

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

WILLIAM JOSEPH KIELCZEWSKI
(CRD No. 4034356),

Respondent.

Disciplinary Proceeding
No. 2017054405401

Hearing Officer–DRS

**EXTENDED HEARING
PANEL DECISION**

May 15, 2020

For engaging in private securities transactions, making false statements to his member firm employer, and willfully causing the firm to file a misleading initial Uniform Application for Securities Industry Registration or Transfer (Form U4) and four Form U4 amendments, Respondent is suspended for 18 months from association with any FINRA member firm in all capacities and fined \$50,000. Additionally, Respondent is ordered to requalify by examination as a registered representative before again acting in that capacity.

Further, as a condition to reassociation with a member firm after his suspension, Respondent shall be placed on heightened supervision for one year.

Appearances

For the Complainant: Kevin Pogue, Esq., David Monachino, Esq., Ralph DeSena, Esq., and James E. Day, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Andrew St. Laurent, Esq. and Afrodite Fountas, Esq., Harris St. Laurent LLP, New York, New York.

DECISION

I. Introduction

Respondent William Joseph Kielczewski, formerly a registered representative, was an investor in a hedge fund and held managerial positions and ownership interests in its related entities. While associated with a FINRA member firm, he engaged in various fund-related activities, including soliciting investors and facilitating their investments in the fund. This case

arises from those activities and representations he made about them to his firm and in regulatory filings.

FINRA Rules prohibit registered representatives from participating in private securities transactions—transactions outside the scope of their relationship with their member firm—without first giving written notice to the firm. FINRA’s Department of Enforcement filed a Complaint charging that Kielczewski participated in private securities transactions involving firm customers and totaling over \$10 million without first notifying his firm in writing of his participation in them.

The Complaint also charges Kielczewski with falsely representing to his firm that he was merely a passive owner in the fund and did not solicit investments for it. According to the Complaint, he actively engaged in fund-related activities, including promoting the fund to potential investors; facilitating their investments in the fund; reviewing and revising the fund’s promotional materials and quarterly portfolio reports; and occasionally suggesting to the fund’s trader that he should purchase certain securities for the fund.

Finally, Kielczewski is charged with willfully causing the firm to file a misleading initial Uniform Application for Securities Industry Registration or Transfer (Form U4) and four Form U4 amendments stating that he was a silent minority partner in the fund’s investment manager and had “a passive position in which [his] personal monies [were] being invested in non investment grade [mortgage-backed securities].” But, according to Enforcement, Kielczewski actively engaged in fund-related activities.

Kielczewski denied the charges and requested a hearing. While conceding that some of his disclosures could have been more robust, Kielczewski maintained that he never tried to deceive anyone and that, in fact, he fully disclosed to the firm his intentions about the fund and its related entities. Also, according to Kielczewski, he never intentionally violated the prohibition against engaging in private securities transactions.

An Extended Hearing Panel held a four-day hearing in this case. As discussed below, we find that Kielczewski committed the violations alleged and impose appropriately remedial sanctions.

II. Findings of Fact

A. Respondent William Joseph Kielczewski

Kielczewski entered the securities industry in June 1999.¹ Over his nearly two-decade career, Kielczewski was associated with two FINRA-regulated broker-dealers: Fifth Third Securities (“Fifth Third”), a subsidiary of Fifth Third Bank,² and Huntington Investment

¹ Answer (“Ans.”) ¶ 3.

² Hearing Transcript (“Tr.”) 131–32, 1014.

Company (“Huntington” or the “Firm”),³ a subsidiary of Huntington Bank.⁴ Kielczewski worked at Fifth Third from June 1999 until November 25, 2013.⁵ He obtained his Series 7 (General Securities Representative) and Series 63 (Uniform Sales Agent) securities licenses in November 1999 and February 2000, respectively.⁶

After Kielczewski left Fifth Third, Huntington hired him as its managing director of institutional sales.⁷ He began on January 8, 2014, and worked in its Toledo, Ohio office.⁸ He was associated with Huntington as a general securities representative from January 15, 2014, until April 26, 2017,⁹ when the Firm involuntarily terminated his employment.¹⁰ In a Uniform Termination Notice of Securities Industry Registration (Form U5) dated May 25, 2017, Huntington reported to FINRA that it had terminated Kielczewski after concluding he had “misrepresented activity relating to an OBA [outside business activity], and engaged in private securities transactions without firm approval”¹¹ At the time of the hearing, Kielczewski was not associated with a FINRA member firm. But from June 2017 until at least the time of the hearing, he was the president and chief investment officer of a registered investment advisory company.¹²

The alleged misconduct in this disciplinary proceeding occurred during Kielczewski’s association with Huntington. But its roots began earlier, when Kielczewski was near the end of his association with Fifth Third.

B. The Mariemont Capital Entities

At Fifth Third, Kielczewski first worked as an institutional sales person,¹³ selling fixed income securities, including mortgage-backed securities, to public institutions and commercial

³ Stipulations (“Stip.”) ¶ 1.

⁴ Tr. 131–32, 195.

⁵ Tr. 118, 124, 141; Joint Exhibit (“JX-__”) 1, at 4. His registrations at Fifth Third terminated on December 13, 2013. JX-1, at 5.

⁶ Stip. ¶ 2.

⁷ Tr. 230.

⁸ Tr. 230, 664.

⁹ Stip. ¶ 3; JX-1, at 4.

¹⁰ Stip. ¶ 3; Ans. ¶ 3.

¹¹ Ans. ¶ 4; Stip. ¶ 4; JX-67, at 5. This Form U5 filing triggered the investigation that led to the filing of the Complaint. Tr. 872–73.

¹² Tr. 117–18.

¹³ Tr. 889–90.

clients.¹⁴ Kielczewski later became an institutional sales manager.¹⁵ While at Fifth Third, he met two individuals who figure prominently in this case: Jeffrey Chapman, the head of Fifth Third's capital markets group and Kielczewski's second-level supervisor,¹⁶ and Kevin Taylor, head of the mortgage-backed securities desk, who would become Kielczewski's close friend.¹⁷

About ten years after Kielczewski joined Fifth Third, the financial crisis struck. In its wake, new banking regulations restricted banks' ability to trade in non-agency mortgage-backed securities, i.e., securities not issued by a government agency such as Ginnie Mae, Fannie Mae, or Freddie Mac. According to Chapman, these restrictions made it "virtually impossible for banks to trade in that type of asset class."¹⁸ This adversely impacted Kielczewski because selling private label mortgaged-backed securities issued by a private institution rather than an agency was one of his specialties.¹⁹ At that time, Kielczewski and Taylor shared a book of business,²⁰ so Kielczewski feared he would have another problem if Taylor were to leave Fifth Third.²¹

In fact, Taylor did intend to leave Fifth Third. By late summer 2013, Taylor had concluded that "the writing was on the wall that [Fifth Third Bank] wanted proprietary trading for private label mortgage-backs to be handled away from the banking system, using private capital." But Taylor had a plan to continue his work in this area: he would start a hedge fund to trade these instruments.²² Shortly before leaving the firm in early September 2013,²³ Taylor began creating a hedge fund and its related entities. Kielczewski would have key roles in these entities.

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.²⁴ 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 its activities.²⁵ On October 2, 2013, Taylor formed the hedge fund, Mariemont Capital Partners, L.P. (the "Mariemont Fund")

¹⁴ JX-1, at 2; Tr. 890, 1016–20.

¹⁵ Tr. 124.

¹⁶ Tr. 879–80, 129–30, 1020–21.

¹⁷ Stip. ¶ 6; Tr. 132, 153, 330, 777–78, 807, 880, 1022, 1024–25.

¹⁸ Tr. 891. *See also* Tr. 1039–42.

¹⁹ Tr. 785–86, 893, 1039–40.

²⁰ Tr. 1041.

²¹ Tr. 1040–41.

²² Tr. 788–89. *See also* Tr. 882.

²³ JX-7, at 1, 3–4.

²⁴ Ans. ¶ 9; Stip. ¶ 10.

²⁵ Stip. ¶ 13.

or the “Fund”).²⁶ Taylor was the Fund’s trader.²⁷ The Fund’s general partner, MCP GP, LLC (the “General Partner”) was formed the next day, and Kielczewski was one of its three managers.²⁸

Kielczewski invested in the Mariemont Fund and held ownership interests in the related entities. On January 10, 2014 (right after joining Huntington), Kielczewski personally invested \$400,000 in the Fund.²⁹ As of February 2014, he owned a 10 percent interest in the General Partner.³⁰ His ownership increased to 22.25 percent during his employment at Huntington.³¹ Similarly, as of March 2014, Kielczewski owned a 10 percent interest in the Investment Manager,³² and that grew over the next three years. By January 2016, he held an 18.65 percent interest in the Investment Manager, and by January 2017, a 22.25 percent interest, where it remained as of when Enforcement filed the Complaint.³³ Kielczewski’s ownership interests in the General Partner and the Investment Manager increased without him contributing any additional capital.³⁴

The Mariemont Fund began operations on January 22, 2014, trading and investing in pools of residential mortgage-backed securities,³⁵ and sold its first partnership interest nine days later, on January 31.³⁶ As of the time of the hearing, the Mariemont Fund was still in business.³⁷

²⁶ Stip. ¶ 5.

²⁷ Tr. 796.

²⁸ Stip. ¶ 14.

²⁹ Ans. ¶ 13; Stip. ¶ 9. In connection with his investment, 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 (“Reg D”) because, among other things, he was “a director, executive officer, or general partner of the issuer of the securities being offered or sold, or [the] director, executive officer, or general partner of a general partner of that issuer.” Kielczewski also represented that he satisfied the criteria to be a “qualified client” under 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.” Ans. ¶ 14; Stip. ¶ 15.

³⁰ Stip. ¶ 14.

³¹ Tr. 173.

³² Ans. ¶ 11; Stip. ¶ 12.

³³ Ans. ¶ 11; Stip. ¶ 12; Tr. 160. According to the limited liability company agreement for the Investment Manager, the company’s managers could “issue additional Units to existing Members who provide strategic services to [the Investment Manager] . . . whether as employees, independent contractors or in any other capacity.” Stip. ¶ 12; Tr. 160.

³⁴ Tr. 160–61, 175.

³⁵ Stip. ¶ 5.

³⁶ Stip. ¶ 8. The Fund experienced steady sales growth. By June 15, 2017, it had sold \$53.4 million in limited partnership interests to 41 investors. Stip. ¶ 8. The Fund’s confidential private offering memorandum specifically referred to the limited partnership interests in the Fund as securities available for sale only to accredited investors, as defined in Reg D. Stip. ¶ 7.

³⁷ Tr. 850.

C. Kielczewski Joins Huntington and the Mariemont Fund Becomes a Customer

In February 2011, Chapman left Fifth Third³⁸ to join Huntington³⁹ as chairman and head of all capital markets.⁴⁰ Shortly afterward, he began recruiting Kielczewski to join Huntington⁴¹ and bring over his customers.⁴² Eventually, Chapman's recruiting efforts proved successful. In late November 2013, two months after Taylor left Fifth Third, Kielczewski resigned as well.⁴³ On January 8, 2014, Kielczewski joined Huntington⁴⁴ as a Managing Director in Institutional Sales.⁴⁵ Even though selling private label mortgage-backed securities had been a large part of his overall business, Kielczewski decided to "at least try to be an institutional salesperson" at Huntington, and planned to introduce his clients to the Fund as well as invest in it himself.⁴⁶

Later in January 2014, the Mariemont Fund became a Huntington customer, and its account was assigned to another Firm registered representative who worked in a different branch office than Kielczewski.⁴⁷ Yet another Firm registered representative periodically assisted with the Mariemont Fund's trading activity.⁴⁸

D. Kielczewski Solicits and Facilitates Customers' Investments in the Mariemont Fund

From the end of November 2013 until early 2014, anticipating Kielczewski's move to Huntington, Kielczewski and Taylor embarked upon "road shows" to visit Kielczewski's former Fifth Third customers. At those meetings, they explained that Kielczewski would be joining Huntington, and that they wanted these former customers to bring their accounts to Huntington and, among other things, invest in the Mariemont Fund.⁴⁹ According to Kielczewski, after the

³⁸ Tr. 879.

³⁹ Tr. 130–31, 880–81, 1032.

⁴⁰ Tr. 131.

⁴¹ Tr. 131, 882–83, 894–95, 1032–33.

⁴² Tr. 907–08.

⁴³ Tr. 183–84; JX-1, at 2.

⁴⁴ Tr. 118.

⁴⁵ Ans. ¶ 18; Stip. ¶ 20.

⁴⁶ Tr. 1048–51.

⁴⁷ Ans. ¶ 15; Stip. ¶ 16.

⁴⁸ Stip. ¶ 16. From January 2014 to May 2017, all the Mariemont Fund's assets were held in a Huntington account and traded through the Firm. Stip. ¶ 16. Despite exploratory discussions at the Firm in 2015 about the Firm offering the Fund as an investment opportunity to high net worth or institutional customers, Huntington never offered the Fund for sale to its customers, nor did it include the Fund in its platform of securities products for its registered representatives to sell. Stip. ¶ 18. At the time of the hearing, the Mariemont Fund was no longer a Huntington customer. Tr. 728.

⁴⁹ Tr. 191–94.

road shows, his former Fifth Third customers understood his role versus Taylor's: "[M]y efforts for them [would be] in the Huntington investment platform and Kevin Taylor would focus on the Mariemont platform We definitely disclosed, I am doing Huntington. He is doing Mariemont."⁵⁰

Soon after joining Huntington, Kielczewski, working in tandem with Taylor, continued his efforts to have former Fifth Third customers open accounts at the Firm and invest in the Mariemont Fund. Most of Kielczewski's former Fifth Third customers did move to Huntington,⁵¹ and several of them invested in the Fund, as we discuss below.

1. HGI

While still at Fifth Third, Kielczewski was the assigned broker on an account for an insurance agency called HGI. After moving to Huntington, Kielczewski exchanged emails with HGI executives about potential investments in the Mariemont Fund.⁵² Two days after starting work at Huntington, on January 10, 2014, Kielczewski messaged Taylor, "Letz go!!!!!" Taylor responded that Kielczewski would have "access to all Mariemont Capital files" via a shared drive.⁵³ Later that day, through his personal account, Kielczewski emailed an HGI executive vice president.⁵⁴ Kielczewski said he wanted to discuss "a new potential investment" for HGI in a fund he had created with the former head of mortgage-backed trading at Fifth Third.⁵⁵ He also said that he would email the executive "some material on the investment partnership."⁵⁶ He did so that day, forwarding a PowerPoint presentation entitled "Mariemont Capital Partners, L.P. Where Investment Professionals Invest" and a private offering memorandum for the Fund.⁵⁷ On January 21, Kielczewski met with the executive and gave him an abbreviated explanation of the Fund.⁵⁸

Kielczewski continued his solicitations in the spring of 2014. On April 4, 2014, Kielczewski emailed four HGI executives, updating them on the Fund's first quarter performance, predicting end-of-year returns, and asking them to reestablish their relationship with him and/or Mariemont Capital.⁵⁹ Later that day, he separately emailed HGI's chief financial officer, saying, "As a follow-up to our Mariemont proposal . . . , I am going to send an email

⁵⁰ Tr. 260–62.

