to equal the price paid by the seller (Grey) when the seller acquired the bond." He claims that a "more reliable metric" is necessary in this case, however, because "the purchase of the disputed bonds during the financial crisis in bid-wanted auctions, in odd-lots, presented a challenge for determining market value which cost-basis valuation does not answer." We disagree. As discussed below, the circumstances here unambiguously favor contemporaneous cost as the best measure of prevailing market price.

First, Grey argues that "he was able to buy the bonds below their market value" because the transactions "took place in the midst of the financial crisis when price discovery was very difficult." The tumultuous financial climate in 2008 and 2009 may well have affected the value the market ascribed to various assets—but it did not alter the fundamental concept that the *market* dictates prevailing market price.[30] We assume that prices accurately reflected the market

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28 *See e.g.*, *Codispoti*, 1987 WL 755546, at *1. *See also SFI Inv., Inc.*, 2000 WL 33299598, at *10 ("The Commission has looked to a dealer's purchase occurring within five business days either before or after the retail transaction at issue for determining contemporaneous costs.") (quoting *Escalator Secs., Inc.*, Complaint No. C07950049, 1997 NASD Discip. LEXIS 78, at *20 (NBCC Dec. 31, 1997))).

29 *E.g.*, *Andrew P. Gonchar*, Exchange Act Release No. 60506, 96 SEC 1845, 2009 WL 2488067, at *7 n.25 (Aug. 14, 2009) ("[O]nce NASD presents evidence of contemporaneous cost, the burden shifts to Applicants to refute that evidence."); *Powell & Assocs., Inc.*, Exchange Act Release No. 18577, 47 SEC 746, 1982 WL 32339, at *1–2 (Mar. 22, 1984).

30 Yields lost much of their predictive value during this period because the financial crisis introduced new risks for which the standard models did not account. For example, while the risk levels associated with municipal bonds are ordinarily reflected in the interest rate, many bonds became riskier investments on account of the financial crisis without any corresponding interest

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demand at the time, taking into account market uncertainties, risk tolerance, liquidity, and other variables. The crisis did not unseat contemporaneous cost as the appropriate measure of prevailing market price. If anything, the financial crisis bolstered contemporaneous cost as the best evidence of prevailing market price, since interdealer trades provided the only objective measure at a time when the assumptions underlying external models were suspect and, as Grey notes, price discovery was unusually difficult.

Second, Grey argues that "[t]he very nature of the bid-wanted process precludes conclusive reliance on the auction pricing as equaling market value." Despite Grey's contention to the contrary, we treat bid-wanted auction transactions as we would any other interdealer trades when assessing contemporaneous cost. MSRB Rule G-13 provides: "If a . . . municipal securities dealer is distributing or publishing a quotation . . . such . . . dealer shall have no reason to believe that the price stated in the quotation is not based on the best judgment of the fair market value of the securities . . . ." Municipal bond dealers generally have access to firm bid and ask quotations for bonds purchased through bid-wanted auction and rely on that information to assess prevailing market price.[31] Bid-wanted auctions function as a free-market system and are designed to solicit the highest market bidder. Grey's own account of the auction process for the relevant bonds underscores its competitive nature. Grey submits that he bid on hundreds of bonds and only a tiny percentage of his bids—"perhaps 4%"—were actually accepted.

Third, Grey argues that contemporaneous cost is an improper measure of prevailing market price because he purchased the bonds in odd-lots (quantities of less than 100 bonds), and odd-lots are undesirable and difficult to sell. Even accepting Grey's argument that odd-lots trade at a discount, however, contemporaneous cost would remain the best measure of prevailing market price. Grey purchased the bonds at issue in odd-lots and sold them to retail customers in odd-lots. Any discount should have carried through to the customers because those customers would experience the same disadvantages associated with odd-lot trades if they chose to liquidate the bonds down the line.

Finally, Grey failed to demonstrate how market conditions at the time he sold the bonds to his customers changed the prevailing market price of the bonds as measured by

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rate adjustment. The risks accompanying municipal bonds increased with the onset of the credit crisis as major bond issuers suffered ratings downgrades and default rates tripled. *See* SEC, Report on the Municipal Securities Market, at 23 nn.119–21, 49 (July 31, 2012), *available at* http://www.sec.gov/news/studies/2012/munireport073112.pdf.

