BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. William Joseph Kielczewski Ottawa Hills, OH, Respondent.	DECISION Complaint No. 2017054405401 Dated: September 30, 2021

Respondent engaged in private securities transactions, made false statements to his member firm employer, and willfully caused his member firm employer to file a misleading initial Form U4 and four misleading Form U4 amendments. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Megan Davis, Esq., Kevin Pogue, Esq, David Monachino, Esq., Ralph DeSena, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Andrew St. Laurent, Esq., Afrodite Fountas, Esq.

Decision

William Joseph Kielczewski appeals an Extended Hearing Panel ("Hearing Panel") decision. The Hearing Panel found that Kielczewski participated in undisclosed private securities transactions ("PSTs"), made false statements to his employer firm, and willfully caused his employer firm to file a misleading initial Uniform Application for Securities Industry Registration or Transfer ("Form U4") and four misleading Form U4 amendments. All Kielczewski's misconduct related to his involvement with, and sale of, a hedge fund. For this misconduct, the Hearing Panel suspended Kielczewski for 18 months, fined him $50,000, required that he requalify as a general securities representative, and ordered that he be subject to heightened supervision for one year as a condition of re-entry after his suspension.

After a thorough review of the record, we affirm the Hearing Panel's liability findings and the suspension, fine, and requirement to requalify. Because Kielczewski is statutorily disqualified based on our determination that he willfully caused his firm to file misleading Forms U4, we eliminate the heightened supervision requirement. Instead, a tailored heightened supervision plan will come more appropriately from the Membership Continuance Application process (MC-400), which is necessary should Kielczewski reapply for membership with a FINRA member.

I. Background

Kielczewski entered the securities industry in June 1999. Fifth Third Securities employed him as a general securities representative from June 1999 until November 25, 2013. Kielczewski met two individuals at Fifth Third who play central roles in this case: Jeffrey Chapman, the then-head of Fifth Third's capital markets group and one of Kielczewski's supervisors, and Kevin Taylor, the then-head of the mortgage-backed securities desk, who became Kielczewski's close friend and business associate.

In 2013, in the face of declining incomes at Fifth Third, Kielczewski and Taylor discussed forming a hedge fund. On August 26, 2013, Taylor, Kielczewski, and three other individuals formed Mariemont Capital LLC, which would be the investment manager (the "Investment Manager") responsible for making all investments for the soon-to-be formed hedge fund. In addition to being members of the Investment Manager, Kielczewski, Taylor, and another individual were also managers, with the power to conduct, direct, and exercise full control over all the Investment Manager's activities. Taylor left Fifth Third in early September 2013 to work for the Investment Manager. On October 2, 2013, Taylor, along with Kielczewski and others, formed the hedge fund, Mariemont Capital Partners, L.P. (the "Mariemont Fund" or the "Fund"). Taylor was the Fund's trader. Kielczewski was one of the three managers of the Fund's general partner, MCP GP, LLC (the "General Partner"). Kielczewski, as a member and manager of both the Investment Manager and the General Partner, had the power to "conduct, direct and exercise full control over all activities" of those entities. Kielczewski resigned from Fifth Third on November 25, 2013.

On January 8, 2014, Kielczewski associated with The Huntington Investment Company ("Huntington") as a general securities representative and was named a managing director of institutional sales. Two days later, on January 10, 2014, Kielczewski invested $400,000 in the Fund.[1] The limited liability company agreements for both the Investment Manager and the General Partner provided that their managers may "issue additional Units to existing Members who provide strategic services . . . whether as employees, independent contractors or in any other capacity." Pursuant to these provisions, Kielczewski's ownership interests in both entities grew

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[1] In order to invest, Kielczewski completed a subscription agreement in which he represented that he qualified as an accredited investor under Regulation D of the Securities Act of 1933 because, among other things, he was "a director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer." He additionally represented that he satisfied the criteria to be a "qualified client" pursuant to Reg D by virtue of his position with the Investment Manager as an "executive officer, director, trustee, general partner, or person serving in a similar capacity, of the investment advisor."

during his employment at Huntington from 10% to 22.25%, without Kielczewski contributing any additional capital.

The Fund began operating on January 22, 2014, by trading and investing in pools of residential mortgage-backed securities. Later that month, the Fund itself became a Huntington customer.[2] While he was associated with Huntington, Kielczewski engaged in various Fund-related activities, including soliciting investors and facilitating their investments in the Fund. Huntington never included the Fund on its platform of securities products available for sale by its registered representatives.

On April 26, 2017, Huntington fired Kielczewski because of his activities involving the Fund. In a Uniform Termination Notice of Securities Industry Registration ("Form U5"), the "Firm concluded that [Kielczewski] misrepresented activity relating to an OBA, and engaged in private securities transactions without firm approval for which there are no known customer complaints."

Kielczewski has not been associated with another FINRA member since Huntington fired him in 2017.

II. Procedural History

Huntington's filing disclosing Kielczewski's termination for cause triggered FINRA's investigation in this case. The Department of Enforcement began disciplinary proceedings on May 21, 2019, when it filed a three-cause complaint alleging that Kielczewski engaged in misconduct while he was associated with Huntington for which FINRA should impose sanctions.[3] Enforcement specifically alleged that Kielczewski: (1) made false statements to

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[2] The Fund's account was assigned to another firm representative who worked in a different branch than Kielczewski. From January 2014 through May 2017, all the Fund's assets were held in a Huntington account and traded through the firm. As of the hearing in this case, the Fund was still operating, but was no longer a Huntington customer.

[3] Kielczewski challenges FINRA's jurisdiction over him. He argues that Enforcement failed to file the complaint within two years of his termination date (April 26, 2017) from Huntington. Kielczewski misunderstands the parameters of FINRA's jurisdiction. Article V, Section 4(a)(i) of the FINRA By-Laws provides that FINRA retains jurisdiction to file a complaint against a person whose association with a member has been terminated for "two years after the effective date of termination of registration." The termination upon which FINRA's continuing jurisdiction is predicated therefore "is not termination of employment or association, but termination of registration." *Donald M. Bickerstaff*, 52 S.E.C. 232, 234 (1995). "A person who becomes registered remains registered until FINRA (not the registered person) ends the registration, based, among other things, on the Forms U5 it receives." *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *22 (July 27, 2015) (emphasis omitted); *see also Dep't of Enf't v. Weinstock*, Complaint No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *11 n.5 (FINRA NAC July 21, 2016) (explaining that termination of

[Footnote continued on next page]

Huntington, his member firm employer, in violation of FINRA Rule 2010; (2) engaged in PSTs, in violation of NASD Rule 3040 and FINRA Rules 3280 and 2010; and (3) willfully caused Huntington to file a misleading initial Form U4 and four misleading Form U4 amendments, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010.[4]

Kielczewski's primary arguments before the Hearing Panel were that he did not intentionally make false and misleading statements to Huntington about his involvement in PSTs and that he fully disclosed his intentions regarding Mariemont in conversations with his soon-to-be supervisor, Chapman, before he joined Huntington. Kielczewski contended that he "gave an accurate and complete picture of his planned activities in connection with this new hedge fund." After listening to Kielczewski's testimony, however, the Hearing Panel found Kielczewski not credible on these points and credited Chapman and the other Huntington witnesses, all of whom denied authorizing Kielczewski to solicit investments in the Fund.

The Hearing Panel found that Kielczewski engaged in the alleged misconduct. For making false statements to Huntington, engaging in undisclosed PSTs, and willfully causing Huntington to file misleading Forms U4, the Hearing Panel fined Kielczewski $50,000, suspended him in all capacities for 18 months, ordered him to requalify as a general securities representative, and placed him on heightened supervision for one year as a condition of re-association after his suspension.

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registration is effective upon the date that FINRA receives a Form U5 from the individual's member firm). "Moreover, the registered person receives a copy of the form filed with FINRA, with express reminders that he or she will 'continue to be subject to the jurisdiction of regulators for at least two years after [his or her] registration is terminated' and that FINRA 'determines the effective date of termination of registration.'" *Evansen*, 2015 SEC LEXIS 3080, at *11 n.5 (quoting the Form U5).

In this case, Huntington filed a Form U5 indicating that the firm had terminated Kielczewski's association with the firm in all capacities on May 25, 2017. Kielczewski remains subject to FINRA's jurisdiction for purposes of this proceeding because the complaint was filed within two years after the termination of his registration with a member firm, and it charges him with misconduct that commenced prior to the termination of his registration. *See* Article V, Section 4 of the FINRA By-Laws.

