BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

William Joseph Kielczewski

For Review of Disciplinary Action

Taken by

FINRA

File No. 3-20636

BRIEF OF FINRA IN OPPOSITION TO APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Michael Smith
Associate General Counsel

Jennifer Brooks
Associate General Counsel

FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083
jennifer.brooks@finra.org
nac.casefilings@finra.org

March 7, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL DECISIONS

COMMISSION DECISIONS AND RELEASES

CODE OF FEDERAL REGULATIONS

FEDERAL STATUTES

FINRA DECISIONS

FINRA BY-LAWS AND RULES

FINRA GUIDELINES

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

William Joseph Kielczewski

For Review of Disciplinary Action

Taken by

FINRA

File No. 3-20636

BRIEF OF FINRA IN OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

For more than two years while William Joseph Kielczewski was associated with FINRA member firm, The Huntington Investment Company ("Huntington"), he participated in five private securities transactions with five Huntington customers who invested over $10 million in a hedge fund that Kielczewski created and co-owned. Kielczewski does not dispute that he participated in these transactions and failed to provide Huntington with prior written notice of the transactions and his role in them, in violation of NASD and FINRA rules. Rather than disclosing to Huntington his participation in these transactions, Kielczewski repeatedly assured the firm in email correspondence, on compliance attestations, and on five securities registration filings that he was only a "passive" investor in the fund who spent little to no time on its business. These assurances were demonstrably false. FINRA's National Adjudicatory Council ("NAC") found

OS Received 03/07/2022

Kielczewski liable for (1) engaging in private securities transactions; (2) making false statements to Huntington; and (3) willfully causing Huntington to file a misleading securities registration form and four misleading registration form amendments. The record fully supports the NAC's findings.

Consistent with the FINRA Sanction Guidelines ("Guidelines") and the seriousness of Kielczewski's misconduct, the NAC suspended Kielczewski for 18 months, fined him $50,000, and required him to requalify as a general securities representative. FINRA's sanctions are fully warranted. Kielczewski sold away over $10 million of a hedge fund that he co-owned to firm customers, and he stood to gain from these transactions. While engaged in myriad activities for the hedge fund, including participating in millions of dollars of undisclosed private securities transactions, Kielczewski intentionally and repeatedly misled Huntington about his activities for the fund. Kielczewski's misinformation prevented the firm from supervising his selling away and deprived the customers of that critical oversight. The NAC's findings of liability are sound, and the NAC's sanctions are appropriately remedial.

On appeal, Kielczewski concedes liability for selling away and presents no persuasive arguments to overturn the NAC's well-supported decision. Instead, he mainly argues that he was deprived of a fair proceeding in connection with his false statements to the firm on compliance forms and securities registration filings because the Hearing Officer denied Kielczewski's untimely motion to compel Huntington to produce privileged information relating to an internal firm investigation. The Commission should reject these claims, which are nothing more than an attempt to obfuscate Kielczewski's own misconduct and shift blame to Huntington and FINRA.

The bases underlying the NAC's findings are fully supported and undeniable. The Commission should dismiss Kielczewski's application for review.

OS Received 03/07/2022

II. FACTUAL BACKGROUND

Most of the underlying facts in this case are the subject of the parties' joint stipulations and are largely undisputed.

A. Kielczewski's Background and His Formation of an Investment Manager and Hedge Fund

Fifth Third Securities employed Kielczewski as a general securities representative from June 1999 until November 25, 2013. (RP 307, 2832.)[1] During this time, Jeffrey Chapman was the head of Fifth Third's capital markets group and one of Kielczewski's supervisors, and Kevin Taylor was the head of the mortgage-backed securities desk. Chapman subsequently supervised Kielczewski at Huntington, and Taylor later became Kielczewski's business associate. (RP 919-21, 922, 1120, 1734-35, 2032-33.)

In 2013, in the face of declining incomes at Fifth Third, Kielczewski and Taylor discussed forming a hedge fund. (RP 926-27.) In August 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. (RP 308.) In addition to being members of the Investment Manager, Kielczewski, Taylor, and another individual were also managers, with the power to "conduct, direct, and exercise full control over all" the Investment Manager's activities. (RP 309.)

In October 2013, Taylor, along with Kielczewski and others, formed the hedge fund, Mariemont Capital Partners, L.P. (the "Mariemont Fund" or the "Fund"). (RP 308.) Taylor was the Fund's trader. (RP 1753.) Kielczewski was one of the three managers of the Fund's general partner, MCP GP, LLC (the "General Partner"). (RP 309.) Kielczewski as a member and

[1] "RP" refers to the page numbers in the certified record of this case filed with the Commission.

OS Received 03/07/2022

manager of both the Investment Manager and the General Partner had the power to "conduct, direct and exercise full control over all activities" of those entities. (RP 308-09, 962, 2825, 2961-62, 2977, 3034.) Kielczewski left Fifth Third almost two months later, in late November 2013. (RP 908, 2830.)

The Mariemont Fund began operating in January 2014, by trading and investing in pools of residential mortgage-backed securities. (RP 308.) Prior to joining Huntington, Kielczewski and Taylor visited Kielczewski's former Fifth Third customers encouraging them to move their accounts to Huntington and invest in the Fund. (RP 983-84.) Most of Kielczewski's Fifth Third customers moved to Huntington, and several of them invested in the Fund: HG, WI and RI, SC, and K&R and its founder, KK.[2] (RP 2081-82.)

B. Kielczewski Tells the Firm His Role in the Fund Is Merely Passive and the Firm Approves His Association

When Kielczewski resigned from Fifth Third, Chapman, then the head of capital markets at Huntington and Kielczewski's former supervisor at Fifth Third, recruited him to join Huntington. (RP 921, 2032-33.) During his recruitment, Kielczewski told Chapman that he wanted to retain an ownership interest and be a general partner in the Fund while working at Huntington. (RP 2034-35, 2048.) Chapman conveyed this information to Huntington's compliance department to determine whether Huntington would allow Kielczewski to continue his ownership in the Fund. (RP 2090-91, 2094, 2120.) Chapman understood that Kielczewski planned to bring his Fifth Third clients to Huntington, and that Taylor, another former Fifth Third employee, had identified those same clients as potential investors in the Fund. (RP 2048, 2057-58, 2068-70.)