⁵¹ Tr. 931–32.

⁵² Stip. ¶¶ 50, 51.

⁵³ Tr. 238–39, 830–31; JX-24b.

⁵⁴ Stip. ¶ 52; JX-20g, at 2–3.

⁵⁵ Stip. ¶ 52; Tr. 241; JX-20g, at 3.

⁵⁶ Stip. ¶ 52; JX-20g, at 3.

⁵⁷ JX-20b, at 2, 15–34.

⁵⁸ Tr. 250–51.

⁵⁹ Stip. ¶ 53; JX-20d, at 5.

with the first quarter performance,” adding: “I will also have a few comments and rebuttals to reasons why or why not to work with me, Mariemont, or both.”⁶⁰

Kielczewski followed up with the chief financial officer on April 27, 2014, asking that he consider and provide his thoughts about a “potential transition and strategy” that included HGI investing in the Fund.⁶¹ Among other things, Kielczewski wrote:

- “In my opinion, our whole loan investments will outperform if we use Mariemont Capital.”
- “An easy transition to Mariemont would involve taking the monthly cash flows from the current whole loan positions and transferring them to Mariemont at the end of each month.”
- “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.”
- “I look forward to working with you all again and can’t wait to get started.”⁶²

Eight months later, in December 2014, HGI became a Huntington customer, with Kielczewski serving as the account’s broker of record.⁶³ The next year, on December 2, 2015, HGI invested \$1.5 million in the Mariemont Fund.⁶⁴ The following spring, Kielczewski stayed in touch with HGI about its Fund investments. And on June 22, 2016, Kielczewski exchanged emails with HGI’s controller about Kielczewski and Taylor meeting with him and the chief financial officer to discuss, among other things, HGI’s Mariemont Fund investment.⁶⁵ A week later, on June 29, Kielczewski and Taylor made a presentation at HGI’s offices concerning the company’s investments.⁶⁶ And, on August 1, HGI invested an additional \$1.5 million in the Fund.⁶⁷

⁶⁰ JX-20d; JX-20e.

⁶¹ Stip. ¶ 54; JX-20f, at 1.

⁶² Stip. ¶ 54; JX-20f, at 1.

⁶³ Stip. ¶ 55.

⁶⁴ Stip. ¶ 56.

⁶⁵ Stip. ¶ 57.

⁶⁶ Stip. ¶ 58.

⁶⁷ Stip. ¶ 59.

2. WI and RI

WI and RI, a married couple, held a joint brokerage account at Fifth Third where Kielczewski was the assigned broker.⁶⁸ In January 2014, WI and RI opened a joint brokerage account at Huntington with Kielczewski as the broker of record.⁶⁹ On January 16, 2014, from his personal email account,⁷⁰ Kielczewski sent WI a blank Mariemont Fund subscription agreement and a copy of his own completed subscription agreement to serve as a guide on how to complete one.⁷¹

On January 25, Kielczewski used his personal email account again to send WI and RI's completed subscription agreement for their \$3 million investment in the Fund to Taylor.⁷² A few days later, on January 28, Taylor emailed Kielczewski, suggesting which bonds WI and RI should sell from their Firm account to generate funds to invest in the Mariemont Fund.⁷³

On January 30, Kielczewski instructed a Huntington sales assistant to give WI the forms necessary to wire funds from WI's personal investment account at another broker-dealer to the Fund's account there.⁷⁴ The next day, January 31, WI and RI completed their initial \$1.94 million investment in the Fund.⁷⁵ Five days later, on February 5, Kielczewski sent Taylor a message saying he was "done with [WI] . . . , who was going to sell [certain specified] bonds" and then "move the proceeds from those transactions into the Fund."⁷⁶

Then on February 11, Kielczewski emailed WI: "Here are 3 trade tickets for bonds we should sell."⁷⁷ Minutes later, WI replied, saying they were "on the same page" and that Kielczewski should "[g]o ahead and execute [those] 3 sales"⁷⁸ Kielczewski responded, "OK will do and will let you know what [Taylor] comes up with."⁷⁹ A few days later, Kielczewski sold the specified bonds from WI and RI's account for about \$222,000.⁸⁰ On February 14, using the proceeds from those bonds sales, plus additional cash in WI and RI's account, WI authorized

⁶⁸ Stip. ¶ 68.

⁶⁹ Stip. ¶ 68.

⁷⁰ Tr. 265–66; JX-25b, at 1, 12.

⁷¹ Tr. 264–67; JX-25b, at 1–32, 44.

⁷² JX-25b, at 45–66.

⁷³ JX-25b, at 67.

⁷⁴ JX-25b, at 68.

⁷⁵ JX-25b, at 68–81.

⁷⁶ Stip. ¶ 69; JX-25c, at 3.

⁷⁷ JX-25c, at 24.

⁷⁸ Stip. ¶ 70; JX-25c, at 24.

⁷⁹ Stip. ¶ 70.

⁸⁰ Stip. ¶ 71.

the transfer of \$303,841 to the Mariemont Fund brokerage account at Huntington for a second investment in the Fund.⁸¹

3. SCCI

SCCI, a chemical manufacturer, had a brokerage account at Fifth Third where Kielczewski was the assigned broker.⁸² On January 13, 2014, a few days after Kielczewski joined Huntington, Kielczewski and Taylor met with SCCI's investment team to discuss investing in the Mariemont Fund.⁸³ Afterward, SCCI's treasurer, SL, asked Taylor to send him a Fund subscription agreement. SL explained that SCCI's team had told Kielczewski that SCCI would initially invest \$3.85 million in the Fund. Kielczewski then wrote the following to Taylor about how to fund the investment: "[W]e have \$4mm in money market we can use for initial contribution."⁸⁴ SCCI opened an account at the Firm on January 21, 2014,⁸⁵ with Kielczewski as the broker of record.⁸⁶

On January 29, SL emailed Taylor (copying Kielczewski) a signed Fund Limited Partnership Agreement and subscription agreement for SCCI's initial investment.⁸⁷ SL later instructed Kielczewski by email to wire \$3.85 million to the Fund from SCCI's brokerage account at the Firm.⁸⁸ But two days later, Kielczewski emailed SL, saying the Firm was unable to wire funds from SCCI's brokerage account to the Fund because of technical issues.⁸⁹ Kielczewski reassured SL, "We think we have a solution to this very stupid and frustrating situation."⁹⁰ Kielczewski asked SL to provide SCCI's third-party bank information to his sales assistant to effect the transfer later that day.⁹¹ Using Kielczewski's suggested process to wire funds, SCCI invested \$3.85 million in the Mariemont Fund on January 31.⁹²

Soon afterward, Taylor urged Kielczewski to get SCCI to increase its investment. On February 26, Taylor messaged Kielczewski, in part: "let's go...get another 2 mm from [SCCI] in

⁸¹ Stip. ¶¶ 72–73; JX-25c, at 38.

⁸² Stip. ¶ 74.

⁸³ Tr. 236.

⁸⁴ JX-26b, at 1–4.

⁸⁵ Ans. ¶ 69; Stip. ¶ 74; JX-26a.

⁸⁶ Stip. ¶ 74.

⁸⁷ Stip. ¶ 75.

⁸⁸ Stip. ¶ 76.

⁸⁹ Stip. ¶ 77.

⁹⁰ Stip. ¶ 77; JX-26b, at 44, 48.

⁹¹ Stip. ¶ 78.

⁹² Stip. ¶ 79; Complainant's Exhibit ("CX-__") 2.

here.”⁹³ One week later, on March 5, Taylor wrote to SL and another SCCI employee, copying Kielczewski, that the Fund was “off to a great start!”⁹⁴ Kielczewski replied to the email, noting, “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 \$330K+ on the 25th of this month.”⁹⁵

The next day, March 6, at Taylor’s request, Kielczewski emailed SL, explaining that the attached wire request had to be completed “in order to move funds from the [SCCI] Investment account to the Mariemont Investment Account.”⁹⁶ After receiving the completed wire instructions from SL, Kielczewski forwarded the documents to his sales assistant and asked her to process the wire.⁹⁷ And the following day, SCCI invested \$2.15 million in the Fund.⁹⁸

4. K&R and KK

K&R is a construction contractor⁹⁹ founded by KK, who is also its chief executive officer, secretary, and treasurer.¹⁰⁰ Both K&R and KK held brokerage accounts at Fifth Third, where Kielczewski was the assigned broker.¹⁰¹ On August 26, 2014, Kielczewski emailed KK, thanking him for taking a meeting about potentially moving K&R’s assets from Fifth Third to Huntington.¹⁰²

About a year and a half later, but before K&R and KK had opened accounts at Huntington, Kielczewski met with KK on March 23, 2016, to recommend that he split his assets between Huntington and the Mariemont Fund; Taylor was not present at that meeting.¹⁰³ That day, KK signed a Fund subscription agreement for K&R’s proposed \$1 million investment in the Mariemont Fund.¹⁰⁴ The next day, KK emailed Kielczewski, thanking him for meeting the day before and informing him that he would “probably go” with Kielczewski’s recommendation.¹⁰⁵

⁹³ Stip. ¶ 80; JX-26c.

⁹⁴ Stip. ¶ 81; JX-26d, at 1.

⁹⁵ Stip. ¶ 81; JX-26d, at 1.

⁹⁶ Stip. ¶ 83; JX-26d, at 9.

⁹⁷ Stip. ¶ 83.

⁹⁸ Stip. ¶ 84; JX-26d, at 7–14.

⁹⁹ Stip. ¶ 85; Ans. ¶ 79.

¹⁰⁰ Ans. ¶ 79; Stip. ¶ 85; Tr. 842.

¹⁰¹ Ans. ¶ 79; Stip. ¶ 87.

¹⁰² Stip. ¶ 86.

¹⁰³ Tr. 346–49.

¹⁰⁴ JX-27h.

¹⁰⁵ Stip. ¶ 88; JX-27d.

A month later, in April 2016, K&R and KK became Firm customers, with Kielczewski serving as their broker.¹⁰⁶

Afterward, Kielczewski prompted KK to invest in the Fund. On May 24, 2016, Kielczewski emailed KK a form to wire funds from KK’s Huntington brokerage account for his Mariemont Fund investment and notified KK that he needed to “hurry” to not miss the entry point for that initial investment.¹⁰⁷ Kielczewski also instructed KK on the mechanics of his money transfer into the Fund.¹⁰⁸ That day, KK emailed Kielczewski the completed wire documents, asking: “I assume you will need the funds wired to Mariemont after they have hit my account?”¹⁰⁹ Kielczewski told KK he was correct and that he would tell Taylor to provide KK with wire instructions.¹¹⁰ Two days later, K&R invested \$1 million in the Fund.¹¹¹ And a few days later, on June 1, 2016, KK invested \$3 million.¹¹²

5. Summary of Firm Customers’ Mariemont Fund Investments

Summarized below are the above-described Firm customers’ Mariemont Fund Investments:

Date of Investment	Customer	Investment Amount
January 31, 2014	SCCI	\$3.85 million
January 31, 2014	WI/RI	\$1.94 million
February 14, 2014	WI/RI	\$303,841
March 7, 2014	SCCI	\$2.15 million
December 2, 2015	HGI	\$1.5 million
May 26, 2016	K&R	\$1 million
June 1, 2016	KK	\$3 million
August 1, 2016	HGI	\$1.5 million
	Total	\$15.2 million

¹⁰⁶ Ans. ¶ 79; Stip. ¶ 87.

¹⁰⁷ Tr. 351–52; JX-27e, at 14.

¹⁰⁸ Tr. 352–53; JX-27e, at 14.

¹⁰⁹ Stip. ¶ 89; JX-27e, at 14.

¹¹⁰ Stip. ¶ 89; JX-27e, at 14.

¹¹¹ Stip. ¶ 90.

¹¹² Stip. ¶ 91.

E. Kielczewski Engages in Additional Fund-Related Activities

Besides soliciting investments in the Fund, Kielczewski engaged in other Fund-related activities, mainly in conjunction with Taylor. These activities included the following: (1) communicating frequently with Taylor about the Fund, including sometimes recommending that the Fund invest in certain securities;¹¹³ (2) receiving three sample financial statements on December 9, 2014, from Taylor, who asked Kielczewski for his opinion about which sample statement should be used in connection with the Fund;¹¹⁴ (3) participating in communications about the Fund’s pitch book and providing input as to its contents; and (4) reviewing and revising the Fund’s Quarterly Manager’s Report sent to Fund investors.

We address in more detail, below, Kielczewski’s involvement with the Fund’s pitch book and quarterly reports.

1. Pitch Book

The Fund’s promotional efforts included using a pitch book—a multi-page PowerPoint presentation describing, among other things, the Fund’s purpose, investment strategy, and annual performance compared to certain indexes.¹¹⁵ Taylor relied on Kielczewski to review the pitch book and often used him as a “sounding-board” for promoting the Fund.¹¹⁶ Kielczewski explained, “He definitely wanted insight [from] me [about] how things would sound.”¹¹⁷

During Kielczewski’s time at the Firm, Taylor sent him numerous updated versions of the Mariemont Fund pitch book.¹¹⁸ And from 2014 through 2016, Taylor and others who reviewed and revised the pitch book copied Kielczewski on numerous emails (some of which attached the

¹¹³ Stip. ¶ 66; Tr. 299–300, 331–32; JX-23a–JX-23t.

¹¹⁴ Stip. ¶ 67.

¹¹⁵ Stip. ¶ 60.

¹¹⁶ Tr. 298, 837.

¹¹⁷ Tr. 298–99.

¹¹⁸ Tr. 297–98.

pitch book).¹¹⁹ The evidence showed that Kielczewski did not simply read these emails, but actively weighed in on the pitch book. For example, in a June 30, 2014 email concerning a series of pitch book revisions suggested by two members of the Investment Manager and the General Partner,¹²⁰ Kielczewski joked that they should handle the pitch book presentations instead of Taylor¹²¹ because he felt Taylor was not doing a good job running them.¹²² On January 8, 2015, Taylor emailed Kielczewski asking him to add Bloomberg screenshots concerning a specific residential mortgage-backed security to the pitch book for a meeting he was having with a prospective investor.¹²³

Kielczewski's wife helped out as well. On April 4, 2016, she sent Kielczewski and Taylor an updated pitch book, asking Taylor to let her know if there was anything else he needed.¹²⁴

2. Quarterly Manager's Report

In addition to revising the pitch book, at times during the period 2014 through 2016, at Taylor's request, Kielczewski reviewed, proofread, and revised certain Quarterly Manager's Reports before Taylor released them to Fund investors.¹²⁵ For example, in October 2014, Kielczewski recommended to Taylor who should receive the report, adding, "[If you] think of anyone else I should send [it] directly [to] . . . let me know."¹²⁶ On February 5, 2015, Kielczewski emailed Taylor a 2014 fourth quarter report in which he revised two sentences to

¹¹⁹ Tr. 297, 836–37; JX-21a (showing that in March 2014, while making pitch book revisions, Taylor sent Kielczewski a draft pitch book for the Fund); JX-21b, at 1, 4, 5–21, 24, 28–29, 32, 36–37, 41–42 (showing that at the end of June 2014, Kielczewski was copied on numerous emails among Taylor and others regarding proposed pitch book revisions); Stip. ¶ 60 (stipulating that on June 26, 2014, Taylor emailed Kielczewski a revised pitch book for the Fund); Stip. ¶ 61 (stipulating that Taylor copied Kielczewski on a June 26 to July 1, 2014 email chain that included comments and edits to the pitch book by two members and one manager of the Investment Manager); JX-21b, at 65, 70–71; JX-21c, at 1–20; JX-21d, at 1–20 (showing that in early July 2014 and in August 2014, Kielczewski was included on emails regarding pitch book revisions, some with attached draft versions of the pitch book); Stip. ¶ 62 (stipulating that on August 20, 2014, Taylor emailed Kielczewski and two members of the Investment Manager a copy of the revised pitch book). One especially telling email about the pitch book suggests that Kielczewski solicited investors for the Fund. On August 22, 2014, during discussions concerning the pitch book, Taylor informed an Investment Manager member that Kielczewski "is getting close with a few prospects" Stip. ¶ 63; Tr. 320; JX-21c, at 20.

