SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 76118 / October 8, 2015

Admin. Proc. File No. 3-13678r

In the Matter of the Application of

JOHN M.E. SAAD

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Misappropriation

Associated person of member firm barred, in remanded proceedings, based on earlier findings that he misappropriated member firm's funds by filing a false expense report. *Held*, association's disciplinary action is *sustained*.

APPEARANCES:

Steven N. Berk, of Berk Law PLLC, for John M.E. Saad

Alan Lawhead, Jennifer Brooks, and *Michael Garawski,* for FINRA

Appeal filed: April 13, 2015
Last brief received: August 3, 2015

John M.E. Saad, formerly a registered representative associated with Homer, Townsend & Ken ("HTK"), a FINRA member firm, appeals from FINRA disciplinary action.[1] FINRA found that Saad misappropriated funds of HTK's parent company, Penn Mutual Life Insurance Co., in violation of NASD Rule 2110, by accepting reimbursement based on Saad's submission of false expense reimbursement requests and receipts.[2] FINRA barred Saad in all capacities and assessed costs, which we sustained after Saad appealed. Saad then filed a limited appeal of our decision with the Court of Appeals for the District of Columbia Circuit, "not contest[ing] his culpability, but instead argu[ing] only that the SEC abused its discretion in upholding the lifetime bar."[3] The court remanded the proceeding, finding that we "fail[ed] to address several potentially mitigating factors."[4] We, in turn, remanded the proceeding to FINRA to address the concerns raised by the court. On remand, FINRA again determined to bar Saad, which led to this appeal. We base our findings on an independent review of the record.

I. Background

We summarize below the pertinent facts and procedural history of this matter, which are undisputed. Although the findings of violation against Saad are not now at issue, the facts supporting those findings provide context for our review of FINRA's sanctioning determination.

A. Saad submitted a false expense claim for a canceled business trip.

In July 2006, when a scheduled business trip to Memphis, Tennessee was canceled, Saad, who lived and worked in Atlanta, Georgia, did not go into work but instead checked into an Atlanta hotel for two nights. Shortly thereafter, he submitted a false expense report to HTK in which he sought reimbursement for two nights at a Memphis hotel and roundtrip airfare to that city. The expense report Saad submitted included an airline travel receipt and a Memphis hotel receipt, both of which he had forged. In doing so, he sought to make his fake receipts look authentic by researching the cost of a last minute flight from Atlanta to Memphis and Memphis hotel rates, and by downloading and copying from the internet corporate logos and related graphics for Delta Airlines and Marriot International, Inc. In describing his efforts and the resulting forged documents, Saad testified that he "had to be consistent with the fact that, you know, it was a last minute purchase-type of ticket." He also testified that he used "an estimated room rate of what it would be to stay there" and "what [he] thought . . . was the rate . . . at the

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[1] FINRA is the successor to the National Association of Securities Dealers, Inc. (the "NASD"), which was the regulatory authority that initially investigated these matters. While Saad's conduct occurred before the creation of FINRA, FINRA's Department of Enforcement, together with FINRA's Office of Hearing Officers, initiated proceedings against Saad, applying NASD rules. Generally, references to the NASD and FINRA are interchangeable throughout the opinion.

[2] Rule 2110 requires that members and their associated persons "observe high standards of commercial honor and just and equitable principles of trade."

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

[4] *Id.* at 912.

time." In addition, he submitted reimbursement requests to his office administrator for meals and other expenses, purportedly incurred in Memphis, but actually incurred in Atlanta. These, he testified, were designed "to show [he] was in Memphis in some form."

Saad explained that his actions were a consequence of personal and professional stress he was then experiencing. During the preceding year, his production had declined and he had virtually halted business travel, which was considered a significant aspect of his professional responsibilities.[5] In June 2006, he was issued a production warning and directed to increase his sales. According to Saad, he learned that the Memphis meeting had been canceled on the way to the airport and "panicked because [his] travel was down dramatically."