---

[2] The customers are identified in the certified record at RP 27.

Chapman testified credibly that although Huntington agreed to allow Kielczewski to retain his ownership interest in the Fund, Chapman expected Kielczewski only to raise funds for Huntington, and not the Fund. (RP 2107, 5334-35.) According to Chapman, these expectations were based on his discussions with Kielczewski. "[W]hen we were recruiting and talking to him," Chapman testified, "we had the conversation that you work here, you don't work at Mariemont Capital. [Kielczewski] understood that." (RP 2119.) Chapman stated that he never gave permission to Kielczewski to solicit customers to invest in the Fund. (RP 2035-37, 2107, 2118-19.) In comparison, Kielczewski testified that Chapman had expressly agreed to let him solicit his transitioning Fifth Third customers to invest in the Fund while employed at Huntington. (RP 1013-14.) Kielczewski admitted, however, that he "couldn't solicit [customers] in terms of being a person that signs on the account subscription documents to on-board them. I can't do those things that I thought was soliciting" and "Taylor would do that." (RP 2273-75.)

On December 23, 2013, Kielczewski completed a pre-registration form as part of Huntington's onboarding process. On that form, he disclosed that he was engaged in an outside business activity with Mariemont Capital. (RP 2850.) He specifically described himself as a "passive owner/investor in a general/limited partnership that invests in non-conforming" mortgage-backed securities. (*Id.*) Kielczewski further represented that he had "[n]o business duties" at Mariemont Capital, and that he intended to devote approximately one hour per month to the outside business. (*Id.*) He also checked "yes" when asked whether he was a general partner in an investment-related limited partnership or manager of an investment-related limited liability company. (RP 2848.) And he answered "yes" to the question "do you participate in any private securities transactions [PSTs]?" (RP 2847.) The pre-registration form defined PSTs as

those outside the scope of his association with Huntington and those in which he "participate[d] for another's party's benefit," regardless of compensation. (*Id.*) On January 8, 2014, Kielczewski associated with Huntington as a general securities representative and became a managing director of institutional sales.[3] (RP 1020, 2832.)

After Kielczewski associated with Huntington, the firm's compliance department requested clarification of Kielczewski's pre-registration disclosures. (RP 2860.) A principal and head of Huntington's registration group asked Kielczewski to explain his affirmative response concerning his participation in PSTs and noted that the firm does not "normally allow these types of transactions." (RP 311, 1380, 2860.) In fact, Huntington's written supervisory procedures ("WSPs") prohibited registered representatives from participating in PSTs. (RP 310, 2861-62.) The WSPs exempted from this prohibition only "passive investments and activities," which Huntington defined as "those from which an individual receives income but for which he or she performs no service. Examples would include interest on investments or income from a corporation of which the person is a passive shareholder." (RP 310, 2861.) Only Huntington's compliance department had authority to grant exceptions to this policy. (RP 1377, 1383-84.)

Mark Gregory, who was Huntington's chief compliance officer ("CCO") at the time Kielczewski joined Huntington, testified that he was not aware of a single instance when the firm made an exception to its general prohibition against PSTs. (RP 1377, 1473.) Gregory also

---

[3] Two days after registering at Huntington, on January 10, 2014, Kielczewski invested $400,000 in the Fund. (RP 308.) To invest, Kielczewski completed a subscription agreement in which he represented that he qualified as an accredited investor under Regulation D of the Securities Act of 1933 because, among other things, he was "a director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer." (RP 309, 3003.) He additionally represented that he satisfied the criteria to be a "qualified client" pursuant to Reg D by virtue of his position with the Investment Manager as an "executive officer, director, trustee, general partner, or person serving in a similar capacity, of the investment advisor." (RP 309, 3004-05.)

OS Received 03/07/2022

testified credibly that although he discussed Kielczewski's hiring with Chapman, they never discussed or agreed that Kielczewski could sell interests in the Fund. (RP 1398-99, 1411-12.)

Huntington's registration principal also asked Kielczewski to explain his disclosure that he was a "general partner in an investment-related limited partnership or manager of an investment-related limited liability company." (RP 2860.) Kielczewski responded that he was a "passive owner and investor in a limited partnership that invests in non-investment grade private label [mortgage-backed securities]." (RP 2859.) He added that "[b]eing a passive general partner allows me to have minority ownership in a limited partnership company," and that he was "not a manager of an investment related company and my passive ownership will not conflict with [Huntington] clients." (RP 2860.)

The principal forwarded Kielczewski's response to Gregory. (RP 2859.) Gregory asked Kielczewski to clarify whether his role with Mariemont Capital was "just that of a passive investor/owner (you do not engage in private securities transactions)?" (*Id.*) Kielczewski assured Gregory that his role was passive, explaining that he "must have misunderstood what the private securities transactions question was." (RP 2859.) Based on Kielczewski's response, Gregory understood that Kielczewski was not engaging in PSTs, his role was as a "passive investor," and he was not "active in managing the investment, soliciting clients for the investment." (*See* RP 1389-90, 1474.) In addition, based upon Kielczewski's assurances that he was not engaged in PSTs, Huntington approved Kielczewski's outside business activity request to remain a passive investor in the Fund and moved forward with his registration. (RP 1390-92, 2851.)

OS Received 03/07/2022

C. Kielczewski's Misleading Securities Registration Filings

On January 15, 2014, Huntington filed an initial Uniform Application for Securities Industry Registration or Transfer ("Form U4") on Kielczewski's behalf based on information that he had provided. (RP 312, 1410.) Question 13, titled "Other Business," asked, "Are you currently engaged in any other business as a proprietor, partner, officer, director, employee, trustee, agent or otherwise?" (RP 312-13.) In response, Kielczewski, through Huntington, represented that his role with the Fund was passive:

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

(RP 313, 3165.)

Kielczewski repeated this disclosure in four subsequent Form U4 amendments through December 2016 without making any changes despite his active participation in PSTs and engaging in a multitude of Fund activities, as described below. (RP 3166-69.)

D. Kielczewski Actively Engaged in Soliciting Investors for the Fund

Notwithstanding his representations to Huntington that he played only a passive role, the record unequivocally shows that Kielczewski was actively involved with the Fund, including soliciting investors, throughout his employment with Huntington.