¹²⁰ Tr. 316–17.

¹²¹ JX-21b, at 28.

¹²² Tr. 317–18.

¹²³ Stip. ¶ 64; JX-21e.

¹²⁴ JX-21g.

¹²⁵ Stip. ¶ 65. Tr. 337–38, 837–38, 1141; JX-22a; JX-22b; JX-22c; JX-22d, at 5–12; JX-22e; JX-22f. Kielczewski tried to make the materials more presentable. Tr. 339.

¹²⁶ JX-22b, at 4.

make the Fund’s credit profile understandable.¹²⁷ And on August 4, 2015, Kielczewski gave Taylor feedback on the 2015 second quarter report, emailing him that the report was too long and “wordy” and contained too many “analogies that don’t connect into a cohesive story.”¹²⁸

F. Kielczewski Makes Misrepresentations to His Firm and on an Initial Form U4 and Four Form U4 Amendments about His Relationship with the Mariemont Entities

Enforcement charges that over a three-year period, Kielczewski misrepresented to the Firm on his initial Form U4 and four Form U4 amendments the nature and extent of his relationship with the Fund. The gist of these charges is that in light of Kielczewski’s Fund-related activities, as described above, it was false and misleading for Kielczewski to represent that he was merely a passive owner and investor and had neither engaged in private securities transactions nor solicited investors for the Fund. Next, we address those alleged misrepresentations.

1. Representations on the Firm’s Pre-Registration Request Form

On December 23, 2013, as part of his onboarding at Huntington, Kielczewski submitted a Pre-Registration Request Form to the Firm.¹²⁹ On that form, Kielczewski represented, among other things, the following:

1. he was engaged in an outside business activity with an entity named “Mariemont Capital”;¹³⁰
2. his relationship with Mariemont Capital began on November 30, 2013;¹³¹
3. he was a “passive owner/investor in a general/limited partnership that invests in non-conforming MBS [mortgage-backed securities]”;¹³²
4. he had no business duties at Mariemont Capital;¹³³

¹²⁷ Stip. ¶ 65; Tr. 338; JX-22c, at 4.

¹²⁸ Stip. ¶ 65; JX-22e, at 7.

¹²⁹ Stip. ¶ 21; JX-3.

¹³⁰ Stip. ¶ 21; JX-3, at 6. The form defined an “outside business activity” as “any outside activity by which a Registered Representative *receives compensation or is employed in any way* outside of the normal scope of their employment with The Huntington Investment Company.” JX-3, at 3, 6. It required a separate disclosure for each outside business. Nevertheless, Kielczewski did not disclose his ownership interest and role at the General Partner. JX-3, at 6. At the hearing, Kielczewski explained that he used the term “Mariemont Capital” as a “holistic name” representing the Mariemont entities. Tr. 1064.

¹³¹ Stip. ¶ 25; JX-3, at 6.

¹³² Stip. ¶ 22; JX-3, at 6.

¹³³ Ans. ¶ 21; Stip. ¶ 23; JX-3, at 6.

5. he intended to devote approximately one hour per month to this other business;¹³⁴ and
6. he received \$50,000 annually in compensation from this outside business activity.¹³⁵

Additionally, Kielczewski checked “yes” to the following two questions: (1) was he a general partner in an investment-related limited partnership or manager of an investment-related limited liability company;¹³⁶ and (2) did he participate in any private securities transactions?¹³⁷ The form defined private securities transactions as “those outside the scope of your association with The Huntington Investment Company and in which you participate for another party’s benefit. These transactions include both those in which you do and/or do not receive compensation.”¹³⁸

Kielczewski’s response to the private securities transactions question prompted a follow-up by Jillian Bowman, a Huntington securities principal and head of the compliance department’s registrations group.¹³⁹ In a January 8, 2014 email—Kielczewski’s first day at the Firm—she asked Kielczewski to explain his private securities transaction disclosure, informing him that Huntington normally did not permit such transactions.¹⁴⁰ Bowman also asked him to explain his disclosure that he was a general partner in an investment-related limited partnership or a manager of an investment-related limited liability company.¹⁴¹

Kielczewski replied later that day by email that he was a “passive owner and investor in a limited partnership that invests in non-investment grade private label MBS.”¹⁴² He added, “Being a passive general partner allows me to have minority ownership in a limited partnership company,” and he assured Bowman that he was “not a manager of an investment related company and [his] passive ownership will not conflict with [Firm] clients.”¹⁴³

¹³⁴ Stip. ¶ 22; JX-3, at 6.

¹³⁵ Ans. ¶ 21; Stip. ¶ 23; JX-3, at 6.

¹³⁶ Ans. ¶ 22; Stip. ¶ 24; JX-3, at 4.

¹³⁷ Ans. ¶ 24; Stip. ¶ 26; JX-3, at 3.

¹³⁸ Ans. ¶ 24; Stip. ¶ 26; JX-3, at 3.

¹³⁹ Stip. ¶ 27; Tr. 422, 935.

¹⁴⁰ Stip. ¶ 27; JX-4, at 2.

¹⁴¹ Stip. ¶ 27; JX-4, at 2.

¹⁴² Stip. ¶ 28; JX-4.

¹⁴³ Stip. ¶ 28; JX-4.

Kielczewski's response was quickly escalated within the Firm and reached Mark Gregory, then the Firm's chief compliance officer.¹⁴⁴ Less than an hour after Kielczewski sent his response, Gregory requested Kielczewski to "clarify" that his "role is just that of a passive investor/owner" and that he did "not engage in private securities transactions."¹⁴⁵ Kielczewski responded immediately that Gregory was "correct," adding that he "must have misunderstood . . . the private securities transactions question" and was "sorry."¹⁴⁶ After receiving Kielczewski's response, the Firm approved his Outside Business Activity Request Form, which permitted Kielczewski to remain a passive investor in "Mariemont Capital" while associated with the Firm.¹⁴⁷

2. Representations on Initial Form U4 and Four Form U4 Amendments

Between January 2014 and December 2016, based on information Kielczewski provided, Huntington filed an initial Form U4 and four Form U4 amendments on Kielczewski's behalf.¹⁴⁸ Question 13 on each form, entitled "Other Business," asked, in pertinent part, "Are you currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise?"¹⁴⁹ On the initial Form U4, Kielczewski, through the Firm, responded:

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. . . . 0 HOURS PER MONTH DEVOTED TO THIS BUSINESS.¹⁵⁰

None of the four Form U4 amendments changed this disclosure.¹⁵¹

¹⁴⁴ Stip. ¶ 29; Tr. 417–18. Gregory worked at Huntington from approximately May 2013 until October 2015. Tr. 417.

¹⁴⁵ Stip. ¶ 29; JX-4, at 1.

¹⁴⁶ Stip. ¶ 29; JX-4, at 1.

¹⁴⁷ Stip. ¶ 30.

¹⁴⁸ Stip. ¶ 33. The initial Form U4 was filed on January 15, 2014, and the four amendments were filed on January 16, 2014; April 22, 2016; May 31, 2016; and December 20, 2016. Tr. 257; JX-12.

¹⁴⁹ Stip. ¶ 33; Tr. 257–58.

¹⁵⁰ Stip. ¶ 33; Ans. ¶ 29; JX-12, at 1.

¹⁵¹ Stip. ¶ 33; JX-12, at 2–5.

3. Representation on the Registered Representative Annual Questionnaire

Around December 2015, Kielczewski completed his 2015 Registered Representative Annual Questionnaire.¹⁵² Kielczewski answered “no” to the question, “Have you engaged in any Private Securities Transactions while employed through [Huntington]?”¹⁵³

4. Representations in Connection with FINRA’s 2016 Cycle Examination

In April 2016, FINRA conducted a branch cycle examination of Huntington (“2016 Cycle Exam”).¹⁵⁴ On April 22, in connection with that exam, Kielczewski’s supervising principal, David Fitzsimmons II,¹⁵⁵ sent Kielczewski an email asking that he complete a personal activity questionnaire provided by FINRA.¹⁵⁶ Kielczewski completed the form four days later,¹⁵⁷ attesting that the information he provided on it was accurate and truthful.¹⁵⁸ In response to the question on the form about whether he was engaged in outside employment/activities or private securities transactions, Kielczewski wrote, in pertinent part:

Yes. Silent minority partner in Mariemont Capital LLC. Investment related company 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.¹⁵⁹

Huntington provided Kielczewski’s completed personal activity questionnaire form to FINRA during the course of its 2016 Cycle Exam.¹⁶⁰

On or about May 2, 2016, in the presence of Firm supervisory and compliance personnel, Kielczewski met with FINRA Member Regulation Exam staff during the 2016 Cycle Exam at the Firm’s Toledo branch.¹⁶¹ FINRA investigators questioned Kielczewski about his role with

¹⁵² Tr. 343–44; JX-13. The record does not reflect the exact date on which Kielczewski completed it.

¹⁵³ Ans. ¶ 30; Stip. ¶ 34; JX-13.

¹⁵⁴ Tr. 349.

¹⁵⁵ Stip. ¶ 35. The Firm’s December 23, 2013 Pre-Registration Request Form identified Chapman as Kielczewski’s supervising principal and identified Greg Ledford as Kielczewski’s team leader. As team leader, Ledford managed/supervised Kielczewski and reported to Chapman. Tr. 425–26, 744, 946; JX-3, at 1. Fitzsimmons became Kielczewski’s supervisor after Ledford. Tr. 1086. Since the fall of 2014, Fitzsimmons has been the Firm’s managing director for institutional sales and trading. Tr. 661.

¹⁵⁶ Stip. ¶ 35; Tr. 540–41; JX-14a.

¹⁵⁷ Stip. ¶ 36; Tr. 350; JX-14b.

¹⁵⁸ JX-14b, at 5.

¹⁵⁹ Stip. ¶ 36; JX-14b, at 3.

¹⁶⁰ Stip. ¶ 37; Tr. 1081–83.

¹⁶¹ Stip. ¶ 38; Tr. 1081–83.

the Investment Manager,¹⁶² and Kielczewski responded with the same information he had provided on the personal activity questionnaire.¹⁶³

5. Representations after the 2016 Cycle Examination

After FINRA's 2016 Cycle Exam, in a July 1, 2016 email, Fitzsimmons asked Kielczewski to clarify the nature of his investment in the Fund and to ensure the accuracy of his prior outside business activity disclosures.¹⁶⁴ Kielczewski responded that he had only "a passive role in Mariemont Capital" and "[did] not solicit funds for" it.¹⁶⁵ Kielczewski also disclosed to the Firm that certain Huntington customers were invested in the Fund, including SCCI, HGI, WI, K&R, and K&R's owners, which included KK.¹⁶⁶

Based on his responses, at his supervisor's request, Kielczewski completed a Disclosure of Outside Business Activity form dated July 14, 2016 ("July 14 OBA Form").¹⁶⁷ On that form, Kielczewski identified "Mariemont Capital" as the outside business activity, describing it as a "limited partnership that manages non-rated whole loan CMOs."¹⁶⁸ Kielczewski described himself as a "passive minority owner" with "no duties or obligations."¹⁶⁹ Additionally, he answered "zero" in response to the question, "What percentage of your time is spent on this activity during regular business hours . . . ?"¹⁷⁰ He checked "no" to the question, "Have you solicited any other individual(s) to invest in this entity?"¹⁷¹ The July 14 OBA Form also listed each of the joint Firm-Fund customers that Kielczewski had previously identified to Fitzsimmons.¹⁷²

Two months later, on September 20, 2016, Kielczewski and Fitzsimmons executed an Outside Business Activity Monitoring form.¹⁷³ This form included a business plan to document the Firm's oversight of Kielczewski's Mariemont-related activities and to monitor Kielczewski's Huntington email account.¹⁷⁴ One of the "contributing factors" forming the basis for the Firm's

¹⁶² Stip. ¶ 38; Tr. 1083.

¹⁶³ Tr. 1083.

¹⁶⁴ Stip. ¶ 39; JX-15c; JX-16a.

¹⁶⁵ Stip. ¶ 40; JX-15d, at 10–11.

¹⁶⁶ Ans. ¶ 33; Stip. ¶ 41; JX-15d, at 11.

¹⁶⁷ Stip. ¶ 42; JX-15d, at 4–7; JX-16a; JX-16b.

¹⁶⁸ Stip. ¶ 43.

¹⁶⁹ Stip. ¶ 43.

¹⁷⁰ Stip. ¶ 44; JX-15d, at 4.

¹⁷¹ Stip. ¶ 44; JX-15d, at 6.

¹⁷² Stip. ¶ 45; JX-15d, at 7.

¹⁷³ Stip. ¶ 46; JX-17c, at 2–3.

¹⁷⁴ Stip. ¶ 46; Tr. 674–75; JX-17a–JX-17d.

monitoring, according to Fitzsimmons, was that Kielczewski had told him he “[did] not solicit funds for Mariemont, but share[d] common clients.”¹⁷⁵ Kielczewski signed the form, acknowledging the accuracy of the representations on it.¹⁷⁶ As part of the plan to monitor Kielczewski’s Mariemont-related activities, the Firm pledged to conduct a quarterly review of Kielczewski’s emails using “Mariemont” as a filter, and to request annual confirmation that Kielczewski’s representations, including that he did not solicit investors, remained accurate.¹⁷⁷

Three months passed. Then, in a December 6, 2016 email, Fitzsimmons asked Kielczewski again to confirm, among other things, that he continued to hold a minority interest in “Mariemont” and that he did not solicit funds from clients.¹⁷⁸ Kielczewski replied that his prior descriptions of his Mariemont-related activities remained accurate.¹⁷⁹

6. Conclusion Regarding Kielczewski’s Misrepresentations

For three years, from December 2013 through December 2016, Kielczewski repeatedly portrayed his role with the Mariemont Fund as that of a passive owner/investor who did not solicit investors for the Fund, did not engage in private securities transactions, and who devoted zero hours per month to Fund activities. Taken individually and collectively, Kielczewski’s representations about the nature and extent of his Fund-related activities were false and misleading.