Saad explained his decision to check into an Atlanta hotel by stating that if he "had gone to the office, that it would have been evident that [he] hadn't done any travel." Also at this time, he had two young children, one of whom had recently been hospitalized with "significant" health problems.[6] He stated that, by checking into the hotel, he hoped to have a "couple of days that I could focus on my work." When Penn Mutual approved the expense report, Saad accepted the unwarranted reimbursement.

Saad's forgery was discovered by the office administrator, who noticed that Saad had attached to his expense report an unaltered, apparently authentic, receipt for four drinks purchased in an Atlanta hotel lounge on the same day when, according to his expense report, he was supposed to be in Memphis. When the administrator asked him about the receipt, Saad took it back and threw it away. The administrator retrieved the receipt from the trash, and provided it to Penn Mutual's home office, which eventually discovered what Saad had done and terminated him. Saad never offered to repay the misappropriated funds until "after [Penn Mutual] came back to [him] and asked [him] about the expenses."

B. Saad submitted a false reimbursement request for a cell phone.

Also in July 2006, but apparently unrelated to the claimed Memphis trip, Saad sought $392.19 in reimbursement for the purchase of a cell phone, claiming on the report that it was to replace an "old Treo [that] broke." The section on the attached receipt indicating the cell phone recipient had been blacked out. Saad could not recall whether he had blacked out the receipt, but "assum[ed]" that he "probably did." Saad also admitted to writing the justification for the reimbursement request and that, in fact, he had not purchased the phone to replace his own phone, as the justification suggested. Instead, as he later admitted, he obtained the phone for an insurance agent with another firm whom he hoped to recruit.

Saad testified that he believed that the purchase was legitimate because it furthered the Firm's recruiting objectives and was consistent with prior recruiting practices and reimbursement

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[5] As a Penn Mutual regional director, Saad's chief duties entailed recruiting new sales agents and helping existing agents grow their business. Saad initially was a top producer and traveled extensively on recruiting trips but, by June 2006, he had effectively stopped traveling.

[6] *Saad v. SEC*, 718 F.3d at 908.

policy. But, when asked about the altered receipt he submitted, he testified: "I was under the pressure of the situation that I just said, you know, I'm just going to put it down as my own, but I should have put it down as exactly the way it should have been put down and expensed it that way." He further admitted that, despite his claims about the Firm's reimbursement policy, the cell phone purchase "probably wouldn't have been" an approved expense if the Firm had known the identity of the recipient. The hearing panel, which observed his demeanor during testimony, did not credit his claim that the purchase was consistent with prior practice.

C. After Saad's termination, FINRA investigated and instituted disciplinary proceedings.

Approximately two months after his termination in the fall of 2006, Saad was questioned by FINRA investigators about the circumstances surrounding it. When confronted, Saad sought to mislead FINRA by providing false answers to their questions. For example, he told investigators that the expenses claimed on the report were "for a business trip that had yet to occur" when, in fact, they were for a trip that had been canceled and not rescheduled. He also falsely indicated that the cell phone purchase was to replace his own broken phone. He further initially claimed that he did not know whether he had purchased a plane ticket for the July trip to Memphis. Only when FINRA investigators asked Saad to document the airfare purchase, through a credit card statement, did he admit that he did not "believe [he] purchased that ticket."