1. Customer HG

Soon after joining Huntington, Kielczewski messaged Taylor on January 10, 2014, "Letz go!!!!!!" (RP 3829.) Taylor responded, telling Kielczewski that he was giving him access to all Fund files via a shared drive. (*Id.*) Later that day, Kielczewski, using his personal email account, contacted the executive vice president of HG, an insurance agency, about a "new

potential investment" in the Fund. (RP 3406-07.) Kielczewski told the executive that he had created the Fund with the "former head of Mortgage-backed Trading at 5/3" and forwarded a 12-page PowerPoint presentation titled, "Mariemont Capital Partners, LP: Where Investment Professionals Invest," as well as a private offering memorandum for the Fund. (RP 315-16, 3353-86, 3404-07.) Kielczewski and the executive met on January 21, 2014, and Kielczewski gave him what he described as the "Reader's Digest" version of the offering. (RP 1040-41, 3406.)

On April 4, 2014, Kielczewski emailed four senior HG executives, updating them on the Fund's first quarter performance, predicting the Fund's year-end returns, and urging them to invest with him at "Huntington and/or Mariemont." (RP 3391, 3395-96.) Kielczewski emailed the HG executives again in late April 2014, asking to review with the HG team "a potential investment in Mariemont Capital" and seeking their thoughts about "a potential transition and strategy" that included HG investing in the Fund. (RP 3403.) Among other things, Kielczewski stated, "In my opinion, our whole loan investments will outperform if we use Mariemont Capital. . . . I feel very confident that the performance of the Mariemont Fund will beat your expectations and help us increase our returns to a degree not possible in the traditional institutional investment account." (*Id.*)

HG became a firm customer in December 2014 with Kielczewski as the account's assigned broker. (RP 317.) HG invested $1.5 million in the Fund in December 2015. (*Id.*) HG invested another $1.5 million in the Fund in August 2016 after Kielczewski and Taylor made a presentation at HG's offices concerning the company's investments. (RP 318.)

OS Received 03/07/2022

2. Customer SC

On January 13, 2014, Kielczewski and Taylor met with a chemical manufacturing company, SC, which was also a former Fifth Third customer, to discuss investing in the Fund. (RP 1026.) On January 24, SC's then treasurer asked Taylor for a Fund subscription agreement and indicated the company would invest $3.85 million in the Fund. (RP 4038.) Kielczewski confirmed for Taylor that SC had "$4mm in money market we can use for initial contribution." (*Id.*) On January 29, SC instructed Kielczewski to wire $3.85 million from its Huntington money market account to the Fund. Kielczewski facilitated the transaction on January 31. (RP 320.)

On February 26, 2014, Taylor messaged Kielczewski, "let's go . . . get another 2 mm from [SC] in here." (RP 4171.) A week later, Taylor emailed SC senior executives and copied Kielczewski that the Fund was "off to a great start!" (RP 4173.) Kielczewski replied to the group message encouraging SC's additional investment, "we have a lot of cash in money market to start the month should you want to deploy, and we can continue to expect our current MBS to prepay around $300K+ on the 25th of this month." (*Id.*)

The following day, Kielczewski emailed SC's then treasurer a wire request form, and explained that the form needed to be completed "in order to move funds from the [SC] investment account to the Mariemont Investment account." (RP 4181.) In March 2014, Kielczewski facilitated the wire transfer to move funds from SC's Huntington brokerage account to the Fund. (RP 4179-86.) SC invested an additional $2.15 million in the Fund at that time. (RP 321.)

3. Customers WI and RI

WI and RI are a married couple who held a joint brokerage account at Fifth Third. They moved their account to Huntington in January 2014 with Kielczewski as their assigned broker. (RP 319.) On January 16, 2014, Kielczewski, using his personal email account, sent WI a blank subscription agreement for the Fund along with a copy of his own completed subscription agreement for the Fund to serve as a guide on how to complete it. (RP 1054-55, 3833-64.) On January 25, Kielczewski sent to Taylor WI and RI's completed subscription agreement for their planned investment in the Fund. (RP 3877-98.) Three days later, Taylor and Kielczewski discussed which securities to sell from WI and RI's Huntington brokerage account to generate monies to invest in the Fund. (RP 3899.) Kielczewski subsequently directed a Huntington sales assistant to provide WI with the necessary forms to transfer funds from Huntington to the Fund. (RP 3900.) On January 31, WI and RI invested $1.936 million in the Fund. (RP 3904-13.)

Kielczewski messaged Taylor on February 5, 2014, stating he was "done with [WI] . . . , who was going to sell his Bank of America and Chase bonds," and that once those positions were settled, WI would invest those proceeds in the Fund. (RP 319.) On February 11, WI emailed Kielczewski, "We are on the same page. Go ahead and execute these 3 sales . . . ." Kielczewski replied, "OK will do and will let you know what [Taylor] comes up with." (*Id.*) Kielczewski sold bonds from WI and RI's brokerage account on February 14 for approximately $222,000. (*Id.*) Using the proceeds from the bond sales, plus additional cash in WI and RI's Huntington account, Kielczewski had his Huntington sales assistant effect a $303,841.39 transfer into the Fund to make WI and RI's second investment in the Fund. (*Id.*)

4. Customers K&R and KK

KK is the founder and chief executive officer, secretary, and treasurer of a construction contractor, K&R. (RP 321, 1799.) KK and K&R held brokerage accounts at Fifth Third with Kielczewski as the assigned broker. (RP 321.) On March 23, 2016, Kielczewski, without Taylor, met with KK to discuss moving KK's and K&R's brokerage accounts to Huntington and splitting those assets between the firm and the Fund. (RP 1134-39.) KK signed a Fund subscription agreement that day for K&R's proposed $1 million investment in the Fund. (RP 4409-18.) The next day, KK told Kielczewski, "In terms of the split of my assets between Mariemont and the institutional account I will probably go with your recommendation on that, but let me know what you think." (RP 322, 4284.)