[4] In the complaint, the heading of cause three (the misleading Forms U4) references only the Form U4 amendments, not the initial Form U4 filing, and references a violation of FINRA Rule 2020. The body of the complaint, however, plainly alleges that Kielczewski willfully made misleading statements on his initial Form U4 and four Form U4 amendments and that these misleading statements violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010—not Rule 2020. We, like the Hearing Panel, consider whether Kielczewski violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010, by willfully making misleading statements on his initial Form U4 and four Form U4 amendments.

Kielczewski timely appealed the Hearing Panel's decision. On appeal, Kielczewski concedes liability for the PSTs. On the two remaining charges, he contends that he did not mislead the firm and fully disclosed to Chapman his activities for Mariemont, including his intention to solicit Huntington customers and that Chapman agreed that he could sell the Fund to transitioning Fifth Third customers away from Huntington. Consequently, he argues that he did not cause Huntington to file misleading Forms U4. As discussed in detail below, we defer to the Hearing Panel's credibility determinations on these points.

III. Facts

The parties stipulated to many of the facts in this case; therefore, few facts are in dispute.

A. Conversations Preceding Kielczewski's Hiring at Huntington

Chapman, then the head of capital markets at Huntington and Kielczewski's former supervisor at Fifth Third, recruited Kielczewski to Huntington. During his recruitment, Kielczewski told Chapman that he wanted to retain an ownership interest and be a general partner in the Fund while working at Huntington. Chapman conveyed this information to Huntington's compliance department to determine whether the firm would allow Kielczewski to continue his ownership in the Fund. Chapman understood that Kielczewski planned to bring his Fifth Third clients to Huntington and that Taylor had identified those same clients as potential investors in the Fund.

Chapman testified that irrespective of whether the firm agreed to allow Kielczewski to retain his ownership interest in the Fund, based on his discussions with Kielczewski, Chapman expected Kielczewski only to raise funds for Huntington, and not the Fund. According to Chapman, "when we were recruiting and talking to him, we had the conversation that you work here, you don't work at Mariemont Capital. [Kielczewski] understood that." Chapman stated that he never gave permission to Kielczewski to solicit customers to invest in the Fund. In comparison, Kielczewski testified that Chapman had expressly agreed to let him solicit his transitioning Fifth Third customers to invest in the Fund while employed at the firm. Kielczewski admitted, however, that he "couldn't solicit [customers] in terms of being a person that signs on the account subscription documents to on-board them. I can't do those things that I thought was soliciting" and "Taylor would do that."

B. Huntington's Policies Prohibited PSTs

Huntington's written supervisory procedures ("WSPs") prohibited registered representatives from participating in PSTs. The WSPs exempted from this prohibition "passive investments and activities," which Huntington defined as "those from which an individual receives income but for which he or she performs no service. Examples would include interest on investments or income from a corporation of which the person is a passive shareholder." Only Huntington's compliance department had authority to grant exceptions to this policy. Mark Gregory, who was the firm's chief compliance officer ("CCO") at the time Kielczewski joined Huntington, testified he was not aware of a single instance when the firm made an exception to its general prohibition against PSTs. Gregory also testified that although he discussed

Kielczewski's hiring with Chapman, they never discussed or agreed that Kielczewski could sell interests in the Fund.

C. Kielczewski Tells the Firm His Role in the Fund Is Merely Passive

On December 23, 2013, Kielczewski completed a pre-registration form as part of Huntington's onboarding process. Kielczewski checked "yes" when asked whether he was a general partner in an investment-related limited partnership or manager of an investment-related limited liability company. And he answered "yes" to the question "do you participate in any private securities transactions?" The pre-registration form defined PSTs as those outside the scope of his association with the firm and those in which he "participate[d] for another party's benefit," regardless of compensation. On the section of the form devoted to outside business activity requests, Kielczewski stated that he was engaged in an outside business activity with Mariemont Capital. In that section, he specifically described himself as a "passive owner/investor in a general/limited partnership that invests in non-conforming" mortgage-backed securities. Kielczewski also represented on the form that he had "[n]o business duties" at Mariemont Capital, and that he intended to devote approximately one hour per month to the outside business.

On Kielczewski's first day at Huntington (January 8, 2014), the firm's compliance department requested his clarification of these disclosures. A principal and head of the firm's registration group asked Kielczewski to explain his affirmative response concerning participating in PSTs and noted that the firm does not "normally allow these types of transactions." The principal also asked Kielczewski to explain his disclosure that he was a "general partner in an investment-related limited partnership or manager of an investment-related limited liability company."

Kielczewski responded that he was a "passive owner and investor in a limited partnership that invests in non-investment grade private label [mortgage-backed securities]." He added that "[b]eing a passive general partner allows me to have minority ownership in a limited partnership company," and that he was "not a manager of an investment related company and my passive ownership will not conflict with [Huntington] clients."

The principal forwarded Kielczewski's response to the firm's CCO, Gregory. Gregory asked Kielczewski to clarify whether his role with Mariemont Capital was "just that of a passive investor/owner (you do not engage in private securities transactions)?" Kielczewski assured Gregory that his role was passive, explaining that he "must have misunderstood what the private securities transactions question was." Based on Kielczewski's response, Gregory understood that Kielczewski was not engaging in PSTs, his role was "just a passive investor," and he was not "active in managing the investment, soliciting clients for the investment." Based upon Kielczewski's assurances that he was not engaged in PSTs, the firm approved Kielczewski's outside business activity request to remain a passive investor in the Fund and moved forward with his registration.

D. Kielczewski's Form U4 Filings

On January 15, 2014, the firm filed an initial Form U4 on Kielczewski's behalf based on information that he had provided. Question 13, titled "Other Business," asked, "Are you currently engaged in any other business as a proprietor, partner, officer, director, employee, trustee, agent or otherwise?" In response, Kielczewski, through the Firm, represented that his role with the Fund was passive:

> SILENT MINORITY PARTNER IN MARIEMONT CAPITAL LLC. THIS IS AN INVESTMENT RELATED COMPANY. START DATE WAS 12/1/2013. I HAVE A PASSIVE POSITION IN WHICH MY PERSONAL MONIES ARE BEING INVESTED IN NON INVESTMENT GRADE MBS [mortgage-backed securities] . . . 0 HOURS PER MONTH DEVOTED TO THIS BUSINESS.

Kielczewski repeated this disclosure in four subsequent Form U4 amendments through December 2016 without making any changes.

E. Kielczewski Actively Engaged in Soliciting Investors for the Fund

Prior to joining Huntington, Kielczewski and Taylor visited Kielczewski's former Fifth Third customers encouraging them to move their accounts to Huntington and invest in the Fund. Most of Kielczewski's Fifth Third customers moved to Huntington, and several of them invested in the Fund: HGI, WI and RI, SCCI, and K&R and its founder, KK. Despite his representations to the firm that he played only a passive role, Kielczewski was actively involved with the Fund, including soliciting investors, throughout his employment with Huntington.

1. HGI

Soon after joining Huntington, Kielczewski messaged Taylor on January 10, 2014, "Letz [sic] go!!!!!!" Taylor responded, telling Kielczewski that he was giving him access to all Fund files via a shared drive. Later that day, Kielczewski, using his personal email account, contacted the executive vice president of an insurance agency, HGI, about a "new potential investment" in the Fund. Kielczewski told the executive that he had created the Fund with the "former head of Mortgage-backed Trading at 5/3" and forwarded a 12-page PowerPoint presentation titled, "Mariemont Capital Partners, LP: Where Investment Professionals Invest," as well as a private offering memorandum for the Fund. Kielczewski and the executive met on January 21, 2014, and Kielczewski gave him what he described as the "Reader's Digest" version of the offering.

On April 4, 2014, Kielczewski emailed four senior HGI executives, updating them on the Fund's first quarter performance, predicting the Fund's year-end returns, and urging them to invest with him at "Huntington and/or Mariemont." Kielczewski emailed the HGI executives again in late April 2014, asking to review with the HGI team "a potential investment in Mariemont Capital" and seeking their thoughts about "a potential transition and strategy" that included HGI investing in the Fund. Among other things, Kielczewski stated, "In my opinion, our whole loan investments will outperform if we use Mariemont Capital." "I feel very confident that the performance of the Mariemont Fund will beat your expectations and help us increase our returns to a degree not possible in the traditional institutional investment account."

HGI became a firm customer in December 2014 with Kielczewski as the account's assigned broker. HGI invested $1.5 million in the Fund in December 2015. HGI invested another $1.5 million in the Fund in August 2016 after Kielczewski and Taylor made a presentation at HGI's offices concerning the company's investments.

