BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Jim Jinkook Seol Lake Forest, CA, Respondent.	DECISION Complaint No. 2014039839101 Dated: March 5, 2019

Registered representative participated in undisclosed private securities transactions, engaged in undisclosed outside business activities, and provided false statements on his firm's annual compliance questionnaires in response to questions concerning the private securities transactions and outside business activities. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Tiffany Buxton, Esq., Richard Margolies, Esq., Leo Orenstein, Esq., Joseph Strauss, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Lisa Haines, Esq., Christopher Robertson, Esq.

Decision

In September 2011, while associated with Ameriprise Financial Services, Inc. ("Ameriprise"), Jim Jinkook Seol formed Western Regional Center, Inc. ("WRCI"), a California corporation, and began serving in several capacities, including WRCI's CEO and president. Between June 2012 and December 2013, Seol, through WRCI, solicited investments in California Energy Investment Fund 1, LP, a limited partnership that Seol formed to serve as a qualifying investment facility under the US Citizenship and Immigration Services' Employment-Based Category 5, or EB-5, program. Seol sold $100 million in units of California Energy Investment Fund to 200 investors. In addition, in October 2013, Seol, through WRCI, entered into a consulting agreement with an entity named YL Partners, Inc. Seol agreed to assist YL Partners with the identification and solicitation of five qualified foreign nationals to develop and operate 10 yogurt shops in the US.

This case focuses on three legal issues: (1) whether Seol's activities with WRCI, including his solicitation and sales of investments in California Energy Investment Fund, violated FINRA's prohibition against undisclosed private securities transactions; (2) whether Seol's activities with WRCI, including his role as the company's president and CEO and his consulting agreement with YL Partners, violated FINRA's prohibition against undisclosed outside business activities; and (3) whether Seol provided false statements on Ameriprise's annual compliance questionnaires in response to questions concerning his private securities transactions and outside business activities. In the proceedings below, the Hearing Panel determined that Seol participated in undisclosed private securities transactions, engaged in undisclosed outside business activities, and provided false statements on Ameriprise's annual compliance questionnaires. The Hearing Panel barred Seol in all capacities for the violations. After an independent review of the record, we affirm the Hearing Panel's findings and sanctions.

I. Factual Background

When the conduct in this case occurred, Seol had been in the securities industry for nearly 15 years. In April 1997, Seol entered the industry when he registered as a general securities representative with Ameriprise. Seol remained associated with Ameriprise until May 2014, when the firm discharged him for the conduct at issue here. During his time in the securities industry, Seol has been associated only with Ameriprise. Seol is not currently registered or associated with any FINRA member firm.

A. Ameriprise's Written Supervisory Procedures

Between September 2011 and June 2014, the period relevant to the conduct in this case, Ameriprise's written supervisory procedures ("WSPs") prohibited registered representatives from participating in private transactions. Section 12.1.21 of the WSPs, entitled "Private Securities Transactions," explained, with reference to NASD Rule 3040, that "all securities products and services sold by a registered representative must 'go through' or be known to the firm . . . , so the firm can maintain appropriate books and records and supervise the transaction." Ameriprise expressly prohibited registered representatives from selling any securities not offered by the firm, regardless of compensation, and warned that "[f]ailure to comply with this policy constitutes 'selling away' and will result in disciplinary action that may include termination."

Ameriprise's WSPs also required registered representatives to disclose any outside business activity and obtain written approval from the firm before engaging in it. Specifically, Section 12.3.3 of the WSPs, entitled "Business Ownerships," required registered representatives to "disclose any business ownership or co-ownership, regardless of whether they receive compensation from that activity." Section 13.1 of the WSPs, entitled "Disclosure of Outside Activities" and referencing FINRA Rule 3270, enumerated activities that were "generally allowable that must be disclosed," including, without limitation, "[b]usiness ownership, regardless of whether compensation is received," and "[m]emberships on boards of directors and similar governing bodies, both non-profit and for profit." Ameriprise required registered representatives to complete "Outside Business Activities Disclosures" on an annual basis as well as in advance of commencing any new outside activity.

B. Seol Incorporates WRCI

In September 2011, while associated with Ameriprise, Seol incorporated WRCI in California. At the time of WRCI's incorporation, Seol certified that he was WRCI's CEO, CFO, president, secretary, and its only director. Seol held a 35 percent ownership interest in WRCI. As of April 2014, WRCI had four employees, including Seol. Seol operated WRCI out of the same office in which he conducted his work for Ameriprise.

C. The EB-5 Program

Seol formed WRCI to solicit foreign national investments under the EB-5 program. Congress created the EB-5 program in 1990 to stimulate the US economy through foreign investors' job creation and capital investments. The US Citizenship and Immigration Services, an agency of the US Department of Homeland Security, oversees the EB-5 program. The EB-5 program permits foreign investors who invest capital in new job-creating commercial enterprises in the US to receive conditional permanent residence in the US, and, ultimately, become lawful permanent residents of the US.

To qualify for the EB-5 program, a foreign investor must invest at least: (1) $1,000,000 in capital in a new commercial enterprise that creates at least 10 full-time jobs; or (2) $500,000 in capital in a new commercial enterprise located within a US Citizenship and Immigration Services-approved "regional center" that directly or indirectly creates at least 10 full-time jobs. The regulations implementing the EB-5 program explain that a foreign investor "invests" when the investor "contribute[s] capital," and it requires that foreign investors place their invested capital "at risk for the purpose of generating a return."[1]

D. Seol Forms California Energy Investment Fund and WRC Investment Fund to Capitalize the Genesis Solar Energy Project

The Genesis Solar Energy Project is a 280-megawatt solar power plant owned and operated by NextEra Energy Capital Holdings, LLC, in Riverside County, California. The Genesis Solar Energy Project is a US Citizenship and Immigration Services-approved regional center.

In early 2012, Seol discussed securing EB-5 program funding for the Genesis Solar Energy Project with NextEra Energy Capital Holdings. In February 2012, Seol formed two entities to solicit foreign investors to obtain EB-5 program funding for the Genesis Solar Energy Project. First, Seol formed California Energy Investment Fund as a for-profit entity to pool qualifying capital investments from EB-5 program foreign investors for the purpose of loaning the pooled investments to NextEra Energy Capital Holdings for the Genesis Solar Energy Project. Second, Seol formed WRC Investment Fund 1, LLC to serve as California Energy Investment Fund's "general partner."[2] Once fully funded, California Energy Investment Fund

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[1] 8 C.F.R. §§ 204.6(e), 204.6(j)(2) (2018).

[2] The terms of the relationship between California Energy Investment Fund and WRC Investment Fund are detailed in a "limited partnership agreement" between California

[Footnote continued on next page]

planned to loan NextEra Energy Capital Holdings $100 million in capital for the Genesis Solar Energy Project.