Immediately upon joining the Firm in January 2014, Kielczewski picked up where he left off from his fall 2013 road shows. He began soliciting the transitioning Fifth Third customers to invest in the Fund. Those efforts bore fruit. Over the next year and a half, from January 31, 2014, through August 1, 2016, six of them invested in the Fund. As addressed below in our Conclusions of Law discussion, we conclude that Kielczewski’s actions constituted participating in private securities transactions. We therefore find that his representations to Huntington that he did not engage in such transactions were false and misleading.

Specifically, on January 8, 2014, when responding to questions raised by his answers on the Firm’s Pre-Registration Request Form, Kielczewski represented that he did not engage in private securities transactions. While he had not yet engaged in any transactions at that point, he intended to do so; just two days later he began soliciting SCCI to invest in the Fund. And a few weeks later, on January 31, SCCI invested in the Fund. Even more troubling was that Kielczewski denied on his 2015 Registered Representative Annual Questionnaire that he had

¹⁷⁵ Stip. ¶ 47; JX-17c, at 2.

¹⁷⁶ Ans. ¶ 39; Stip. ¶ 48.

¹⁷⁷ Ans. ¶ 40; Stip. ¶ 48; JX-17c, at 3.

¹⁷⁸ Stip. ¶ 49.

¹⁷⁹ Stip. ¶ 49; JX-18.

engaged in any private securities transactions through Huntington. By that time, he had participated in at least four private securities transactions.¹⁸⁰

In addition to these false statements to the Firm about his involvement in private securities transactions, Kielczewski repeatedly minimized his role with the Fund in representations to the Firm, on his initial Form U4, and on four Form U4 amendments. Contrary to his representations, Kielczewski was not merely a passive investor/owner or silent minority partner in the Investment Manager who devoted no time to this outside business activity and did not solicit investors. Rather, his Fund-related activities—individually and in their totality—constituted material, active measures¹⁸¹ to assist the Fund’s business. These activities included, among other things, directly soliciting investors,¹⁸² helping Taylor solicit investors, engaging in private securities transactions, and reviewing and revising the Fund’s pitch book and the Quarterly Manager’s Report. Accordingly, for the above reasons, we find that Kielczewski made false and misleading statements to the Firm on his initial Form U4 and four Form U4 amendments.

III. Kielczewski’s Arguments/Defenses

Kielczewski admits that some of his disclosures “may have been less accurate than they could have been.”¹⁸³ For example, Kielczewski testified that he made a “bad decision” by listing zero hours on the Pre-Registration Request Form and other forms and “should have put

¹⁸⁰ See Summary of Firm Customers’ Mariemont Fund Investments Chart at p. 12 above.

¹⁸¹ Cf. *Dep’t of Enforcement v. Brown*, No. 2007010450601, 2009 FINRA Discip. LEXIS 30, at *21 (OHO July 14, 2009) (finding that respondent’s “active measures” to establish an outside business activity “amounted to more than the passive investment activity that falls outside the scope of [the predecessor to FINRA Rule 3270],” which provides that registered persons shall not be employed by, or accept compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of their relationship with the employer firm, without providing prompt written notice to the member firm employer); see also *Joseph Abbondante*, 58 S.E.C. 1082, 1109 (2006) (holding that it “did not intend 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).

¹⁸² “In the investment context, one who solicits attempts to produce the sale by urging or persuading another to act.” *Meadows v. SEC*, 119 F.3d 1219, 1225 (5th Cir. 1997) (citing *Pinter v. Dahl*, 486 U.S. 622, 646 (1988)).

¹⁸³ Post-Hearing Brief Submitted on Behalf of Respondent William Joseph Kielczewski (“Resp’t Post-Hr’g Br.”) 1, 29.

something like approximately zero to one hour per month.”¹⁸⁴ But, for the most part, Kielczewski disputes that he ever tried to deceive anyone and maintains that “his disclosures, taken as a whole, certainly gave an accurate, overall, depiction of his relationship with Mariemont.”¹⁸⁵ We reject these arguments.

A. Kielczewski’s Argument That He Did Not Intentionally Make False and Misleading Statements

Kielczewski argues that he did not intend to mislead the Firm by representing that he was a passive investor/owner, denying soliciting investments for the Fund, and denying engaging in private securities transactions. The thrust of this argument is that certain terms in Kielczewski’s disclosures have various meanings, and that Kielczewski’s understanding and use of those terms show he had no intent to mislead, especially when coupled with other disclosures he made to the Firm. Rather than demonstrating the absence of intent to mislead, Kielczewski’s conduct reflects just the opposite.

As a threshold matter, Kielczewski points out that the words “passive” and “solicit” are “nowhere to be found, much less defined, in” the private securities transactions rules.¹⁸⁶ Next, regarding his representations that he was merely a passive owner/investor, Kielczewski argues:

1. “Passive” is used in FINRA Rule 3270—the outside business activities rule—and he is not charged with violating that rule.
2. The term “passive investments” is defined in the Firm’s written supervisory procedures in connection with “Private Securities Transactions” but not “Outside Employment” (the term the written supervisory procedures use to refer to Outside Business Activities), and Kielczewski used the term “passive” when he was responding to a question about outside business activities, but not private securities transactions.
3. He merely used the term to mean that he was doing a minimal amount of work, “not actively calling customers trying to get [monies] into Mariemont,”¹⁸⁷ “not

¹⁸⁴ Tr. 1066. *See also* Tr. 1101–02 (Kielczewski testifying that his answer on the Form U4 could have been more full by adding, among other things, that he devoted zero to one hour per month to the business); Tr. 350–51, 384, 1080–81 (Kielczewski (1) conceding that his answer was inaccurate because when he filled out the personal activity questionnaire ahead of FINRA’s branch exam, he was devoting more than zero hours to the Fund, and (2) testifying that it would have been more accurate to write “something like zero to one hour[] per week devoted to this business.”); Tr. 1145 (Kielczewski testifying, “I messed that up. It should be a zero or an approximate zero or zero to one.”); Tr. 847–48 (Taylor confirming that Kielczewski’s representations to the Firm on the Form U4 filings as well as in attestations that he had devoted zero hours to the business activities of the Fund were inaccurate because Kielczewski devoted approximately an hour per month to Fund matters).

¹⁸⁵ Resp’t Post-Hr’g Br. 1, 29.

¹⁸⁶ Resp’t Post-Hr’g Br. 27.

¹⁸⁷ Tr. 1141–42; *see also* Resp’t Post-Hr’g Br. 27–28.

having the ability to control anything inside of any of the Mariemont entities,” and not having “the ability to control anything or effect a transaction.”¹⁸⁸

4. Although he did use the term “passive investor,” Kielczewski also repeatedly identified himself as a general partner or an owner of a general partner, and at least once identified himself as an “owner/manager.”¹⁸⁹ And in his Pre-Registration Request Form, he answered “yes” to the question asking if he was the general partner of an investment-related limited partnership or a manager of an investment-related limited liability company.¹⁹⁰

As to denying that he solicited funds for the Mariemont Fund, Kielczewski asserts:

1. “Soliciting” is not the same as engaging in private securities transactions as defined in the private securities transactions rule.¹⁹¹
2. The Firm was not harmed by Kielczewski’s July 1, 2016 denial that he solicited funds because by that time, “[the Firm] had already concluded that the Kielczewski’s relationship with Mariemont created an insuperable conflict that required divestment.”¹⁹²
3. When Kielczewski said “I do not solicit funds” in his July 1, 2016 email to Fitzsimmons, his statement was accurate because his answer was in present tense and at that point he had completed all customer introductions to the Fund and disclosed the full list of overlapping Huntington/Mariemont clients.¹⁹³
4. When Kielczewski answered “no” to the question “[h]ave you solicited any other individual(s) to invest in this entity?” on his July 14 OBA Form, that answer was also accurate because as of July 1, 2016, he had identified his clients who were

¹⁸⁸ Tr. 219–20.

¹⁸⁹ Resp’t Post-Hr’g Br. 23–24; JX-15d, at 5.

¹⁹⁰ Resp’t Post-Hr’g Br. 23; JX-3, at 4.

¹⁹¹ Resp’t Post-Hr’g Br. 26.

¹⁹² After FINRA concluded its 2016 Cycle Exam, the Firm reviewed Kielczewski’s activities and by June 28, the Firm’s compliance department had concluded that Kielczewski should “divest himself of his ownership interest in Mariemont Capital due to, amongst other things, a potential conflict of interest.” JX-46a, at 65.

¹⁹³ Resp’t Post-Hr’g Br. 28–29; Tr. 1091–92. This explanation is not credible because two weeks later, when asked on the Disclosure of Outside Business Activity Form about his *past* solicitation efforts for Mariemont, he still answered “no.” JX-16b, at 3. Thus, verb tense was not a factor in either denial.

also investors in the Fund,¹⁹⁴ and “[t]here was no one else that [he] talked to” about Mariemont Capital.¹⁹⁵

Finally, Kielczewski argues that he did not mean to mislead the Firm when he denied in emails with Bowman in 2014¹⁹⁶ and on the 2015 Registered Representative Questionnaire¹⁹⁷ that he had engaged in private securities transactions. By way of background, Kielczewski begins by pointing out that he initially answered “yes” on the Pre-Registration Request Form to the question about whether he would engage in such transactions.¹⁹⁸ But, Kielczewski explains, he later reversed his position only because of a suggestion by Gregory, who, he reasonably believed, understood the nature of his anticipated relationship with Huntington, the Mariemont Fund entities, and the transitioning clients.¹⁹⁹ This purported suggestion from Gregory consisted of an email asking: “Just to clarify, your role is just that of a passive investor/owner (you do not engage in any private securities transactions)?” Kielczewski testified that he thought Gregory was telling him that he had answered the question regarding private securities transactions incorrectly.²⁰⁰

Next, to show that he did not intend to mislead the Firm when he denied engaging in private securities transactions, Kielczewski focuses on differences in the definition of private securities transactions found in the Pre-Registration Request Form,²⁰¹ the Firm’s written supervisory procedures,²⁰² and the private securities transactions rule.²⁰³ He argues that the

¹⁹⁴ JX-15, at 2.

¹⁹⁵ Tr. 1093–94. This point is not persuasive. In the July 1 email, Kielczewski identified the Huntington clients who had also invested in the Mariemont Fund. In his email he said, “I do not solicit funds for Mariemont Capital,” but he did not say whether he *had* solicited investments from those clients or anyone else. In fact, he had solicited investments in the Fund from them, thus making his “no” response on the July 14 OBA Form false.

¹⁹⁶ JX-4.

¹⁹⁷ JX-13, at 1.

¹⁹⁸ Resp’t Post-Hr’g Br. 24; JX-3, at 3.

¹⁹⁹ Tr. 1073–74; Resp’t Post-Hr’g Br. 24–25.

²⁰⁰ Tr. 1072–74; JX-4, at 1.

²⁰¹ JX-3, at 3.

²⁰² Huntington’s written supervisory policies and procedures in effect during Kielczewski’s tenure expressly prohibited its registered representatives from participating in “private securities transactions” as defined therein. Stip. ¶ 19. The policies also stated that passive investments and activities were exempt from the Firm’s prohibition of private securities transactions. Stip. ¶ 19. According to the policies, “Passive investments are 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.” Stip. ¶ 19; JX-5, at 1. Kielczewski testified that he certified on his pre-employment compliance forms that he would read and understand the written supervisory policies and procedures. Tr. 220. But it is unclear if he actually read them. Nevertheless, Kielczewski conceded that when going to meetings and explaining investing in the Fund, he was performing services for the Fund. Tr. 221–22.

²⁰³ Resp’t Post-Hr’g Br. 25–26.

Firm's definitions for private securities transactions were different, and narrower, than those in NASD Rule 3040 and FINRA Rule 3280,²⁰⁴ and that the other documents he completed regarding private securities transactions did not reference the private securities transactions rules or give "any indication that any definition other than the one in the [written supervisory procedures] was applicable."²⁰⁵

Kielczewski's arguments that he did not intentionally make false and misleading statements about not engaging in private securities transactions fail for a number of reasons. First, we reject Kielczewski's explanation of why he abandoned his "yes" answer in response to Gregory's email. It is both inconsistent with the plain reading of Gregory's email and implausible. Gregory's email did not convey information or suggest that Kielczewski should change his "yes" answer. Instead, the only reasonable interpretation of the email is that Gregory sought clarification because he had flagged a potential inconsistency between Kielczewski's description of himself as a "passive investor/owner" and his "yes" answer to the question about whether he engaged in private securities transactions. It is obvious that, realizing Gregory had spotted this potential inconsistency, Kielczewski decided to eliminate the issue by backtracking from his "yes" response.

Second, his argument based on different definitions regarding private securities transactions is strained and unpersuasive. Kielczewski never claimed that he was aware of and confused by these definitional differences, or that he believed he did not engage in private securities transactions based on Firm definitions. Instead, he claimed ignorance about the private securities transactions rule. Kielczewski testified that at the time he joined the Firm, he did not know what the term "private securities transaction" meant or that there was an NASD or FINRA Rule governing private securities transactions,²⁰⁶ and only learned the of Rule's existence during FINRA's 2016 Cycle Exam.²⁰⁷

This testimony, however, is belied by his earlier testimony. When asked if he knew while at Fifth Third "what selling away was," he answered "yes." He said he "learned about it over time," adding, "I didn't necessarily know that selling away was inappropriate. There might be instances where if you get approval, you could do that." His professed ignorance of the Rule is

²⁰⁴ Resp't Post-Hr'g Br. 25.

²⁰⁵ JX-13, at 1; JX-14b, at 3; Resp't Post-Hr'g Br. 25.

²⁰⁶ Tr. 1185-86.

²⁰⁷ Tr. 1186-87.

not credible for additional reasons: his long experience in the industry;²⁰⁸ the importance of this prohibition to the regulatory framework; and the near certainty that Kielczewski over the years completed other compliance questionnaires asking whether he had engaged in private securities transactions. Thus, we find that Kielczewski was aware that he would be engaging in private securities transactions and was aware, later, that he had done so. In short, Kielczewski acted intentionally or, at a minimum, recklessly²⁰⁹ in falsely denying that he would engage in, or had engaged in, private securities transactions.

* * *

We reject Kielczewski's claim that he did not intentionally make false and misleading statements. His arguments amount to definitional hair splitting and after-the-fact rationalizing. But more fundamentally, Kielczewski's arguments fail because they miss the larger point: Kielczewski portrayed himself as a passive investor who did not engage in private securities transactions, solicit investors for the Fund, or expend more than minimal time on Fund-related activities. Regardless of how his individual words and phrases could be interpreted piecemeal, their "composite effect"²¹⁰ created the false and misleading impression that he was not actively engaged in Fund-related activities. Given the scope and importance of Kielczewski's activities, the falsity of his misleading statements is so obvious that we find he made them intentionally or, at a minimum, recklessly.