FINRA instituted disciplinary proceedings in September 2007, alleging "conversion of funds" in violation of NASD Rule 2110. A FINRA hearing panel found that Saad deliberately deceived his employer both with regard to the travel report and the cell phone purchase; that this constituted conversion of the Firm's funds; and that such conversion was inconsistent with Rule 2110's requirement that members and their associated persons adhere to just and equitable principles of trade. The panel imposed a permanent bar, noting that, according to FINRA Sanction Guidelines, a bar is standard for conversion regardless of the amount involved.[7] Saad appealed first to FINRA's National Adjudicatory Council (the "NAC") and then to the Commission, both of which affirmed the findings of violation and imposition of the bar.[8]

In remanding the case to us following Saad's appeal, the D.C. Circuit held that our decision "ignore[d] several potentially mitigating factors asserted by Saad and supported by evidence in the record."[9] The court further noted that it had previously "cautioned that the SEC 'must be particularly careful to address potentially mitigating factors' before affirming a permanent bar."[10] In particular, the court criticized our failure to consider that HTK had

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[7] The D.C. Circuit also applied FINRA's Guidelines.

[8] The NAC characterized Saad's actions as "misappropriation" rather than "conversion" but found that the same sanction was warranted. We agreed with the NAC. *See* n. 19 and accompanying text..

[9] *Saad*, 718 F. 3d at 913.

[10] *Id.* (quoting *Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007)).

disciplined Saad by terminating him and Saad's argument that he "was under severe stress with a hospitalized infant and a stressful job environment." Although the court took "no position on the proper outcome of the case," it remanded so that we could "fully address *all* potentially mitigating factors that might militate against a lifetime bar."[11]

D. FINRA determined that Saad should be barred.

Following our remand order, the NAC reaffirmed its decision to bar Saad. In doing so, it considered Saad's various claims in support of reduced sanctions, but found that they did "not rise to the level of mitigation that would be sufficient to reduce the sanctions we originally imposed." It further held that, "[i]n light of the absence of qualifying mitigating factors, the presence of aggravating factors, the troubling nature of Saad's misconduct, and his concealment of that misconduct from regulators, it remains appropriate to bar Saad for misappropriation of his firm's funds." Among the factors the NAC identified as aggravating were that Saad's actions were "intentional and ongoing" and "did not result from any misunderstanding." The NAC further found that Saad's conduct resulted in $1,144 in monetary gain to Saad and an equal loss to the Firm.

With respect to the two potentially mitigating factors specifically identified by the court, the NAC held that termination prior to regulatory detection is not mitigating, citing FINRA and other precedent as support for this position. The NAC further supported its position by noting that such termination "does not disqualify an individual from working elsewhere . . . ." As for Saad's claimed stress, the NAC held that "personal problems" could be mitigating if they "interfered with an ability to comply with FINRA rules or that violations resulted from, or were exacerbated by, such problems." It further held that establishing stress or similar personal circumstances as a mitigating factor is "a difficult burden to meet" and will, in any event, be "weighed together with all other relevant considerations."

While the NAC found that Saad was under "significant" professional and personal stress, it did not consider such circumstances mitigating because there was no evidence that the stress "interfered with his *ability* to comply with FINRA rules or his understanding of what those rules required . . . ."[12] According to FINRA, "this was not a situation where a stressful situation caused a person to be momentarily distracted from his compliance obligation . . . ." Instead, Saad, in response to a stressful situation, "voluntarily chose and then methodically continued an unethical course of conduct . . . ." In rejecting stress as a mitigating factor here, the NAC expressed concern that Saad could again engage in misconduct if he faced another stressful situation related to his job or family, "which could recur at any time."

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11 *Id.* at 14 (emphasis in original).

12 (Emphasis in original).

The NAC addressed various other claims by Saad but also found them not mitigating. These included Saad's lack of a disciplinary history and the asserted "modest" amount of money involved. According to the NAC, "regardless of whether $1,144 is a 'large' sum or not, the amount involved is less important . . . than Saad's willingness to engage in a series of deceptive actions that he knew would result in financial loss to his firm and benefit to him." Nor did it credit Saad's claim that he accepted responsibility for his actions, noting that he did so only after having been caught. Similarly, it rejected Saad's claim of remorse, finding it unsupported and "at odds with his numerous efforts to minimize his transgressions . . . [and] blame others."