In April 2016, KK and K&R became Huntington brokerage customers, and Kielczewski was the broker of record on their accounts. (RP 321.) On May 24, 2016, Kielczewski emailed KK instructions to wire funds from KK's Huntington account to the Fund for his investment. (RP 4301-34.) Kielczewski also told KK that he needed to "hurry" so he would not "miss the 5/31/16 entry point for [his] Mariemont initial investment." (RP 1142, 4314.) K&R invested $1 million in the Fund on May 26, 2016. (RP 322.) On June 1, 2016, KK invested an additional $3 million in the Fund. (RP 322.)

E. Kielczewski Completes Inaccurately an Annual Compliance Questionnaire

By the time Kielczewski completed an annual compliance questionnaire for Huntington in December 2015, he had participated in more than $6 million in PSTs in the Fund. (RP 1133-34, 3171-73.) Despite his participation in these transactions, Kielczewski falsely responded "no" to the question asking, "Have you engaged in Private Securities Transactions while employed through [Huntington]?" (RP 3171.)

OS Received 03/07/2022

F. Kielczewski Actively Engaged in Numerous Other Activities for the Fund

Throughout his employment at Huntington, Kielczewski actively engaged in many activities for the Fund in addition to soliciting investors. Kielczewski communicated with Taylor almost daily about the operation of the Fund and occasionally recommended investments for the Fund to Taylor. (RP 319, 1090, 1116-17, 3727-66.) For example, while he was associated with Huntington, Kielczewski sent Taylor messages with Bloomberg screen shots of certain securities attached for Taylor to consider as potential investments for the Fund. (RP 319.)

While he was associated with Huntington, Kielczewski also reviewed and edited the Fund's "pitch book," which was used to solicit investors. (RP 318, 1088, 1793-94, 3488-3686.) The pitch book comprised a PowerPoint presentation that included a description of the Fund's purpose, investment strategy, and annual performance compared with certain indices. (RP 318.) Taylor relied on Kielczewski to review the pitch book and act as his "sounding-board" in connection with promoting the Fund. (RP 1088, 1793-94.) In a June 20, 2014 email concerning a series of pitch book revisions, Kielczewski suggested that other members of the Investment Manager handle the pitch book presentations rather than Taylor. (RP 3548.) On August 20, 2014, Taylor sent a revised pitch book to Kielczewski and two other members of the Investment Manager. (RP 318.) In an email exchange two days later, Taylor informed one of the other Investment Manager members that Kielczewski "is getting close with a few prospects" for the Fund. (RP 318, 1110, 3606.) On January 8, 2015, Taylor again asked Kielczewski to revise the pitch book so Taylor could use it at a meeting with prospective Fund investors. (RP 318.) Kielczewski admitted that he strove to make the Fund pitch materials "more presentable" to prospective clients such as HG. (RP 1088-89, 1129.)

During Kielczewski's association with Huntington, Taylor also asked Kielczewski to proofread the Fund's quarterly Portfolio Management Reports sent to Fund investors, and Kielczewski made numerous edits to those reports. (RP 318, 1795, 3687-3725.) Taylor testified that he frequently relied on Kielczewski to review and revise these reports before they were released to Fund investors. (RP 1795.) For example, in February 2015, in response to Taylor's proofreading and editing request, Kielczewski emailed him a 2014 fourth quarter report Kielczewski had revised. (RP 318, 1128.) In August 2015, Kielczewski suggested to Taylor in an email that the 2015 second quarter report was too "long and to [sic] wordy," with too "many analogies that dont [sic] connect into a cohesive story." (RP 318, 3713, 3719-20.)

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

In April 2016, Huntington asked Kielczewski to complete a personal activity questionnaire form in connection with FINRA's 2016 cycle examination of the firm. (RP 313, 3183-89.) In response to the question concerning whether he was engaged in outside business activities or PSTs, Kielczewski wrote:

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

(RP 313, 3185.)

Huntington provided Kielczewski's completed personal activity questionnaire form to FINRA. (RP 313.) At the hearing, Kielczewski admitted that he was devoting more than zero hours per week to the Fund at the time he filled out the personal activity form for the FINRA exam. (RP 1140-41.)

OS Received 03/07/2022

On May 2, 2016, in the presence of Huntington supervisory and compliance personnel, Kielczewski met with FINRA Member Regulation examination staff, who questioned him about his role at the Investment Manager. (RP 313.) Kielczewski told them his conduct was consistent with his personal activity questionnaire and that he was an "owner and a general partner in Mariemont Capital." (RP 2233.) He went on to state that he did not receive a salary from Mariemont but earned general partnership fees of around $20,000. (*Id.*) Kielczewski admitted to the examiner that he believed there were "a lot of conflicts of interest" with him working for Huntington while being an owner and partner in Mariemont, but he believed there were "good procedures in place" to manage the conflicts. (RP 2234.)

H. Kielczewski's Representations to the Firm After the Cycle Exam and Kielczewski's Firing

After FINRA's cycle exam, Huntington reviewed Kielczewski's relationship with the Fund. On July 1, 2016, Kielczewski's then-supervisor, David Fitzsimmons, asked Kielczewski in an email to clarify the nature of his investment in the Fund and to ensure the accuracy of his prior outside business activity disclosures. (RP 314.) In response, Kielczewski repeated his prior statement that he had only "a passive role in Mariemont Capital," and also stated that he did "not solicit funds for Mariemont Capital." (RP 314, 3196.) In addition, Kielczewski disclosed that certain Huntington customers had invested in the Fund, including HG, SC, WI, and K&R and its owner. (RP 314, 3196.) Fitzsimmons forwarded Kielczewski's response to Huntington's CCO at the time, Stephen Dahlke, adding that Kielczewski was "willing to provide [an] attestation that he does not solicit for the fund." (RP 3195.) Fitzsimmons also told Dahlke that Kielczewski also "confirmed" that "the corporate clients in [Kielczewski's] book who are also investors in the fund were solicited by the fund's principal, Kevin Taylor." (RP 3195.)