In reaching this conclusion, we considered two additional factors. First, the parties stipulated that "each of the tax returns that Kielczewski filed between 2014 and 2016 identifi[ed] the proceeds he received from the Investment Manager as non-passive income."²¹¹ Kielczewski claims that he only learned the reason for the classification several years later when, during the investigation, FINRA brought it to his attention and he called his accountant for an explanation. According to Kielczewski, his accountant explained that "all general partnership income by IRS

²⁰⁸ See *Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *24 (Dec. 12, 2013) (finding that respondent's "long experience in the industry" made it "particularly true" that he acted intentionally or with severe recklessness); *Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *33 (May 13, 2011) (explaining that industry experience contradicts claims of ignorance); *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *20–21 (Nov. 8, 2006) (affirming the hearing panel's finding that respondent's "testimony that he was unaware of the prohibitions on private securities transactions was not plausible given his securities industry experience").

²⁰⁹ "Reckless conduct includes 'a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *Dep't of Enforcement v. Clements*, No. 2015044960501, 2018 FINRA Discip. LEXIS 11, at *42 (NAC May 17, 2018) (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

²¹⁰ Cf. *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co.*, 661 F. Supp. 1448, 1476 (D. Wyo. 1987) (quoting L. Nizer, *The Implosion Conspiracy* 6–7 (1973)) ("It is the composite effect that is determinative. Not the dissection of each fact, as though it were the whole."), *aff'd in relevant part*, 885 F.2d 683 (10th Cir. 1989).

²¹¹ Stip. ¶ 95.

rules has to go in as a non-passive income.”²¹² Even if true, this is beside the point. Kielczewski reviewed the 2014 federal tax return for accuracy with his accountant before he signed it.²¹³ So, at least in this instance, he saw, or recklessly disregarded, the non-passive characterization pertaining to the Investment Manager—a red flag that his role at the Fund or its related entities may not have been passive. Therefore, Kielczewski acted intentionally, or at least recklessly, by continuing to characterize himself as a passive investor. All the more so if, as Kielczewski claims, he did not know the reason for the “non-passive” description on his tax return.

Second, Kielczewski revealed a motive for intentionally not disclosing that he was soliciting customers: “[I]n this industry, solicit is a bad word. So we try not to never use it ever,” he testified. “Solicit is what you get in trouble for if you sell a security incorrectly. We were told that at Fifth Third our entire career. If you break the rule, you are really in bad trouble.”²¹⁴

B. Kielczewski’s Argument That He Accurately Depicted His Overall Relationship with Mariemont

Kielczewski claims that rather than trying to deceive the Firm, before joining it, he fully disclosed his intentions regarding Mariemont in conversations with Chapman²¹⁵ and explained “his roles as an investor, as a general partner, and, in particular, as a relationship manager for the group of transitioning Fifth Third clients.” Therefore, according to Kielczewski, he “gave an accurate and complete picture of his planned activities in connection with this new hedge fund.”²¹⁶

Central to this assertion is a purported understanding Kielczewski claims he reached with Chapman during their pre-employment conversations that (1) permitted the Mariemont Fund and Huntington to have overlapping customers; (2) permitted the Mariemont Fund to be “offered as an inducement to Fifth Third customers to transition to Huntington” and as “an inducement to Kielczewski to join Huntington”; and (3) permitted Kielczewski to have “the ability to profit from his interest in Mariemont by introducing his prospective Huntington customers to Mariemont.”²¹⁷

The credible evidence, however, did not demonstrate that Kielczewski fully disclosed his intended Fund-related activities or that this purported understanding with Chapman existed. No documentary proof supports his claims. Kielczewski testified that the terms of the understanding

²¹² Tr. 1104.

²¹³ Tr. 185–87; JX-29b, at 22.

²¹⁴ Tr. 1132–33.

²¹⁵ Resp’t Post-Hr’g Br. 22–23.

²¹⁶ Resp’t Post-Hr’g Br. 29.

²¹⁷ Resp’t Post-Hr’g Br. 6. *See also* Tr. 1047–48 (Kielczewski testifying that the “final enticement” for him to move to the Firm was being able to continue to participate in the Fund); Tr. 1122–23 (Kielczewski testifying that it was imperative that he and his customers participate in the Fund).

were summarized in a February 2014 credit approval document for the Fund’s line of credit with the Huntington National Bank.²¹⁸ But the relevant portion of that 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.” It does not refer to any agreement permitting Kielczewski to solicit investors.²¹⁹ Further, Kielczewski admitted that he had nothing in writing from Ledford (his supervising principal at the time)²²⁰ or Chapman (his second-level supervisor) permitting him to solicit investments for the Mariemont Fund.²²¹

Additionally, Kielczewski’s assertions are either unsupported or contradicted by other witnesses’ testimony. Not only did Chapman not “recall a specific conversation” with Kielczewski about him selling interests in the Mariemont Fund,²²² but he denied having given Kielczewski permission during the recruitment process to sell the Fund to former Fifth Third customers who were transitioning over to the Firm,²²³ and he did not expect Kielczewski to do so.²²⁴

For his part, Fitzsimmons—Kielczewski’s supervisor after Ledford—denied that Kielczewski ever told him about having an agreement with Chapman permitting him to solicit investments in the Fund.²²⁵ In fact, Kielczewski admitted that he did not tell Fitzsimmons about this purported agreement with Chapman²²⁶—something we conclude he likely would have done at some point if such an agreement existed.²²⁷

Mark Gregory, the Firm’s chief compliance officer when Kielczewski joined, and Stephen Dahlke, who succeeded Gregory as chief compliance officer in October 2015,²²⁸ both similarly failed to support Kielczewski’s assertion about such an understanding. Gregory

²¹⁸ JX-45b, at 12; Tr. 1053–54.

²¹⁹ JX-45b, at 12.

²²⁰ Tr. 422.

²²¹ Tr. 1122–24.

²²² Tr. 885.

²²³ Tr. 886–87. Chapman testified that although he expected the transitioning clients to ask Kielczewski questions about the Mariemont Fund and that Kielczewski would answer them, he neither expected that Kielczewski would solicit them to invest in the Fund nor did he know that they had, in fact, made investments in it. Tr. 956–57, 967.

²²⁴ Tr. 967–68.

²²⁵ Tr. 671.

²²⁶ Tr. 1168. Nor did he mention the purported understanding to Bowman when he responded to her January 8, 2014 email informing him that the Firm prohibited private securities transactions. Tr. 1131.

²²⁷ Tellingly, even when Fitzsimmons met with Kielczewski to terminate him, Kielczewski never tried to save his job by telling Fitzsimmons that he and Chapman had an understanding permitting him to introduce transitioning Fifth Third customers to the Fund. Tr. 678.

²²⁸ Tr. 535–36. He moved to a different position at the Firm about three weeks before the hearing. Tr. 536.

testified that it was his responsibility to approve any exceptions to the policy prohibiting private securities transactions, and he (1) did not recall any exemptions made to the Firm’s general prohibition against private securities transactions;²²⁹ (2) specifically denied that the compliance department ever approved Kielczewski to sell Fund interests to transitioning Fifth Third clients;²³⁰ (3) did not recall “any discussions [with Chapman] with respect to whether or not Mr. Kielczewski could sell interest[s] in the Mariemont [hedge] fund”;²³¹ and (4) did not recall anyone telling him that Kielczewski and Chapman had entered into an agreement permitting Kielczewski to sell Fund interests to transitioning customers.²³²

Likewise, Dahlke testified that private securities transactions were “prohibited by policy and there were no exceptions sought or direct requests to opine on whether or not it was permitted.”²³³ Dahlke added that Kielczewski was never permitted to engage in private securities transactions.²³⁴ He also denied having any conversations with Chapman about Kielczewski’s involvement with the Fund.²³⁵

We found Chapman, Fitzsimmons, Gregory, and Dahlke to be credible witnesses on this subject. Their testimony was consistent, plausible, and cross-corroborated, and it was not undercut on cross-examination. And none of these witnesses evidenced bias against Kielczewski.²³⁶

Taylor’s testimony did not support Kielczewski regarding the scope of the alleged agreement, either. According to Taylor, he understood that as an inducement for Kielczewski to join the Firm, Chapman had initiated an outside business agreement between Huntington and Kielczewski that would allow Kielczewski “to continue to be a part of Mariemont Capital and an owner of Mariemont Capital.”²³⁷ But Taylor did not mention that the agreement permitted Kielczewski to introduce transitioning customers to the Mariemont Fund.

Accordingly, Kielczewski failed to establish that he and Chapman had an understanding permitting him to introduce transitioning customers to the Fund. And, in any event, even if such

²²⁹ Tr. 420, 516.

²³⁰ Tr. 454.

²³¹ Tr. 433.

²³² Tr. 454–55.

²³³ Tr. 641–42.

²³⁴ Tr. 539.

²³⁵ Tr. 539–40.

²³⁶ Chapman left Huntington in late September 2014. Tr. 953. At the time of the hearing, he was out of the industry and was a partner in a compliance firm that serves as the Fund’s compliance team. Tr. 878–79, 887. Kielczewski testified that he believed Chapman testified accurately. Tr. 1135–36. And Taylor, as noted above, is one of Kielczewski’s best friends. Tr. 132, 857–59.

²³⁷ Tr. 855–56.

an understanding existed, there is no evidence that he ever disclosed to Chapman or anyone else at the Firm the full extent of his Fund-related activities, which went far beyond introductions to transitioning customers.

In conclusion, we reject Kielczewski's argument that he gave the Firm an accurate and complete picture of his planned activities in connection with the Mariemont Fund or its related entities.

C. Additional Defenses

Kielczewski asserted three affirmative defenses: (1) Enforcement lacks jurisdiction over him; (2) the Complaint is barred under applicable statutes of limitations; and (3) FINRA Rule 2010 violates his due process rights under the Fifth Amendment because it is insufficiently definite to give adequate notice of violative conduct.²³⁸ These defenses are meritless.

Under Article V, Section 4(1) of FINRA's By-Laws, FINRA retains jurisdiction to file a disciplinary action against a formerly associated person if the alleged misconduct occurred while the person was associated and if the action was filed within two years of the effective date of termination. Kielczewski argues that his "effective date of termination" occurred on April 26, 2017, when the Firm discharged him, and that the Complaint was not filed until May 19, 2019, more than two years later. Therefore, FINRA lacked jurisdiction to bring this proceeding, according to Kielczewski.

FINRA's National Adjudicatory Council ("NAC"), however, has rejected Kielczewski's jurisdiction calculation. According to the NAC, it is well established that

[t]he termination upon which FINRA's continuing jurisdiction is predicated . . . is not termination of employment or association, but termination of registration. 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. 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.²³⁹

The Complaint was filed on May 21, 2019 (not May 19), and the effective date of termination was May 25, 2017, the date the Firm filed a Form U5 concerning Kielczewski's

²³⁸ See Second, Third, and Eighth Affirmative Defenses. Ans. 13. Kielczewski originally asserted five other affirmative defenses in his Answer but withdrew them at the hearing. Ans. 12–13; Tr. 1367–68.

²³⁹ See, e.g., *Dep't of Enforcement v. Weinstock*, No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *11 n.5 (NAC July 21, 2016) (citations omitted).

termination.²⁴⁰ Because the Complaint was filed within two years after the termination of his registration with a member firm and charges him with misconduct that commenced before his registration terminated, Kielczewski remains subject to FINRA’s jurisdiction for purposes of this proceeding.

Finally, Kielczewski’s statute of limitations and due process arguments also fail. Neither a statute of limitations²⁴¹ nor the due process clause apply to FINRA disciplinary proceedings.²⁴²

IV. Conclusions of Law

The Complaint alleges three causes of action against Kielczewski: (1) engaging in private securities transactions in violation of NASD Rule 3040 and FINRA Rules 3280 and 2010; (2) making false statements to his member firm employer in violation of FINRA Rule 2010; and (3) willfully causing the Firm to file a misleading initial Form U4 and four Form U4 amendments in violation of Article V, Section 2(c) of FINRA’s By-Laws and FINRA Rules 1122 and 2010.²⁴³ We conclude that Enforcement established each of these alleged violations.

²⁴⁰ JX-1, at 4; JX-2, at 1.

²⁴¹ *Dep’t of Enforcement v. Tweed*, No. 2015046631101, 2019 FINRA Discip. LEXIS 53, at *21 (NAC Dec. 11, 2019) (“SEC and FINRA decisions have established the consistently held principle that no statute of limitations applies to disciplinary actions of [self-regulatory organizations] like FINRA.”), *appeal docketed*, No. 3-19652 (SEC Jan. 10, 2020).

²⁴² *Dep’t of Enforcement v. White*, No. 2015045254501, 2019 FINRA Discip. LEXIS 30, at *48 (NAC July 26, 2019) (citing *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *37 n.52 (Mar. 15, 2016) (holding that FINRA is not a state actor and thus could not violate the applicant’s due process rights), *aff’d*, 672 F. App’x 865 (10th Cir. 2016)); *Dep’t of Enforcement v. Murphy*, No. 2012030731802, 2018 FINRA Discip. LEXIS 24, at *66 (NAC Oct. 11, 2018) (“[D]ue process arguments fail, in their entirety, because FINRA is not subject to constitutional and common law due process requirements.”), *appeal docketed*, No. 3-18895 (SEC Nov. 9, 2018). *Cf. Dep’t of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *30 (NAC June 2, 2000) (quoting *Alderman v. SEC*, 104 F.3d 285, 289 (9th Cir. 1997) (“Challenges to [FINRA Rule 2010] on vagueness grounds have generally failed, where application of the rule to the particular misconduct ‘cannot have come as a surprise.’”)); *Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *28 (Jan. 9, 2009) (“Courts have consistently found that the rule is sufficiently specific and provides an adequate standard of compliance . . .”).

²⁴³ The title of this cause of action references only the Form U4 amendments and not the initial Form U4, and also references FINRA Rule 2020. Complaint (“Compl.”) 17. But the body of the Complaint clearly charges Kielczewski with making misleading statements on both the initial Form U4 and the four Form U4 amendments and with violating FINRA Rule 2010, not FINRA Rule 2020. *See* Compl. ¶¶ 2, 108–09. So we include the initial Form U4, not just the amendments, in our analysis and consider whether Kielczewski violated FINRA Rule 2010. *See Garrison v. Hadder*, No. 6:12-CV-2659-RDP, 2012 U.S. Dist. LEXIS 159048, at *13 n.4 (N.D. Ala. Nov. 5, 2012) (“Of course, the ‘title’ of Count Four is not controlling. Rather, it is the substance of the allegations under this heading that should be considered.”) (citing *Int’l Bhd. of Elec. Workers, Local Union No. 323 v. Coral Elec. Corp.*, 576 F. Supp. 1128, 1134 (S.D. Fla. 1984) (noting that “a court should not elevate form over substance in reviewing the pleadings of a case”)).