Having considered all the circumstances, the NAC concluded that "Saad's remaining in the industry, which relies so heavily on personal integrity . . . poses serious risks to the investing public." Therefore, it found that barring Saad was necessary to "protect the public from future harm and deter others . . . ."

II. Analysis

Under Securities Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find that it is "excessive or oppressive" or imposes an unnecessary or inappropriate burden on competition.[13] We also consider whether the sanctions imposed by FINRA are remedial in nature and not punitive.[14] Based on our independent review, we affirm FINRA's determination to bar Saad.

FINRA's Sanction Guidelines state that "a bar is standard" for conversion "regardless of [the] amount converted."[15] This approach reflects the judgment that, absent mitigating factors,[16] conversion "poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry."[17] Indeed, conversion is antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their

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[13] 15 U.S.C. § 78s(e)(2). Saad does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

[14] *Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1065; *see also* Guidelines, at 2 ("Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry.").

[15] Although we are not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

[16] The Guidelines include a list of non-exhaustive aggravating and mitigating factors (*i.e.*, "Principal Considerations"), and state that, "as appropriate, Adjudicators should consider case-specific factors in addition to those listed." Guidelines, at 6-7.

[17] *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *5 n.27 (Nov. 8, 2007).

money.[18] Although we, like the NAC, found in our decision in Saad's first appeal that Saad's action constituted misappropriation rather than conversion, the same public interest concerns motivate us in assessing the sanction FINRA imposed. [19]

It is aggravating that Saad attempted to conceal his misconduct from Penn Mutual and regulators, and that he profited from his actions and Penn Mutual suffered loss. The Guideline's Principal Consideration 10 considers "[w]hether the respondent attempted to conceal his . . . misconduct or . . . mislead . . . regulatory authorities or" his firm. Saad admittedly concealed his actions from his employer for months and concealed his actions from regulators through repeated omissions and affirmative misrepresentations, including statements to regulators that the Memphis expenses were for a future trip and that the phone charges were to replace Saad's own broken phone. The Guideline's Principal Considerations 11 and 17 include whether the misconduct resulted in "injury" to the respondent's firm and/or "monetary or other gain" to the respondent. Given that Saad was reimbursed for the false expense reports, both of these considerations apply and support the bar.

Nevertheless, Saad argues that the bar is "an impermissible penalty," dismissing his actions as "a series of blunders in desperate times" accompanied by a "foolish[] (aided by poor legal advice) attempt[] to cover up that mistake." Saad further challenges FINRA's "refusal to accept 'termination of employment' as a mitigating factor." In support, he cites the Guideline's statement that adjudicators are to consider "[w]hether the member firm with which an individual respondent is/was associated disciplined respondent for the same misconduct at issue prior to regulatory detection."

We repeatedly have held that the "collateral consequences" of misconduct, including loss of employment, reputation, and income, are not mitigating.[20] That said, the Guidelines direct that employment termination, which we have held is a form of disciplinary action, should be considered mitigating if it was related to the misconduct at issue and it occurred before

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[18] *See John Edward Mullins*, Exchange Act Release No. 66373, 2012 WL 423413, at *18 (Feb. 10, 2012) (stating that conversion "is extremely serious and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that underpin the self-regulation of the securities markets" (internal quotation omitted)); *Joseph H. O'Brien II*, Exchange Act Release No. 34105, 1994 WL 234279, at *3 (May 25, 1994) ("In converting [customer] funds, O'Brien abused the trust that is the cornerstone of the relationship between a securities professional and his customer.").

[19] The court affirmed this position in its remand order, stating that "[t]he SEC reasonably concluded that 'misappropriation is doubtless analogous to conversion'. . . . Because the Guidelines do not list a particular sanction for misappropriation, it was not arbitrary and capricious for the Commission to analogize to the guideline's conversion prong in this way." *Saad v. SEC*, 718 F.3d at 911.

