BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of	
Department of Market Regulation,	DECISION
Complainant,	Complaint No. CMS030182
vs.	
Richard F. Kresge Bay Shore, NY,	Dated: October 9, 2008
Respondent.	

On remand from the Securities and Exchange Commission for redetermination of sanctions. Held, sanctions modified.

Appearances

For the Complainant: Matthew Campbell, Esq., Department of Market Regulation, Financial Industry Regulatory Authority

For the Respondent: Lawrence R. Gelber, Esq.

Decision

This matter is before us on remand from the SEC to redetermine the sanctions that should be imposed on Richard F. Kresge ("Kresge"), formerly the president of Yankee Financial Group, Inc. ("Yankee Financial" or "the Firm"), for supervision, reporting, and registration violations. Kresge's violations occurred during a period when new representatives of the Firm engaged in fraudulent sales practices and unsuitable recommendations that caused substantial harm to customers. The SEC set aside our findings that Kresge had secondary liability for such fraudulent and unsuitable recommendations. After considering the record, we bar Kresge from associating with any member firm in any and all capacities.

I. Background

Kresge entered the securities industry in 1978 and formed Yankee Financial in 1986. Kresge was the Firm's president, chief executive officer, and 95 percent owner. During the relevant period, approximately September 2001 to June 2002, Kresge was registered with Yankee Financial in several capacities, including general securities representative, general securities principal, and financial and operations principal. Kresge also served as the Firm's compliance director except from February 2002 through June 2002, when Joseph Korwasky ("Korwasky") held that position. *Richard F. Kresge*, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407, at *5 (June 29, 2007). Kresge "admittedly had ultimate responsibility for the Firm's operations." *Id.* at *29. Kresge is not currently associated with a FINRA member firm.

II. Procedural History

In an August 4, 2006 decision, we found that Kresge engaged in a number of violations. First, we found that Kresge failed to supervise a new branch office of the Firm located in Brooklyn, New York, and failed to establish or enforce a supervisory system, in violation of NASD Rules 3010 and 2110.[1] Second, we found that Kresge failed to report 11 customer complaints, in violation of NASD Rules 3070(c) and 2110.[2] Third, we found that Kresge failed to register Joseph Ferragamo ("Ferragamo") as a principal and a representative of the Firm, in violation of NASD Rules 1021(a), 1031(a), 2110, and IM-1000-3, and failed to disclose on the Firm's Uniform Application for Broker-Dealer Registration ("Form BD") Ferragamo's financial support of the Firm's new Brooklyn branch office, in violation of NASD Rule 2110 and IM-1000-1.[3] Finally, we found that Kresge had secondary liability for fraudulent sales practices and unsuitable recommendations committed by some of Yankee Financial's registered representatives in the Firm's Brooklyn branch office, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, NASD Rules

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1 NASD Rule 3010(a) provides that each member "shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD rules." NASD Rule 3010(b)(1) provides that each member "shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of NASD." NASD Rule 2110 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and equitable principles of trade."

2 NASD Rule 3070(c) requires in pertinent part that a member firm report to FINRA, on a quarterly basis, statistical and summary information regarding customer complaints.

3 NASD Rules 1021(a) and 1031(a) require that all persons who act as a principal or as a representative of a member firm be properly registered. Interpretive Material 1000-3 provides that the failure to register an employee who should be registered as a registered representative may be deemed to be conduct inconsistent with just and equitable principles of trade. Interpretive Material 1000-1 provides, in pertinent part, that the filing with FINRA of information with respect to membership that is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, may be deemed to be conduct inconsistent with just and equitable principles of trade.

2120, 2310, 2110, and IM-2310-2. For these violations, which we aggregated for purposes of imposing sanctions, we barred Kresge in all capacities and ordered Kresge, jointly and severally with Yankee Financial, to pay restitution to 10 customer witnesses. *Dep't of Market Regulation v. Yankee Fin. Group, Inc.*, Complaint No. CMS030182, 2006 NASD Discip. LEXIS 21 (NASD NAC Aug. 4, 2006).

On June 29, 2007, the SEC sustained our findings that Kresge engaged in supervision, reporting, and registration violations. *Kresge*, 2007 SEC LEXIS 1407, at *5-52. The SEC set aside, however, our findings that Kresge had secondary liability for the registered representatives' fraudulent and unsuitable recommendations, and it remanded the proceeding for a redetermination of the sanctions. *Id.* at *52-58.