2. SCCI

On January 13, 2014, Kielczewski and Taylor met with a chemical manufacturing company, SCCI, which was also a former Fifth Third customer, to discuss investing in the Fund. On January 24, 2014, SCCI's treasurer asked Taylor for a Fund subscription agreement and indicated the company would invest $3.85 million in the Fund. Kielczewski confirmed for Taylor that SCCI had "$4mm in money market we can use for initial contribution." On January 29, SCCI instructed Kielczewski to wire $3.85 million from its Huntington money market account to the Fund. Kielczewski facilitated the transaction on January 31.

On February 26, 2014, Taylor messaged Kielczewski, "let's go . . . get another 2 mm from [SCCI] in here." A week later, Taylor emailed SCCI senior executives and copied Kielczewski that the Fund was "off to a great start!" Kielczewski replied to the group message encouraging SCCI's additional investment, "we have a lot of cash in money market to start the month should you want to deploy, and we can continue to expect our current MBS to prepay around $300K+ on the 25th of this month."

The following day, Kielczewski emailed SCCI's treasurer, explaining that the attached wire request form needed to be completed "in order to move funds from the [SCCI] investment account to the Mariemont Investment account." In March 2014, Kielczewski facilitated the wire transfer to move funds from SCCI's Huntington brokerage account to the Fund. SCCI invested an additional $2.15 million in the Fund at that time.

3. WI and RI

WI and RI are a married couple who held a joint brokerage account at Fifth Third. They moved their account to Huntington in January 2014 with Kielczewski as their assigned broker. On January 16, 2014, Kielczewski, using his personal email account, sent WI a blank subscription agreement for the Fund along with a copy of his own completed Fund subscription agreement to serve as a guide on how to complete it. On January 25, Kielczewski sent to Taylor WI and RI's completed subscription agreement for their planned investment in the Fund. Three days later, Taylor and Kielczewski discussed which securities to sell from WI and RI's Huntington brokerage account to generate monies to invest in the Fund. Kielczewski subsequently directed a Huntington sales assistant to provide WI with the necessary forms to transfer funds from Huntington to the Fund. On January 31, WI and RI invested $1.936 million in the Fund.

Kielczewski messaged Taylor on February 5, 2014, stating he was "done with [WI] . . . , who was going to sell his Bank of America and Chase bonds," and that once those positions were settled, WI would invest the proceeds in the Fund. On February 11, WI emailed Kielczewski, "We are on the same page. Go ahead and execute these 3 sales . . . ." Kielczewski replied, "OK will do and will let you know what [Taylor] comes up with." Kielczewski sold bonds from WI and RI's brokerage account on February 14 for approximately $222,000. Using the proceeds from the bond sales, plus additional cash in WI and RI's Huntington account, Kielczewski had his Huntington sales assistant effect a $303,841.39 transfer into the Fund to make WI and RI's second investment in the Fund.

4. K&R and KK

KK is the founder and chief executive officer, secretary, and treasurer of a construction contractor, K&R. KK and K&R held brokerage accounts at Fifth Third with Kielczewski as the assigned broker. On March 23, 2016, Kielczewski, without Taylor, met with KK to discuss moving KK's and K&R's brokerage accounts to Huntington and splitting those assets between the firm and the Fund. KK signed a Fund subscription agreement that day for K&R's proposed $1 million investment in the Fund. The next day, KK told Kielczewski, "In terms of the split of my assets between Mariemont and the institutional account I will probably go with your recommendation on that, but let me know what you think."

In April 2016, KK and K&R became Huntington brokerage customers, and Kielczewski was the broker of record on their accounts. On May 24, 2016, Kielczewski emailed KK instructions to wire funds from KK's Huntington account to the Fund for his investment. Kielczewski also told KK that he needed to "hurry" so he would not "miss the 5/31/16 entry point for [his] Mariemont initial investment." K&R invested $1 million in the Fund on May 26, 2016. On June 1, 2016, KK signed a Fund subscription agreement and invested $3 million in the Fund.

F. Kielczewski Completes Inaccurately an Annual Compliance Questionnaire

By the time Kielczewski completed an annual compliance questionnaire for the firm in December 2015, he had participated in more than $6 million in PSTs in the Fund. Despite this participation, Kielczewski responded "no" to the question asking, "Have you engaged in Private Securities Transactions while employed through [Huntington]?"

G. Kielczewski Actively Engaged in Other Activities for the Fund

Throughout his employment at Huntington, Kielczewski actively engaged in myriad activities for the Fund in addition to soliciting investors. Kielczewski communicated with Taylor almost daily about the operation of the Fund and occasionally recommended investments for the Fund to Taylor. For example, while he was associated with Huntington, Kielczewski sent Taylor messages with Bloomberg screen shots of certain securities attached for Taylor to consider as potential investments for the Fund.

While he was associated with Huntington, Kielczewski also reviewed and edited the Fund's "pitch book," which was used to solicit investors. The pitch book comprised a PowerPoint presentation that included a description of the Fund's purpose, investment strategy, and annual performance compared with certain indices. Taylor relied on Kielczewski to review the pitch book and act as his "sounding-board" in connection with promoting the Fund.[5] In a June 20, 2014 email concerning a series of pitch book revisions, Kielczewski suggested that other members of the Investment Manager handle the pitch book presentations rather than Taylor. On August 20, 2014, Taylor sent a revised pitch book to Kielczewski and two other members of the Investment Manager. In an email exchange two days later, Taylor informed one of the other Investment Manager members that Kielczewski "is getting close with a few prospects" for the Fund. On January 8, 2015, Taylor again asked Kielczewski to revise the pitch book so Taylor could use it at a meeting with prospective Fund investors. Kielczewski admitted that he strove to make the pitch materials "more presentable" to prospective clients such as HGI.

During Kielczewski's association with Huntington, Taylor also asked Kielczewski to proofread the Fund's quarterly Portfolio Management Reports sent to Fund investors, and Kielczewski made numerous edits to those reports. Taylor testified that he frequently relied on Kielczewski to review and revise these reports before they were released to Fund investors. For example, on February 5, 2015, in response to Taylor's proofreading and editing request, Kielczewski emailed him a 2014 fourth quarter report Kielczewski had revised. On August 4, 2015, Kielczewski suggested to Taylor in an email that the 2015 second quarter report was too "long and to [sic] wordy," with too "many analogies that dont [sic] connect into a cohesive story."

H. Kielczewski's Representations About His Involvement with the Fund in Connection with a FINRA Examination

In April 2016, Huntington asked Kielczewski to complete a personal activity questionnaire form in connection with FINRA's 2016 cycle examination of the firm. In response to the question concerning whether he was engaged in outside business activities or PSTs, Kielczewski wrote:

> Yes. Silent minority partner in Mariemont Capital LLC. Investment Related Company. LP was started 12/1/2013. My personal monies are invested in the fund in non-investment grade MBS. 0 hours per week devoted to business. Kevin Taylor is managing director of M.C. and makes all business and investment decisions.

Huntington provided Kielczewski's completed personal activity questionnaire form to FINRA. At the hearing, Kielczewski admitted that he was devoting more than zero hours per week to the Fund at the time he filled out the personal activity form for the FINRA exam.

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[5] In December 2014, for example, Taylor emailed Kielczewski three sample financial statements and asked for his opinion as to which sample Taylor should use in connection with the Fund.

On May 2, 2016, in the presence of Huntington supervisory and compliance personnel, Kielczewski met with FINRA Member Regulation examination staff, who questioned him about his role at the Investment Manager. Kielczewski told them his conduct was consistent with his personal activity questionnaire and that he was an "owner and a general partner in Mariemont Capital." He went on to state that he did not receive a salary from Mariemont but earned general partnership fees of around $20,000. Kielczewski admitted to the examiner that he believed there were "a lot of conflicts of interest" with him working for Huntington while being an owner and partner in Mariemont, but he believed there were "good procedures in place" to manage the conflicts.

I. Kielczewski's Representations to the Firm After the Cycle Exam

After FINRA's cycle exam, Huntington reviewed Kielczewski's relationship with the Fund. On July 1, 2016, Kielczewski's then-supervisor, David Fitzsimmons, asked Kielczewski in an email to clarify the nature of his investment in the Fund and to ensure the accuracy of his prior outside business activity disclosures. In response, Kielczewski repeated his prior statement that he had only "a passive role in Mariemont Capital," and also stated that he did "not solicit funds for Mariemont Capital." In addition, Kielczewski disclosed that certain Huntington customers had invested in the Fund, including HGI, SCCI, WI, and K&R and its owner. Fitzsimmons forwarded Kielczewski's response to the firm's CCO at the time, Stephen Dahlke, adding that Kielczewski was "willing to provide [an] attestation that he does not solicit for the fund." Fitzsimmons told Dahlke that Kielczewski also "confirmed" that "the corporate clients in [Kielczewski's] book who are also investors in the fund were solicited by the fund's principal, Kevin Taylor."