[20] *See, e.g., Kent M. Houston*, Exchange Act Rel. No. 71589A, 2014 WL 936398, at 8 (Feb. 20, 2014) (finding that collateral consequences from misconduct were not mitigating).

regulatory detection.[21] But, as we have held in a similar situation, "the mitigating effect from [respondent's] termination is no guarantee of changed behavior . . ." and may not be enough to overcome our concern that he or she "poses a continuing danger to investors and other securities industry participants (including would-be employers) . . . ."[22]

It is undisputed that Saad repeatedly used dishonest means to overcome personal and professional disappointments and obstacles, and to mislead his employer and regulators. Not only did he submit false expense requests; he also took considerable effort in forging documents to support those requests, and diligently persevered in his dishonest scheme despite partial exposure by his administrator. Then, when confronted by authorities with reason to doubt his claims, he again chose dishonesty in a failed attempt to avoid the consequences of his actions. Indeed, Saad's continued deception during the investigation of this matter, which occurred months after his termination, shows that his termination was insufficient to dissuade him from further misconduct. As a result, we cannot conclude that termination, while mitigating under certain circumstances, overcomes the threat he would pose to investors and other securities industry participants were he to return to the industry.

Nor are we persuaded by Saad's argument that "[h]is conduct spr[a]ng from pressure and stress not innate dishonesty" and that "[h]e did not intend to harm anyone."[23] Although we credit Saad's assertion that he was under both professional and personal stress at the time of his relevant conduct, we find that his stress is not a mitigating factor under these circumstances. His course of conduct was not the type that one might associate with stress, such as an unthinking reaction during a stressful moment that is later redressed; instead, his deceptive conduct demonstrated a high degree of intentionality over a long period of time.

When his trip to Memphis was cancelled, Saad did not disclose this professional setback to his Firm. Even if this failure standing alone might have been viewed as an unthinking reaction to stress, his next steps were intended to deceive his Firm and required planning and research. He led his Firm to believe that the Memphis trip had occurred as planned by disappearing for two days at an Atlanta hotel, methodically forging hotel and airfare receipts that bore logos that he had copied from the internet, incurring expenses in Atlanta during those two days to make it

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[21] *Denise M. Olson*, Exchange Act Rel. No. 75837, 2015 WL 5172954, at *5 (Sept. 3, 2015) (holding that termination of employment for the misconduct at issue can be mitigating factor). FINRA seeks to distinguish termination from other disciplinary actions, noting that the Guidelines "contain no references to 'loss of employment' but ask whether a firm 'disciplined' a respondent." It further asserts that, "[w]hen a firm terminates an associated person, it relinquishes control, making firm-imposed discipline unattainable." We do not find this distinction persuasive given the pertinent language, and find that termination in this context constitutes disciplinary action and, as such, may be mitigating under the Guidelines.

[22] *Id.*

[23] Saad also argues that "[s]ubmitting accurate expense reports is a private matter between employer and employee" and not subject to "regulatory scrutiny." But, as noted, Saad did not contest our earlier findings of violation, so his liability is no longer subject to challenge.

appear as if he had incurred them on a business trip to Memphis, and then submitting a falsified expense report that attached the receipts. Although Saad could have admitted the truth when questioned about his conduct—including when his office administrator challenged one of his receipts—he repeatedly chose deception. Separate and apart from the Memphis trip, Saad, used dishonest means and a false justification to circumvent Firm reimbursement policy to purchase a cell phone for a recruiting prospect. Saad compounded his deception by misleading FINRA investigators.

The extent of Saad's planning, and his detailed execution of that plan, belies Saad's assertion that his conduct was simply "a series of blunders." And Saad's repeated deception of his employer and attempt to mislead FINRA investigators are contrary to his assertions that his conduct was a result of "stress not innate dishonesty." We find that Saad's stress is not a mitigating factor under these circumstances.