E. California Energy Investment Fund's Confidential Offering Memorandum

To capitalize the Genesis Solar Energy Project, California Energy Investment Fund held an offering in July 2012. California Energy Investment Fund authorized the issuance and sale to qualified foreign investors of up to 200 limited partnership units for a total offering amount of $100 million. The minimum capital investment per unit was $500,000, accompanied by up to $65,000 per unit for fees and expenses associated with the investment and EB-5 program process, including a management fee of up to $4,000 payable to WRCI.[3]

The offering memorandum for the sale of California Energy Investment Fund's limited partnership units states that California Energy Investment Fund "has been formed as a commercial for profit entity governed by the provisions of the [l]imited [p]artnership [a]greement attached to the [o]ffering and will engage solely in the business of making an investment or series of investments in the [Genesis Solar Energy] Project under the [EB-5] [p]rogram in the form of loans." The offering memorandum adds that "[t]he [l]imited [p]artnership's investment objective is to invest in the [Genesis Energy Solar] Project[] which create[s] no fewer than ten (10) direct and/or indirect jobs per EB-5 investor in order to permit investors to qualify for immigration to the United States . . . and to permit [l]imited [p]artners to participate in a commercial for profit enterprise."

1. The Authority Vested in California Energy Investment Fund's General Partner (WRCI) and Limited Partners

The offering memorandum for the sale of California Energy Investment Fund's limited partnership units contemplates two categories of partnership – general partners and limited partners. WRC Investment Fund was California Energy Investment Fund's "sole general partner." In turn, WRCI was the "sole member" of WRC Investment Fund.[4] Based on these delegations, WRCI was California Energy Investment Fund's de facto general partner. As

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Investment Fund and WRC Investment Fund, dated April 2012, and a "confidential offering memorandum" for California Energy Investment Fund, dated July 2012. Seol assisted in drafting the offering memorandum by reviewing the draft offering memorandum and providing information to WRCI's outside counsel regarding the Genesis Solar Energy Project.

[3] The offering memorandum attaches several documents, including the following documents that explain the investments, projects, and relationships among the entities involved in the transactions: (1) the limited partnership agreement between California Energy Investment Fund and WRC Investment Fund, dated April 2012 (see note 3); (2) a cooperative business agreement between WRCI and California Energy Investment Center, LLC, dated June 2012; (3) a letter from the US Citizenship and Immigration Services approving California Energy Investment Center as a regional center, dated August 2009; and (4) the offering's subscription agreement.

general partner, WRCI was vested with broad authority to conduct California Energy Investment Fund's business activities, including "the full unrestricted power and exclusive authority to . . . carry on the activities of the [p]artnership and to do and to perform any and all things necessary for, incidental to, or connected with carrying on the activities of the partnership." This broad grant of authority endowed WRCI with the exclusive power to make all decisions concerning the selection of California Energy Investment Fund's investments, to receive a one percent ownership interest in California Energy Investment Fund, and to obtain management fees "paid from the cash flow from the return on investment of the [p]artnership."[5]

In contrast, each foreign investor who made a "qualifying investment" in California Energy Investment Fund pursuant to the EB-5 program became a "limited partner" of the fund. Limited partners had "the rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act," but limited partners had no authority to bind or undertake any obligation on behalf of California Energy Investment Fund. The offering memorandum states that limited partners "may take part in the business of [California Energy Investment Fund]," but may do so only by "ordinary resolution," which the confidential offering memorandum defines as "51 [percent] of [l]imited [p]artners voting."

2. The Allocation and Distribution of Expenses and Profits for California Energy Investment Fund's General Partners and Limited Partners

California Energy Investment Fund allocated expenses and distributed profits based on the categorization as a general partner or limited partner:

> **Allocation of Net Income/Loss, Sales Repayment.** Interest income earned from [i]nvestments minus [p]artnership [e]xpenses shall be allocated 99% to the [l]imited [p]artner pro rata and 1% to the [g]eneral [p]artner. Net proceeds realized from the sale or repayment of an investment and profits or losses realized from an investment shall be allocated 100% to the limited partners pro rata until the cumulative amounts allocated and distributed to each limited partner equals $500,000. Thereafter, such amounts shall be allocated 99% to the limited partners and 1% to the general partner.

In addition to distributions of California Energy Investment Fund's profits, limited partners of the fund also were entitled to receive "annual distributions" consisting of "all net income and scheduled payments received in connection with [i]nvestments of the [p]artnership

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[4] The offering memorandum states that Seol formed WRC Investment Fund "solely for the purpose of acting as general partner of [California Energy Investment Fund]."

[5] WRCI, as general partner, also had responsibility for "monitor[ing] [the] payment of interest and the overall collection of the loan [to NextEra Energy Capital Holdings], as well as longer term plans for the partnership to consider future loan opportunities for its future ongoing business activities."

for the previous fiscal year . . . net of any required tax withholdings and any amounts which, in the opinion of the [g]eneral [p]artner, are required to meet the ongoing obligations (whether certain or contingent) of the [p]artnership."[6]

3. The Risks Associated with Investing in California Energy Investment Fund's Offering for the Genesis Solar Energy Project

The offering memorandum informed potential investors of the risks associated with participating in California Energy Investment Fund's offering for the Genesis Solar Energy Project. The offering memorandum advised that "[a]n investment in [California Energy Investment Fund] involves certain risks . . .," and it warned potential investors, "[i]n making an investment decision, investors must rely on such investor's own examination of the terms of the offering, including the merits and risks involved." The offering memorandum instructed potential investors to evaluate the Genesis Solar Energy Project, including "the detailed investment description, . . . form and structure of the investment, characteristics of [the] securities[,] and anticipated returns," and it noted that the Genesis Energy Solar Project "may earn returns below market for similar investments." The offering memorandum stressed that California Energy Investment Fund's "[limited partnership] units [were] suitable only for investors who do not need liquidity in their investments and who can afford the loss of their entire investment."

The offering memorandum also advised potential investors that California Energy Investment Fund's "offering will include offers of the [limited partnership] units to non-US persons outside the United States pursuant to regulations promulgated under the Securities Act." Finally, the offering memorandum explained that California Energy Investment Fund had relied on certain exemptions under the Securities Act of 1933 ("Securities Act") to avoid registration of the limited partnership units.[7] If California Energy Investment Fund's offering failed to satisfy the requirements of an exemption from registration under the Securities Act, the offering memorandum explained that WRCI, as general partner, was obligated to register California Energy Investment Fund's limited partnership units or terminate the offering.

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[6] The offering memorandum also informed potential investors that they may profit from their investments through California Energy Investment Fund's future business activities with NextEra Energy Capital Holdings, after NextEra Energy Capital Holdings repaid California Energy Investment Fund the principal and interest due on the $100 million loan for the Genesis Solar Energy Project. The offering memorandum states, "after the [l]oan [to NextEra Energy Capital Holdings] has been fully repaid or realized upon and all distributions to the [l]imited [p]artners in connection therewith have been made pursuant to the [California Energy Investment Fund] [limited] [p]artnership [a]greement, the [l]imited [p]artners may, by unanimous resolution (100% of [l]imited [p]artners voting) elect to make [an investment other than the loan]. Limited [p]artners who do not approve such investment will withdraw from the [l]imited [p]artnership."

[7] The offering memorandum stated that California Energy Investment Fund's limited partnership units were exempt from the registration requirements of the Securities Act based on "Section 4[(a)](2) of the Securities Act, Regulation S promulgated under the Securities Act, and/or Regulation D promulgated under the Securities Act."