31 *See, e.g.*, SEC, Report on the Municipal Securities Market, at 114 n.693, 121, 128 n.769 (July 31, 2012); United States Government Accountability Office, Report to Congressional Committees, *Municipal Securities: Overview of Market Structure, Pricing, and Regulation*, GAO-12-265, at 8 (Jan. 2012).2012), *available at* http://www.gao.gov/assets/590/587714.pdf.

contemporaneous cost.[32] Grey purchased all of the bonds in interdealer trades within five business days of the customer transaction—a period we consider close enough in time for determining contemporaneous cost in this case.[33] He presented no evidence of any major market changes during the time he held the bonds or intermediate interdealer trades at competing price points. Accordingly, Grey failed to demonstrate any need to deviate from the contemporaneous cost standard.

Grey further argues that Enforcement's expert on the issue of municipal bond pricing, James McKinney,[34] did not do enough to determine the fair market value or properly consider the extraordinary conditions of the market at the time. As an initial matter, we reiterate that Grey bore the burden of rebutting the presumption in favor of contemporaneous cost—Enforcement need not account for every potential market variable to a respondent's personal satisfaction.[35] In any event, we find McKinney's testimony to be fair, thorough, and credible. McKinney testified that a maximum markup of three percent represented the industry standard. He used Electronic Municipal Market Access ("EMMA") and Municipal Market Data ("MMD") to review the ratings and other characteristics of the relevant bonds. He noted that no intervening trades occurred in the market for the relevant bonds and testified that the prevailing market price for the bonds was the last interdealer trade (*i.e.*, the price at which Grey had acquired the bonds).

Even though no intervening trades occurred in the market for the relevant bonds following Grey's purchases, McKinney adjusted the prevailing market price for the bonds to give Grey "any benefit of any market movement" that he could glean from the MMD scale. As McKinney explained, these adjustments cut exclusively in Grey's favor: "In the cases where the market went down, I didn't nick him on that, but when the market would improve, I gave him the full benefit of the market movement during those days." The adjustments lowered the markup calculations as illustrated in *Table II* below:

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32 *LSCO Sec., Inc.*, Exchange Act Release No. 28994, 50 SEC 518, 1991 WL 296502, at *2 (Mar. 21, 1991) ("[A]bsent some showing of a change in the prevailing market, a dealer's inter-dealer cost may be used to establish market price for a period up to five business days from the date of the dealer's purchase.").

33 We and FINRA (formerly NASD) have looked to a dealer's purchases occurring within five business days of the retail transaction at issue for determining contemporaneous costs. *See* note 28 *supra*.

34 Grey maintains that McKinney used a flawed "best execution" standard in pricing the municipal bonds based on occasions in which McKinney used that term in his testimony. While "best-execution obligations and fair-pricing obligations are closely related," Exchange Act Release No. 72956, 109 SEC 14, 2014 WL 4352319, at *2 (Sept. 2, 2014) (proposing SR-MSRB-2014-07), we independently apply existing fair pricing standards under MSRB Rule G-30 in reviewing McKinney's testimony and in determining whether Grey sold the subject bonds at prices that were fair and reasonable.

35 *See, e.g.*, *Gonchar*, 2009 WL 2488067, at *7 ("[O]nce NASD presents evidence of contemporaneous cost, the burden shifts to Applicants to refute that evidence.").

Table II		
Bond	**Raw Markup**	**McKinney Adjusted Markup**
Osceola	18.13%	**14.38%**
Ocala	5.36%	**5.36%**
Collier	19.89%	**19.12%**
Florida State	22.92%	**16.88%**
Highlands (Health)	9.88%	**8.62%**
Highlands (School)	6.64%	**6.64%**

These prevailing market price valuations—which were accepted by FINRA—are, at a minimum, reasonable.

b. Grey failed to meet his burden of proving a superior metric for prevailing market price.

In any event, we reject Grey's proposed alternative means of determining prevailing market price based on yield to customers at the time of sale. His approach, which he describes as "multi-faceted," "conscientious," and "practical," is a survey of cherry-picked data, including yield curves of unrelated bonds, historical trading points, and actual profits realized.

Grey relies heavily on the testimony of his expert, John Bagley, to argue that the yield curve, which he claims Enforcement ignored, was a better measure of where the market was at the points of sale to the customers.[36] Bagley testified that the yields for the bonds at the time of sale were "very attractive" based on his "analysis on whether [he] *felt* these bonds were sold at a fair and reasonable price." But his analysis was not scaled to any existing objective criteria that Grey should have consulted at the time of the transactions. Even though Grey purchased all of the bonds in interdealer trades within five business days of the respective customer transactions and presented no evidence of any major market changes during the time he held the bonds, Bagley generally ignored Grey's wholesale purchase prices (*i.e.*, the most recent interdealer trades) when analyzing the fair market value of the bonds at the time of the customer transactions. He explained: "I didn't look at what the fair price was between two interdealer brokers. I looked at the price [Grey's] client paid. That's what I looked at as relevant." He continued: "When I did my analysis, there were many times I threw out interdealer trades because I didn't think they were relevant or the price was wrong. So just because they are interdealer trades doesn't mean they are right."