At Fitzsimmons's request, Kielczewski also completed a Disclosure of Outside Business Activity Form on July 14, 2016 ("July 2016 OBA Form"). Kielczewski identified "Mariemont Capital" as an outside business activity, describing it as a "limited partnership that manages non-rated whole loan [collateralized mortgage obligations]." Kielczewski again described himself as a "passive minority owner" with "no duties or obligations" regarding the Fund. He additionally answered "0" in response to the question, "what percentage of your time is spent on this activity during regular business hours?" In response to the question, "Have you solicited any other individual(s) to invest in this entity," Kielczewski responded, "no." Kielczewski also disclosed HGI, SCCI, WI, K&R, and KK as "clients that transferred assets to Huntington from 5/3 and do business with Mariemont."

In September 2016, the firm placed Kielczewski on a heightened supervision plan to document the firm's oversight of Kielczewski's Mariemont-related activities and monitor his firm email account. One of the "contributing factors" that formed the basis of the firm's monitoring was Fitzsimmons's understanding from his discussions with Kielczewski that "[Kielczewski] does not solicit funds for Mariemont, but shares common clients."

In a December 6, 2016 email, Fitzsimmons asked Kielczewski again to confirm that he continued to hold a minority interest in "Mariemont" and that he did not solicit funds from clients. Kielczewski replied that his prior representations about his Mariemont-related activities remained accurate. After the firm discovered emails showing Kielczewski's role with the Fund was "beyond passive" and violated firm policies and potentially FINRA rules, Huntington fired Kielczewski on April 26, 2017.

IV. Discussion

We affirm the Hearing Panel's findings that Kielczewski engaged in undisclosed PSTs, made false statements to Huntington, and willfully caused Huntington to file a misleading initial Form U4 and four misleading amendments. We discuss the violations in detail below.

A. Kielczewski Participated in Undisclosed PSTs

NASD Rule 3040 and FINRA Rule 3280 prohibit any person associated with a firm from participating in any manner in PSTs outside the regular course or scope of his employment without providing prior written notice to the firm.[6] Enforcement alleged that Kielczewski violated Rules 3040 and 3280 with respect to: (1) WI and RI's $303,841 investment in the Fund on February 14, 2014; (2) SCCI's $3.85 million investment in the Fund on January 31, 2014, and its $2.15 million investment in the Fund on March 7, 2014; (3) K&R's $1 million investment in the Fund on May 26, 2016; and (4) KK's $3 million investment in the Fund on June 1, 2016.[7] It is undisputed that these interests in the Fund were securities. Kielczewski concedes on appeal that he "participated" in the alleged transactions and failed to provide Huntington with prior written notice of the transactions and his role in them, in violation of NASD and FINRA rules. *See* NASD Rule 3040; FINRA Rule 3280; *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *25-27 (Sept. 30, 2016) ("'Participating in any manner' in private securities transactions includes soliciting investors by providing information that may influence their investment decisions and facilitating the execution of transactions."). Accordingly, we affirm without further discussion, the Hearing Panel's findings that Kielczewski violated NASD Rule 3040 and FINRA Rules 3280 and 2010 by engaging in undisclosed PSTs.[8]

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6 Effective September 21, 2015, FINRA Rule 3280 superseded NASD Rule 3040 without substantive change. *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt FINRA Rule 3280 (Private Securities Transactions of an Associated Person)*, Exchange Act Release No. 75757, 2015 SEC LEXIS 3471 (Aug. 25, 2015). NASD Rule 3040 applies to Kielczewski's misconduct occurring prior to September 21, 2015, and FINRA Rule 3280 applies thereafter.

7 Because Enforcement did not charge Kielczewski with violating Rule 3040 or 3280 in connections with the two HGI $1.5 million transactions (December 2, 2015, and August 1, 2016) or WI and RI's $1.94 million transaction (January 31, 2014), we do not consider them for purposes of liability. We do, however, find them relevant to determining the appropriate sanctions. *See Dep't of Enf't v. Braff*, Complaint No. 2007011937001, 2011 FINRA Discip. LEXIS 15, at *33 n.22 (FINRA NAC May 13, 2011), *aff'd*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620 (Feb. 24, 2012).

8 *Dep't of Enf't v. Mathieson*, Complaint No. 2014040876001, 2018 FINRA Discip. LEXIS 9, at *12 (FINRA NAC Mar. 19, 2018) (stating that a violation of FINRA's rules

[Footnote continued on next page]

See, e.g., *Dep't of Enf't v. Murray*, Complaint No. 2008016437801, 2013 FINRA Discip. LEXIS 33, at *5 (FINRA NAC Dec. 17, 2013) (summarily affirming findings and sanctions not challenged by either party on appeal).

B. Kielczewski Provided False Information to Huntington

The Hearing Panel found that Kielczewski made certain false and misleading statements to Huntington on firm compliance questionnaires in response to questions concerning PSTs, in violations of FINRA Rule 2010. We concur.

FINRA Rule 2010 requires that associated persons observe high standards of commercial honor and just and equitable principles of trade. FINRA Rule 2010 encompasses broad ethical principles and applies broadly to all business-related misconduct. *See Timothy L. Burkes*, 51 S.E.C. 356, 360 n.21 (1993), *aff'd*, 29 F.3d 630 (9th Cir. 1994). The rule does not require proof of scienter. *Dep't of Enf't v. Orlando*, Complaint No. 2014043863001, 2020 FINRA Discip. LEXIS 26, at *32 (FINRA NAC Mar. 16, 2020). Rather, "[u]nethical behavior, even if not undertaken in bad faith, is sufficient to establish liability under FINRA Rule 2010." *Id.* The fundamental 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). An associated person's failure to disclose material information to his firm violates FINRA Rule 2010 and is misconduct that calls into question his "ability to comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public." *Dep't of Enf't v. Seol*, Complaint No. 2014039839101, 2019 FINRA Discip. LEXIS 9, at *40 (FINRA NAC Mar. 5, 2019). The evidence establishes that Kielczewski provided false statements on Huntington's annual compliance questionnaires in violation of FINRA Rule 2010.

In December 2015, when Kielczewski completed the firm's 2015 Registered Representative Annual Questionnaire, he answered "no" to the question, "Have you engaged in any Private Securities Transactions while employed through [Huntington]?" By the time he completed this questionnaire, Kielczewski had participated in several private securities transactions totaling over $6 million. In addition, Kielczewski on appeal acknowledges that his response in the 2015 questionnaire was "not accurate."

Kielczewski also made false statements to the firm before and after FINRA's 2016 cycle examination. In April 2016, Kielczewski completed the firm's personal activity questionnaire that the firm provided to FINRA as part of its examination. On that questionnaire, Kielczewski stated, in part, that he was a "[s]ilent minority partner in Mariemont Capital" and devoted "0

[Cont'd]

prohibiting undisclosed PSTs is also a violation of FINRA Rule 2010). FINRA Rule 2010 applies also to persons associated with a member under FINRA Rule 0140(a), which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."

hours per week [ ] to [its] business." Kielczewski's then-supervisor, Fitzsimmons, asked him to clarify the nature of his investment in the Fund and to ensure the accuracy of his prior disclosures. Kielczewski responded that he had only "a passive role in Mariemont Capital." While Kielczewski also disclosed to Fitzsimmons that HGI, SCCI, WI, K&R, and KK were firm customers who had invested in the Fund, Kielczewski stated he did not solicit investors for the Fund and claimed instead that Taylor had solicited any Fund investors who were also Huntington customers.

Based on Kielczewski's responses, Fitzsimmons directed Kielczewski to complete the July 2016 OBA Form. In that form, Kielczewski identified Mariemont Capital as an outside business. With respect to his role, he described himself as a "passive minority owner" with "no duties or obligations." In response to the question asking what percentage of his time was spent on the business during regular business hours, Kielczewski answered "zero." Kielczewski checked "no" when asked if he had solicited any other individuals to invest in the business. He also listed each of the firm customers who had invested in the Fund.

Kielczewski's active involvement in the Fund demonstrates that the statements he made to the firm were untrue. The evidence shows that Kielczewski was actively involved with the Fund and devoted more than "zero" hours to the business during business hours. For example, he attended meetings with Huntington customers to recommend investments in the Fund, regularly communicated with Taylor about the Fund's operations, discussed with Taylor potential investments for the Fund, reviewed and edited the Fund's pitch book, reviewed and edited certain Fund management reports for Taylor that were sent to investors, and facilitated the PSTs for which Kielczewski now concedes liability. He omitted from his disclosures in 2015 that he was soliciting customers to invest in the Fund. And in his updated disclosures in 2016, he falsely denied soliciting investors and claimed instead that Taylor had solicited any Fund investors who were also Huntington customers. In reality, during his employment at Huntington, Kielczewski actively solicited sales of the Fund to his transitioning Fifth Third customers, and he otherwise participated in more than $10 million in Fund investments. Moreover, as a member and manager of the Investment Manager and General Partner, Kielczewski did not have a passive role in those entities; rather, he had the power to "conduct, direct and exercise full control over all activities" of those entities.