At Fitzsimmons's request, Kielczewski also completed a Disclosure of Outside Business Activity Form on July 14, 2016 ("July 2016 OBA Form"). (RP 314, 3211-14.) On that form, Kielczewski identified "Mariemont Capital" as an outside business activity, describing it as a "limited partnership that manages non-rated whole loan CMOs." (RP 314, 3211.) Kielczewski again described himself as a "passive minority owner" with "no duties or obligations" regarding the Fund. (RP 3211.) He additionally answered "0" in response to the question, "what percentage of your time is spent on this activity during regular business hours?" (RP 3211.) In response to the question, "Have you solicited any other individual(s) to invest in this entity," Kielczewski responded, "no." (RP 3213.) Kielczewski also disclosed HG, SC, WI, K&R, and KK as "clients that transferred assets to Huntington from 5/3 and do business with Mariemont." (RP 3214.)

In September 2016, Huntington placed Kielczewski on a heightened supervision plan to document the firm's oversight of his Mariemont-related activities and monitor his firm email account. (RP 314, 1151.) One of the "contributing factors" that formed the basis of the firm's monitoring was Fitzsimmons's understanding from his discussions with Kielczewski that "Kielczewski does not solicit funds for Mariemont, but shares common clients." (RP 315, 3261-62.)

In a December 6, 2016 email, Fitzsimmons asked Kielczewski again to confirm that he continued to hold a minority interest in "Mariemont" and that he did not solicit funds from clients. Kielczewski replied that his prior representations about his Mariemont-related activities remained accurate. (RP 3263.) Huntington fired Kielczewski on April 26, 2017, after the firm discovered emails showing Kielczewski's role with the Fund was "beyond passive" and violated firm policies and, potentially, FINRA rules. (RP 4673-75.)

OS Received 03/07/2022

III. PROCEDURAL BACKGROUND

The Department of Enforcement ("Enforcement") filed a complaint against Kielczewski on May 21, 2019. (RP 6-24.) Enforcement alleged that Kielczewski: (1) made false statements to Huntington, his member firm employer, in violation of FINRA Rule 2010; (2) engaged in PSTs, in violation of NASD Rule 3040 and FINRA Rules 3280 and 2010; and (3) willfully caused Huntington to file a misleading initial Form U4 and four misleading Form U4 amendments, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010. (*Id.*)

After a four-day hearing, the Hearing Panel found Kielczewski liable for the violations alleged in the complaint and imposed sanctions.[4] (RP 5337-54.) After Kielczewski appealed, the NAC affirmed the Hearing Panel's findings of violations and its determination that Kielczewski is statutorily disqualified because he willfully provided misleading information that was material on his Form U4 and on four Form U4 amendments. (RP 5622-29.) In sanctioning Kielczewski, the NAC balanced numerous aggravating factors with certain factors that served in part to mitigate Kielczewski's misconduct. (RP 5635-37.) The NAC suspended Kielczewski for 18 months, fined him $50,000, and ordered that he requalify by examination as a registered representative before again acting in that capacity.[5] (RP 5637.)

---

[4] For engaging in PSTs, making false statements to Huntington, and willfully causing Huntington to file misleading Forms U4, the Hearing Panel fined Kielczewski $50,000, suspended him in all capacities for 18 months, ordered him to requalify as a general securities representative, and placed him on heightened supervision for one year as a condition of re-association after his suspension. (RP 5352-53.)

[5] The NAC eliminated a heightened supervision requirement that the Hearing Panel had imposed as an additional sanction. (RP 5637.)

OS Received 03/07/2022

On October 28, 2021, Kielczewski filed this appeal with the Commission. (RP 5645-47, 5683.)

IV. ARGUMENT

The Commission should sustain FINRA's action in all respects. It is undisputed that Kielczewski participated in more than $10 million in PSTs involving five Huntington customers without providing the notice required under NASD and FINRA rules. In addition, the evidence conclusively shows that Kielczewski provided false and misleading information to Huntington on firm compliance questionnaires and willfully caused Huntington to file five inaccurate Forms U4. Kielczewski has provided no legitimate reason to overturn these findings.

FINRA provided Kielczewski with the fair procedure required under the Securities Exchange Act of 1934 ("Exchange Act"). The Hearing Officer acted well within his discretion in denying Kielczewski's motion to compel based on Kielczewski's unreasonable delay. Kielczewski has not met his heavy burden to show the Hearing Officer abused his discretion.

In addition, Kielczewski has not demonstrated that the suspension, fine, and order to requalify imposed upon him are excessive or oppressive. The Guidelines fully support the NAC's sanctions. The suspension, fine, and requalification order serve to remediate Kielczewski's misconduct and protect investors.

A. Kielczewski's Undisputed Participation in PSTs Without the Required Written Notice

The Commission should affirm the NAC's uncontested findings that Kielczewski engaged in undisclosed PSTs, in violation of NASD Rule 3040 and FINRA Rules 3280 and 2010. Kielczewski participated in the following five securities transactions outside the scope of his employment with Huntington without providing prior written notice to the firm: (1) WI and

RI's $303,841 investment in the Fund on February 14, 2014; (2) SC's $3.85 million investment in the Fund on January 31, 2014; (3) SC's $2.15 million investment in the Fund on March 7, 2014; (4) K&R's $1 million investment in the Fund on May 26, 2016; and (5) KK's $3 million investment in the Fund on June 1, 2016.[6] (RP 22, 319-22.) Kielczewski conceded before the NAC that he engaged in this misconduct. (RP 5410, 5425.)

NASD Rule 3040 and FINRA Rule 3280 prohibit an associated person from participating in any manner in PSTs without first providing written notice of these transactions to his member firm.[7] A "private securities transaction" is "any securities transaction outside the regular course or scope of an associated person's employment with a member." NASD Rule 3040(e)(1); FINRA Rule 3280(e)(1). An associated person's liability for participating in undisclosed PSTs under NASD Rule 3040 and FINRA Rule 3280 is predicated upon the associated person's failure to describe to his employer firm in written detail the nature of the proposed transaction and his proposed role before the transactions occur. NASD Rule 3040(a), (b); FINRA Rule 3280(a), (b); *see also Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *23 (May 13, 2011) (explaining that PSTs require written notice to firm before engaging in the transactions). Kielczewski did none of these things. It is uncontested that Kielczewski violated NASD Rule 3040 and FINRA Rule 3280 because he participated in PSTs involving investments

---

[6] NASD Rule 3040 applies to Kielczewski's misconduct occurring prior to September 21, 2015, and FINRA Rule 3280 applies thereafter. *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) (announcing FINRA Rule 3280 superseding NASD Rule 3040 without substantive change effective September 21, 2015).