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36 Grey also claims that unrebutted testimony indicated that "he could have sold the bonds to the street at higher prices." Aside from his own testimony before the Hearing Panel to that effect, Grey presented no evidence that he sought or received contemporaneous bids from outside dealers on any of the bonds—let alone that other dealers were ready to pay higher prices than those at which he sold the bonds to his customers.

Bagley's subjective assessment of whether Grey's customers received a good deal on the bonds—armed with the benefit of hindsight—is irrelevant to the objective question of whether Grey charged his customers prices that were reasonably related to the prices the market set for the bonds at the time of the retail sales. Grey's belief that certain bonds were sound investments did not permit him to supplant the market's price with his own assessment of value or relieve him of his responsibilities to his customers.

In sum, Grey failed to present sufficient evidence to overcome the presumption in favor of contemporaneous cost as the best measure of prevailing market price.

2. Grey's aggregate markups on the bonds were excessive, unfair, and unreasonable, and violated MSRB Rules G-17 and G-30.

Based on the contemporaneous costs of the bonds at issue, Grey charged his customers markups ranging from 5.36% to 19.12% above the prevailing market price.[37] MSRB Rule G-30 requires municipal securities dealers to charge prices that are "fair and reasonable, taking into consideration all relevant factors."[38] The MSRB lists numerous factors that may be relevant in

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[37] Specifically, Grey charged cumulative markups of 5.36% on the two Ocala bond trades, 6.64% on the Highlands (School) bond trade, 8.62% on the three Highlands (Heath) bond trades, 14.38% on the Osceola bond trade, 16.88% on the Florida State bond trade, and 19.12% on the two Collier bond trades. *See Table II.* Our finding on this point refutes Grey's argument that the interpositioning was "inconsequential" because "each customer paid approximately 3% or less over the prevailing market value."

[38] MSRB Interpretations of Rule G-30, "Report on Pricing," (Sept. 26, 1980), MSRB Manual (CCH) ¶ 3646, at 5157 (hereinafter, "MSRB 'Report on Pricing'"); *accord Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 535 (2d Cir. 1999); *Grandon*, 147 F.3d at 190, 193; *Banca Cremi, S.A. v. Alex Brown & Sons, Inc.*, 132 F.3d 1017, 1033 (4th Cir. 1997).

Although MSRB Rule G-30 provides no percentage guideline as to what constitutes a reasonable markup, we have repeatedly stated that markups on municipal securities should fall below five percent absent exceptional circumstances. *First Honolulu*, 1993 WL 380039, at *3 ("[A]lthough some markups on municipal bonds may reach 5%, that figure might be acceptable in only the most exceptional cases." (citing *SEC v. Charles A. Morris & Assoc., Inc.*, 386 F. Supp. 1327, 1334 n.5 (W.D. Tenn. 1973) ("It is the practice in the municipal bond industry to charge retail customers a price which is no more than one quarter of one per cent to five per cent over a bond's current market price."))); *see also, e.g.*, *Investment Planning, Inc.*, Exchange Act Release No. 32687, 51 SEC 592, 1993 WL 289728, at *1–2 (July 28, 1993) (finding markups 4% and above on various corporate bonds and municipal securities improper, stating that such markups "represent extraordinary charges for ordinary transactions"); *Zero-Coupon Secs.*, Exchange Act Release No. 24368, 38 SEC 158, 1987 WL 756237, at *2 (Apr. 21, 1987) (the Commission "consistently has taken the position that mark-ups on debt securities, including municipal securities, generally are expected to be lower than mark-ups on equity securities, and has upheld NASD decisions finding mark-ups as low as 5.1% to violate the rules of the MSRB"); *Staten Secs. Corp.*, Exchange Act Release No. 18628, 47 SEC 766, 1982 WL 32503, *1 (Apr. 9,