F. Seol's Solicitation Efforts

Between June 2012 and December 2013, while associated with Ameriprise, Seol travelled to South Korea and China to market investments in California Energy Investment Fund to foreign migration companies and attorneys. Seol made presentations concerning investments in California Energy Investment Fund to prospective foreign investors on 25 to 30 occasions.

As president of WRCI, Seol also entered into finder's agreements with multiple migration companies. The finder's agreements advised the migration companies that "[t]he [o]ffering [for the Genesis Solar Energy Project] will be made in accordance with Regulation S, Regulation D, and Section 4[(a)](2) under the Securities Act of 1933, as amended," and that "the terms 'offer' and 'sale' have the meanings specified in [S]ection 2(3) of the Securities Act." The finder's agreements strictly limited the migration companies' activities to identifying and introducing potential investors to California Energy Investment Fund. Seol provided subscription materials and qualifying documents, including the offering memorandum, to the migration companies. The migration companies, in turn, forwarded the information that Seol had provided to prospective foreign investors.

By December 2013, as a result of Seol's efforts, California Energy Investment Fund raised $100 million in capital to invest in the Genesis Solar Energy Project. Approximately 200 foreign investors each invested $500,000 in exchange for one limited partnership unit of California Energy Investment Fund. As detailed in California Energy Investment Fund's offering memorandum for the Genesis Solar Energy Project, California Energy Investment Fund transmitted $100 million as a loan to NextEra Energy Capital Holdings in three tranches between March 2013 and December 2013. Each payment was evidenced by a promissory note between NextEra Energy Capital Holdings and California Energy Investment Fund. California Energy Investment Fund received more than $92 million in interest on the loan tranches.

G. Seol's Compensation

In July 2014, after his association with Ameriprise ended, Seol began receiving a salary of $6,000 per month from WRCI from the fees and expenses that WRCI received from the Genesis Solar Energy Project and other EB-5 projects. After January 2016, Seol's salary increased to $9,000 per month.

In April 2015, Seol received more than $21,000 as a distribution from WRCI to cover pass-through tax liabilities for the year ending on December 31, 2014, and, in April 2016, Seol received a distribution of more than $57,000 to cover pass-through tax liabilities for the year ending on December 31, 2015. As of April 2016, Seol had received more than $144,000 in salary from WRCI, and WRCI had received at least $796,405 in management fees from California Energy Investment Fund.

H. The Yogurtland EB-5 Project

In October 2013, Seol, through WRCI, entered into a consulting agreement with YL Partners. As part of the consulting agreement, Seol agreed to assist YL Partners in its solicitation of a $5 million investment pursuant to the EB-5 program. WRCI's services included identifying

potential EB-5 investors, performing due diligence investigations to qualify for approval under the EB-5 program, and overseeing the project. In return, WRCI was entitled to receive "an initial consulting fee of $20,000 per Yogurtland franchise store development at commencement of identification of site location" and an annual consulting fee of $15,000 per Yogurtland store owned and operated by YL Partners for the duration of its partnership.

I. Seol Conceals His Activities with WRCI and California Energy Investment Fund from Ameriprise

Seol failed to disclose his activities with WRCI and California Energy Investment Fund on Ameriprise annual compliance questionnaires that expressly required him to do so, and he repeatedly concealed his activities with WRCI and California Energy Investment Fund from Ameriprise personnel when they periodically visited his office.[8] In February 2012, for example, days after forming California Energy Investment Fund, Seol submitted responses to Ameriprise's annual compliance questionnaire in which he attested that he was familiar with, and would abide by, the firm's WSPs, and he represented, without disclosing his activities with WRCI and California Energy Investment Fund, that he had disclosed all of his outside business activities to the firm and would update his disclosure and seek written approval before starting any new outside business activity. In addition, over the next two years, as Seol entered into the finder's agreements with migration companies to locate investors for California Energy Investment Fund, traveled to South Korea and China to solicit investments in California Energy Investment Fund, negotiated loan agreements with NextEra Energy Capital Holdings, attained full investor participation of $100 million for the Genesis Solar Energy Project, and transmitted the $100 million to NextEra Capital Holdings for the Genesis Solar Energy Project, Seol submitted outside business activity disclosures and annual compliance questionnaires in which he falsely attested that he had disclosed all of his outside business activities as required by Ameriprise's WSPs.[9]

During this same timeframe, Seol's Ameriprise compliance examiner, Holly Hall, Ameriprise supervisor, Stephen Tetmeir, and supervising "Registered Principal Delegate," James Zielke, conducted reviews of Seol's office on six different occasions.[10] During each of these reviews, Hall, Tetmeir, and Zielke asked Seol whether he had disclosed all his outside business activities to Ameriprise. Hall specifically reminded Seol of his obligation to disclose and receive

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[8] Seol also used two different non-Ameriprise email addresses when he conducted WRCI-related business.

[9] Seol submitted three outside business activity disclosures, in August 2012, February 2013 and February 2014, respectively, and he submitted responses to Ameriprise's annual compliance questionnaires in February 2013 and February 2014. In each instance, Seol attested that he understood and would abide by the Ameriprise's WSPs, and he represented that he had disclosed all of his outside business activities to the firm.

[10] Hall conducted reviews of Seol's office in June 2012, March 2013, and February 2014. Tetmeir and Zielke conducted reviews of Seol's office in August 2012, September 2012, and April 2013.

pre-approval for any new or existing outside business activity, regardless of whether he was receiving compensation. During each of the six office reviews, Seol advised Hall, Tetmeir, and Zielke that he had no new or existing outside business activity to disclose or update.

J. FINRA Investigates and Ameriprise Terminates Seol

In March 2014, FINRA staff sent Seol a request for information and documents in connection with its investigation of this case.[11] FINRA staff also sent a copy of the information and document request to Ameriprise. Ameriprise initiated an investigation upon receipt of FINRA's request.

Tetmeir arranged to meet with Seol at Seol's office in early-April 2014. Tetmeir and Zielke attended the meeting in person. Other Ameriprise personnel, including an Ameriprise investigator, attended the meeting via telephone. When questions about Seol's activities with WRCI arose, Seol admitted his activities related to WRCI and California Energy Investment Fund, but he claimed that his objective was to develop future business for Ameriprise. Seol did not disclose his consulting activities with YL Partners during the meeting.

Ameriprise promptly suspended Seol. In May 2014, Ameriprise terminated Seol for violating company policy related to undisclosed outside business activities.

II. Procedural History

In May 2016, the Department of Enforcement ("Enforcement") filed a three-cause complaint against Seol. The first cause of action alleged that Seol participated in undisclosed private securities transactions, in violation of NASD Rule 3040 and FINRA Rule 2010, because he solicited and sold investments in California Energy Investment Fund.[12] The second cause of action alleged that Seol engaged in undisclosed outside business activities, in violation of FINRA Rules 3270 and 2010, because he formed and incorporated WRCI and served as the company's CEO, CFO, president, secretary, and director and provided consulting services to YL Partners. The third cause of action alleged that Seol made false statements to Ameriprise, in violation of FINRA Rule 2010, because he failed to disclose his private securities transactions and outside business activities on the firm's annual compliance questionnaires on three occasions between February 2012 and February 2014.