Kielczewski concedes on appeal that some of his specific statements regarding the Fund were false but contends that his disclosures to the firm when, "considered as a whole," together with his alleged oral disclosures to Chapman, were accurate. Kielczewski claims that he reached an understanding with Chapman during their conversations before Kielczewski began working for Huntington. Kielczewski claims that Chapman permitted the Fund and Huntington to have overlapping customers and permitted the Fund to be offered to Fifth Third customers to induce their transition to Huntington and incentivize Kielczewski to join the firm. This purported arrangement would permit Kielczewski potentially to profit from his interest in Mariemont by introducing his prospective Huntington customers to the Fund. The Hearing Panel, however, found not credible Kielczewski's claim that he fully disclosed to Chapman his involvement with the Fund, including his plan to solicit investors. The Hearing Panel also determined there was no credible evidence that this purported understanding with Chapman existed, including any documentary proof corroborating Kielczewski's assertions.

Kielczewski argues that his purported agreement with Chapman was summarized in documents relating to a line of credit the Fund obtained from Huntington's affiliate bank. The Hearing Panel, however, rejected this reading of the documents, which do not refer to any agreement permitting Kielczewski to solicit investors. Rather, the relevant document merely acknowledges that Kielczewski, Taylor, and another Fifth Third Trader "have former Fifth Third clients that will be investors in Mariemont [and that] those clients are also prospective [firm] clients." Indeed, Kielczewski admitted at the hearing that he had nothing in writing from Chapman or any Huntington supervisor permitting him to solicit investments for the Fund, and he did not tell Fitzsimmons about this purported agreement with Chapman—even when the firm confronted him about the PSTs. During the hearing, Chapman unequivocally denied giving Kielczewski permission during the recruitment process to sell the Fund to former Fifth Third customers who were transitioning over to the firm and stated that he did not expect Kielczewski to do so.

Further, the Hearing Panel found that Kielczewski's assertions about the purported agreement were not supported by other witnesses, including Chapman, Fitzsimmons, and the firm's chief compliance officers (Gregory and Dahlke) during the relevant period, all of whom denied that they or anyone else at the firm gave Kielczewski permission to solicit investors in the Fund. The Hearing Panel found all these witnesses credible on this subject. The Hearing Panel characterized these witnesses' testimony as "consistent, plausible, and cross-corroborated, and . . . not undercut on cross-examination." It also found that "none of these witnesses evidenced bias against Kielczewski."[9] The Hearing Panel further noted that even Taylor's testimony did not support the existence of a purported agreement allowing Kielczewski to solicit investments in the Fund. Taylor said only that he understood that Kielczewski had Huntington's permission "to continue to be a part of Mariemont Capital and an owner of Mariemont Capital," but Taylor said nothing about an arrangement permitting Kielczewski to engage in PSTs on behalf of the Fund. Kielczewski has not set forth the "substantial evidence" necessary to set aside the Hearing Panel's credibility findings, and we therefore defer to those findings. *See Dep't of Enf't v. Vungarala*, Complaint No. 2014042291901, 2018 FINRA Discip. LEXIS 26, at *97 (FINRA NAC Oct. 2, 2018), *aff'd*, Exchange Act Release No. 90476, 2020 SEC LEXIS 4938 (Nov. 20, 2020).

Kielczewski asserts that his use of the term "passive" accurately described his involvement with the Fund because he claims his work for the Fund "did not amount to more than 20 hours." We reject this characterization of the term. According to the firm's WSPs, "passive investments and activities" were exempt from the firm's prohibition of PSTs. The WSPs defined "passive investments" as "those from which an individual receives income but for which he or she performs no service. Examples would include interest on investments or income from a corporation of which the person is a passive shareholder." Kielczewski's activities

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[9] The Hearing Panel also found relevant that when Fitzsimmons met with Kielczewski to terminate his employment, Kielczewski did not tell him that he and Chapman had a purported understanding that allowed him to sell interests in the Fund to transitioning Fifth Third customers.

performed for the Fund, which included the solicitation of investors, were not "passive." *See, e.g.*, *Joseph Abbondante*, 58 S.E.C. 1082, 1109 (2006) (explaining that it was "not intend[ed] for the 'passive investment' exception to include activities in which the associated person materially participates" because "[t]o permit a passive investment exemption for a registered representative's material participation would frustrate the stated purposes of the rule"), *aff'd*, 209 F. App'x 6 (2d Cir. 2006). Kielczewski's false and misleading representations to the firm left Huntington with the mistaken impression that he was only a passive investor who was not engaged in PSTs.

When Kielczewski provided the false statements to Huntington on compliance questionnaires, he engaged in conduct that was inconsistent with the high standards of commercial honor and just and equitable principles of trade in violation of FINRA Rule 2010.[10] *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).

C. Kielczewski Willfully Filed Inaccurate Forms U4

We also affirm the Hearing Panel's findings that Kielczewski caused the firm to file an inaccurate initial Form U4 and four inaccurate Form U4 amendments, in violation of Article V, Section 2(c) of the FINRA By-Laws and FINRA Rules 1122 and 2010. In addition, we agree that Kielczewski's actions were willful and involved material information, therefore subjecting Kielczewski to statutory disqualification under the Securities Exchange Act of 1934 ("Exchange Act").

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[10] We reject Kielczewski's challenge to FINRA Rule 2010 as unconstitutionally vague. "Challenges to [Conduct Rule 2110] on vagueness grounds have generally failed, where application of the rule to the particular misconduct 'cannot have come as a surprise.'" *Dep't of Enf't v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *30 (NASD NAC June 2, 2000). Rule 2010 applies to Kielczewski's false statements to his firm made on firm compliance forms because such conduct is unquestionably unethical, and it should come as no surprise to any registered representative that Rule 2010 prohibits it. *See id.* Indeed, FINRA previously has found similar misconduct violated Rule 2010. *See, e.g.*, *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *39-41 (Mar. 27, 2017) (finding false statements on compliance questionnaire violated FINRA Rule 2010), *aff'd*, 733 F. App'x 571 (2d Cir. 2018); *Seol*, 2019 FINRA Discip. LEXIS 9, at *40-41 (same); *Dep't of Enf't v. Holeman*, Complaint No. 2014043001601, 2018 FINRA Discip. LEXIS 12, at *26-27 (FINRA NAC May 21, 2018) (same), *aff'd*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903. (July 31, 2019), *aff'd*, 833 F. App'x 485 (D.C. Cir. 2021).

1. Inaccurate Forms U4

Article V, Section 2 of the FINRA By-Laws requires that applicants for FINRA registration provide FINRA "reasonable information with respect to the applicant as [FINRA] may require." Article V, Section 2(c) of the FINRA By-Laws provides, in pertinent part, that "[e]very application for registration filed with [FINRA] shall be kept current at all times by supplementary amendments" and that any "[s]uch amendment . . . shall be filed with [FINRA] not later than 30 days after learning of the facts or circumstances giving rise to the amendment." FINRA Rule 1122 prohibits a member firm, registered representative, or person associated with a member firm from filing with FINRA information with respect to membership or registration "which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof."[11] *See Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *16 (Oct. 20, 2011). This requirement applies to the Form U4, which FINRA and other self-regulatory organizations use to screen applicants and monitor their fitness for registration within the securities industry. *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *8 (Dec. 22, 2008).

The information contained in Form U4 is important not only to regulators but also to employers and the investing public. *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *16, 29 (Dec. 7, 2009), *aff'd*, 671 F.3d 210 (2d Cir. 2012); *Dep't of Enf't v. Elgart*, Complaint No. 2013035211801, 2017 FINRA Discip. LEXIS 9, at *14 (FINRA NAC Mar. 16, 2017), *aff'd*, Exchange Act Release No. 81779, 2017 SEC LEXIS 3097 (Sept. 29, 2017). "Because '[r]egistration of broker-dealers is a means of protecting the public,' every person submitting a Form U4 has the obligation to ensure that the information provided on the form is true and accurate." *Neaton*, 2011 SEC LEXIS 3719, at *16; *see also Mathis*, 2009 SEC LEXIS 4376, at *16 ("[T]he candor and forthrightness of [individuals making these filings] is critical to the effectiveness of the screening process."); *Tucker*, 2012 SEC LEXIS 3496, at *30 (stating that "FINRA 'cannot investigate the veracity of every detail in each document filed with it, [and] must depend on its members to report to it accurately and clearly in a manner that is not misleading'"). Furthermore, "[a] registered representative has a continuing obligation to timely update information required by Form U4 as changes occur." *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *10-12 (Mar. 15, 2016), *aff'd*, 672 F. App'x 865 (10th Cir. 2016).