A. Kielczewski Violated NASD Rule 3040 and FINRA Rules 3280 and 2010 by Engaging in Private Securities Transactions Without Giving Prior Written Notice to His Firm Employer

Under NASD Rule 3040, associated persons may not “participate in any manner in a private securities transaction” without providing prior written notice to their member firm employer.²⁴⁴ (On September 21, 2015, the Rule was superseded by FINRA Rule 3280 without any substantive changes.)²⁴⁵ The Rule defined a private securities transaction as “any securities transaction outside the regular course or scope of an associated person’s employment with a member.”²⁴⁶ Such written notice was required to describe “in detail the proposed transaction and the person’s proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction”²⁴⁷ “Selling compensation” included “any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security”²⁴⁸ The Rule required associated persons to “provide prior written notice of their participation in a private securities transaction irrespective of whether they will receive selling compensation.”²⁴⁹

According to the Securities and Exchange Commission (“SEC”), “the prohibition on private securities transactions is fundamental to an associated person’s duty to his customers and his firm.”²⁵⁰ Violation of the private securities transactions rule “deprives investors of a member firm’s oversight and due diligence, protections they have a right to expect.”²⁵¹ The purpose of the Rule “is to protect investors from unsupervised sales and securities firms from exposure to loss and litigation”²⁵² To further that regulatory purpose, “[t]he NAC and the [SEC] have

²⁴⁴ See NASD Rules 3040(a) and (b).

²⁴⁵ See 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 conduct before that date, and FINRA Rule 3280 applies to his conduct afterward.

²⁴⁶ NASD Rule 3040(e)(1).

²⁴⁷ NASD Rule 3040(b).

²⁴⁸ NASD Rule 3040(e)(2).

²⁴⁹ *Dep’t of Enforcement v. Miller*, No. 2012034393801, 2018 FINRA Discip. LEXIS 13, at *26 (NAC May 23, 2018).

²⁵⁰ *Friedman*, 2011 SEC LEXIS 1699, at *35.

²⁵¹ *Keyes*, 2006 SEC LEXIS 2631, at *15.

²⁵² *Siegel v. SEC*, 592 F.3d 147, 158 (D.C. Cir. 2010). See also *Dep’t of Enforcement v. Mathieson*, No. 2014040876001, 2018 FINRA Discip. LEXIS 9, at *12 (NAC Mar. 19, 2018) (“NASD Rule 3040 protects both the investing public and the member firm from claims arising from an associated person’s activities away from the firm.”) (citing *Mark H. Love*, 57 S.E.C. 315, 320 (2004)).

interpreted broadly the [R]ule’s phrase, ‘participate in any manner,’”²⁵³ and have not limited the application of the Rule “merely to solicitation of an investment.”²⁵⁴ Rather, the Rule “encompass[es] the activities of an associated person who not only makes a sale but who participates in any manner.”²⁵⁵ And, indeed, the SEC has found violations of Rule 3040 in a wide range of circumstances.²⁵⁶

Enforcement charged Kielczewski with violating the applicable private securities transactions rule in connection with (1) WI and RI’s \$303,841 investment on February 14, 2014; (2) SCCI’s \$3.85 million investment on January 31, 2014, and its \$2.15 million investment on March 7, 2014; (3) K&R’s \$1 million investment on May 26, 2016; and (4) KK’s \$3 million on June 1, 2016.²⁵⁷

To establish that Kielczewski violated NASD Rule 3040 and FINRA Rule 3280, Enforcement must prove the following: (1) the sale of Fund interests constituted “private securities transactions”; (2) Kielczewski “participated” in the transactions; and (3) Kielczewski failed to provide the Firm with prior written notice of the transactions and his role in them.²⁵⁸

²⁵³ *Kenny Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *36 (NAC Dec. 29, 2015), *aff’d*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016); *Miller*, 2018 FINRA Discip. LEXIS 13, at *27 (“It is well established that the clause ‘participate in any manner’ in NASD Rule 3040 is interpreted broadly to further the regulatory objectives of the rule.”).

²⁵⁴ *Abbondante*, 58 S.E.C. at 1098–99; *Miller*, 2018 FINRA Discip. LEXIS 13, at *27.

²⁵⁵ *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *32–33 & n.22 (Sept. 24, 2015) (quoting *Stephen J. Gluckman*, 54 S.E.C. 175, 182 & n.24 (1999)).

²⁵⁶ *Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at *12, 18–19 (Oct. 6, 2008) (finding a violation where associated person promoted the benefits of the investment, told investors that it looked like a really good deal, and facilitated their purchase of the investment), *aff’d in relevant part*, 592 F.3d 147; *Abbondante*, 58 S.E.C. at 1100 (finding a violation where the associated person touted the prospects of the issuer and introduced investors); *Love*, 57 S.E.C. at 320–21 (finding a violation where the associated person, among other things, vouched for the issuer’s principal, discussed the validity of the investments, disclosed his own interest in investing, and served as an intermediary between the issuer and customer and noting that if a “the broker becomes involved in a customer’s investment choice through a specific recommendation and by facilitating the mechanics of transactions, . . . such participation fits within the broad range of behavior prohibited by Rule 3040”); *Allen S. Klosowski*, 48 S.E.C. 954, 955 (1988) (finding a violation where the associated person purchased the investment for his own account and recommended that firm customers purchase a similar investment “because [he] thought it had merit”).

²⁵⁷ Enforcement did not charge Kielczewski with violating the applicable private securities transactions rule with respect to 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). So, we have not considered them in connection with our liability determinations, but we did find them relevant for determining sanctions.

²⁵⁸ *Dep’t of Enforcement v. Seol*, No. 2014039839101, 2019 FINRA Discip. LEXIS 9, at *24–25 (NAC Mar. 5, 2019); *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *35–36. A showing of scienter is not required to establish a violation of NASD Rule 3040. See *Mathieson*, 2018 FINRA Discip. LEXIS 9, at *12 (citing *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93 (Jan. 18, 2006)).

Kielczewski concedes liability for WI and RI's \$303,841 transaction;²⁵⁹ we therefore conclude that Kielczewski violated NASD Rule 3040 in connection with that transaction.

We also conclude that Enforcement established each element of a private securities transaction violation regarding the other allegedly violative transactions. Kielczewski was associated with the Firm at the time of each of the alleged investments; the interests in the Fund are securities;²⁶⁰ the transactions were outside the scope of his relationship with the Firm; it is undisputed that Kielczewski did not provide prior written notice to the Firm of his intention to engage in these private securities transactions; and Kielczewski participated in the alleged private securities transactions within the meaning of the applicable Rule. As to this last element, the evidence showed that Kielczewski promoted the Fund to SCCI and assisted it on two occasions in wiring \$6 million to invest in the fund.²⁶¹ He also recommended that K&R and KK invest in the Fund and assisted them in transferring \$4 million to it.²⁶² This conduct constitutes participation within the meaning of the private securities transactions rules.

We thus conclude that Kielczewski violated NASD Rule 3040 (for the private securities transactions regarding WI, RI, and SCCI), and FINRA Rule 3280 (for the private securities transactions regarding K&R and KK). By virtue of these violations, Kielczewski also violated FINRA Rule 2010, which requires member firms, in the conduct of their business, to "observe

²⁵⁹ Resp't Post-Hr'g Br. 32.

²⁶⁰ Stip. ¶ 7.

²⁶¹ Kielczewski argues that his involvement in the SCCI transactions did not rise to the level of participation under NASD Rule 3040 and FINRA Rule 3280. Kielczewski claims he "took no actions to advance [SCCI] transactions" and was simply "in the room" when Taylor made "presentations . . . to [SCCI] about Mariemont or was copied on emails between Taylor and officers of [SCCI] during the discussions concerning their investment." Resp't Post-Hr'g Br. 32. But the evidence showed Kielczewski's actual involvement in transactions was more extensive and central to the transactions, as discussed above.

²⁶² Kielczewski submits that advising KK "about the split of his investments between securities on the Huntington platform falls squarely within the conduct identified as being protected in the *Love* case, making a recommendation about another potential investment." Resp't Post-Hr'g Br. 32. Kielczewski's reliance on that SEC decision is misplaced. While the Commission emphasized in its *Love* decision "that a broker who does nothing more than refer a customer to another investment opportunity should not ordinarily run afoul of Rule 3040," it went on to explain that if, as here, "the broker becomes involved in a customer's investment choice through a specific recommendation and by facilitating the mechanics of the transactions," then "such participation fits within the broad range of behavior prohibited by Rule 3040." *Love*, 57 S.E.C. at 321.

high standards of commercial honor and just and equitable principles of trade,” and also applies to associated persons.²⁶³

B. Kielczewski Violated FINRA Rule 2010 by Making False Statements to His Firm Employer

“FINRA Rule 2010 includes the obligation to disclose truthfully material information to an associated person’s firm.”²⁶⁴ The rationale, as explained by the SEC, is that submitting false information to a member firm reflects negatively on an associated person’s ability to comply with regulatory requirements fundamental to the securities industry.²⁶⁵ Accordingly, providing false information violates this Rule,²⁶⁶ including providing false information on a compliance questionnaire.²⁶⁷

We found that on January 8, 2014, Kielczewski sent emails to a securities principal at the Firm and to the Firm’s then-chief compliance officer representing that he was merely a “passive owner and investor” in the Mariemont Fund. He then continued to claim in two compliance attestations he completed in 2015 and 2016, as well as in email correspondence exchanged with his then-supervisor, that he had only a “passive role in Mariemont” and that he did not solicit investments for the Fund.

We determined that these representations were false and misleading in light of Kielczewski’s Fund-related activities. Specifically, while associated with the Firm, Kielczewski actively promoted the Fund to potential investors through email correspondence in which he not

²⁶³ FINRA Rule 0140(a) (“The Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under the Rules.”); *see Mathieson*, 2018 FINRA Discip. LEXIS 9, at *12 (“A violation of NASD Rule 3040 is also a violation of FINRA Rule 2010.”) (citing *Gluckman*, 54 S.E.C. at 185); *see generally Dep’t of Enforcement v. Meyers*, No. 2010020954501, 2018 FINRA Discip. LEXIS 1, at *13 n.13 (NAC Jan. 4, 2018) (“A violation of any FINRA rule constitutes also a violation of FINRA Rule 2010.”) (citing *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *15 n.11 (Aug. 12, 2016)), *aff’d*, Exchange Act Release No. 86497, 2019 SEC LEXIS 1869 (July 26, 2019), *petition for review denied*, 719 F. App’x 724 (9th Cir. 2018).

²⁶⁴ *Mathieson*, 2018 FINRA Discip. LEXIS 9, at *19; *see also Dep’t of Enforcement v. Hardin*, No. E072004072501, 2007 NASD Discip. LEXIS 24, at *10–11 (NAC July 27, 2007) (“[T]he SEC has consistently construed [the predecessor to Rule 2010] broadly to apply to all business-related misconduct, including misrepresentations made to a member firm by a registered representative.”) (citing *James A. Goetz*, 53 S.E.C. 472, 477–78 (1998)).

²⁶⁵ *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22–23 (Aug. 22, 2008); *Mathieson*, 2018 FINRA Discip. LEXIS 9, at *19.

²⁶⁶ *Dep’t of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *16 (NAC Mar. 9, 2015) (holding that registered representative who misleads his member firm by providing false information violates FINRA Rule 2010); *see also Dep’t of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *90 (NAC Oct. 1, 2013) (same).

²⁶⁷ *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *39–41 (Mar. 27, 2017), *petition for review denied*, 733 F. App’x 571 (2d Cir. 2018); *Seol*, 2019 FINRA Discip. LEXIS 9, at *40–41 (finding registered representative’s submission of false statements on compliance questionnaires violated FINRA Rule 2010).

only solicited investments but also touted the Fund’s performance and scheduled meetings with customers to discuss the Fund. Further, he helped facilitate customers’ investments in the Fund by assisting them to complete wire transfers in order to fund their investments. Finally, Kielczewski reviewed and revised the Fund’s pitch book and quarterly portfolio reports, and occasionally suggested to Taylor that the Fund consider purchasing certain securities for the Fund.

Based on the foregoing, we conclude that Kielczewski’s conduct was inconsistent with high standards of commercial honor and just and equitable principles of trade; therefore, he violated FINRA Rule 2010.

C. Kielczewski Violated Article V, Section 2(c) of FINRA’s By-Laws and FINRA Rules 1122 and 2010 by Filing a Misleading Initial Form U4 and Four Misleading Form U4 Amendments

Kielczewski is charged with violating Article V, Section 2(c) of FINRA’s By-Laws and FINRA Rules 1122 and 2010 by filing a misleading initial Form U4 and four Form U4 amendments. Article V, Section 2 of FINRA’s By-Laws requires that associated persons applying for registration with FINRA provide “such . . . reasonable information with respect to the applicant as [FINRA] may require.” And Article V, Section 2(c) of FINRA’s 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 “[s]uch amendment[s] . . . shall be filed with [FINRA] not later than 30 days after learning of the facts or circumstances giving rise to the amendment.”²⁶⁸ “The duty to provide accurate information and to amend the Form U4 to provide current information assures regulatory organizations, employers, and members of the public that they have all material, current information about the securities professional with whom they are dealing.”²⁶⁹

The information on a Form U4 is important to the investing public.²⁷⁰ It is also important to regulators, including FINRA and other self-regulatory organizations and state regulators, which use the information “as a means to determine the fitness of individuals seeking to join and

²⁶⁸ See also *Dep’t of Enforcement v. Holeman*, No. 2014043001601, 2018 FINRA Discip. LEXIS 12, at *12–13 (NAC May 21, 2018) (“[A] registered representative has a continuing obligation to timely update information required by Form U4 as changes occur.”) (quoting *McCune*, 2016 SEC LEXIS 1026, at *10–12), *aff’d*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *33–42 (July 31, 2019), *petition for review filed*, No. 19-1251 (D.C. Cir. Nov. 26, 2019); *Dep’t of Enforcement v. Elgart*, No. 2013035211801, 2017 FINRA Discip. LEXIS 9, at *21 (NAC Mar. 16, 2017) (“The requirement to amend the Form U4 is based in FINRA rules, and a registered representative is presumed to know and abide by FINRA Rules.”), *aff’d*, Exchange Act Release No. 81779, 2017 SEC LEXIS 3097 (Sept. 29, 2017), *petition for review denied*, 750 F. App’x 821 (11th Cir. 2018).

²⁶⁹ *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *17–18 (Oct. 20, 2011).

²⁷⁰ *Holeman*, 2018 FINRA Discip. LEXIS 12, at *11–12 (citing *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)).

remain in the securities industry.”²⁷¹ Further, “[d]isclosures on the Form U4 ‘can serve as an early warning mechanism, identifying individuals with troubled pasts or suspect financial histories’ and ‘[u]ntruthful answers [on the Form U4] call into question an associated person’s ability to comply with regulatory requirements.”²⁷²

The information’s importance is reflected in FINRA Rule 1122. This Rule 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.”²⁷³

We found that while associated with Huntington, Kielczewski answered “yes” to Question 13 in connection with his initial Form U4 and four Form U4 amendments, stating that he was a silent minority partner in the Investment Company and that he had a passive position with the company in which his personal monies were invested in non-investment grade mortgage-backed securities. Further, we found that these representations were false and misleading in light of Kielczewski’s Fund-related activities. Therefore, we conclude that Kielczewski violated Article V, Section 2(c) of FINRA’s By-Laws and FINRA Rules 1122 and 2010.²⁷⁴

D. Kielczewski Is Statutorily Disqualified

Making misleading statements or omissions on a Form U4 can result in a statutory disqualification. Under Article III, Section 4 of FINRA’s By-Laws and Securities Exchange Act of 1934 (“Exchange Act”) Section 3(a)(39)(F), a person is subject to a statutory disqualification if he or she:

has willfully made or caused to be made in any application . . . to become associated with a member of . . . a self-regulatory organization, [or] report required to be filed with a self-regulatory organization . . . any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with

²⁷¹ *Id.* at *12 (citing *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *26 (Nov. 9, 2012)).