III. Sanctions

The FINRA Sanction Guidelines ("Guidelines") guide our assessment of the appropriate sanctions for Kresge's supervision, registration, and reporting violations. As explained below, the Guidelines present both recommended ranges of sanctions as well as a number of relevant principal considerations.[4]

A. Recommended Ranges of Sanctions

The rules that Kresge violated serve fundamental regulatory purposes. "Assuring proper supervision is a critical component of broker-dealer operations." *Kresge*, 2007 SEC LEXIS 1407, at *27; *see also La Jolla Capital Corp.*, 54 S.E.C. 275, 286 (1999). The requirement to file reports on customer complaints "is intended to protect public investors by helping to identify potential sales practice violations in a timely manner." *Kresge*, 2007 SEC LEXIS 1407, at *44. FINRA's "registration requirement provides an important safeguard in protecting public investors, and strict adherence to that requirement is essential because it serves a significant purpose in the policing of the securities markets and in the protection of the public interest." *Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655, 2008 SEC LEXIS 819, at *60 (Apr. 11, 2008) (internal quotations omitted). Furthermore, the registration requirements for principals, to whom FINRA "looks to ensure compliance with regulatory requirements," are "intended to ensure that principals maintain the requisite levels of knowledge and competence." *Id.* (citing cases). Considering the important purposes served by these rules, the Guidelines recommend strong ranges of sanctions for their violation, especially for egregious violations such as the ones at issue here.

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[4] As we did in the August 4, 2006 decision, we aggregate Kresge's misconduct for purposes of imposing sanctions because it emanated from a single, underlying problem: Kresge's addition of, and failure to monitor, the Firm's new Brooklyn office. *Dep't of Enforcement v. Respondent Firm 1*, Complaint No. C8A990071, 2001 NASD Discip. LEXIS 6, at *30 (NASD NAC Apr. 19, 2001) (imposing a unitary sanction for violations attributable to a common underlying cause).

For supervision violations, the Guidelines recommend imposing a fine between $5,000 and $50,000, and suspending the responsible individual in all supervisory capacities for up to 30 business days. In egregious cases, the Guidelines recommend that we consider suspending the responsible individual in any or all capacities for up to two years or barring the responsible individual.[5]

For deficient written supervisory procedures, the Guidelines recommend that we impose a fine between $1,000 and $25,000. In egregious cases, the Guidelines further recommend that we consider suspending the responsible individual in any or all capacities for up to one year.[6]

For registration violations, the Guidelines recommend that we impose a fine between $2,500 and $50,000, and suspend the individual in any or all capacities for up to six months. In egregious cases, the Guidelines recommend that we consider a lengthier suspension (of up to two years) or a bar.[7]

For failing to report customer complaints, the Guidelines recommend that we impose a fine between $5,000 and $100,000, and suspend the responsible principal in all supervisory capacities for 10 to 30 business days. In egregious cases, the Guidelines recommend that we suspend the responsible principal in any or all capacities for up to two years or bar the responsible principal in all supervisory capacities.[8]

B. Principal Considerations in Determining Sanctions

In addition to considering the relevant ranges of sanctions, we also look to the Principal Considerations in Determining Sanctions listed in the Guidelines. Numerous considerations, including ones that are specific to each violation at issue and others that are applicable to all violations, are pertinent here.

1. Supervision Violations

a. Summary of the SEC's Findings of Supervision Violations

Before addressing the principal considerations that apply to Kresge's supervision violations, we first summarize the SEC's findings. The SEC began by finding that Kresge, as president of Yankee Financial, "had ultimate responsibility for the Firm's operations," and that

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5 *FINRA Sanction Guidelines* 108 (2007), http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

6 *Id.* at 109.

7 *Id.* at 48.

8 *Id.* at 78.

he had not reasonably delegated supervisory authority to anyone else at the Firm. *Kresge*, 2007 SEC LEXIS 1407, at *29. After making that initial finding, the SEC proceeded to find that Kresge failed to fulfill his supervisory responsibilities in two ways.

First, the SEC found that Kresge failed to establish or maintain a system of supervision that was reasonably designed to achieve compliance with applicable laws, regulations, and NASD rules. The deficiencies in the system were numerous, but they all essentially reflected a failure to respond reasonably to major changes that Yankee Financial effected in 2001 to its business operations and activities. Those changes included the addition of two new branch offices in Melville and Brooklyn, New York,[9] the hiring of a substantial number of new and "untried" representatives and principals whose Uniform Applications for Securities Industry Registration or Transfer ("Forms U4") suggested "particular compliance issues,"[10] and the commencement of a new line of business in penny stock sales. *Id.* at *5-42. Among other deficiencies in the supervisory system, Kresge failed to keep the new Brooklyn office under close surveillance, to make reasonable efforts to determine that new supervisors were qualified, to monitor whether the new supervisors were performing their responsibilities, and to establish reasonably designed written supervisory procedures that accounted for the Firm's new personnel and business activities. *Id.* at *39-42.