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determining the fairness and reasonableness of municipal securities transaction prices, including: (1) the best judgment of the broker or dealer as to the fair market value of the securities at the time of the transaction; (2) the expense involved in effecting the transaction; (3) the fact that the broker or dealer is entitled to a reasonable profit; (4) the expertise provided by the broker or dealer; (5) the total dollar amount of the transaction; (6) the availability of the security in the market; (7) the price or yield of the security; (8) the resulting yield after the subtraction of the markup compared to the yield on other securities of comparable quality, maturity, availability; (9) the risk and the role played by the broker or dealer; and (10) the nature of the professional's business.[39] "Of the many possible relevant factors," the MSRB has stated that "resulting yield to a customer is the most important one in determining the fairness and reasonableness of price in any given transaction."[40]

In its case in chief, Enforcement presented extensive evidence that Grey engaged in a pattern of excessive markups. This included the testimony of FINRA examiner Barbara Walley, who discovered the pattern and testified to producing a schedule of customer transactions involving 36 municipal bonds that were executed through Grey's personal accounts during the review period. Enforcement also presented the expert testimony of James McKinney, who not only testified that, under standard industry practice, three percent is generally the maximum permissible markup on municipal securities, but also individually assessed the value of the relevant bonds at the time of sale.

After the presentation of Enforcement's case in chief, Grey failed to refute evidence that the markups were excessive, or to present evidence that would justify the markups. Specifically, Grey did not challenge Enforcement's evidence regarding industry practice or otherwise argue

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1982) ("As a general rule, markups on municipal bonds are significantly lower than those for equities securities."); *id.* at *2 n.9 ("This does not mean that markups of 5% or less are necessarily 'fair and reasonable.' We note that markups on municipal securities are often as low as one or two percent in frequently traded issues, such as those in the instant case."); *SFI Inv., Inc.*, 2000 WL 33299598, at *10 (Mar. 28, 2000) ("Based on the contemporaneous costs of the bonds at issue, the prices charged to SFI's retail customers resulted in 174 transactions with excessive markups ranging from over 4% to over 8%. Absent exceptional circumstances, this is well above any acceptable benchmark for markups on municipal bonds.").

We also note that in this matter, GMCI's WSPs prohibited the Firm from selling municipal securities to customers with a markup exceeding three percent, noting that "[FINRA] will take exception to and may attempt to charge fraud for any mark-up . . . in excess of" that amount.

[39] MSRB "Report on Pricing" ¶ 3646, at 5158. We note that MSRB G-30, as amended in a consolidated fair-pricing rule, preserves the substance of dealers' existing fair-pricing obligations, and includes as Supplementary Material .02 a list of eleven relevant (but non-exclusive) factors.

[40] *Id.* at 5160.

that markups of 5.36% to 19.12% were fair and reasonable under the circumstances.[41] In fact, Grey conceded that "markups exceeding three percent are suspect and probably excessive" and that "markups well under 5% are the norm."

Furthermore, our review of the relevant facts in the record establishes that Grey has failed to demonstrate that the markups he charged the customers were fair and reasonable under the circumstances. Grey did not present persuasive evidence that the resulting yields to the customers justified the markups he charged. His expert, John Bagley, failed to compare the yield of the relevant bonds "to the yield of other securities of comparable quality, maturity, and availability."[42] Instead, Bagley concluded that the yields of the relevant bonds "were very attractive" based on his comparison of those bonds to unrelated bonds that were not actually "comparable." For example, the unrelated bonds, which Grey had personally selected for Bagley, were general obligation bonds based on round-lot trades rather than revenue bonds in odd-lot trades like the ones at issue here,[43] and many of the "comparable" trades occurred weeks after the relevant transactions.[44] Bagley also relied on MMD yields, which are equally inapposite because (1) the MMD, like the unrelated bonds Grey selected, provides yields based on general obligation bonds in round-lot transactions; and (2) MMD yields are based on bonds throughout the United States (unlike the bonds at issue here, which were all issued in Florida).

Moreover, Grey did not present evidence to establish that he was entitled to the markups he charged based on the services he provided to the customers, the risks or expenses he incurred in executing the transactions, or any other relevant factor. First, Grey purchased the bonds in bid-wanted auctions in odd-lot quantities. The record indicates that odd-lots flooded the market during the relevant period and were not in short supply. Second, to the extent Grey was exposed to risk during the periods he held the bonds in his personal accounts, those periods were brief (lasting no more than two business days), and Grey testified that he did not believe the relevant bonds were risky investments. Third, although a low dollar value transaction relative to the expense involved in effecting the transaction may, in some instances, justify a higher markup to permit a dealer to receive a reasonable profit,[45] Grey did not introduce any evidence to suggest

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41 Grey's opening brief before us states: "Grey has never disagreed with the idea that markups exceeding 3% are suspect and probably excessive. What he has always disagreed with here is the contention that the markups actually exceeded 3%."