[7] Kielczewski's participation in the undisclosed PSTs also violated FINRA's ethical standards rule, FINRA Rule 2010. A violation of any FINRA rule, including NASD Rule 3040 and FINRA Rule 3280, violates FINRA Rule 2010. *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *2 (Sept. 24, 2015).

by five Huntington customers in the Fund without providing the required written notice to the firm. The Commission should uphold these uncontroverted findings.

B. Kielczewski Provided False Information to Huntington

The NAC found that Kielczewski violated FINRA Rule 2010 when he made false and misleading statements on Huntington's compliance questionnaires in which he failed to disclose his involvement in PSTs. The Commission should affirm the NAC's findings.

FINRA Rule 2010 requires that associated persons observe high standards of commercial honor and just and equitable principles of trade. The principal consideration of FINRA Rule 2010 is whether the misconduct "reflects on the associated person's ability to comply with the regulatory requirements of the securities business." *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). The Commission repeatedly has found that a registered representative's failure to disclose material information to his firm in firm compliance questionnaires violates these ethical rules. *See, e.g.*, *Allen Holeman*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *31 (July 31, 2019) ("Holeman's false response in his firm's Annual Compliance Certification was inconsistent with just and equitable principles of trade."), *aff'd*, 833 F. App'x 485 (D.C. Cir. 2021); *Richard Allen Riemer, Jr.*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022, at *17-18 (Oct. 31, 2018) ("Riemer's false responses in his firm's annual compliance certifications were inconsistent with just and equitable principles of trade."); *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *39-41 (Mar. 27, 2017) (finding respondent engaged in conduct inconsistent with just and equitable principles of trade when he made false statements in his firm's compliance questionnaires), *aff'd*, 733 F. App'x 571 (2d Cir. 2018); *Dep't of Enf't v. Mullins*, Complaint Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *29-38 (FINRA NAC Feb. 24, 2011) (finding that respondents' misstatements on

the firm's compliance questionnaires violated FINRA's rules), *aff'd*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *1 (Feb. 10, 2012).

In December 2015, when Kielczewski completed Huntington's 2015 Registered Representative Annual Questionnaire, he answered "no" to the question, "Have you engaged in any Private Securities Transactions while employed through [Huntington]?" His response could not have been more inaccurate. Undeniably, by the time Kielczewski completed this questionnaire, he had participated in several PSTs totaling over $6 million. (RP 1133-34, 3171-73.) Indeed, on appeal before the NAC, Kielczewski acknowledged that his negative response in the 2015 questionnaire was "not accurate." (RP 5415.)

Kielczewski also made false statements to Huntington before and after FINRA's 2016 cycle examination. In April 2016, Kielczewski completed Huntington's personal activity questionnaire, which the firm provided to FINRA as part of its examination. On that questionnaire, Kielczewski stated, in part, that he was a "[s]ilent minority partner in Mariemont Capital" and devoted "0 hours per week [ ] to [its] business." (RP 313.) Kielczewski's then-supervisor, Fitzsimmons, asked him to clarify the nature of his investment in the Fund and to ensure the accuracy of his prior disclosures. (RP 314.) Kielczewski responded that he had only "a passive role in Mariemont Capital." (*Id.*) While Kielczewski disclosed to Fitzsimmons that HG, SC, WI, K&R, and KK were firm customers who had invested in the Fund, he also stated he did not solicit investors for the Fund and claimed instead that Taylor had solicited any Fund investors who were also Huntington customers. (*Id.*) The evidence shows that Kielczewski's statement was untrue.

Based on Kielczewski's responses, Fitzsimmons directed Kielczewski to complete the July 2016 OBA Form. (*Id.*) In that form, Kielczewski identified Mariemont Capital as an

OS Received 03/07/2022

outside business. With respect to his role in the Fund, he again described himself as a "passive minority owner" with "no duties or obligations." (*Id.*) In response to the question asking what percentage of his time was spent on the Fund's business during regular business hours, Kielczewski answered "zero." (*Id.*) And despite listing each of the firm customers who had invested in the Fund because of his solicitations, Kielczewski checked "no" when asked if he had solicited individuals to invest in the business. (*Id.*)

As the NAC found, Kielczewski's active involvement in the Fund unquestionably demonstrates that these statements he made to Huntington were untrue. The evidence shows that Kielczewski was actively involved with the Fund and devoted more than "zero" hours to the business. He attended meetings with Huntington customers to recommend investments in the Fund, regularly communicated with Taylor about the Fund's operations, discussed with Taylor potential investments for the Fund, reviewed and edited the Fund's pitch book, reviewed and edited certain Fund management reports for Taylor that were sent to investors, and facilitated the PSTs that Kielczewski concedes he made. (RP 317, 318, 319, 1026, 1040-41, 1088, 1090, 1110, 1116-17, 1134-39, 1793-94, 3406, 3606, 3727-66.) He omitted from his disclosures in 2015 that he was soliciting customers to invest in the Fund. And in his updated disclosures in 2016, he denied soliciting investors and falsely claimed instead that Taylor had solicited any Fund investors who were also Huntington customers.

During his employment at Huntington, Kielczewski actively solicited sales of the Fund to his transitioning Fifth Third customers, and he otherwise participated in more than $10 million in Fund investments. Moreover, as a member and manager of the Investment Manager and General Partner, Kielczewski did not have a passive role in those entities; rather, he had the power to "conduct, direct and exercise full control over all activities" of those entities and, in fact,

engaged in a full array of activities for the Fund. (RP 308-09, 962, 2825, 2961-62, 2977, 3034.) Kielczewski therefore violated FINRA Rule 2010. *See McGee*, 2017 SEC LEXIS 987, at *39-41.

The Commission should affirm the NAC's findings that Kielczewski violated FINRA Rule 2010 by making false statements to Huntington on compliance forms.