Second, the SEC found that Kresge "turned a blind eye" to the fact that some of the new representatives in the Brooklyn office were engaging in fraudulent solicitations and unsuitable recommendations concerning three speculative penny stocks. *Id.* at *38. Specifically, the opening of the Brooklyn office unleashed six months of abusive sales practices. Between October 2001 and April 2002, Brooklyn-based representatives, including at least Anderson, Eric Cenname ("Cenname"), and Dugo, "engaged in serious sales practice violations in connection with sales to customers of [$8,377,270 in] penny stocks." *Id.* at *20, 22-23. These representatives "enthusiastically recommended the purchase of [penny stocks of three] companies," "made unfounded claims about the merits of [such] investments," and "predicted

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9 Yankee Financial acquired its new Melville office from another member firm. The Melville office opened in January 2001 and employed approximately 50 registered representatives. Yankee Financial opened its new Brooklyn office in October 2001 pursuant to an agreement that Kresge negotiated with Ferragamo, who acted as the "spokesperson for a group of brokers [who wanted to relocate.]" *Id.* at *5-8.

10 Kresge staffed the new Brooklyn office with several new representatives who had changed firms frequently within a short period of time, including the new branch manager Gary Giordano ("Giordano"). Kresge acknowledged that this "was a red flag for potential compliance issues." *Id.* at *11, 30. One of those new representatives, David Anderson ("Anderson"), had fewer than two years of industry experience, and Giordano had only recently passed the principal qualification examination. *Id.* at *30, 31. Another of those new representatives, Lawrence Dugo ("Dugo"), was "the subject of a pending arbitration action alleging a mishandling of an account." *Id.* at *11. Kresge also was aware that Dugo "may have had 'disclosure' information related to a felony conviction for cocaine possession." *Id.* at *11.

rising stock prices without disclosing the poor financial condition" of the issuers. *Id.* at *23. "Many of the customers were retirees, and none expressed an interest in, or had a history of, investing in speculative stocks." *Id.* at *23.

b. Principal Considerations Applicable to Supervision Violations

With that as background, we turn to examining the pertinent principal considerations applicable to supervision violations. Many of those principal considerations are aggravating.

To start, the Guidelines direct that we consider whether Kresge ignored "red flag" warnings that should have resulted in additional supervisory scrutiny.[11] The record demonstrates, and the SEC found, that Kresge ignored numerous red flags that should have caused him to establish a more adequate supervisory system and place heightened supervisory attention on the Brooklyn office.

Many of the warning signs occurred before the Firm's new Brooklyn office commenced operations. As noted above, in 2001 the Firm effected a "major change to its organizational structure and business." *Kresge*, 2007 SEC LEXIS 1407, at *28. Prior to January 2001, Yankee was a one-office operation "that employed approximately ten registered representatives who engaged primarily in bond, mutual fund, and listed equities transactions." *Id.* at *28. In 2001, however, the Firm added new branch offices in Melville and Brooklyn, and it "acquired a substantial number of new personnel, including supervisory personnel." *Id.* at *28. As the SEC explained, there is an "obvious need to keep [a] new office with . . . untried personnel under close surveillance." *Id.* at *30. That need was even more acute considering the questionable backgrounds of the new personnel whom Kresge hired to staff the Brooklyn office. *Id.* at *30. Kresge also was aware that the agreement he had negotiated with Ferragamo to open the Brooklyn office permitted it "to direct trades with certain third-party broker-dealers that did not routinely do business with the Firm." *Id.* at *9. Directed trades "may be evidence of manipulation." *Id.* at *28 n.25.

The opening of the Brooklyn office coincided with the commencement of six months of abusive sales practices.[12] *Id.* at *22-23. Kresge witnessed several red flags in connection with

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11 *Guidelines*, at 108 (Principal Considerations in Determining Sanctions, No. 1).