In November 2016, prior to the hearing, the Hearing Panel granted a motion for partial summary disposition that Enforcement filed in the case. The Hearing Panel concluded, based on the undisputed facts, that Seol engaged in undisclosed outside business activities, and that Seol had made false statements to Ameriprise on the annual compliance questionnaires.

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[11] The Commission also initiated an investigation of Seol's activities with WRCI and California Energy Investment Fund. At the conclusion of its investigation, in July 2014, the Commission issued a no-action letter.

[12] We apply the rules in effect when the conduct occurred.

A two-day hearing took place in Los Angeles, California, in January 2017. The hearing focused on the remaining cause of action, specifically, whether Seol participated in undisclosed private securities transactions, and the sanctions that should be assessed against Seol for all violations alleged in the complaint. Three witnesses testified at the hearing – Seol, Tetmeir, and Hall.

The Hearing Panel issued its decision in May 2017. The Hearing Panel found that Seol participated in undisclosed private securities transactions, and it reiterated its findings that Seol had engaged in undisclosed outside business activities and made false statements on Ameriprise's annual compliance questionnaires. The Hearing Panel imposed a unitary sanction, a bar, for the three violations. This appeal followed.

III. Discussion

The Hearing Panel determined that Seol participated in undisclosed private securities transactions, engaged in undisclosed outside business activities, and provided false statements on Ameriprise's annual compliance questionnaires. We affirm the Hearing Panel's findings.

A. Seol Participated in Undisclosed Private Securities Transactions

As an initial matter, the Hearing Panel found that Seol solicited investors through WRCI to purchase California Energy Investment Fund's limited partnership units; California Energy Investment Fund's limited partnership units were securities; and Seol failed to notify Ameriprise of his solicitations for these investments. The Hearing Panel therefore concluded that Seol engaged in undisclosed private securities transactions and violated NASD Rule 3040 and FINRA Rule 2010. We affirm these findings.

1. NASD Rule 3040

NASD Rule 3040 prohibits any person associated with a firm from participating in any manner in private securities transactions outside the regular course or scope of his employment without providing prior written notice to the firm. NASD Rule 3040(a), (b), (e)(1). If an associated person is compensated for the transactions, he must receive the firm's written permission before engaging in the transactions.[13] NASD Rule 3040(c)(1).

In order to find that Seol violated NASD Rule 3040, Enforcement must prove by a preponderance of the evidence that: (1) California Energy Investment Fund's limited partnership units constituted "private securities transactions;" (2) Seol "participated" in the transactions; and (3) Seol participated in the transactions without providing Ameriprise with written notice.

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[13] FINRA Rule 2010, FINRA's ethical standards rule, states that, "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." A violation of any FINRA rule, including NASD Rule 3040, violates FINRA Rule 2010. *See Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *2 n.1 (Sept. 24, 2015). FINRA Rule 0140 subjects associated persons to FINRA Rule 2010.

NASD Rule 3040(a), (b); *Mielke*, 2015 SEC LEXIS 3927, at *28-43. If Seol actually received, or had the potential to receive, "selling compensation," he also needed to obtain Ameriprise's written approval prior to participating in the private securities transactions. NASD Rule 3040(c)(1).

Seol does not contest that he participated in the transactions; that he failed to provide Ameriprise with written notice of his participation in the transactions; and that he received selling compensation for participating in the transactions. Seol, however, does assert that California Energy Investment Fund's limited partnership units are not securities. We therefore focus our discussion on the first element of the analysis – whether California Energy Investment Fund's limited partnership units constitute private "securities" transactions within the meaning of NASD Rule 3040. The record in this case establishes that they are.

2. Seol's Solicitation and Sales of California Energy Investment Fund's Limited Partnership Units Constitute Private Securities Transactions

NASD Rule 3040 defines "private securities transaction" as "any securities transaction outside the regular course or scope of an associated person's employment with a member, including, though not limited to, new offerings of securities which are not registered with the Commission." NASD Rule 3040(e)(1). Seol does not contest that his solicitation and sales of California Energy Investment Fund's limited partnership units were outside the scope of his employment with Ameriprise.

Seol, however, disputes that the foreign investors' investments with California Energy Investment Fund are securities within the meaning of the Securities Act or Securities Exchange Act of 1934 ("Exchange Act"). Seol states that California Energy Investment Fund's offering "fund[ed] a loan made by multiple limited partners to a single borrower . . . in exchange for participation in a qualified EB-5 program," and that "participation in the Genesis Solar [Energy] Project created a loan participation agreement with no expectation of 'profit.'" We disagree and find that California Energy Investment Fund's limited partnership units constitute "investment contracts," which constitute securities under the Securities Act and Exchange Act.[14] *See SEC v.*

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[14] The term "security" is defined as:

> [A]ny note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing . . . .

[Footnote continued on next page]

W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (explaining that there is an investment contract, and consequently a security, where there is: (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits, (4) to come solely from the efforts of the promoter or a third party).

As an initial matter, the record clearly demonstrates that the foreign investors who participated in California Energy Investment Fund's offering purchased units in California Energy Investment Fund's limited partnership. They did not purchase loans, loan participation agreements, or promissory notes.[15] Second, the foreign investors' funds, or investments, were pooled into California Energy Investment Fund's common enterprise, the funding of a loan for the capitalization and development of the Genesis Solar Energy Project. Third, the foreign investors who purchased California Energy Investment Fund's limited partnership units became limited partners of the fund and played no role in the management of the enterprise. Finally, in return for their investment, California Energy Investment Fund's foreign investors expected to earn profits through the efforts of others, i.e., Seol and WRCI. Based on these facts, we find that California Energy Investment Fund's limited partnership units are securities under the Securities Act and Exchange Act.[16] *See, e.g.*, *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 755 (11th Cir. 2007) (explaining that limited partnership interests are routinely treated as investment contracts); *Mayer v. Oil Field Sys. Corp.*, 721 F.2d 59, 65 (2d Cir. 1983) (explaining that a limited partnership interest "generally is a security because such an interest involves investment in a common enterprise with profits to come solely from the efforts of others."); *SEC v. Murphy*, 626 F.2d 633, 640-41 (9th Cir. 1980) ("Under the test for an investment contract . . . , a limited partnership generally is a security.").

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15 U.S.C. § 78c(a)(10) (emphasis added). The definition of a security under the Securities Act and Exchange Act is virtually identical and may be considered the same. *See United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 847 n.12 (1975).

[15] If the foreign investors' investments with California Energy Investment Fund had been structured as a loan or promissory note, such loan or promissory note would not have constituted invested capital under the EB-5 program. 8 C.F.R. § 204.6(e) ("A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part."). For this reason, we do not reach the issue of whether the foreign investors' investments with California Energy Investment Fund constituted securities under the family resemblance test articulated in *Reves v. Ernst & Young*, 494 U.S. 56, 63-64, 67 (1990) (explaining that the family resemblance test rebuts the presumption that a note is a security if the note in question "bears a strong resemblance (in terms of the four factors we have identified) to one of the enumerated categories of instrument[s].")