²⁷² *Id.*

²⁷³ See also *Neaton*, 2011 SEC LEXIS 3719, at *16 (“[E]very person submitting a Form U4 has the obligation to ensure that the information printed on the form is true and accurate.”); *Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993) (same), *petition for review denied*, 40 F.3d 1240, 1994 U.S. App. LEXIS 43727 (3d Cir. 1994) (table format).

²⁷⁴ *Dep’t of Enforcement v. Fretz*, No. 2010024889501, 2015 FINRA Discip. LEXIS 54, at *52 (NAC Dec. 17, 2015) (“Filing a misleading Form U4 . . . violates the high standards of commercial honor and just and equitable principles of trade to which FINRA holds its members under FINRA Rule 2010.”) (citing *Mathis*, 2009 SEC LEXIS 4376, at *16).

respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.²⁷⁵

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.”²⁷⁶ “[E]ssentially all the information that is reportable on the Form U4 is material.”²⁷⁷

A person acts willfully under the above provisions if “the person charged with the duty knows what he is doing.” It is not necessary that the person also “be aware that he is violating one of the Rules or Acts.”²⁷⁸ Nor is it necessary that the person acted “with a culpable state of mind,” only that the person voluntarily provided false answers on the Form U4 or voluntarily omitted to state a material fact.²⁷⁹ Thus, if Kielczewski “voluntarily committed the acts that constituted the violation, then he acted willfully.”²⁸⁰

Kielczewski’s representations regarding his relationship with the Mariemont entities were false and misleading for the reasons discussed above. We also find that they were material. Upon answering “yes” to Question 13, he was required to provide details relating to “the other business,” the amount of time he devoted to the other business, and a description of the duties he performed. We also find that his representations were material because in light of the actual extent and nature of his Fund-related activities, a reasonable employer would have viewed his actual relationship with the Fund as “significantly altering the total mix of information made available” by him to the Firm. Finally, we find that Kielczewski made his representations willfully, as he made them voluntarily and knew what he was doing.

Based on the foregoing, Kielczewski is statutorily disqualified. As a result, under Article III, Section 3 of FINRA’s By-Laws, Kielczewski cannot become or remain associated with a FINRA member unless his member firm applies to FINRA for, and FINRA grants, relief from the statutory disqualification.²⁸¹

²⁷⁵ 15 U.S.C. § 78c(a)(39)(F).

²⁷⁶ *McCune*, 2016 SEC LEXIS 1026, at *21–22.

²⁷⁷ *Holeman*, 2018 FINRA Discip. LEXIS 12, at *23.

²⁷⁸ *Dep’t of Enforcement v. Riemer*, No. 2013038986001, 2017 FINRA Discip. LEXIS 38, at *14 (NAC Oct. 5, 2017) (quoting *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal citation omitted)), *aff’d*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022 (Oct. 31, 2018).

²⁷⁹ *Fretz*, 2015 FINRA Discip. LEXIS 54, at *54; *Riemer*, 2017 FINRA Discip. LEXIS 38, at *14 (quoting *Tucker*, 2012 SEC LEXIS 3496, at *41) (finding that to establish willfulness, it is sufficient “if the respondent of his own volition provides false answers on his Form U4”).

²⁸⁰ *Elgart*, 2017 FINRA Discip. LEXIS 9, at *19.

²⁸¹ *See Amundsen*, Exchange Act Release No. No. 69406, 2013 SEC LEXIS 1148, at *35 (Apr. 18, 2013), *petition for review denied*, 575 F. App’x 1, 2014 U.S. App. LEXIS 15559 (D.C. Cir. 2014) (per curiam) (table format).

V. Sanctions

A. Overview

In considering the appropriate sanctions to impose on Kielczewski, we begin our sanctions analysis with FINRA’s Sanction Guidelines (“Guidelines”) as a benchmark.²⁸² The Guidelines contain (1) General Principles Applicable to All Sanction Determinations (“General Principles”) “that should be considered in connection with the imposition of sanctions in all cases”; (2) a list of Principal Considerations in Determining Sanctions (“Principal Considerations”) “which enumerates generic factors for consideration in all cases”; and (3) guidelines applicable to specific violations (“Specific Considerations”), which “identify potential principal considerations that are specific to the described violation.”²⁸³

The General Principles explain that “sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct.” Adjudicators are therefore instructed to “design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct.” Further, sanctions should “reflect the seriousness of the misconduct at issue,”²⁸⁴ and should be “tailored to address the misconduct involved in each particular case.”²⁸⁵

The sanctions we impose here are appropriate, proportionally measured to address Kielczewski’s misconduct, and designed to protect and further the interests of the investing public, the industry, and the regulatory system. To that end, we have decided to impose a single sanction on Kielczewski. We do so because his violations are based on related misconduct; derive from the same underlying issue; and stem from a continuous course of action.²⁸⁶ We also considered that the NAC has sustained the imposition of a unitary sanction when, as here, the

²⁸² See, e.g., *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *80 (Sept. 28, 2017) (finding that a sanctions analysis should begin with the Sanction Guidelines as a benchmark).

²⁸³ FINRA Sanction Guidelines at 1 (2019) (Overview), <http://www.finra.org/sanctionguidelines>.

²⁸⁴ Guidelines at 2 (General Principle No. 1).

²⁸⁵ Guidelines at 3 (General Principle No. 3).

²⁸⁶ Using slightly different formulations at various times, the NAC has often approved the imposition of a unitary sanction. See *Riemer*, 2017 FINRA Discip. LEXIS 38, at *21 n.6 (“[V]iolations . . . are based on related misconduct.”); *Tucker*, 2011 FINRA Discip. LEXIS 66, at *28 (“[V]iolations are related and derive from the same underlying issue.”), *aff’d*, 2012 SEC LEXIS 3496; *Dep’t of Enforcement v. J. Alexander Sec., Inc.*, No. CAF010021, 2004 NASD Discip. LEXIS 16, at *69 (NAC Aug. 16, 2004) (finding misconduct stemmed from a continuous course of action).

misconduct included private securities transactions and false statements on a firm's compliance questionnaire.²⁸⁷

B. Private Securities Transactions

FINRA's private securities transactions rule plays "a crucial role in FINRA's regulatory scheme, and its abuse calls for significant sanctions," according to the NAC.²⁸⁸ Similarly the SEC has described "engaging in private securities transactions [as] a serious violation."²⁸⁹ This seriousness is reflected in the applicable Sanction Guideline.

The Guideline for private securities transactions recommends that the Adjudicators impose a fine between \$5,000 and \$77,000. The Guideline also recommends non-monetary sanctions ranging from a suspension of ten business days to a bar, depending on the results of a two-step analysis. The first step requires the Adjudicators "to assess the extent of the selling away, including the dollar amount of sales, the number of customers and the length of time over which the selling away occurred."²⁹⁰ For dollar amounts of sales exceeding \$1 million, the Guideline suggests a suspension of 12 months to a bar. Next, the Guideline directs Adjudicators to consider the factors described in the Principal Considerations and the General Principles.²⁹¹ The Guideline goes on to explain that "[t]he presence of one or more mitigating or aggravating factors may either raise or lower the above-described [non-monetary] sanctions."²⁹²

A number of aggravating factors are present here. Kielczewski's misconduct was not limited to a short period, but occurred in both 2014 and 2016.²⁹³ He participated in five violative

²⁸⁷ *Seol*, 2019 FINRA Discip. LEXIS 9, at *42–47 (imposing a unitary sanction and using the guidelines for private securities transactions, undisclosed outside business activities, and falsification of firm's records where the undisclosed private securities transactions, undisclosed outside business activities, and false statements on the firm's annual compliance questionnaires were related violations); *Mathieson*, 2018 FINRA Discip. LEXIS 9, at *9–10, 20 (affirming imposition of a unitary sanction for respondent's engaging in improper private securities transactions and outside business activities, in violation of NASD Rule 3040 and FINRA Rules 3270 and 2010, and submitting false responses on his firm's compliance questionnaire and continuing his outside business activities after his firm directed him to stop, in violation of FINRA Rule 2010).

²⁸⁸ *Seol*, 2019 FINRA Discip. LEXIS 9, at *57 (quoting *Dep't of Enforcement v. Fox Fin. Mgmt. Corp.*, No. 2012030724101, 2017 FINRA Discip. LEXIS 3, at *25 (NAC Jan. 6, 2017)).

²⁸⁹ *Keyes*, 2006 SEC LEXIS 2631, at *14.

²⁹⁰ Guidelines at 14.

²⁹¹ Guidelines at 14. The Guideline for this violation includes 13 Specific Considerations. See Guidelines at 14–15.

²⁹² Guidelines at 14.

²⁹³ Guidelines at 14 (Specific Consideration No. 3) and 7 (Principal Consideration No. 9).

transactions,²⁹⁴ which totaled over \$10 million,²⁹⁵ involved five Firm customers,²⁹⁶ and, through his financial interest in the Fund and its related entities, resulted in potential monetary gain for Kielczewski.²⁹⁷ While prior written notice was required, he even failed to give the Firm verbal notice of the details of the proposed sales,²⁹⁸ and he misled the Firm about the existence of the selling away activity by denying he engaged in private securities transactions.²⁹⁹

C. False and Misleading Statements to the Firm

Kielczewski made certain false and misleading statements to the Firm on compliance questionnaires. There are no specific Guidelines concerning false statements on a firm's compliance questionnaire, so we looked to the Guidelines for analogous violations.³⁰⁰ The Guideline for falsification of records is sufficiently analogous under the circumstances because Kielczewski's failure to disclose his actual Fund-related activities on the questionnaires resulted

²⁹⁴ Guidelines at 7–8 (Principal Consideration Nos. 8, 17). In determining sanctions, Adjudicators may consider uncharged misconduct similar to the charged misconduct. *Dep't of Enforcement v. Braff*, No. 2007011937001, 2011 FINRA Discip. LEXIS 15, at *33 n.22 (NAC May 13, 2011), *aff'd*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 (Feb. 24, 2012); *see also Sears*, 2008 SEC LEXIS 1521, at *22 n.33. Therefore, as part of Kielczewski's pattern of misconduct, we also considered that he engaged in uncharged misconduct regarding WI and RI's initial \$1.94 million transaction and the two HGI \$1.5 million transactions.

²⁹⁵ Guidelines at 14 (Specific Consideration No. 1).

²⁹⁶ Guidelines at 14–15 (Specific Consideration Nos. 2, 8). Although they had a joint account, in arriving at this number, we treat WI and RI as two customers rather than one. Stip. ¶ 68.

²⁹⁷ Guidelines at 8 (Principal Consideration No. 16) and 14 (Specific Consideration No. 5).

²⁹⁸ Guidelines at 15 (Specific Consideration No. 9).

²⁹⁹ Guidelines at 7 (Principal Consideration No. 10) and 15 (Specific Consideration No. 13). Additionally, other conduct had the effect of concealing Kielczewski's solicitation efforts. Kielczewski knew that Firm policy prohibited registered representatives to use a personal email account to transact business. Tr. 451, 643, 1179–81. Nevertheless, Kielczewski circumvented the Firm's supervisory procedures by using his personal email account to solicit WI, RI, and SCCI, and to forward pitch materials to HGI. It is unclear whether he did so in order to conceal his conduct. Kielczewski denied "trying to hide or be sneaky" by using his personal email account. Tr. 1179–80. He explained that "a lot of these e-mails are from my customers reaching back out to me. They didn't know any Huntington e-mail at the time. So they were replying to me at an e-mail which they knew . . . existed, which was the gmail account." Tr. 1179–80.

³⁰⁰ Guidelines at 1.

in the falsification of the Firm's records.³⁰¹ To a lesser degree we also considered the Guideline for misrepresentations or material omissions of fact because Kielczewski made several of his misrepresentations in emails.³⁰²

The Guideline pertaining to the falsification of records recommends a fine of \$5,000 to \$155,000 where the respondent falsifies a document without authorization, in the absence of other violations or customer harm. Where a respondent falsifies a document without authorization, in the absence of other violations or customer harm, the Guidelines recommend suspending the respondent for two months to two years. Where a respondent falsifies a document without authorization, in furtherance of another violation, resulting in customer harm or accompanied by significant aggravating factors, however, a bar is standard.

The Guideline applicable to fraud, misrepresentations or material omissions of fact recommends imposing a fine of between \$10,000 to \$155,000 when the misconduct is intentional or reckless and recommends that the Adjudicators strongly consider barring the individual. But if mitigating factors predominate, it recommends a suspension of six months to two years.

Kielczewski's violative misstatements present several aggravating considerations. He made his misrepresentations intentionally, or at least recklessly,³⁰³ repeatedly,³⁰⁴ and over a lengthy period of time (three years),³⁰⁵ on Firm documents that included compliance

³⁰¹ Recently, the NAC recognized that while "prior cases have looked to the Guidelines related to recordkeeping violations and the falsification of records for guidance on sanctions related to false statements on a firm's compliance questionnaires," in *Seol* it took its "primary guidance in this area . . . from the Guideline related to the falsification of records . . ." It did so "because [the respondent's] false statements on the compliance questionnaires resulted in false information being relied on by the firm and maintained in the firm's records." *Seol*, 2019 FINRA Discip. LEXIS 9, at *46 & n.34. Cf. *Riemer*, 2017 FINRA Discip. LEXIS 38, at *12, *22 ("While there are no Guidelines specifically for false statements to an employer, we agree that the Guidelines for recordkeeping violations and falsification of records are analogous because [respondent's] failures to disclose his tax liens and bankruptcy caused his firm to maintain inaccurate books and records" when respondent provided false responses on firm compliance questionnaires, in violation of the predecessor to FINRA Rule 2010.); *Dep't of Enforcement v. McGee*, No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *86-90 (NAC July 18, 2016) (applying the Guidelines related to recordkeeping and the falsification of records for false statements on firm compliance questionnaires), *aff'd*, 2017 SEC LEXIS 987.

³⁰² Guidelines at 89. This Guideline is not limited to violations involving customers; it has also been applied when a registered representative violates just and equitable principles of trade by providing a member firm employer with misleading, inaccurate information. See *Pierce*, 2013 FINRA Discip. LEXIS 25, at *94 (applying the Guideline for misrepresentations or material omissions of fact when a registered representative violated just and equitable principles of trade by providing his firm with inaccurate information). But see, e.g., *Dep't of Enforcement v. Skiba*, No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *15 (NAC Apr. 23, 2010) (applying the Guideline for forgery and/or falsification of records when a registered representative violated the predecessor to FINRA Rule 2010 by submitting false and misleading variable annuity applications to his member firm).