12 Such underlying misconduct is itself an aggravating factor. *See Guidelines*, at 108 (Principal Considerations in Determining Sanctions, No. 2). Apart from the significant extent and size of the underlying violations, it is axiomatic that fraud and unsuitable recommendations rank among the most serious kinds of securities law violations. *Marshall E. Melton*, Exchange Act Rel. 48228, 2003 SEC LEXIS 1767, at *29-30 (July 25, 2003) (stating that "conduct that violates the antifraud provisions of the federal securities laws is especially serious"); *Dep't of Enforcement v. Wiard*, Complaint No. C8A030078, 2005 NASD Discip. LEXIS 45, at *4 (NASD NAC Oct. 18, 2005) (stating that the suitability rule is "grounded in [the] fundamental responsibility" of fair dealing with customers).

the operation of the Brooklyn office that warned of both the deficiencies in the supervisory system and of potential misconduct. Upon opening, the Brooklyn branch office "immediately began to sell speculative penny stocks," which marked a major change in the Firm's lines of business and which was completely inconsistent with a representation that Ferragamo had previously made to Kresge that "[he] and his associates engaged primarily in transactions in listed equities."[13] *Id.* at *13, 26. Kresge "knew that the Brooklyn branch office was active in penny stocks because he received commission reports from a clearing firm every couple of days." *Id.* at *26, 33 n.30. Furthermore, after visiting the Brooklyn office, Korwasky "recommended that Kresge install a telephone monitoring system." *Id.* at *34. In addition, Ferragamo, who was acting as an unregistered principal and representative of the Firm, asked that Kresge not register him out of an attempt "to avoid being financially responsible for a pending arbitration at his former firm." *Id.* at *47. Kresge acknowledged that Ferragamo's unregistered status was "very weird." *Id.* at *47. These numerous red flags aggravate Kresge's supervision violations.

The Guidelines also direct that we consider the quality and degree of Kresge's implementation of the Firm's supervisory procedures and controls.[14] The quality and degree of implementation undertaken by Kresge are aggravating factors. Despite Kresge's view that he "did his best," the record demonstrates that Kresge's implementation of supervisory procedures and controls was woefully inadequate.

The deficiencies in the supervisory system that Kresge established were extensive. One flaw rested in Kresge's unreasonable delegations of supervisory authority. *See* NASD Rule 3010(a)(6) (requiring "[r]easonable efforts to determine that all supervisory personnel are qualified by virtue of experience or training to carry out their assigned responsibilities"). Kresge argued that he reasonably delegated supervisory authority to Giordano, Kenneth Gliwa ("Gliwa"), and Korwasky, but the SEC disagreed, as we do. Kresge hired Giordano to be the Brooklyn branch office manager without making reasonable efforts to determine that he was qualified, giving him a compliance manual, or training him. *Kresge*, 2007 SEC LEXIS 1407, at *9-10, 30, 31. Kresge assigned Gliwa, a Melville-based registered principal who also was new to the Firm, to monitor Giordano. But Kresge knew that Gliwa already was "overwhelmed" with other responsibilities, "almost never" visited the Brooklyn branch office, and did not conduct suitability reviews of the Brooklyn customer accounts. *Id.* at *14-15, 33. The SEC also rejected Kresge's argument that he had reasonably delegated supervisory authority to Korwasky. *Id.* at *29. Kresge hired Korwasky as a compliance consultant in January 2002, and appointed him the Director of Compliance in February 2002. But as the SEC found, "no one had a clear

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13 The opening of the Brooklyn office caused a "dramatic[ ]" increase in the Firm's penny stock activity. *Id.* at *39. In its first three months, the Brooklyn office sold more than $3 million in just the penny stock issued by Silver Star Foods, Inc., one of the three speculative penny stocks at issue. *Id.* at *26. Kresge admitted that he viewed the Brooklyn office as becoming "overwhelming." *Id.* at *16.

14 *Guidelines*, at 108 (Principal Considerations in Determining Sanctions, No. 3).

understanding of Korwasky's responsibilities," and it was "unclear" whether Korwasky—who lacked hiring and firing authority, an adequate office space, and access to the back office operations and the Central Registration Depository ("CRD"®) system—was a supervisor. *Id.* at *34. Korwasky's first visit to the Brooklyn office was not until February 2002. *Id.* at *18. And on top of these unreasonable delegations, Kresge failed to fulfill his duty to monitor whether his delegated supervisors were performing effectively. Kresge essentially did nothing to follow up and review Giordano's and Gliwa's performances. *Id.* at *14-15, 32-33, 36.