C. Kielczewski Violated FINRA By-Laws and Rules by Providing Misleading Form U4 Information and Failing to Correct It

The NAC properly found that Kielczewski provided to Huntington misleading information on his Form U4 and four Form U4 amendments, in violation of FINRA's By-Laws and rules.[8] The law is clear that "[e]very person submitting registration documents has the obligation to ensure that the information printed therein is true and accurate." *Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993), *aff'd*, 40 F.3d 1240 (3d Cir. 1994); *see Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *16 (Oct. 20, 2011). This requirement applies to the Form U4, which is used to screen applicants for employment within the securities industry and determine their fitness for registration. *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *8 (Dec. 22, 2008). Thus, once filed, a registered

[8] Article V, Section 2 of the FINRA By-Laws requires that applicants for FINRA registration provide FINRA "reasonable information with respect to the applicant as [FINRA] may require." Article V, Section 2(c) of the FINRA By-Laws provides, in pertinent part, that "[e]very application for registration filed with [FINRA] shall be kept current at all times by supplementary amendments" and that any "[s]uch amendment . . . shall be filed with [FINRA] not later than 30 days after learning of the facts or circumstances giving rise to the amendment." FINRA Rule 1122 prohibits a member firm, registered representative, or person associated with a member firm from filing with FINRA information with respect to membership or registration "which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof." A violation of FINRA Rule 1122 is also a violation of FINRA Rule 2010. *Dep't of Enf't v. N. Woodward Fin. Corp.*, Complaint No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *17 (FINRA NAC July 21, 2014), *aff'd*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015), *aff'd*, No. 15-3729, slip op. at 1 (6th Cir. June 29, 2016).

representative is under a continuing obligation to timely update information required by the Form U4 as changes occur. *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *10-12 (Mar. 15, 2016), *aff'd*, 672 F. App'x 865 (10th Cir. 2016). Filing a misleading Form U4 or failing to timely amend a Form U4 when required violates the high standards of commercial honor and just and equitable principles of trade to which FINRA holds its members and their associated persons under FINRA Rule 2010. *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *18 (Dec. 7, 2009), *aff'd*, 671 F.3d 210 (2d Cir. 2012). "[T]he candor and forthrightness of [individuals making these filings] is critical to the effectiveness of the screening process." *Id.* at *16.

Question 13 on the Form U4 asked Kielczewski, "Are you currently engaged in any other business as a proprietor, partner, officer, director, employee, trustee, agent or otherwise?" (RP 312-13.) Kielczewski provided inaccurate information in his responses to that question on an initial Form U4 filed on January 15, 2014, and four subsequent Form U4 amendments filed through December 2016. (RP 3165-69.) On those Forms U4, Kielczewski falsely stated he was a "SILENT MINORITY PARTNER IN MARIEMONT CAPITAL LLC," in which he has a "PASSIVE POSITION IN WHICH MY PERSONAL MONIES ARE BEING INVESTED IN NON INVESTMENT GRADE MBS," and that he spent "0 HOURS PER MONTH DEVOTED TO THIS BUSINESS." (RP 312-13, 3165-69.)

While Kielczewski maintains that his responses were accurate, ample evidence contradicts his position. As discussed above, Kielczewski's Fund-related activities demonstrates that he was actively involved with the Fund, including the millions of dollars in PSTs which he admits he solicited—not passively involved, as he reported repeatedly. He also was devoting more time to the Fund's business than the zero hours per month that he reported on the Forms

U4. Indeed, Kielczewski admitted before the NAC that "he could have been clearer about the amount of time he was going to spend on the venture" in disclosures. (RP 5424.) Instead of disclosing his many activities on the Fund's behalf, over a period of nearly 3 years, Kielczewski provided false information. (RP 312-13, 3165-69.) The Commission should hence affirm the NAC's findings that Kielczewski violated Article V, Section 2(c) of the FINRA By-Laws and FINRA Rules 1122 and 2010.

D. Kielczewski Is Subject to Statutory Disqualification Because He Willfully Failed to Disclose Material Information on Five Forms U4

The NAC also correctly found that Kielczewski was subject to statutory disqualification because of he willfully provided false information on his Form U4 and four Form U4 amendments. A person is subject to "disqualification" with respect to FINRA membership, or association with a FINRA member, if that person is subject to any "statutory disqualification" under Section 3(a)(39) of the Exchange Act.[9] FINRA By-Laws Article III, Sec. 4. Section 3(a)(39)(F) of the Exchange Act provides that a person is statutorily disqualified if such person has, among other things,

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

[9] Kielczewski argues that subjecting him to statutory disqualification is an "excessive" sanction. (Br. at 25.) But statutory disqualification is not a sanction imposed by FINRA. "FINRA does not subject a person to a statutory disqualification as a penalty or remedial sanction. Instead, a person is subject to statutory disqualification by operation of Exchange Act Section 3(a)(39)(F) whenever there has been, among other things, a determination that a person willfully failed to disclose material information on a Form U4." *Riemer*, 2018 SEC LEXIS 3022, at *28-29. That is the case here.

15 U.S.C. § 78c(a)(39)(F). This statutory provision applies to a representative, like Kielczewski, who has willfully provided false or misleading statements on a Form U4 with respect to a material fact or who willfully failed to amend a Form U4 with material information that is required on the Form U4.[10] *See, e.g.*, *McCune*, 2016 SEC LEXIS 1026, at *13-23 (finding that applicant was statutorily disqualified for willfully failing to amend Form U4); *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *37-41 (Apr. 18, 2013) (finding that applicant was statutorily disqualified for willfully providing material false information on, and excluding material information from, a Form U4), *aff'd*, 575 F. App'x 1 (D.C. Cir. 2014).

1. Kielczewski's Actions Were Willful

The NAC properly concluded that Kielczewski's providing false information on his Form U4 and the four Form U4 amendments were willful. Acting "willfully" means to "[v]oluntarily commit[ ] the acts that constitute[ ] the violation." *McCune*, 2016 SEC LEXIS 1026, at *15. In comparison, an "inadvertent filing of an inaccurate form" is not something that would support a finding of willfulness. *Mathis v. SEC*, 671 F.3d 210, 218 (2d Cir. 2012); *see also Holeman*, 2019 SEC LEXIS 1903, at *38 (requiring "subjective intent" for a willful violation). A finding of willfulness "do[es] not require that the actor 'also be aware that he is violating one of the Rules or Acts'" or that he "acted with a culpable state of mind" or "scienter." *McCune*, 2016 SEC LEXIS 1026, at *15, 19. As the Commission has held, "[a] failure to disclose is willful under

[10] In arguing that his misconduct was not willful and therefore not subject to a statutory disqualification, Kielczewski conflates the willfulness of the underlying conduct with the willfulness of its non-disclosure. (Br. at 22-24.) The basis for finding that Kielczewski is statutorily disqualified is his willful failure to disclose material information on his Forms U4. (RP 5669-70.)