Question 13 on the Form U4 asked Kielczewski, "Are you currently engaged in any other business as a proprietor, partner, officer, director, employee, trustee, agent or otherwise?"

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[11] A violation of FINRA Rule 1122 is also a violation of FINRA Rule 2010, which requires associated persons to observe high standards of commercial honor and just and equitable principles of trade. *See Dep't of Enf't v. Harari*, Complaint No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *25 n.10 (FINRA NAC Mar. 9, 2015); *Dep't of Enf't v. N. Woodward Fin. Corp.*, Complaint No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *17 (FINRA NAC July 21, 2014), *aff'd*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015), *aff'd*, No. 15-3729, slip op. at 1 (6th Cir. June 29, 2016).

Kielczewski responded "no" to that question on an initial Form U4 filed on January 15, 2014, and four subsequent Form U4 amendments filed through December 2016. On those Forms U4, Kielczewski falsely stated he was a "SILENT MINORITY PARTNER IN MARIEMONT CAPITAL LLC," in which he had a "PASSIVE POSITION IN WHICH MY PERSONAL MONIES ARE BEING INVESTED IN NON INVESTMENT GRADE MBS," and that he spent "0 HOURS PER MONTH DEVOTED TO THIS BUSINESS."

As we discussed above with respect to Kielczewski's similar representations to the firm made in firm compliance questionnaires, the evidence of Kielczewski's Fund-related activities demonstrate that he was actively involved with the Fund, including engaging in millions of dollars in PSTs—not passively involved as he reported repeatedly. He also was devoting some of his time to the Fund's business and now has admitted that "he could have been clearer about the amount of time he was going to spend on the venture" in disclosures. We conclude that Kielczewski's disclosures in his initial Form U4 and four Form U4 amendments were inaccurate, in violation of Article V, Section 2(c) of the FINRA By-Laws and FINRA Rules 1122 and 2010.

2. <u>Kielczewski Is Statutorily Disqualified</u>

We also affirm the Hearing Panel's findings that Kielczewski is statutorily disqualified. FINRA's By-Laws provide that a person subject to a statutory disqualification, as defined in Section 3(a)(39) of the Exchange Act, cannot be associated with a FINRA member firm unless the firm obtains permission from FINRA. *See* Article III, Sections 3(b), 3(d), and 4 of the FINRA By-Laws. A person is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act if such person has, among other things,

> willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, . . . any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any material fact which is required to be stated therein.

15 U.S.C. § 78c(a)(39)(F). This statutory provision applies to representatives who willfully have provided on a Form U4 false statements with respect to a material fact or who willfully have failed to amend Form U4 with material information that is required to be stated on the Form U4. *See, e.g.*, *McCune*, 2016 SEC LEXIS 1026, at *13-23 (finding that applicant was statutorily disqualified for willfully failing to amend Form U4).

We find that Kielczewski acted willfully when providing false information on his Form U4 and the four Form U4 amendments. "A willful violation under the federal securities laws simply means 'that the person charged with the duty knows what he is doing.'" *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *41 (Nov. 9, 2012) (quoting *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)); *see also Mathis*, 671 F.3d at 216-18 (explaining that "willfulness" does not require awareness that one "is violating one of the Rules or Acts," and holding that a person may be subject to statutory disqualification under Section 3(a)(39) as long as he "intentionally submitted an application to register with a FINRA member knowing that the application contained material false information"); *Holeman*, 2019 SEC LEXIS 1903, at *38 (requiring "subjective intent to omit material information" for a willful violation). Kielczewski submitted his Form U4 and four amendments fully aware that he was devoting more than "0 hours per month" to the Fund and doing a multitude of tasks on the Fund's behalf, including participating in PSTs, communicating with Fund investors, and editing Fund documents to be sent to investors. He voluntarily made these representations and knew the information in the Forms U4 did not accurately describe his role with the Fund.

We also find that the information Kielczewski failed to disclose was material. "In the context of Form U4 disclosures, a fact is material if there is a substantial likelihood that a reasonable regulator, employer, or customer would have viewed it as significantly altering the total mix of information made available." *McCune*, 2016 SEC LEXIS 1026, at *21-22. The NAC has found that "essentially all the information that is reportable on the Form U4 is material." *Dep't of Enf't v. McCune*, Complaint No. 2011027993301, 2015 FINRA Discip. LEXIS 22, at *15 (FINRA NAC July 27, 2015), *aff'd*, 2016 SEC LEXIS 1026, *aff'd*, 672 F. App'x 865. Without question, a reasonable employer, regulator, or investor would consider a broker-dealer employee participating in unsupervised PSTs as "significantly altering the total mix of information." *See McCune*, 2016 SEC LEXIS 1026, at *22.

Kielczewski argues that the extent of his activities for the Fund was not material to Huntington because the firm allowed him to continue his association with Mariemont in June 2016 after the firm's investigation of him. We disagree. First, the materiality standard is an objective one and applies to a reasonable employer, regulator, or investor. *See Mathis*, 671 F.3d at 219, 220 (holding that "[t]he SEC employed the proper and familiar test for materiality set forth in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)," and finding "no difficulty in affirming the SEC's conclusion that the tax liens were material" given the Commission's determination that the registered representative's failure to disclose the liens on Form U4 "significantly altered the total mix of information available to [FINRA], other regulators, employers, and investors"). Second, the firm made multiple attempts to clarify Kielczewski's involvement with Mariemont, which demonstrates that the firm considered the information to be material. Even after the firm gave Kielczewski multiple opportunities in 2016 to disclose the activities he was engaged in for the Fund, he repeatedly denied that he solicited investors for the Fund or engaged in PSTs. As the firm's WSPs provide, the firm had a policy generally prohibiting any involvement in PSTs, and the firm's CCO at the relevant time testified he was not aware of a single instance when the firm made an exception to that policy. And ultimately, the firm fired Kielczewski for engaging in undisclosed activities, including PSTs, for the Fund.

Accordingly, we find Kielczewski willfully failed to disclose and update his Form U4 to include material information that was required to be stated on Form U4. As a result, Kielczewski is statutorily disqualified.

D. Kielczewski's Additional Procedural Argument

Kielczewski argues that the Hearing Officer erred by denying his motion to compel Enforcement to issue a FINRA Rule 8210 request to Huntington to produce documents and information relating to an internal firm investigation by the firm's counsel.[12] Huntington argues it withheld this information from FINRA on attorney-client privilege and attorney work-product grounds. On appeal, like he did before the Hearing Officer, Kielczewski asserts that Huntington waived attorney-client privilege by responding to FINRA Rule 8210 requests without identifying the withheld documents and information and the bases for withholding them. The Hearing Officer determined, however, that Kielczewski was on notice for many months that Huntington had withheld documents from Enforcement on privilege grounds but Kielczewski did not object timely. The Hearing Officer found this delay "fatal" to Kielczewski's motion. We agree.

We review for an abuse of discretion the Hearing Officer's order denying Kielczewski's motion to compel. *See Dep't of Enf't v. Se. Invs., N.C., Inc.*, Complaint No. 2014039285401, 2019 FINRA Discip. LEXIS 23, at *45 (FINRA May 23, 2019) ("The Hearing Officer did not abuse its discretion in denying respondents' written motion for production of documents."). FINRA Rule 9252(a) requires that a respondent's request for FINRA to invoke Rule 8210 to compel the production of documents at a hearing be made in writing no later than 21 days prior to the scheduled hearing date. In reviewing such requests, the Hearing Officer considers, among other things, whether the information sought is material and relevant and whether the request to invoke Rule 8210 is "unreasonable, oppressive, excessive in scope, or unduly burdensome." FINRA Rule 9252(b); *see also Dep't of Enf't v. Busacca*, Complaint No. E072005017201, 2009 FINRA Discip. LEXIS 38, at *35-36 (FINRA NAC Dec. 16, 2009) (affirming denial of motion to compel when the respondent waited until two weeks before hearing to bring the issue to the Hearing Officer's attention and failed to show how the information sought was material and relevant), *aff'd*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787 (Nov. 12, 2010), *aff'd*, 449 F. App'x. 886 (11th Cir. 2011).