Kresge's unreasonable delegations of supervisory authority were only one of many deficiencies with the supervisory system. Kresge took no steps to amend the Firm's written supervisory procedures to reflect either the method of oversight of the two new branch offices or the new business line in penny stocks, despite the obvious need to do so. *Id.* at *39; NASD Rules 3010(a)(1) (requiring the "establishment and maintenance of written procedures"), 3010(b); *see* Part III.B.2, *infra*. Kresge did not direct that Dugo, who had a prior felony conviction and a pending arbitration action against him, be subject to heightened supervision. *Kresge*, 2007 SEC LEXIS 1407, at *30; *see NASD Notice to Members 99-45* (June 1999) (instructing members to consider whether the firm employs persons who should be subject to heightened supervisory procedures). Kresge also never designated the Brooklyn office as an Office of Supervisory Jurisdiction, despite knowing that Giordano would be approving new accounts on behalf of the Firm. *Kresge*, 2007 SEC LEXIS 1407, at *13 n.14; *see* NASD Rules 3010(a)(3), 3010(g)(1)(D) (requiring that an office at which new accounts are approved be designated as an Office of Supervisory Jurisdiction).

The dangers posed by Kresge's extensive failures to establish and maintain a reasonable supervisory system were compounded by his reckless failures to *implement* any supervisory controls. *See* NASD Rule 3010(b) (requiring each member to enforce supervisory procedures). "There is no evidence that anyone with supervisory authority ever implemented either set of written procedures." *Kresge*, 2007 SEC LEXIS 1407, at *18, 41. None of the Brooklyn representatives received a compliance manual, and Kresge had no idea if those representatives received any training on sales practices or suitability principles. *Id.* at *13, 30.

Kresge himself took few steps to monitor the activities in the Brooklyn branch office, despite the numerous red flags that were apparent during the relevant period. He "visited the Brooklyn branch office only six times to conduct presentations on potential business lines." *Id.* at *14. He did not review any Brooklyn branch office records. *Id.* at *14, 43. He took no steps to learn how, or how much, the Brooklyn registered representatives would be paid. *Id.* at *9. Kresge did not monitor compliance with requirements governing the sales of penny stocks that took place from the Brooklyn branch office. *Id.* at *26. He even rejected taking supervisory steps when he was expressly asked to do so, such as when he ignored Korwasky's recommendations to install a telephone monitoring system, ban sales scripts, and begin using customer activity letters. *Id.* at *18. In sum, "Kresge turned a blind eye to the activity that occurred," and the quality and degree of his implementation of supervisory procedures was poor. *Id.* at *38.

The Guidelines for supervision violations also direct that we consider whether the individuals responsible for the underlying misconduct attempted to conceal it from Kresge.[15] Although Kresge argued that Giordano, Gliwa, and Ferragamo hid the underlying misconduct from him, the SEC gave no weight to those arguments when finding that Kresge failed to supervise. *Kresge*, 2007 SEC LEXIS 1407, at *33 n.30, *38, 46 n.43. As the SEC found, Kresge's "passive reliance on [Giordano's and Gliwa's] general reassurances was not reasonable under the circumstances." *Id.* at *33 n.30. The SEC further found that "[w]hile it is possible for serious misconduct to occur despite the existence of a reasonably designed supervisory system, . . . Yankee Financial's supervisory system was not reasonably designed to achieve compliance with applicable federal securities laws and regulations and NASD Rules." *Id.* at *38. For similar reasons, even if one or more persons were concealing the misconduct from Kresge, that would not establish any mitigation in this case.[16]

2. Deficient Written Supervisory Procedures

For Kresge's creation of deficient written supervisory procedures, the Guidelines recommend that we consider two principal considerations specific to that violation. First, we consider whether the deficiencies in the procedures allowed violative conduct to occur or escape detection.[17] Second, we consider whether the deficiencies made it difficult to determine the individual or individuals responsible for specific areas of supervision or compliance.[18] Both of these considerations are aggravating.

During the relevant period, Yankee Financial operated under a set of written supervisory procedures that it adopted in January 2001. Those January 2001 procedures—which Kresge created by taking an old supervisory procedures manual that the Melville office had been using and taping "Yankee" on the cover, and which Kresge did not amend when the Brooklyn office opened—"did not establish a supervisory chain of command" and were "not sufficiently tailored to the Firm's then-current activities" in penny stock sales, which is the business activity in which the underlying violations occurred.[19] *Kresge*, 2007 SEC LEXIS 1407, at *16, 39-40. In fact, the

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15 *Guidelines* at 108 (Principal Considerations in Determining Sanctions, No. 1).

16 The SEC rejected outright Kresge's claim that Giordano "deliberately hid" customer complaints from him, finding that Kresge did "not offer any evidence to substantiate his claim." *Id.* at *46 n.43. Kresge again raises the argument that Ferragamo concealed the misconduct from him, this time asserting that Ferragamo "admitted" in a plea agreement that he did so. We find no such specific admission in that plea agreement.

17 *Guidelines*, at 109 (Principal Considerations in Determining Sanctions, No. 1).