[16] Although our independent application of the investment contracts test leads us to conclude that California Energy Investment Fund's limited partnership units are securities, we consider it persuasive that California Energy Investment Fund's offering memorandum identifies the limited partnership units as securities under the federal securities laws.

a. Foreign Investors in California Energy Investment Fund Expected Profits

On appeal, Seol disputes that the foreign investors had an expectation of a profit. Seol specifies that the foreign investors expected to gain access to permanent US residency, not an appreciation in their capital investment. As explained above, however, we find that the foreign investors who purchased California Energy Investment Fund's limited partnership units expected profits, and that their investments in California Energy Investment Fund satisfied the investment contracts test for the definition of a security.[17]

As an initial matter, we note that, in the proceedings before the Hearing Panel, Seol did not testify that the foreign investors did not have any expectation of profit from their investments with California Energy Investment Fund. Rather, Seol stated that California Energy Investment Fund's foreign investors "had low-profit expectations" due to the interest rate associated with the loan to NextEra Energy Capital Holdings. When Seol testified at the hearing, he described two distinct means of the foreign investors profiting from their investments. Seol asserted that WRCI could elect not to take the full amount of its management fee, leaving funds available to distribute to California Energy Investment Fund's foreign investors. Alternatively, Seol noted that, if NextEra Energy Capital Holdings defaulted on a loan payment, the interest rate on the company's loan would rise to generate $2 million in additional interest, and that the additional interest would result in a "surplus" that could be distributed to the foreign investors.

Moreover, we find that the precedent in this area reinforces that the foreign investors' expectation of permanent US residency and capital appreciation, i.e., profit, are not mutually exclusive concepts that would except their investments from the definition of a security under the Securities Act and Exchange Act. In *SEC v. Liu*, No. 16-974, 2016 U.S. Dist. LEXIS 181536, at *9-10 (C.D. Cal. Aug. 17, 2016), for example, the defendant argued that "the [foreign] investors [in an EB-5 program] did not have a primary profit motive in their [c]apital [c]ontributions," and that the "[foreign] investors lacked an expectation of profits in their [c]apital [c]ontributions because the[ir] expected profits were so low that they were easily outpaced by the [a]dministrative [f]ees investors paid to participate in the first place."

In rejecting the defendant's argument, the district court explained that the offering memorandum had characterized the investments as securities, and that the foreign investors had put their capital at risk and expected profits, "albeit small ones." *Id.* at *11. The district court stated, "[t]he fact that investors paid a significant fee to invest their [c]apital [c]ontributions – a fee larger than their projected profits – does not alter th[e] conclusion" that the investments were securities. *Id.* at *12. The court observed, "nobody would dispute that EB-5 investors are motivated in significant part by obtaining lawful permanent residency in the [US]. But the fact

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[17] In connection with this argument, Seol asserts that the foreign investors did not receive profits from the "managerial efforts of others." The terms of California Energy Investment Fund's offering memorandum, however, negates this argument. The offering memorandum vested WRCI, and WRCI alone, with the significant managerial responsibility on which the success or failure of the Genesis Solar Energy Project depended.

that the acquisition of EB-5 shares comes with unrelated benefits does not somehow convert the shares from securities into something else." *Id.* at *13.

Similarly, in *SEC v. Feng*, No. 15-9420, 2017 U.S. Dist. LEXIS 103592, at *8-16 (C.D. Cal. June 29, 2017), the defendants argued that the EB-5 investors in that case did not expect to profit from their investments because the administrative fees the investors were required to pay exceeded the profits from their investments, and the investors were motivated by the desire to gain permanent resident status in the US. *Id.* In rejecting the argument, the district court reasoned:

> [A]lthough it is undisputed EB-5 investors are also motivated to make investments to obtain permanent residency in the [US], the EB-5 regulations require, and the terms of the EB-5 investments demonstrate[,] capital contributions were made by [d]efendants' clients for the purpose of generating a return. Accordingly, the [c]ourt finds the EB-5 investments are investment contracts and therefore securities governed by federal securities laws and regulations.

Id. at *15-16.

We, like the district court in *Liu* and *Feng*, find that the foreign investors who purchased California Energy Investment Fund's limited partnership units expected profits, and their investments in California Energy Investment Fund satisfied the investment contracts test to qualify as a security under the Securities Act and Exchange Act.[18]

b. The Commission Made No Findings Concerning California Energy Investment Fund's Limited Partnership Units

Seol also points to the Commission's investigation of his activities with WRCI and California Energy Investment Fund, and he argues, "after investigating WRCI and the Genesis Solar [Energy] Project, the [Commission] did not determine that the partnership interests were private securities transactions." Seol's argument misses the point.

While we acknowledge that Commission staff investigated Seol, WRCI, and California Energy Investment Fund, and issued a no-action letter at the conclusion of its investigation, we note that the Commission made no specific findings concerning Seol, WRCI, or California Energy Investment Fund. To the contrary, the Commission's no-action letter stresses that "the notice must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation." The Commission's investigation of

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[18] Seol states that he did not violate FINRA's prohibition against undisclosed private securities transactions because none of the foreign investors who participated in California Energy Investment Fund's offering were customers of Ameriprise, and Ameriprise was not "associated with the [Genesis Solar Energy] [P]roject in any way." Seol misreads NASD Rule 3040. The rule applies with equal force regardless of whether the buyers of the securities at issue are customers of the respondent's member firm.

Seol, WRCI, and California Energy Investment Fund, and related no-action letter, provides us with no information concerning the scope of the Commission's investigation or the conclusions of Commission staff. Consequently, we find that the Commission's investigation and no-action letter have no bearing here.

* * *

The record establishes that Seol participated in private securities transactions without the required written notice or written approval. We therefore affirm the Hearing Panel's determination that Seol violated NASD Rule 3040 and FINRA Rule 2010.

B. Seol Engaged in Undisclosed Outside Business Activities

Second, on summary disposition, the Hearing Panel found that Seol "held ownership and officer positions with WRCI," "expected to be compensated for his efforts," and failed to provide Ameriprise with prompt written notice of the activities. The Hearing Panel concluded that Seol engaged in undisclosed outside business activities and violated FINRA Rules 3270 and 2010. We affirm the Hearing Panel's findings.[19]

1. FINRA Rule 3270

FINRA Rule 3270 governs outside business activities and states that, "[n]o registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member."[20] The record in this case establishes that Seol engaged in undisclosed outside business activities.

2. Seol's Role in WRCI and Consulting Services to YL Partners Violated FINRA Rule 3270

In March 2011, February 2012, February 2013, and February 2014, Seol submitted annual compliance questionnaires to Ameriprise. On each form, Seol attested that he was familiar with, and would abide by, Ameriprise's written procedures, including those procedures related to outside business activities. In August 2011, Seol submitted an annual outside business activity disclosure form to Ameriprise. On the form, Seol specifically attested that he understood that he needed to request pre-approval before participating in any outside business activity, and

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[19] Seol does not challenge the Hearing Panel's findings concerning his outside business activities.