42 MSRB "Report on Pricing" ¶ 3646, at 5158.

43 Yields are typically lower on general obligation bonds and round-lot bonds, as compared to revenue bonds and odd-lot bonds. For this reason, Bagley's testimony that the yield curves on the bonds at issue here were higher than the "comparable" bonds is immaterial.

44 For example, the "comparable" trades Bagley considered in connection with the Ocala bond occurred more than three weeks after the subject trade. As Bagley conceded, Grey would not have had an opportunity to consider those as-yet future trades in pricing the bonds.

45 Retail-size trades of $20,000 or below tend to incur higher transactional costs and incur higher markups. *See* SEC, Report on the Municipal Securities Market, at 122–23 (July 31, 2012).

that his transaction costs were high, as was his burden if he wished to justify the markups on that basis.[46] We also observe that Grey charged his customers the same unit price for the bonds, regardless of the dollar value of the transaction, suggesting that the size of the transaction was not a factor in the markups.[47]

In addition, the nature of Grey's business as a municipal securities dealer at GMCI does not warrant the unusually high markups—in fact, GMCI's WSPs prohibited the Firm from selling municipal securities to customers with a markup exceeding three percent.[48] Nor do we credit Grey's testimony that he based the prices on his expertise, experience, and best judgment of the fair value of the bonds at the time of the sale—Grey was incapable of providing a fair assessment of value on account of his undisclosed personal interest in the transactions. Indeed, Grey's elaborate interpositioning scheme, designed to conceal the true size of the markups, reveals his implicit acknowledgement that the cumulative markups were excessive.

D. Grey's excessive markups on seven of the transactions were fraudulent and violated Exchange Act Section 10(b) and Rule 10b-5 thereunder.

We sustain FINRA's findings that, with respect to the seven customer transactions with aggregate markups of eight percent or higher (ranging from 8.62% to 19.12%),[49] Grey violated the antifraud provisions of Exchange Act Section 10(b) and Rule 10b-5 thereunder, which prohibit any person, acting with scienter, from misrepresenting or omitting a material fact in connection with the purchase or sale of a security.[50]

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46 *See Investment Planning*, 1993 WL 289728, at *3 n.19 ("We reject applicants' argument[] . . . that it was necessary for the NASD to elicit evidence of applicants' expenses in executing each order.").

47 *See Table I.* For example, Grey charged two separate retail customers the same price for Ocala bonds on October 30, 2008—$88.77—notwithstanding the fact that one customer purchased a block of 10,000 bonds for a cost of $8,877 and the other customer purchased a block of 40,000 bonds for a cost of $35,508.

48 This portion of the WSP specifically addressed and parroted the MSRB Rules, including Rules G-17 and G-30. The WSP also prohibited interpositioning.

49 Specifically, we sustain FINRA's finding that the following markups violate the antifraud provisions: 8.62% on three of the Highlands (Health) trades, 14.38% on the Osceola trade, 16.88% on the Florida State trade, and 19.12% on two of the Collier trades.

50 *See, e.g.*, *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999); *Lane*, 2015 WL 627346, at *10; SEC, Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others, Exchange Act Release No. 7049, 56 SEC 479, 1994 WL 73628, at *4 (Mar. 9, 1994). Rule 10b-5 provides, "It shall be unlawful for any person, directly or indirectly, . . . (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not

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Grey concedes he did not disclose: that his personal accounts were involved in intermediary transactions before the sales; that his customers were paying higher prices as a result of those intermediary transactions; or the amount of the markups. These omitted facts were material and their omission was misleading. Under any circumstances, it would be important to investors in making their investment decision that their broker was interposing his own accounts between them and the market and causing them to pay higher prices than they would otherwise pay. This is particularly true in the seven transactions with markups between 8.62% and 19.12%—markups ranging from three to six times the industry standard.[51]

The omission of these material facts was particularly misleading because Grey actively concealed the true size of the markups by concentrating his profits in the sale of the bonds from his personal account to GMCI immediately before the retail transactions. This practice made it appear as though GMCI had sold the bonds to customers with standard markups.