18 *Id.* (Principal Considerations in Determining Sanctions, No. 2).

19 NASD Rule 3010(b)(3) required that the Firm's supervisory procedures include the "titles, registration status and locations of the required supervisory personnel and the responsibilities of each supervisory person as these relate to the types of business engaged in, applicable securities laws and regulations, and [NASD rules]." NASD Rule 3010(b)(4) required

[Footnote continued on next page . . .]

January 2001 procedures were so deficient that Korwasky, whom Kresge assigned to revise the procedures months after the Brooklyn office had been open, "had to start from scratch." *Id.* at *16. In March 2002, Kresge approved the distribution of a "draft" set of revised supervisory procedures that Korwasky had prepared. Those March 2002 procedures, however, still lacked adequate descriptions of the supervisory chain of command and the division of supervisory duties and responsibilities; contained no provisions covering either the new penny stock activity or the Firm's traditional business activity in bonds; and "did not provide procedures to detect violations or ensure compliance." *Id.* at *17, 39, 41.

Because Kresge failed to establish written supervisory procedures for detecting violations or ensuring compliance, either concerning the new penny stock business in which the Brooklyn office engaged or otherwise, the Firm's procedures essentially allowed the underlying fraudulent sales and unsuitable recommendations to occur or escape detection. Likewise, Kresge's failure to describe adequately either a supervisory chain of command that accounted for the Brooklyn branch office or the division of supervisory responsibilities made it difficult to determine the individuals responsible for supervising that office.

3. Registration Violations

The SEC affirmed the NAC's findings that Kresge failed to register Ferragamo as either a principal or a representative of the Firm. *Kresge*, 2007 SEC LEXIS 1407, at *46-52. Similarly, the SEC found that Kresge failed to disclose on the Firm's Form BD, as required, the fact that Ferragamo was financing the operation of the new Brooklyn office.[20] The principal considerations in the Guidelines that pertain to registration violations are aggravating factors in this case.

Like his supervision violations, Kresge's failure to register Ferragamo reflects Kresge's abdication of his responsibility to address the Firm's addition of the new Brooklyn office. Ferragamo was the key person driving the opening of that new office. *Id.* at *46-51. Ferragamo "initiated contact with Kresge and Yankee Financial about opening the Brooklyn branch office," negotiated with Kresge the terms by which it would open, "finance[ed] [its] operation," and was often present in that office once it opened. *Id.* at *46-47. As the SEC found, Ferragamo was acting as a principal and a representative of the Firm because his actions amounted to engaging in, and actively managing, the Firm's securities business. *Id.* at *49-51. The SEC further found

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Kresge to amend the Firm's written supervisory procedures "as appropriate within a reasonable time . . . as changes occur in its supervisory system, and . . . communicat[e] amendments through [the] organization."

20 Question 9(B) on Form BD asks, "Does any person . . . wholly or partially finance the business" of the member firm?" If the answer is "yes," a member firm is required to provide further information on Schedule D of Form BD, including the person's name and address, the effective date, and a description of the method and amount of financing.

that Kresge was responsible both for ensuring that Ferragamo was properly registered and for disclosing Ferragamo's financial support of the Brooklyn office, but that Kresge failed to fulfill those responsibilities. *Id.* at *47-52.

The Guidelines contain two principal considerations that are specific to registration violations: whether the respondent had filed a registration application, and the nature and extent of the unregistered person's responsibilities.[21] The first of these considerations is aggravating: Kresge did not file a registration application for Ferragamo.

The second principal consideration also is aggravating. The nature and extent of Ferragamo's responsibilities were significant. The SEC's finding that Ferragamo acted as an unregistered principal necessarily means that he was "actively engaged in the management of the Firm's securities business." *Kresge*, 2007 SEC LEXIS 1407, at *49; NASD Rule 1021(b). Ferragamo "provided financial support for the office, played a substantial role in the finances of the office, was actively involved in hiring, participated in meetings, and acted as the leader of the personnel initially opening the office." *Kresge*, 2007 SEC LEXIS 1407, at *49-50. In and of itself, the managerial role played by Ferragamo aggravates Kresge's registration violations. It is additionally troubling that Ferragamo's responsibilities also involved the possibility that he would interact with customers. Ferragamo's name appeared on a list of "Brokers Who Will Be Receiving Calls for the New York Office," and he received an office tracking number for his "anticipated role as a registered representative of the Firm." *Id.* at *46.