[20] A violation of FINRA Rule 3270 constitutes a violation of FINRA Rule 2010. *See Dep't of Enforcement v. v. McGee*, Complaint No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *62 n.34 (FINRA NAC July 18, 2016), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 at *1 (Mar. 27, 2017), *aff'd*, 733 F. App'x 571 (2d Cir. 2018).

that he needed to update Ameriprise if the scope of his currently disclosed activity relating to the sales of certain insurance products had changed.

Despite these attestations and certifications, Seol engaged in the following undisclosed activities with WRCI and YL Partners: forming and incorporating WRCI; serving as WRCI's CEO, CFO, president, secretary, and director; maintaining a 35 percent ownership interest in WRCI; operating WRCI out of the same office that he conducted his work for Ameriprise; creating WRC Investment Fund, with WRCI as its sole member, to serve as the general partner of California Energy Investment Fund to develop and capitalize the Genesis Solar Energy Project; assisting YL Partners in its solicitation of a $5 million investment for its Yogurtland EB-5 program; and providing various other consulting services to YL Partners. We therefore agree with the Hearing Panel that Seol's unreported activities with WRCI and YL Partners contravened FINRA's prohibition against undisclosed outside business activities, and, accordingly, Seol violated FINRA Rules 3270 and 2010.

C. Seol Provided False Statements on Ameriprise's Annual Compliance Questionnaires

Finally, the Hearing Panel found, on summary disposition, that "on three occasions [February 2012, February 2013, and February 2014][,] Seol represented to Ameriprise in [c]ompliance [q]uestionnaires that he had no outside business activities," that "Seol did, in fact, have undisclosed outside business activities," and that "his contrary responses on the questionnaires were necessarily false." The Hearing Panel concluded that Seol provided false statements on Ameriprise's annual compliance questionnaires, in violation of FINRA Rule 2010. We affirm the Hearing Panel's findings.[21]

1. FINRA Rule 2010

FINRA Rule 2010 is FINRA's ethical standards rule. The rule requires that associated persons observe high standards of commercial honor and just and equitable principles of trade. The reach of FINRA Rule 2010 is not limited to rules of legal conduct, but states a broad ethical principle. *See Timothy L. Burkes*, 51 S.E.C. 356, 360 n.21 (1993). FINRA Rule 2010 applies broadly to all business-related misconduct, regardless of whether the misconduct involves securities. *See id.* The principal consideration of FINRA Rule 2010 is whether the misconduct "reflects on the associated person's ability to comply with the regulatory requirements of the securities business." *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). A registered representative's failure to disclose material information to his firm violates FINRA Rule 2010 and is misconduct that calls into question the registered representative's "ability to comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public." *Dep't of Enforcement v. Davenport*, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *9-10 (NASD NAC May 7, 2003). The record in this case establishes that Seol provided false statements on Ameriprise's annual compliance questionnaires and violated FINRA Rule 2010.

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[21] Seol does not challenge the Hearing Panel's findings concerning his false statements on Ameriprise's annual compliance questionnaires.

2. Seol's Responses on Ameriprise's Annual Compliance Questionnaires Were False and Violated FINRA Rule 2010

In February 2012, February 2013, and February 2014, respectively, Seol submitted annual compliance questionnaires to Ameriprise. As part of these annual certifications, Seol attested that he had disclosed all of his outside business activities, and that he had not engaged in any undisclosed outside business activity. Despite these attestations and certifications, on an ongoing basis, Seol owned and operated WRCI, provided consulting services to YL Partners, and solicited and sold California Energy Investment Fund's limited partnership interests to 200 foreign investors. When Seol provided the false statements on Ameriprise's annual compliance questionnaires, he engaged in conduct that was inconsistent with high standards of commercial honor and just and equitable principles of trade and violated FINRA Rule 2010. *See McGee*, 2017 SEC LEXIS 987 at *39-41 (finding that applicant's false statements on his firm's compliance questionnaires violated FINRA Rule 2010).

IV. Sanctions

The Hearing Panel imposed a unitary sanction, a bar in all capacities, for Seol's undisclosed private securities transactions, undisclosed outside business activities, and false statements on Ameriprise's annual compliance questionnaires. As explained below, we affirm the Hearing Panel's sanctions.

As an initial matter, we find that Seol's undisclosed private securities transactions, undisclosed outside business activities, and false statements on Ameriprise's annual compliance questionnaires are related violations, and that any sanction that we impose would be designed and tailored to deter the same underlying misconduct.[22] We therefore have decided to impose a unitary sanction for these three violations.[23]

Second, we examine the specific Guidelines applicable to Seol's violations. For private securities transactions involving sales over $1 million, the Guidelines recommend, as a starting point, a fine between $5,000 and $73,000, a suspension of at least one year, or a bar.[24] The

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[22] In assessing the appropriate sanctions for Seol's violations, we consulted the Sanction Guidelines and applied the General Principles Applicable to All Sanction Determinations and Principal Considerations in Determining Sanctions, which adjudicators examine in every disciplinary case. *See FINRA Sanction Guidelines* (April 2017 ed.), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter Guidelines].

[23] *See id.* at 4 (General Principles Applicable to All Sanction Determinations, No. 4) (explaining that the aggregation or "batching" of violations may be appropriate for purposes of determining sanctions in disciplinary proceedings); *see also Dep't of Enforcement v. Fox & Co. Invs., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NASD NAC Feb. 24, 2005) ("[W]here multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve NASD's remedial goals . . . ."), *aff'd*, 58 S.E.C. 873, 894 (2005).

[24] *See Guidelines*, at 14 (Private Securities Transactions).

Guidelines stress that the "presence of one or more mitigating or aggravating factors may either raise or lower the above-described sanctions."[25]

The Guidelines advise adjudicators to assess the extent of the private securities transaction by examining the dollar amount of sales, the number of customers, and the length of time over which the misconduct occurred.[26] The Guidelines also direct adjudicators to consider 10 other principal considerations applicable to violations involving private securities transactions, including: (1) whether the product sold away has been found to involve a violation of federal or state securities laws or federal, state, or self-regulatory organization rules; (2) whether the respondent had a proprietary or beneficial interest in, or was otherwise affiliated with, the selling enterprise or issuer and, if so, whether respondent disclosed this information to his customers; (3) whether the respondent attempted to create the impression that his member firm sanctioned the activity; (4) whether the respondent's selling away activity resulted, either directly or indirectly, in injury to the investing public, and, if so, the nature and extent of the injury; (5) whether the respondent sold away to customers of his member firm; (6) whether the respondent provided his employer firm with verbal notice of the details of the proposed transaction, and, if so, the firm's verbal or written response, if any; (7) whether the respondent sold away after being instructed by his firm not to sell the type of the product involved or to discontinue selling the specific product involved in the case; (8) whether the respondent participated in the sale by referring customers or selling the product directly to customers; (9) whether the respondent recruited other registered individuals to sell the product; and (10) whether the respondent misled his member firm about the existence of the activity or otherwise concealed the activity from the firm.[27]

For engaging in undisclosed outside business activities, the Guidelines recommend a fine of $2,500 to $73,000.[28] The Guidelines also recommend a suspension in any or all capacities for a period of 10 business days to three months, when the outside business activities do not include aggravating conduct.[29] Where there are aggravating factors, however, the Guidelines suggest a suspension of up to one year.[30] Where aggravating factors predominate the respondent's misconduct, the Guidelines recommend a longer suspension of up to two years, or a bar.[31] In assessing sanctions for cases involving undisclosed outside business activities, the Guidelines advise adjudicators to consider: (1) whether the outside activity involved customers of the firm; (2) whether the outside activity resulted directly or indirectly in injury to other parties, including

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25 *See id.*

26 *See id.*

27 *See id.* at 14-15.