In this case, Enforcement produced to Kielczewski on July 19, 2019, Huntington's June 23, 2017 responses to FINRA's initial requests made after the firm fired Kielczewski for cause. In those responses, the firm stated it was producing its "non-privileged findings" and "all non-privileged documents." In September 2019, following his review of Enforcement's production, Kielczewski asked Enforcement to issue additional Rule 8210 requests to Huntington, which Enforcement did on September 10, and 19, 2019. Kielczewski, however, did not request that Enforcement seek clarification from Huntington concerning its use of "non-privileged findings" and "non-privileged documents."

On October 7, 2019, Huntington produced additional documents to FINRA in response to two post-complaint Rule 8210 requests for information sought by Kielczewski. The firm's cover

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[12] There is no dispute that Enforcement fully complied with its discovery obligations under FINRA Rule 9251. Rather, Kielczewski is seeking documents that Huntington never produced to FINRA. Both Huntington and Enforcement opposed Kielczewski's motion to compel.

letters accompanying the productions stated that the firm was providing "copies of all non-privileged electronic communications," and that the firm "does not waive any applicable privileges including without limitation, the attorney-client and work-product privileges," again signaling the firm could be withholding documents.[13] Enforcement provided Kielczewski with Huntington's October 7 productions, along with the firm's accompanying cover letters, on October 11, 2019, which was 53 days before the final prehearing conference.

On December 2, 2019, nine days before the hearing in this matter was scheduled to take place, and in connection with his opposition to the firm's motion to intervene, Kielczewski asserted for the first time that Huntington improperly withheld documents from its Rule 8210 productions. At the final pre-hearing conference, the Hearing Officer informed the parties and Huntington that the hearing would go forward as scheduled. The Hearing Officer, however, permitted Kielczewski to fully explore the firm's assertions of attorney-client and work-product privilege at the hearing.

Kielczewski argues that the Hearing Officer improperly prevented him from questioning witnesses concerning matters as to which the firm invoked privilege. The record, however, reflects the testimony that Kielczewski elicited provides no support for his assertion that the firm improperly asserted privilege or that the firm's privilege objections deprived him of any documents or information material to his defense. The Hearing Officer gave Kielczewski wide latitude when questioning witnesses and sustained Huntington's objections when witnesses testified they could not respond without referring to communications with firm counsel.[14] After the hearing ended, and at the Hearing Officer's invitation, Kielczewski filed a post-hearing motion to compel.

The Hearing Officer denied the motion because Kielczewski did not file a Rule 9252 motion timely nor seek an extension of the filing deadline. Rather, Kielczewski chose instead to challenge Huntington's assertion of privilege as part of his opposition to the firm's motion to intervene nine days before the hearing. The Hearing Officer concluded Kielczewski had not set forth good cause for his delay in challenging the firm's withholding of documents.

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[13] Neither Huntington's June 23, 2017 response nor its October 7, 2019 cover letters stated explicitly that the firm was withholding responsive documents.

[14] Huntington was not a party to this disciplinary action, but the Hearing Officer granted the firm's motion to intervene to have counsel present at the hearing for the limited purpose of raising objections to questions that may elicit privileged information while firm employees testified. Kielczewski opposed the motion and Enforcement took no position. The Hearing Officer conducted a prehearing conference on the issue and granted the firm's motion subject to certain conditions, including limiting the firm counsel's participation to raising objections to questions that may elicit privileged communications or matters and precluding the firm's counsel from "conferring with witnesses from the time they begin their testimony until the time they are finished and excused."

We agree with the Hearing Officer's finding that Kielczewski's challenge to the adequacy of Huntington's Rule 8210 responses is untimely under FINRA Rule 9252. Kielczewski was represented by counsel throughout these proceedings, including when Enforcement produced the firm's responses. Kielczewski had months in advance of the Rule 9252 deadline to review the firm's responses that referenced the firm's production of "copies of all non-privileged, electronic communications," "non-privileged findings," and "all non-privileged documents," in which the firm stated that it "does not waive any applicable privileges, including without limitation, the attorney-client and work-product privileges." Kielczewski conceded in his January 2020 post-hearing motion to compel that this language "could support an inference that documents were being withheld." Nonetheless, Kielczewski did not object timely. Kielczewski also did not attempt to clarify whether Huntington was withholding any documents after reviewing the firm's June 2017 production that Enforcement provided to Kielczewski in July 2019. Moreover, Kielczewski's counsel acknowledged that Enforcement had produced Huntington's October 7, 2019 cover letters but stated that he had not seen them before December 3, 2019, because of an error by the technology vendor he had retained to assist with discovery review and which he had "failed to pick up on."

We affirm the Hearing Officer's denial of Kielczewski's motion to compel and conclude Kielczewski received the "fair procedure" that the Exchange Act requires here, including notice of the specific charges against him and multiple opportunities to be heard. *See* 15 U.S.C. § 78o-3(b)(8), (h)(1) (requiring that self-regulatory organizations provide fair procedures); *Guang Lu*, 58 S.E.C. 43, 58-60 (2005) (finding no error in denial of motion to compel production of documents from firm supervisor when respondent was able to cross-examine supervisor at the hearing), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006); *Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding requirements of the Exchange Act met when FINRA brought specific charges, the respondent had notice of such charges, the respondent had an opportunity to defend against such charges, and FINRA kept a record of the proceedings).

V. Sanctions

For Kielczewski's participation in undisclosed PSTs, false statements on firm compliance questionnaires, and filing of inaccurate Forms U4, the Hearing Panel imposed a unitary sanction.[15] *See Seol*, 2019 FINRA Discip. LEXIS 9, at *42 (imposing unitary sanctions for undisclosed private securities transactions, undisclosed outside business activities, and false statements on firm annual compliance questionnaires). The Hearing Panel suspended Kielczewski for 18 months, fined him $50,000, required him to requalify as a general securities representative, and required that he be placed on heightened supervision for one year. For the

[15] When "multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate." *Dep't of Enf't v. Fox & Co. Invs., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NASD NAC Feb. 24, 2005), *aff'd*, 58 S.E.C. 873 (2005); *see also Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *59 (Sept. 24, 2015) (sustaining FINRA's imposition of a unitary sanction resulting from a single systemic problem or cause).

reasons set forth below, we affirm the suspension, fine, and requalification order, but we eliminate the heightened supervision requirement.

A. Relevant Sanction Guidelines

In assessing sanctions, we consider FINRA's Sanction Guidelines ("Guidelines"), including the Principal Considerations in Determining Sanctions and any other case-specific factors. For PSTs involving sales over $1 million, the Guidelines recommend, as a starting point, a fine between $5,000 and $77,000, a suspension of at least one year, or a bar.[16] The Guidelines emphasize that the "presence of one or more mitigating or aggravating factors may either raise or lower the above-described sanctions."[17] The NAC has stressed that FINRA's PST rule "play[s] 'a crucial role in FINRA's regulatory scheme, and its abuse calls for significant sanctions.'" *Seol*, 2019 FINRA Discip. LEXIS 9, at *57.

The Guidelines advise adjudicators to assess the extent of the PSTs by examining the dollar amount of sales, the number of customers, and the length of time over which the misconduct occurred.[18] The Guidelines also direct adjudicators to consider 10 other principal considerations applicable to violations involving PSTs, 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.[19]

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16 *See FINRA Sanction Guidelines* 14 (2020), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter "*Guidelines*"].

17 *Id.*

18 *Guidelines*, at 14.

19 *Id.*

There are no specific Guidelines for false statements on a firm's compliance questionnaire. Nevertheless, as the Hearing Panel found, the Guidelines related to the falsification of records are sufficiently analogous under the circumstances because Kielczewski's failure to disclose to Huntington accurately and fully the extent of his activities for the Fund resulted in the falsification of the firm's records. The Hearing Panel also considered partially relevant the Guidelines for misrepresentations or material omissions because Kielczewski repeated several of his inaccurate statements about his Fund activities in email to firm supervisors.

For the falsification of records, the Guidelines recommend a fine of $5,000 to $155,000 and a suspension of two months to two years when the respondent falsifies a document without authorization, in the absence of other violations or customer harm.[20] When 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.[21] When imposing sanctions for this violation, the Guidelines instruct adjudicators to consider the nature of the falsified documents and whether the respondent had a good-faith, but mistaken, belief of express or implied authority.[22]

For fraud, misrepresentations or omissions, the Guidelines recommend a fine of $10,000 to $155,000.[23] When the misconduct is intentional or reckless, the Guidelines recommend a bar.[24] If mitigating factors predominate, the Guidelines recommend a suspension of six months to two years.[25]

For filing false, misleading, or inaccurate Forms U4 or amendments, the Guidelines recommend a fine of $2,500 to $39,000.[26] When aggravating factors are present, the Guidelines recommend suspending a respondent in any or all capacities for 10 business days to six months.[27] When aggravating factors predominate, an adjudicator should consider a longer suspension in any or all capacities (of up to two years) or, when the respondent intended to conceal information

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[20] *Id.* at 37.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 89.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 71.