4. Reporting Violations

For Kresge's failure to report 11 customer complaints, the Guidelines recommend that we consider two principal considerations: (1) in cases involving the failure to file a quarterly report, the number and type of incidents not reported; and (2) whether the events not reported would have established a pattern of potential misconduct.[22] These considerations are aggravating in this case.

First, the number and type of incidents that Kresge failed to report were significant. As the Firm's compliance director, Kresge was responsible for filing two quarterly reports (due January 15 and July 15, 2002) that were to provide summary and statistical information concerning customer complaints.[23] *Kresge*, 2007 SEC LEXIS 1407, at *43, 45. During those two quarters, the Firm's Brooklyn office received 11 complaints, and Kresge did not file

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21 *Guidelines*, at 48 (Principal Considerations in Determining Sanctions, Nos. 1, 2).

22 *Guidelines*, at 78 (Principal Considerations in Determining Sanctions, Failure to Report or Filing False, Misleading, or Inaccurate Reports, Nos. 1, 2).

23 Korwasky was responsible for filing the quarterly report due on April 15, 2002. *Kresge*, 2007 SEC LEXIS 1407, at *45 n.42.

quarterly reports concerning any of them.[24] *Id.* at *44-45. These 11 letters from customers included a number of troubling allegations, including complaints about sales practices, high pressure sales tactics, unauthorized trades, losses, failing to deliver securities, and failing to deliver proceeds from sales.

Second, the complaints that Kresge failed to report would have demonstrated a pattern of misconduct, in at least one respect. Three customers made six complaints about the sales practices of Anderson. That pattern could have attracted a regulator's attention, had Kresge reported those complaints. *Cf. NASD Notice to Members 97-19* (Apr. 1997) (stating that a firm should consider conducting a thorough review of a representative's customer account activity when such a representative is named, during a one-year period, in just three customer complaints alleging sales practice abuse).

5. Principal Considerations Applicable to All Violations

In addition to the principal considerations that are specific to the violations at issue, a number of other general principal considerations are aggravating in this proceeding. For example, Kresge's supervision, reporting, and registration violations amounted to a pattern of misconduct that persisted over a period of at least six months, which is an extended period.[25] In addition, the underlying sales practice violations that occurred during Kresge's watch led to substantial harm (at least $3.6 million in customer losses).[26] Kresge's failure to supervise also resulted in the potential for his monetary gain, through the receipt of ticket charges and commission overrides from the business generated by the Brooklyn branch office.[27] *Kresge*, 2007 SEC LEXIS 1407, at *9.

We also consider whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence.[28] Kresge's failure to supervise was, at the least, reckless. Considering the dramatic changes to the Firm during 2001 and the presence of numerous red flags, Kresge must have been aware that more supervisory attention was needed on his part. As the Commission found, Kresge "turned a blind eye to the activity that occurred." *Id.* at *38. Likewise, Kresge's failure to report customer complaints was reckless. That Kresge did not inquire if there were any customer complaints does not excuse his failure to report them. As for his registration violations, Kresge intentionally failed to register Ferragamo.

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24 Although Kresge claimed that he lacked awareness of the complaints, the SEC found that such lack of awareness "evidences the inadequacy of the Firm's supervisory system and his abdication of his supervisory responsibilities." *Id.* at *45.

25 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

26 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 11).

27 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 17).

28 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

Kresge argues that there are mitigating factors present. First, Kresge argues that he is not a recidivist. Kresge, however, has a highly troubling disciplinary history, including a recent finding of misconduct that evidences Kresge's disregard for regulatory requirements, investor protection, and commercial integrity, and past registration violations that are similar in nature to his registration violations at issue here. Specifically, on May 27, 2008, a Hearing Panel found that Kresge participated in, and aided and abetted, the fraudulent manipulation and parking of municipal securities, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and MSRB Rules G-14 and G-17. The Hearing Panel barred Kresge in all principal capacities, suspended him for two years in all other capacities, fined him $50,000, and ordered him to requalify. In March 1993, Kresge submitted a Letter of Acceptance, Waiver, and Consent ("AWC") to settle allegations concerning the execution of certain municipal securities and options transactions without an appropriately registered principal. For this, Kresge was censured and fined $10,000 (jointly and severally with Yankee Financial). In November 1991, Kresge submitted an AWC to settle allegations that he executed as a principal various municipal securities transactions that were not fair and reasonable, and that he allowed an associated person to engage in an investment banking or securities business prior to being registered. Kresge was fined $15,000 (jointly and severally with Yankee Financial), censured, and ordered to requalify as a municipal securities principal.[29] In considering the impact that Kresge's disciplinary history has on the appropriate sanction in this case, we are mindful that an important objective of the disciplinary process is to deter and prevent future misconduct by imposing progressively escalating sanctions on recidivists.[30]