28 *See id.* at 13 (Outside Business Activities).

29 *See id.*

30 *See id.*

31 *See id.*

the investing public, and, if so, the nature and extent of the injury; (3) the duration of the outside activity, the number of customers, and the dollar volume of sales; (4) whether the respondent's marketing and sale of the product or service could have created the impression that the member firm had approved the product or service; (5) whether the respondent misled his member firm about the existence of the outside activity or otherwise concealed the activity from the firm; and (6) the importance of the role played by the respondent in the outside business activity.[32]

There are no specific Guidelines concerning false statements on a firm's annual compliance questionnaire.[33] Nevertheless, the Guidelines related to the falsification of records are sufficiently analogous under the circumstances because Seol's failure to disclose his private securities transactions and outside business activities on Ameriprise's annual compliance questionnaires resulted in the falsification of the firm's records.[34]

For the falsification of records, the Guidelines recommend a fine of $5,000 to $146,000, where the respondent falsifies a document without authorization, in the absence of other violations or customer harm.[35] Where a respondent falsifies a document without authorization, in the absence of other violations or customer harm, the Guidelines recommend suspending the respondent for a period of two months to two years.[36] Where a respondent falsifies a document without authorization, in furtherance of another violation, resulting in customer harm or accompanied by significant aggravating factors, however, a bar is standard.[37] When imposing sanctions, the Guidelines instruct adjudicators to examine the following two relevant considerations: (1) the nature of the falsified documents; and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority.[38]

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32 *See id.*

33 *See id.* at 1 (Overview) ("For violations that are not addressed specifically, [a]djudicators are encouraged to look to the guidelines for analogous violations.")

34 While we recognize that prior cases have looked to the Guidelines related to recordkeeping violations and the falsification of records for guidance on sanctions related to false statements on a firm's compliance questionnaires, we have decided to take our primary guidance in this area from the Guideline related to the falsification of records because Seol's false statements on the compliance questionnaires resulted in false information being relied on by the firm and maintained in the firm's records. *Cf. McGee*, 2016 FINRA Discip. LEXIS 33, at *86-90 (applying the Guidelines related to recordkeeping and the falsification of records for false statements on firm compliance questionnaires).

35 *See Guidelines*, at 37 (Forgery, Unauthorized Use of Signatures or Falsification of Records).

36 *See id.*

37 *See id.*

38 *See id.*

Seol's misconduct presents several aggravating factors. First, over the course of nearly two years, Seol raised $100 million from 200 foreign investors.[39] Second, Seol had a proprietary interest in both WRCI and California Energy Investment Fund, the entity on whose behalf the $100 million in investments were solicited.[40] Third, for at least three years, Seol failed to provide Ameriprise with written notice of his WRCI activities, including his solicitation and sales of investments on behalf of California Energy Investment Fund.[41] Fourth, Seol personally solicited investors for California Energy Investment Fund's offering.[42] Fifth, Seol improperly used Ameriprise's name in the solicitation of sales for California Energy Investment Fund's offering.[43] Sixth, Seol intentionally misled Ameriprise about the existence of WRCI, and the selling activities he conducted through WRCI, on several different occasions.[44] Finally, Seol received significant compensation through WRCI in the form of salary and tax distributions for the solicitation and management of the foreign investors' investments in California Energy Investment Fund.[45] Seol's undisclosed private securities transactions and undisclosed outside business activities, coupled with his false responses on Ameriprise's annual compliance questionnaires, sidestepped Ameriprise's supervision of his activities and deprived Ameriprise of the opportunity to protect itself and California Energy Investment Fund's investors.

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39 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 8) (examining whether the respondent engaged in numerous acts or a pattern of misconduct), 14 (Private Securities Transactions) (Principal Considerations in Determining Sanctions, Nos. 1, 2, 3) (examining the dollar volume of sales, number of customers, and length of time over which the selling away activity occurred).

40 *See id.* (Principal Considerations in Determining Sanctions, No. 5) (examining whether the respondent had a proprietary or beneficial interest in the selling enterprise or issuer).

41 *See id.* at 15 (Private Securities Transactions) (Principal Considerations in Determining Sanctions, No. 13) (examining whether the respondent concealed the selling away activity from the firm).

42 *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 11) (examining whether the respondent participated in the sale by referring customers or selling the product directly to customers).

43 *See id.* at 14 (Private Securities Transactions) (Principal Considerations in Determining Sanctions, No. 6) (examining whether the respondent attempted to create the impression that his firm sanctioned the activity).

44 *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 13) (examining whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence), 13 (Outside Business Activities) (Principal Considerations in Determining Sanctions, No. 5) (examining whether the respondent misled his firm about the outside activity or otherwise concealed the activity from the firm).

45 *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 16) (examining whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain).

With a host of aggravating factors before us, we turn to the evidence of mitigation that Seol has presented on appeal to persuade us to recede from the Hearing Panel's bar.[46] It is the presentation of these mitigating factors that is the primary focus of Seol's appeal, and, accordingly, we carefully review each factor in turn below.

Seol's principal argument in favor of mitigation is that he believed he did not have to disclose his WRCI activities and sales of California Energy Investment Fund's limited partnership units to Ameriprise. Seol states that he "was simply unaware of any wrongfulness in his actions, holding an honest, good-faith belief that he had to be compensated by WRCI for his involvement to be considered an 'outside business activity' requiring disclosure to his firm." Seol adds that he "was not compensated for his involvement with, nor did he consider himself an employee of WRCI[,] during his employment with Ameriprise." We note that the Hearing Panel expressly rejected Seol's claims as not credible,[47] and we find that Seol's claims of ignorance do not support the imposition of lesser sanctions.[48]

Seol suggests that it is mitigating that he "received no direct instruction or specific warnings from his firm or any regulator forbidding him from soliciting participation in loan agreements or in the EB-5 program generally."[49] But the absence of prior warnings is not a mitigating factor.[50] In addition, we note that there was no occasion for Ameriprise to provide Seol with a "specific warnings" about his private securities transactions or outside business activities because the firm prohibited its registered representatives from selling any securities other than those offered through the firm or from engaging in any undisclosed outside business

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[46] Seol states that the Hearing Panel "wholly disregarded" "undisputed mitigating factors" that "clearly merit an imposition of a lesser sanction."

[47] On appeal, Seol has failed to produce substantial evidence to overturn the Hearing Panel's credibility determination. *See Dep't of Enforcement v. Giblen*, Complaint No. 2011025957702, 2014 FINRA Discip. LEXIS 39, at *16 n. 16 (FINRA NAC Dec. 10, 2014) (explaining that the Hearing Panel's credibility findings, "which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference and can be overcome only where the record contains substantial evidence for doing so").