Saad makes certain other claims in support of his appeal, none of which we find justifies modification of the sanction. He suggests that he does not pose a risk to investors because there was "no evidence" that he "misappropriated one dollar of customer money" and because "[h]e was mostly in the recruitment side of the business where his job was to recruit other brokers." But we previously have upheld bars where the underlying dishonesty did not relate directly to customers. [24]

Finally, Saad argues that FINRA erred in not considering that, other than this matter, he has a clean disciplinary record. Moreover, according to Saad, "even if FINRA had facts to support a finding of investor 'risk' in 2006, that finding would, at a minimum, be diluted over the past 9 years, particularly as Mr. Saad has been complaint free in that time period." But we have repeatedly held that a clean disciplinary record is not mitigating. [25] And, as FINRA noted, Saad's lack of additional problems in the period subsequent to the misconduct at issue here can be at least partially credited to his employment termination and FINRA bar. [26]

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[24] *See Richard Dale Grafman*, Exchange Act Release No. 21648, 1985 WL 548687, at *2 n.2 (Jan. 14, 1985) ("[W]e do not agree with [respondent] that his misconduct was somehow less serious because it did not involve public customers. The fact that he defrauded a brokerage firm instead is hardly a factor in his favor."); *Henry E. Vail*, Exchange Act Release No. 35872, 52 S.E.C. 339, 1995 WL 380145, at *2 (June 20, 1995) (imposing bar and other sanctions based on respondent's commingling of funds of political organization with personal funds), *aff'd*, 101 F.3d 37 (6th Cir. 1996).

[25] *See World Trade Fin. Corp.*, Exchange Act Rel. No. 66114, 2012 WL 32121, at *16 (Jan. 6, 2012) ("'[L]ack of disciplinary history is not a mitigating factor' because 'firms and their associated persons should not be rewarded for acting in accordance with their duties.'") (citation omitted). We note that the Guidelines expressly state that, "while the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating." Guidelines at 6 (citing *Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006)).

[26] Saad's offer to pay back his firm is not mitigating because it did not occur "prior to detection and intervention." *See* Guidelines at 6 (Principal Considerations in Determining

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It is undisputed that Saad made two false expense claims, seeking more than $1000 to which he was not entitled. Moreover, Saad's deception was carried out with noteworthy attention to detail and imagination, suggesting considerable planning and deliberation. Additionally, at various times, he was questioned about his conduct and could have admitted his deceptions, but he chose, instead, to engage in more dishonest conduct by seeking to mislead HTK personnel and regulators. As discussed, disappointments and challenges in Saad's personal and professional life may have influenced his decision to engage in misconduct, but on the facts of this case, those factors neither excuse that misconduct nor mitigate his responsibility or the need for a strong remedy.

We, like FINRA, believe that one who, regardless of motivation, intentionally misappropriates money from others on more than one occasion, may do so again. In short, Saad's actions betray a dishonest character that is wholly inconsistent with the high standards demanded of securities professionals. They demonstrate that he cannot be entrusted with firm or customer money, and that therefore he would pose a continuing and unacceptable threat to investors and other industry participants if not barred. We also agree with FINRA that a bar in this situation serves important deterrent objectives and reaffirms long-standing FINRA policy that such dishonesty by members or their associated persons will not be tolerated. Because we conclude that a bar is necessary to protect FINRA members, their customers, and other securities industry participants, we find that it is remedial, not punitive.

An appropriate order will issue.[27]

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

Brent J. Fields
Secretary

Sanctions, No. 4). Nor is his unsupported claim that he provided substantial assistance to FINRA. Indeed, as discussed, he sought to thwart FINRA's investigation.

[27] 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. 76118 / October 8, 2015

Admin. Proc. File No. 3-13678r

In the Matter of the Application of

JOHN M.E. SAAD

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

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

ORDERED that the disciplinary action taken by FINRA against John M. E. Saad and its assessment of costs are SUSTAINED.

By the Commission.

Brent J. Fields
Secretary