The record supports a finding that Grey omitted these material facts with scienter. Scienter is "a mental state embracing intent to deceive, manipulate or defraud."[52] It may be inferred from circumstantial evidence and need not be conceded by the respondent.[53] "Where a dealer knows the circumstances indicating the prevailing market price for the securities, knows the retail price that it is charging the customer, and knows or recklessly disregards the fact that its markup is excessive, but nonetheless charges the customer the retail price, the scienter requirement is satisfied."[54] Interpositioning is widely recognized as a form of securities fraud in violation of Section 10(b).[55]

Grey acted with scienter when he intentionally routed the bonds through his personal accounts before he sold them to GMCI's retail customers with excessive and undisclosed

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misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

51 *See, e.g.*, *Sheldon*, 1992 WL 353048, at *12 & nn.67–68 (affirming finding that undisclosed markups ranging from 6 percent to as high as 15 percent violated Rules G-17 and G-30 of the MSRB, and, to the extent the markups exceeded 8 percent, they violated Section 17(a) of the Securities Act, Sections 10(b) and 15(c)(1) of the Exchange Act, and Rules 10b–5 and 15c1–2 thereunder).

52 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1975).

53 *See, e.g.*, *Meyer Blinder*, Exchange Act Release No. 31095, 52 SEC 1145, 1992 WL 216702, at *9 (Aug. 26, 1992).

54 *Id.*; *Powell*, 1982 WL 32339, at *1–2.

55 *See, e.g.*, *David A. Finnerty*, Exchange Act Release No. 56849, 92 SEC 9, 2007 WL 4180387, at *3 (Nov. 27, 2007).

markups.[56] Grey was aware of his contemporaneous costs and personally set the prices at each step of the transactions. The interpositioning served no purpose other than to enrich himself and deceive GMCI, GMCI's customers, and other market participants. As part of his interpositioning scheme, Grey arranged the transactions to make it appear as though the Firm charged markups of around three percent and failed to disclose the hidden markups created by his successive intermediate trades. His actions reveal his intent to deceive, manipulate, and defraud the Firm's retail customers into paying inflated prices in the relevant transactions.[57]

Grey mainly argues that he could not have acted with scienter in the disputed trades because Enforcement brought charges based on only a small number of isolated transactions. Grey contends that he could not have possessed the requisite intent to defraud with respect to the bond trades at issue because he had charged equally high markups in numerous other transactions during the same time period, sometimes with the same clients, none of which were challenged. These other excessive markups to which Grey refers—although not at issue here—hardly undermine our finding of scienter as to the ten transactions in this case. In declining to bring charges relating to these other transactions, Enforcement has not condoned these transactions, but has rather exercised its prosecutorial discretion in deciding which transactions to pursue.[58]

Similarly, Grey argues that it is "incongruous to think that [he] would simultaneously cheat the customers on one bond for insignificant compensation, while selling them numerous bonds at the same time at prices which have not been challenged as fraudulent." But there is no requirement or expectation that fraudulent transactions exclusively accompany other fraudulent transactions. In fact, fraudsters may intentionally bury fraudulent transactions among legitimate trades in an effort to avoid detection. Further, although Grey argues that his compensation was "insignificant," there is no *de minimis* exception to fraudulent conduct. It is irrelevant whether his violations impacted only a few of GMCI's customers, a random set of trades, or what he considers to be an inconsequential sum of ill-gotten gains.[59]

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[56] *See, e.g.*, *Gonchar*, 2009 WL 2488067, at *9 (finding that applicants acted with scienter where customers relied on applicants' pricing and applicants exacerbated the lack of transparency by not disclosing the interpositioning and markups).

[57] Although Enforcement limited its charge of fraudulently excessive markups to seven transactions with markups above eight percent, we have previously noted that "undisclosed, excessive markups constituting any percentage may be fraudulent if done with scienter." *Lane*, 2015 WL 627346, at *10 n.56.

[58] This prosecutorial discretion—which is not at issue in this case—is immaterial to Grey's misconduct. *See Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) ("NASD disciplinary proceedings are treated as an exercise of prosecutorial discretion.").

[59] *Tellabs*, 551 U.S. at 325("While it is true that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference, we agree . . . that the absence of a motive allegation is not fatal.").

Accordingly, we sustain FINRA's finding that Grey willfully violated Exchange Act Section 10(b) and Rule 10b-5 when he charged markups exceeding eight percent, and failed to disclose those excessive markups and his interpositioning to his GMCI's customers.[60]

E. FINRA's sanctions are neither excessive nor oppressive.

Exchange Act Section 19(e)(2) directs us to 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.[61] For Grey's interpositioning, excessive markups, and fraud violations, the NAC fined Grey $30,000, ordered him to disgorge $15,750 (plus prejudgment interest) to FINRA, and suspended him from associating with any FINRA member firm in any capacity for eighteen months. We find the sanctions imposed on Grey to be consistent with the statutory requirements, and we sustain them.