[48] *See ACAP Fin., Inc.*, Exchange Act Release No. 70046, 2013 SEC LEXIS 2156, at *82 (July 26, 2013) (rejecting respondent's claims of lack of understanding and ignorance of FINRA's rules as grounds for mitigation), *aff'd*, 783 F.3d 763 (10th Cir. 2015).

[49] *See Guidelines*, at 15 (Private Securities Transactions) (Principal Considerations in Determining Sanctions, No. 10) (examining whether the respondent sold away after being instructed by his firm not to sell the type of product involved).

[50] *See Dep't of Enforcement v. Elgart*, Complaint No. 2013035211801, 2017 FINRA Discip. LEXIS 9, at *40 (FINRA NAC Mar. 16, 2017), *aff'd*, Exchange Act Release No. 81779, 2017 SEC LEXIS 3097 (Sept. 29, 2017), *aff'd*, 2018 U.S. App. LEXIS 26627 (11th Cir. Sept. 19, 2018).

activity, and Ameriprise would have been in no position to warn Seol about business activities he was concealing from the firm.

Seol asserts that the foreign investors who participated in California Energy Investment Fund's offering were financially "sophisticated," and that their financial sophistication is mitigating.[51] But the record provides no evidence of the foreign investors' level of financial sophistication, and, even if the record contained such evidence, the foreign investors' level of financial sophistication does not diminish Seol's culpability for his misconduct or the seriousness of his violations.[52]

Seol maintains that it is mitigating that he "has given his complete cooperation throughout the regulator's investigation of this matter."[53] But complying with one's obligations under FINRA Rule 8210 to provide information and testimony on request – which is all Seol did here – does not constitute "substantial assistance" meriting a lesser sanction.[54]

Seol further states that the Hearing Panel "cynical[ly] and summar[ily] discount[ed]" the absence of investor harm as a mitigating factor.[55] But "[i]t is well established that the absence of customer harm is not mitigating."[56]

Seol also argues that it is mitigating that the limited partnership interests that he sold have not been found to involve a violation of federal or state securities laws or self-regulatory organization rules;[57] that he did not attempt to create the impression that Ameriprise sanctioned

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[51] *See Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 18) (examining the level of sophistication of the injured or affected customer).

[52] *See Dep't of Enforcement v. Scholander*, Complaint No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *81-82 (FINRA NAC Dec. 29, 2014) (rejecting respondents' mitigation argument based on purported sophistication of customers), *aff'd*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209 (Mar. 31, 2016), *aff'd*, 712 F. App'x 46 (2d Cir. 2017).

[53] *See Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 12) (examining whether the respondent provided substantial assistance to FINRA in its investigation of the underlying misconduct).

[54] *See Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *40-41 (Jan. 9, 2015), *aff'd*, 641 F. App'x 27 (2d Cir. 2016).

[55] *See Guidelines*, at 15 (Private Securities Transactions) (Principal Considerations in Determining Sanctions, No. 7) (examining whether the respondent's misconduct resulted in direct or indirect injury to the investing public).

[56] *KCD Fin., Inc.*, Exchange Act Release No. 80340, 2017 SEC LEXIS 986, at *48 (Mar. 29, 2017).

[57] *See Guidelines*, at 14 (Private Securities Transactions) (Principal Considerations in Determining Sanctions, No. 4) (examining whether the product sold away has been found to

[Footnote continued on next page]

his activities;[58] that he did not recruit other registered representatives or associated persons to participate in his WRCI activities;[59] and that he did not sell California Energy Investment Fund's limited partnership interests to any customer of Ameriprise.[60] We acknowledge these factors. But we also note that the Commission has expressly held that, while the presence of these circumstances may be aggravating, their absence is not mitigating.[61]

Finally, Seol asserts that he should not be barred based on the sanctions imposed in other cases. But it is well-established that "appropriate sanction[s] depend[] upon the facts and circumstances of each particular case and cannot be precisely determined by comparison with the action taken in other proceedings."[62]

The rules proscribing undisclosed private securities transactions and undisclosed outside business activities are "designed to protect investors from unmonitored sales and to protect securities firms from exposure to loss and litigation in connection with sales made by persons associated with them."[63] In light of these concerns, the proscriptions play "a crucial role in FINRA's regulatory scheme, and its abuse calls for significant sanctions."[64] The nature of Seol's

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involve a violation of federal or state securities laws or federal, state, or self-regulatory organization rules).

58 In connection with this factor, we note that Seol improperly used Ameriprise's name to describe his qualifications in materials distributed to California Energy Investment Fund's prospective investors. The use of Ameriprise's name in the California Energy Investment Fund's marketing materials suggests that Ameriprise sanctioned California Energy Investment Fund's offering, or, at a minimum, was aware of Seol's solicitations and sales of the offering's limited partnership units. *See id.* (Principal Considerations in Determining Sanctions, No. 6) (examining whether the respondent attempted to create the impression that his firm sanctioned the activity).

59 *See id.* at 15 (Private Securities Transactions) (Principal Considerations in Determining Sanctions, No. 12) (examining whether the respondent recruited other registered individuals to sell the product).

60 *See id.* (Private Securities Transactions) (Principal Considerations in Determining Sanctions, No. 8) (examining whether the respondent sold away to customers of his firm).

61 *See Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *30-31 (May 13, 2011) (noting that an associated person should not be rewarded simply for acting in compliance with the securities laws and with his duties as a securities professional).

62 *Arthur Joseph Lewis*, 50 S.E.C. 747, 751, n. 15 (1991).

63 *Dep't of Enforcement v. Fox Fin. Mgmt. Corp.*, Complaint No. 2012030724101, 2017 FINRA Discip. LEXIS 3, at *24-25 (FINRA NAC Jan. 6, 2017).

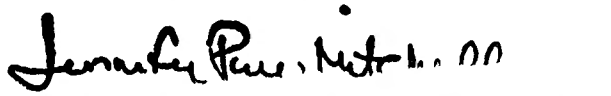
64 *Id.* at 25.

misconduct, particularly, the volume of the private securities, the number of investors involved, the length of time the misconduct occurred, and his repeated misrepresentations to Ameriprise, lead us to conclude that a bar is the appropriate sanction for Seol's actions in this case. Accordingly, we bar Seol from association with any FINRA member firm in any capacity.

V. Conclusion

We affirm the Hearing Panel's findings that: (1) Seol participated in undisclosed private securities transactions, in violation of NASD Rule 3040 and FINRA Rule 2010; (2) Seol engaged in undisclosed outside business activities, in violation of FINRA Rules 3270 and 2010; and (3) Seol provided false statements on Ameriprise's annual compliance questionnaires in response to questions concerning his private securities transactions and outside business activities, in violation of FINRA Rule 2010. For this misconduct, we bar Seol from associating with any FINRA member firm in any capacity.[65] We also affirm the Hearing Panel's order that Seol pay hearing costs of $4,440.70, and we impose appeal costs of $1,627.80.[66]

On Behalf of the National Adjudicatory Council,



Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

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[65] The bar is effective as of the date of this decision.

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