[27] *Id.*

or mislead, a bar.[28] The Principal Considerations specifically applicable to Form U4 violations include: the nature and significance of the information at issue; the number, nature, and dollar value of the disclosable events at issue; whether the omission was in an intentional effort to conceal information; and the duration of the delinquency.[29]

B. Applying the Guidelines to Kielczewski's Misconduct

We determine that several Guideline-specific considerations, along with the General Principles and Principal Considerations relevant to all sanction determinations, are applicable to Kielczewski's misconduct and serve both to aggravate and mitigate sanctions. For more than two years, Kielczewski participated in five PSTs with five firm customers who invested over $10 million in the Fund.[30] Kielczewski was an owner of the Fund that he was promoting to his customers and the PSTs had the potential for his monetary gain.[31] While prior written notice of PSTs is required by rule, Kielczewski also never provided the firm with verbal notice of any of the PSTs, and he misled the firm about whether he was involved in soliciting firm customers to invest in the Fund.[32] Indeed, Kielczewski intentionally and repeatedly misled Huntington in emails, compliance questionnaires, and five Forms U4 by denying that he was soliciting firm customers or otherwise participating in PSTs or other activities for the Fund.[33] For nearly three years, Kielczewski repeatedly and intentionally misrepresented to Huntington that he was merely

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28 *Id.*

29 *Id.*

30 *See id.* at 7-8 (Principal Consideration Nos. 8, 9, 17); *see id.* at 14-15 (Guideline-Specific Consideration Nos. 1, 2, 3, 8). For purposes of his pattern of misconduct, we consider Kielczewski's participation in WI and RI's initial $1.94 million transaction in January 2014 and the two HGI $1.5 million transactions in December 2015 and August 2016. *See Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *22 n.33 (July 1, 2008) (finding for purposes of determining sanctions, adjudicators may consider similar uncharged conduct).

31 *See Guidelines*, at 8 (Principal Consideration No. 16); *see id.* at 14 (Guideline-Specific Consideration No. 5).

32 *See id.* at 7 (Principal Consideration No. 10); *see id.* at 15 (Guideline-Specific Consideration No. 13).

33 *See id.* at 8 (Principal Consideration No. 13). Kielczewski used his personal email account to solicit WI, RI, and SCCI and to forward Fund materials to HGI, which also had the effect of evading the firm's supervision. The record is equivocal, however, as to whether Kielczewski used this account, which he knew the firm prohibited when transacting business, to conceal his conduct or as an accommodation to his customers who used his personal email to contact him and did not know his firm email address. Regardless, Kielczewski's use of a personal email account violated Huntington's policies and procedures.

a passive investor in the Fund, that he did not solicit investments on behalf of the Fund, and that he devoted "0 hours" to Fund activities.[34] As discussed above, the evidence at the hearing conclusively showed that these representations were false. The compliance documents and Forms U4 are important documents, both for the firm and FINRA, including the questionnaire that Kielczewski completed inaccurately in advance of FINRA's examination of the firm.[35] *See McGee*, 2016 FINRA Discip. LEXIS 33, at *88.

We also agree with the Hearing Panel that certain factors serve, in part, to mitigate Kielczewski's misconduct. The firm terminated Kielczewski's employment based on the same conduct at issue in this case. The Guidelines direct that we consider whether Kielczewski has shown the termination "has materially reduced the likelihood of misconduct in the future."[36] After observing Kielczewski's demeanor at the hearing, the Hearing Panel found him "chastened and contrite," noting that Kielczewski stated he "should have got documentation from legal and compliance before" he came to Huntington and, if he had, he "would not be here." We agree that the record reflects that there were discussions between Chapman and Kielczewski prior to Kielczewski officially joining Huntington concerning, to some degree, his ongoing relationship with Mariemont. Kielczewski states that no one, including him, "took the time to ask the hard questions about his relationship with Mariemont and private securities transactions."

The Hearing Panel also found sincere Kielczewski's assurance that he is "sure going to do better in the future" and gave it some mitigative weight. The Hearing Panel balanced this expression of remorse with the fact that Kielczewski failed to acknowledge all his misconduct or fully appreciate its seriousness, particularly when he failed to express remorse until after the firm discovered his misconduct.[37]

Kielczewski argues that the sanctions imposed by the Hearing Panel should be reduced substantially. For participating in PSTs, he contends a 60-day suspension is appropriate and argues the remainder of the sanctions should be dismissed. We disagree that the factors he highlights further mitigate his misconduct. Kielczewski argues that the sanctions here are higher than in other cases. Appropriate sanctions, however, are dependent upon the facts and circumstances of each case and "cannot be precisely determined by comparison with action taken in other proceedings." *See Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *40 (Dec. 11, 2014), *aff'd*, 637 F. App'x 49 (2d Cir. 2016). And, indeed, none of the cases upon which Kielczewski relies encompass the facts and circumstances of this one. The dollar amount of Kielczewski's selling away is substantially higher, and he repeatedly misled his firm about the PSTs and other activity for the Fund.

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[34] *See id.* at 7, 8 (Principal Consideration Nos. 9, 13).

[35] *See id.* at 37 (Guideline-Specific Consideration No. 1).

[36] *Guidelines*, at 5 (General Principle No. 7).

[37] *See id.* at 7 (Principal Consideration No. 2).

Kielczewski argues the customers who invested in the Fund suffered no harm. Lack of financial customer harm is not mitigating generally and is particularly not mitigating here when Kielczewski failed to disclose the PSTs. "[T]he violations at issue harmed the customers by depriving them of [the firm's] supervision of their investments." *Mielke*, 2015 SEC LEXIS 3927, at *63. Kielczewski's undisclosed PSTs, coupled with his false responses on Huntington's compliance questionnaires, and repeated in emails to firm supervisors, "sidestepped [the firm's] supervision of his activities and deprived [Huntington] of the opportunity to protect itself and . . . investors." *See Seol*, 2019 FINRA Discip. LEXIS 9, at *48-49.

We conclude that there are numerous aggravating factors, and several mitigating factors, that support the Hearing Panel's 18-month suspension, $50,000 fine, and requalification order.[38] We affirm these sanctions. Because Kielczewski is statutorily disqualified based on the finding that he willfully filed misleading Forms U4, we eliminate the heightened supervision requirement. A tailored heightened supervision plan will come more appropriately from the MC-400 process, which is necessary should Kielczewski reapply for membership with a FINRA member.[39]

VI. Conclusion

We find that Kielczewski engaged in undisclosed PSTs, in violation of NASD Rule 3040 and FINRA Rules 3280 and 2010; made false statements to his firm, in violation of FINRA Rule 2010; and willfully filed a misleading Form U4 and four misleading Form U4 amendments, in violation of Article V, Section 2(c) of the FINRA By-Laws and FINRA Rules 1122 and 2010. Accordingly, for this misconduct, we suspend Kielczewski for 18 months from associating with any FINRA member in any capacity, fine him $50,000, and order that he requalify by examination as a registered representative before again acting in that capacity. We also affirm the Hearing Panel's order that Kielczewski pay hearing costs of $11,308.60.[40]

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[38] Requalification by examination is appropriate in a case like this when a respondent demonstrates a lack of knowledge or familiarity with the rules and laws governing the securities industry. *Guidelines*, at 6 (General Principle No. 8). Throughout these proceedings, Kielczewski claimed he did not know what the term "private securities transactions" meant or about the FINRA rules governing them. Kielczewski blamed his participation in undisclosed PSTs in part on "oversight and negligence" and "culpable ignorance of the terms of the applicable rule."

[39] Article III, Section 3 of FINRA's By-Laws provides in relevant part that no person shall be associated with a member, continue to be associated with a member, or transfer association to another member if such person is or becomes subject to disqualification. Kielczewski, as a person who is subject to disqualification, may not associate with a FINRA member in any capacity unless and until approved in an eligibility proceeding as set forth in Article III, Section 3(d) of FINRA's By-Laws and FINRA Rules 9520 through 9527.

[40] After seven days' notice in writing, FINRA may summarily revoke the registration of a person associated with a member if such person fails to pay promptly a fine or other monetary

[Footnote continued on next page]

On behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell, Vice President and
Deputy Corporate Secretary

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sanction imposed pursuant to Rule 8310 or a cost imposed pursuant to Rule 8330 when such fine, monetary sanction, or cost becomes finally due and payable.