Kresge also blames FINRA for a variety of actions and inactions that he claims allowed the underlying misconduct of the representatives in the Brooklyn branch office to occur. However, "the responsibility for compliance with applicable requirements cannot be shifted to regulatory authorities." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *26-27 (Jan. 22, 2003). Furthermore, a respondent's "attempts to blame others for his misconduct . . . demonstrate that [the respondent] fails to understand the seriousness of [his] violations." *Michael G. Keselica*, 52 S.E.C. 33, 37 (1994), *petition for review dismissed*, No. 95-1012, 1995 U.S. App. LEXIS 40288 (D.C. Cir. 1995); *see also Kresge*, 2007 SEC LEXIS 1407, at *35 n.33; *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2)

29 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 1) (directing adjudicators to consider a respondent's "relevant disciplinary history"). We also note that a lack of a disciplinary history would not constitute a mitigating factor because "an associated person should not be rewarded for acting in accordance with his duties as a securities professional." *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *26-27 (Apr. 11, 2008), *petition for review filed*, No. 08-1188 (D.C. Cir. May 13, 2008); *Dep't of Enforcement v. Meyers*, Complaint No. C3A040023, 2007 NASD Discip. LEXIS 4, at *48 (NASD NAC Jan. 23, 2007) (rejecting argument that the absence of misconduct since the violations at issue was a mitigating factor).

30 *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2).

(directing adjudicators to consider whether an individual "accepted responsibility for and acknowledged the misconduct" prior to detection and intervention).

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Considering the totality of these facts and circumstances, we remain of the view that Kresge's violations were egregious and that strong sanctions are needed to protect investors and remedy Kresge's violations.[31] The breadth of Kresge's misconduct and his disregard of his regulatory responsibilities make it clear that Kresge represents a serious threat to the investing public. Moreover, given the numerous aggravating factors itemized above—especially the substantial abusive sales practices that occurred during his tenure as president, his recklessness in failing to supervise, his intentional accommodation of Ferragamo to avoid registration, and his highly serious disciplinary history—any sanction short of a bar would place the investing public at too great a risk.[32] Accordingly, we bar Kresge from associating with any member firm.[33]

IV. Conclusion

The SEC found that Kresge: (1) failed to supervise and establish a supervisory system, in violation of NASD Rules 3010 and 2110; (2) failed to register Ferragamo as a principal and representative, in violation of NASD Rules 1021(a), 1031(a), 2110, IM-1000-1 and IM-1000-3; and (3) failed to report 11 customer complaints, in violation of NASD Rules 3070(c) and 2110. For these violations, we bar Kresge from associating with any member firm. We further require Kresge to pay, jointly and severally with Yankee Financial, $7,820.22 in costs in connection with the proceedings before the Hearing Panel, and $1,699.39 in costs for the prior NAC proceeding.

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[31] Kresge argues that the SEC did not expressly find that his conduct was "egregious." But the SEC did not find that Kresge's conduct was *not* egregious. Instead, the SEC, which expressly stated that it did "not intend to suggest any view as to a particular outcome," left it to us to determine the seriousness of the misconduct. *Kresge*, 2007 SEC LEXIS 1407, at *58.

[32] Kresge argues that the "higher sanctions categories of the . . . Guidelines are punitive." Whether a sanction is punitive or remedial, however, depends on the facts and circumstances of the case. Where it is needed to protect customers and the public interest, barring an individual reflects "a remedial, and not a punitive, purpose." *PAZ Sec., Inc.*, 2008 SEC LEXIS 820, at *13 (affirming bar on respondent for failing to respond to requests for information); *see also Dep't of Enforcement v. Castle Sec. Corp.*, Complaint No. C3A010036, 2004 NASD Discip. LEXIS 1, at *30-35 (NASD NAC Feb. 19, 2004) (barring firm president for failing to supervise), *aff'd*, Exchange Act Rel. No. 50543, 2004 SEC LEXIS 2347 (Oct. 14, 2004), *petition for review denied*, *Studer v. SEC*, 260 Fed. Appx. 342 (2d Cir. 2008).

[33] After careful consideration, and considering the facts and circumstances of this case, we decline to impose restitution. Our decision in this regard should not be interpreted to suggest that restitution is not appropriate in other cases involving supervision violations.

No additional costs are imposed for this remand proceeding.[34] The bar from associating with any member firm is effective upon service of this decision.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

[34] We also have considered and reject without discussion all other arguments advanced by respondent.

Pursuant to NASD Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.