For excessive markups, FINRA's Sanction Guidelines recommend a fine of $5,000 to $100,000, plus the gross amount of the excessive markups, as well as suspension for up to 30 days.[62] In egregious cases of excessive markups, the Guidelines permit suspension of up to two

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[60] Grey claims that "[d]ue to the findings on the 10b-5 charge, in effect [he] has been banned from the industry for life." But his statutory disqualification is not a FINRA-imposed penalty or remedial sanction. Rather, FINRA found that Grey was subject to statutory disqualification under Exchange Act Section 3(a)(39)(F) because he willfully violated Section 10(b) and Rule 10b-5. An applicant is subject to statutory disqualification where, as here, the applicant "has willfully violated any provision of the Exchange Act," 15 U.S.C. § 78c(a)(39)(F). *See, e.g.*, *Lane*, 2015 WL 627346, at *1 n.2; *Richard A. Neaton*, Exchange Act Release No. 65598, 101 SEC 1009, 2011 WL 5001956, at *7–10 (Oct. 20, 2011); *Scott Mathis*, Exchange Act Release No. 61120, 97 SEC 1195, 2009 WL 4611423, at *12 & n.40 (Dec. 7, 2009), *aff'd*, *Mathis v. SEC*, 671 F.3d 210 (2d Cir. 2012). Willful violation of the securities laws means "intentionally committing the act which constitutes the violation" and does not require that the actor "also be aware that he is violating one of the Rules or Acts." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal quotation marks omitted). The record firmly establishes that Grey intentionally applied the markups to the transactions at issue without disclosing the details of those markups. We therefore agree with FINRA that he acted willfully and sustain FINRA's finding that he is subject to statutory disqualification.

[61] 15 U.S.C. § 78s(e)(2). Grey does not allege, and the record does not show, that FINRA's sanctions imposed an undue burden on competition.

[62] *See FINRA Sanctions Guidelines*, at 6 (2013). FINRA revised its sanctions guidelines in May 2015, increasing specific fines and penalties that, if applied in this case, could warrant imposing greater fines and penalties against Grey. FINRA intended the 2015 guidelines to supersede prior versions of the guidelines, even for "pending matters." *See FINRA Sanctions Guidelines*, at 8 (2015) ("These guidelines supersede prior editions of the *FINRA Sanction Guidelines* . . . . These guidelines are effective as of the date of publication, and apply to all disciplinary matters, including pending matters"). We apply the 2013 guidelines, here, however, because they were in effect when the NAC reached the decision from which Grey appeals. *Cf.*

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years or a bar.[63] For intentional or reckless misrepresentations or material omissions of fact, the Guidelines recommend a fine of $10,000 to $100,000, a suspension of up to two years, and, in egregious cases, a bar.[64]

As an initial matter, we agree with the NAC's characterization of Grey's excessive markups and misrepresentations as egregious. As we have stated, "[t]he charging of excessive markups [i]s a serious breach of [a broker's] obligation to deal fairly with its customers."[65] Grey demonstrated a complete disregard for this obligation when he repeatedly interposed himself between GMCI and his retail customers, causing them to pay markups that greatly exceeded industry standards and GMCI's internal policies, while concealing the excessive markups through his interpositioning scheme.[66] And, moreover, Grey has yet to acknowledge that his misconduct constituted a violation of the securities laws.[67] No mitigating circumstances warrant reducing the sanctions FINRA imposed. Under the circumstances, neither the $30,000 fine nor the 18-month suspension[68] is excessive or oppressive.[69]

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Kent M. Houston, Exchange Act Release No. 71589, 2014 WL 651953, at *3 n.23 (Feb. 20, 2014) (noting that the NAC applied 2007 Sanction Guidelines on remand, notwithstanding FINRA's 2011 revisions, because the 2007 version was "in effect at the time [the NAC] issued its initial decision").

63 *FINRA Sanctions Guidelines*, at 90 & n.1 (2013).

64 *Id.* at 88 & n.1.

65 *Codispoti*, 1987 WL 755546, at *4.

66 *See, e.g.*, *Sheldon*, 1992 WL 353048, at *13 (finding that "interpositioning of favored accounts between the dealer market and non-favored accounts [that] resulted in fraudulent, excessive markups of as much as 10 percent" was "particularly egregious"); *Frank L. Palumbo*, Exchange Act Release No. 46427, 60 SEC 1473, 1995 WL 630926, at *9 (Oct. 26, 1995) (stating that recklessly overcharging customers without justification demonstrates "a marked insensitivity to [the] obligation to deal fairly with customers").