³⁰³ Guidelines at 8 (Principal Consideration No. 13).

³⁰⁴ Guidelines at 7 (Principal Consideration No. 8).

³⁰⁵ Guidelines at 7 (Principal Consideration No. 9).

questionnaires, which were important supervisory documents.³⁰⁶ Through his misrepresentations, Kielczewski concealed from the Firm the extent of his Fund-related activities,³⁰⁷ thereby permitting his undisclosed private securities transactions, which benefitted him,³⁰⁸ to continue. Kielczewski's false responses on Huntington's annual compliance questionnaires and in other communications with the Firm sidestepped Huntington's supervision of his activities and deprived the Firm of the opportunity to protect itself and its customers. In particular, Kielczewski prevented the Firm from properly monitoring his relationship with the Fund and identifying potential and actual conflicts of interest.³⁰⁹

D. False and Misleading Initial Form U4 and Form U4 Amendments

The Guideline for filing false, misleading, or inaccurate Forms U4 or Form U4 amendments recommends a fine of \$2,500 to \$39,000. It suggests that if aggravating factors are present, Adjudicators should consider suspending the individual in any or all capacities for a period of ten business days to six months. And where aggravating factors predominate, Adjudicators are directed to consider a longer suspension (up to two years) in any or all capacities or, where the respondent intended to conceal information or mislead, a bar.³¹⁰

Aggravating factors exist for this violation as well. The false and misleading information related to Kielczewski's relationship with an outside activity in which he was an investor,³¹¹ and the information was significant for the reasons discussed above. Kielczewski included the false information intentionally, or at least recklessly, to conceal information or in an attempt to mislead.³¹² He made misleading statements not only on the initial Form U4, but on four subsequent amendments³¹³ over a nearly three-year period.³¹⁴

³⁰⁶ Guidelines at 37 (Specific Consideration No. 1). *See McGee*, 2016 FINRA Discip. LEXIS 33, at *88 (finding that the firm's compliance questionnaires were important, and respondent's "lack of candor on the questionnaires impeded [the firm's] ability to monitor [respondent], his permissible (and impermissible) business operations and activities, and his customer interactions and solicitations").

³⁰⁷ Guidelines at 7 (Principal Consideration No. 10).

³⁰⁸ Guidelines at 8 (Principal Consideration No. 16).

³⁰⁹ *Cf. Dep't of Enforcement v. Mullins*, Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *67–68 (NAC Feb. 24, 2011) (“[One respondent’s] omissions concerning her roles with the Foundation [formed by the customer] were important, and her inaccurate Firm questionnaires prevented the Firm from properly monitoring respondents’ relationship with [the customer] and the Foundation and identifying lying conflicts of interest and potential conflicts of interest.”).

³¹⁰ Guidelines at 71.

³¹¹ Guidelines at 71 (Specific Consideration No. 1).

³¹² Guidelines at 71 (Specific Consideration No. 3) and 7–8 (Principal Consideration Nos. 10, 13).

³¹³ Guidelines at 7 (Principal Consideration No. 8).

³¹⁴ Guidelines at 7 (Principal Consideration No. 9).

* * *

Contrasted with the above aggravating factors, we found mitigative the Firm’s termination of Kielczewski based on the same conduct at issue in this disciplinary proceeding. The Guidelines direct Adjudicators to “consider whether a respondent has demonstrated that the termination qualifies for any mitigative value, keeping in mind the goals of investor protection and maintaining high standards of business conduct.” Under the Guidelines, Kielczewski has the burden of showing that his termination “materially reduced the likelihood of misconduct in the future.” In cases of serious misconduct, however, Adjudicators may find that notwithstanding the employment termination, there is “no guarantee of changed behavior and therefore may impose the sanction of a bar.”³¹⁵

Having observed Kielczewski’s demeanor at the hearing, we find that he appeared chastened and contrite as a result of his termination and its resulting impact on his career and life.³¹⁶ “I wish that we would have properly documented this thing from day one,” he testified, referring to Chapman, Taylor, Gregory, and himself.³¹⁷ He went on to say that he should have been better at “knowing compliance. Paying attention to modules and answering questions and figuring it out.” He said, “I should have got documentation from legal and compliance before I came over and I would not be here.”³¹⁸ We found Kielczewski’s assurance that he is “sure going to do better in the future” to be sincere, and accorded it some weight.³¹⁹ Thus, we find that his termination, coupled with his remorse,³²⁰ materially reduce the likelihood of future misconduct.³²¹

³¹⁵ Guidelines at 5 (General Principle No. 7).

³¹⁶ Tr. 1109–17.

³¹⁷ Tr. 1178.

³¹⁸ Tr. 1178–79.

³¹⁹ Tr. 1119.

³²⁰ See Guidelines at 7 (Principal Consideration No. 2). We assign only limited mitigative weight to Kielczewski’s expression of remorse, however, because he failed to acknowledge all his wrongdoing or to fully appreciate its seriousness. Cf. *Dep’t of Enforcement v. Milberger*, No. 2015047303901, 2020 FINRA Discip. LEXIS 4 (NAC Mar. 27, 2020) (finding that in assessing sanctions, the hearing panel properly considered that the respondent acknowledged her misconduct, expressed sincere remorse, “appeared chastened and contrite,” and was unlikely to commit a similar violation in the future). Also, Kielczewski failed to express remorse until after the Firm discovered his misconduct. See *Dep’t of Enforcement v. Golonka*, No. 2009017439601, 2013 FINRA Discip. LEXIS 5, at *37 (NAC Mar. 4, 2013) (assigning only limited mitigative weight to respondent’s remorse because he did not express it until after his firm had detected some of his violations).

³²¹ The Guidelines inform Adjudicators “that how long a respondent takes to regain employment, loss of salary, and other impacts of employment termination are merely collateral consequences of being terminated and should not be considered as mitigating” Guidelines at 5 (General Principle No. 7). Accordingly, we have not considered these collateral consequences mitigating.

E. Kielczewski's Sanctions Arguments

Kielczewski argues that any sanctions we impose should be modest and reflect that any violations resulted from negligence and not intentional or willful misconduct.³²² We disagree. As we found above, Kielczewski's misconduct was intentional, or at least reckless; he willfully made misleading statements on the initial Form U4 and the four Form U4 amendments;³²³ and his misconduct was accompanied by many aggravating considerations.

Kielczewski makes a number of other arguments.³²⁴ Regarding the private securities transactions violations, he attempts to partially shift blame to the Firm. He asserts that no one—including himself—"took the time to ask the hard questions about his relationship with Mariemont and private securities transactions."³²⁵ Continuing, Kielczewski characterizes "the violations of NASD Rule 3040 here" as resulting from "oversight and negligence, and, on the part of Kielczewski, culpable ignorance of the terms of the applicable rule."³²⁶ He also points out that he did not receive selling compensation, did not associate the Firm with the investments, and did not harm anyone.³²⁷

We reject each of these arguments. First, a respondent cannot shift responsibility for compliance to others,³²⁸ including his firm or his supervisors.³²⁹ Second, "[i]gnorance of FINRA rules is not a basis for mitigation."³³⁰ And third, "the presence of certain factors may be

³²² Resp't Post-Hr'g Br. 34, 36, 39.

³²³ For clarity, we note that "statutory disqualification is a consequence imposed by operation of Exchange Act Section 3(a)(39)(F) and is not a sanction or penalty imposed by FINRA." *Dep't of Enforcement v. Wyche*, No. 2015046759201, 2019 FINRA Discip. LEXIS 2, at *27 n.26 (NAC Jan. 8, 2019) (citing *McCune*, 2016 SEC LEXIS 1026, at *37, and *Anthony A. Grey*, Exchange Act Release No. 75839, 2015 SEC LEXIS 3630, at *47 n.60 (Sept. 3, 2015)).

³²⁴ To support his arguments, Kielczewski compares and contrasts the factual scenarios and sanctions in other cases. Resp't Post-Hr'g Br. 35–38, 40. The SEC and the NAC, however, have not found this approach instructive. "It is well established that 'the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases.'" *White*, 2019 FINRA Discip. LEXIS 30, at *58–59 (quoting *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011)).

³²⁵ Resp't Post-Hr'g Br. 38.

³²⁶ Resp't Post-Hr'g Br. 39.

³²⁷ Resp't Post-Hr'g Br. 36.

³²⁸ *Thomas C. Kocherhans*, 52 S.E.C. 528 (1995) (holding that a respondent cannot shift responsibility for compliance to others).

³²⁹ *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *15 (Dec. 22, 2008) (holding that a registered representative "cannot shift his responsibility to comply with NASD rules to his firm"); *Rafael Pinchas*, 54 S.E.C. 331, 338 (1999) (holding that "a registered representative is responsible for his actions and cannot shift that responsibility to the firm or his supervisors").

³³⁰ *Dep't of Enforcement v. Eplboim*, No. 2011025674101, 2014 FINRA Discip. LEXIS 8, at *44 (NAC May 14, 2014) (citing *Gilbert M. Hair*, 51 S.E.C. 374, 378 n.12 (1993)).

aggravating, but their absence does not draw an inference of mitigation.”³³¹ In particular, the absence of customer harm in connection with private securities violations is not mitigative.³³²

Finally, Kielczewski argues that he has no history of customer complaints or prior disciplinary action.³³³ It is well established, however, that these circumstances are not mitigating.³³⁴

F. Conclusion

Based on the foregoing, we conclude that for engaging in private securities transactions, making false statements to his member firm employer, and willfully causing the Firm to file a misleading initial Form U4 and four Form U4 amendments, Kielczewski should be suspended for 18 months from association with any FINRA member firm in all capacities and fined \$50,000.

The Guidelines provide that requiring requalification is appropriate where “a respondent’s actions have demonstrated a lack of knowledge or familiarity with the rules and laws governing the securities industry.”³³⁵ The evidence shows that Kielczewski failed to appreciate his responsibilities under the securities laws and would benefit from focusing on the securities rules and regulations. For these reasons, we find that requalification would be remedial here.³³⁶ We therefore order Kielczewski to requalify by examination as a registered representative before again acting in that capacity.

³³¹ Guidelines at 7. *See also Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *43 (Jan. 9, 2015) (rejecting respondent’s claim that the absence of several aggravating factors is mitigating), *aff’d*, 641 F. App’x 27 (2d Cir. 2016); *Siegel*, 2008 SEC LEXIS 2459, at *43 (“While the presence of any of these factors could constitute aggravating circumstances justifying an increase in sanctions, their absence is not mitigating.”).

³³² *Miller*, 2018 FINRA Discip. LEXIS 13, at *45–46 (citing *Mielke*, 2015 SEC LEXIS 3927, at *63 (finding lack of customer harm not mitigating for NASD Rules 3040 and 3030 violations); *see generally Braff*, 2012 SEC LEXIS 620, at *26 (“The absence of . . . customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally.”) (citations omitted).

³³³ Tr. 1335.

³³⁴ *See, e.g., Wyche*, 2019 FINRA Discip. LEXIS 2, at *25 (holding that respondent’s lack of disciplinary history and customer complaints “spanning a 25-year career in the industry” is not mitigating); *John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *65 n.77 (Nov. 12, 2010) (“[L]ack of a disciplinary history is not a mitigating factor.”), *petition for review denied*, 449 F. App’x 886, 2011 U.S. App. LEXIS 25933 (11th Cir. 2011) (per curiam) (table format).

³³⁵ Guidelines at 6 (General Principle No. 8); *see also Dep’t of Enforcement v. N. Woodward Fin. Corp.*, No. E8A2005014902, 2008 FINRA Discip. LEXIS 47, at *29 n.24 (NAC Dec. 10, 2008) (citing *Leonard John Ialeggio*, 53 S.E.C. 601, 604 (1998) (explaining that a requalification requirement is a “reasoned means of reeducating [the respondent] about his regulatory responsibilities to both his customers and his employer.”)).

³³⁶ *See Dep’t of Enforcement v. Cuzzo*, No. C9B050011, 2007 NASD Discip. LEXIS 12, at *30 (NAC Feb. 27, 2007) (ordering respondent to requalify after finding that he would benefit from focusing on the securities rules and regulations).

Finally, we impose an additional remedial sanction. Adjudicators may design sanctions other than those specified in the Guidelines. For example, they may require a firm to implement heightened supervision of certain individuals.³³⁷ We believe that a heightened supervision requirement would emphasize to Kielczewski the importance of complying with the securities laws and prevent the recurrence of his violative conduct. Accordingly, we require that as a condition to reentry after his suspension, Kielczewski may only become associated with a member firm that agrees in writing to place him on heightened supervision for one year.³³⁸ This requirement shall remain in effect until Kielczewski has been under heightened supervision by one firm for one year.³³⁹

VI. Order

Respondent William Joseph Kielczewski is fined \$50,000 and suspended for 18 months from associating with any FINRA member firm in all capacities for (1) engaging in private securities transactions in violation of NASD Rule 3040 and FINRA Rules 3280 and 2010; (2) making false statements to his member firm employer in violation of FINRA Rule 2010; and (3) willfully causing his Firm to file a misleading initial Form U4 and four Form U4 amendments in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010, for which he is also statutorily disqualified.

Additionally, Kielczewski is ordered to requalify by examination as a registered representative before again acting in that capacity. And, as a condition to reassociation with a member firm after his suspension, Kielczewski shall only be employed by a member firm that agrees in writing to place him on heightened supervision for one year. This requirement shall remain in effect until Kielczewski has been under heightened supervision by one firm for one year.

Finally, Kielczewski is ordered to pay the costs of the hearing in the amount of \$11,308.60, which includes a \$750 administrative fee and \$10,558.60 for the cost of the transcript.

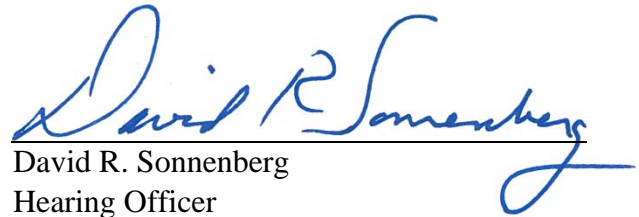
If this decision becomes FINRA's final disciplinary action, the suspension shall become effective with the opening of business on July 6, 2020, and ends on January 5, 2022. The fine

³³⁷ Guidelines at 3 (General Principle No. 3).

³³⁸ See *Dep't of Enforcement v. Carlson*, No. 2007008724701, 2012 FINRA Discip. LEXIS 50, at *28–29 (OHO June 8, 2012) (ordering that respondent may only be employed by a member firm that agrees to subject him to heightened supervision regarding compliance with Section 5 of the Securities Act for a one-year period).

³³⁹ To clarify, if Kielczewski reassociates with a member firm after the end of his suspension and is placed on heightened supervision, but leaves that firm less than a year later, the next firm he joins must place him on heightened supervision for one year or else Kielczewski is not permitted to become associated with it.

and assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action.³⁴⁰


David R. Sonnenberg
Hearing Officer
For the Extended Hearing Panel

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³⁴⁰ The Extended Hearing Panel has considered and rejects without discussion all other arguments of the parties.