67 We reject Grey's argument that FINRA punished him for defending himself in a disciplinary action. The acceptance or acknowledgment of misconduct is a principal consideration in tailoring appropriate sanctions to deter future conduct. *See FINRA Sanctions Guidelines*, at 2 (2013); *Kevin Lee Otto*, Exchange Act Release No. 43296, 73 SEC 751, 2000 WL 1335346, at *4 (Sept. 15, 2000) (adjusting sanctions upward because respondent's "refusal to acknowledge his misconduct and actions demonstrate a serious misunderstanding of the obligations he owes to a customer as a registered representative," and questioning "his commitment to the high standards demanded by the securities industry"), *aff'd* 253 F.3d 960 (7th Cir. 2001).

68 Grey claims that the NAC decision, which reduced his suspension from two years to 18-months, actually lengthened his suspension for nearly a year, because the Hearing Panel originally scheduled his suspension to run from August 19, 2013 to August 18, 2015, but the

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We also sustain FINRA's order for Grey to disgorge $15,750 in unlawful profits plus prejudgment interest as of July 27, 2009. Grey challenges this calculation because it includes his entire profit and not just the excessive portion (*i.e.*, the markup in excess of three percent). Although Grey is correct that the disgorgement sum includes his entire profit from the series of transactions at issue, its calculation was neither an error nor an injustice. In egregious cases involving intentional or reckless misconduct, FINRA may require respondents to disgorge their entire financial benefit.[70] We find this disgorgement sum appropriate in light of the egregious nature of Grey's misconduct.[71]

V. Conclusion

Over a period of several months, Grey repeatedly interposed his personal accounts between his customers and the market, causing his customers to pay unfair and unreasonable markups ranging from 5.36% to 19.12% above the prevailing market price. These markups were unfair and unreasonable under the circumstances of the case. Grey consistently concealed the excessive markups by using intermediate trades, routed through his personal accounts, to artificially increase the Firm's purchase price. Grey also failed to disclose to his customers that he was personally involved in the transactions and profited from the excessive markups they

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(. . . continued)
NAC decision (dated October 3, 2014) rescheduled it for December 1, 2014 to May 31, 2016. Of course, the "'reduction' of the suspension by six months" did not "result[] in an extension of the suspension for nearly a year," as Grey claims. Rather, his choice to appeal the Hearing Panel's decision to the NAC delayed the start of the suspension. *See* FINRA Rule 9311(b) ("An appeal to the National Adjudicatory Council . . . shall operate as a stay of that decision until the National Adjudication Council issues a decision . . . ."). Grey's suspension is likewise stayed pending his application of review before this Commission. *See* FINRA Rule 9370(a) ("The filing with the SEC of an application for review by the SEC shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting a final disciplinary action of FINRA . . . .").

69 All of the cases Grey cites to support his claim that the sanctions are improperly punitive are distinguishable from this case and have minimal relevance because most were settled, *see FINRA Sanctions Guidelines*, at 1 (2013) (settled cases often impose lesser sanctions), and none involved fraud (which warrants higher sanctions).

70 *See id.* at 5 ("In cases in which the record demonstrates that the respondent obtained a financial benefit from his or her misconduct, where appropriate to remediate misconduct, Adjudicators may require the disgorgement of such ill-gotten gains by fining away the amount of some or all of the financial benefit derived, directly or indirectly."); *id.* at 88 n.2 ("As set forth in General Principal No. 6, Adjudicators may increase the recommended fine amount by adding the amount of respondent's financial benefit.").

71 We likewise sustain the order for Grey to pay $5,267.32 in hearing costs.

were charged. For all of these reasons, we sustain FINRA's sanctions for Grey's violations of MSRB Rules G-17 and G-30 and Exchange Act Section 10(b).

An appropriate order will issue.[72]

By the Commission (Chair WHITE and Commissioners GALLAGHER, STEIN and PIWOWAR; Commissioner AGUILAR not participating).

Brent J. Fields

Secretary

By: Lynn M. Powalski
Deputy Secretary

[72] 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.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 75839 / September 3, 2015

Admin. Proc. File No. 3-16230

In the Matter of the Application of

ANTHONY A. GREY

For Review of Disciplinary Action Taken By

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by FINRA against Anthony A. Grey, and the assessment of costs imposed, be, and they hereby are, sustained.

By the Commission.

Brent J. Fields
Secretary

By: Lynn M. Powalski
Deputy Secretary