Exchange Act § 3(a)(39)(F) if the respondent of his own volition provides false answers on his Form U4." *Amundsen*, 2013 SEC LEXIS 1148, at *38.

Kielczewski submitted his Form U4 and four amendments fully aware that he was devoting more than "0 hours per month" to the Fund and that he was more than a "passive" investor in the Fund. Five times Kielczewski voluntarily made these representations and knew the information in the Forms U4 did not accurately describe his time spent or role with the Fund. The record shows that he was doing a multitude of tasks on the Fund's behalf, including participating in PSTs, communicating with Fund investors, and editing Fund documents to be sent to investors. On five Forms U4, Kielczewski, on his own volition, stated falsely that he was devoting no time to Mariemont, and characterized inaccurately his role as "passive" despite his many Fund-related activities, all of which plainly demonstrate that he acted willfully. *See id.*

The record belies Kielczewski claims that he "fully and fairly informed Huntington of his involvement with Mariemont at every stage," and that "he believed Huntington knew and approved" of his activities for the Fund. (Br. at 22, 24.) While the NAC agreed that Kielczewski had some preliminary conversations with Chapman about Mariemont before Kielczewski started at Huntington, the NAC deferred to the Hearing Panel's credibility determinations that Kielczewski's disclosures to Chapman were limited. The Hearing Panel found that Kielczewski was not credible when he stated he "gave an accurate and complete picture of his planned activities in connection with this new hedge fund" to Chapman. (RP 5277.) The Hearing Panel instead credited Chapman and the other Huntington witnesses, all of whom denied authorizing Kielczewski to solicit investments in the Fund. The Hearing Panel found that Kielczewski's assertions about the purported agreement were not supported by other witnesses, including Chapman, Fitzsimmons, and Huntington's chief compliance officers (Gregory and Dahlke)

during the relevant period, all of whom denied that they or anyone else at the firm gave Kielczewski permission to solicit investors in the Fund. The Hearing Panel characterized these witnesses' testimony as "consistent, plausible, and cross-corroborated, and it was not undercut on cross-examination." (RP 5335.) Kielczewski has not set forth the "substantial evidence" necessary to set aside the Hearing Panel's credibility findings, to which the NAC properly deferred. *See Lek Sec. Corp.*, Exchange Act Release No. 82981, 2018 SEC LEXIS 830, at *27 n.22 (Apr. 2, 2018) ("We defer to a hearing panel's credibility determinations absent substantial evidence to the contrary.").

Kielczewski's assertion of full disclosure to Huntington is undercut by his own actions. When Kielczewski stated in his pre-registration form that he participated in PSTs, Huntington pushed back and requested clarification from him. Kielczewski then changed his answer to state that he would not participate in PSTs while registered at Huntington. (RP 2859; Br. at 24 n.8.) Moreover, when Fitzsimmons met with Kielczewski to terminate his employment, Kielczewski made no mention whatsoever of the purported understanding he and Chapman had that allowed him to sell interests in the Fund to transitioning Fifth Third customers. (RP 1635.)

The record directly undermines Kielczewski's claims of full disclosure to Huntington and reflects the misleading characterization of his activities. Kielczewski's providing incorrect information in response to Form U4 questions, and failing to update his answers with accurate information, was willful conduct.

2. Kielczewski's Activities for the Fund Are Material

The NAC also correctly found that Kielczewski's active participation in the Fund's business, including engaging in over $10 million in undisclosed PSTs with Huntington customers, is material information that he failed to disclose. "In the context of Form U4 disclosures, a fact is material if there is a substantial likelihood that a reasonable regulator, employer, or customer would have viewed it as significantly altering the total mix of information made available." *McCune*, 2016 SEC LEXIS 1026, at *21-22.

The Form U4 "is a critically important regulatory tool." *See Amundsen*, 2013 SEC LEXIS 1148, at *23. The duty to provide accurate information on a Form U4 and to amend a Form U4 to provide current information "assures regulatory organizations, employers, and members of the public that they have all of the material, current information about the registered representative with whom they are dealing." *McCune*, 2016 SEC LEXIS 1026, at *12. Through his circumvention of his Form U4 disclosure obligations, Kielczewski deprived not only Huntington, but other stakeholders, such as the investing public, self-regulatory organizations, and state regulators, of important information about his business activities for the Fund. Thus, Kielczewski's active involvement in the Fund, including engaging in PSTs, was material information and should have been disclosed on his Form U4 and Form U4 amendments.

E. Kielczewski's Procedural Arguments Are Without Merit and Do Not Undermine the NAC's Findings or Sanctions

Faced with the credible and consistent testimony of four witnesses (Chapman, Fitzsimmons, Gregory, and Dahlke), each denying that they or anyone else at Huntington gave Kielczewski permission to solicit investors in the Fund, and the lack of any evidence supporting Kielczewski's incredible testimony that he did not mislead Huntington about his Fund activities, Kielczewski raises procedural arguments attempting to undermine the NAC's findings and cast

doubt upon the fairness of FINRA's proceedings. (Br. at 14-22.) These arguments are without support, and the Commission should reject them.

1. The Hearing Officer Correctly Denied Kielczewski's Motion to Compel

FINRA's rule for a respondent to move a Hearing Officer to order discovery from a third party provides that the respondent must make this request in writing 21 days before the scheduled hearing date. In ruling on such a request, the Hearing Officer considers whether the documents are material, relevant, and if the request is unreasonable or unduly burdensome. Here, the Hearing Officer was correct and did not abuse his discretion when he denied as untimely and not supported by good cause Kielczewski's pre-hearing request for the Hearing Officer to order Huntington to produce documents or his related post-hearing motion to compel Enforcement to issue a FINRA Rule 8210 request to Huntington.[11]

Kielczewski's objective was to review information related to an internal investigation by Huntington's attorney to assess the "potential legal and regulatory ramifications" of Kielczewski's misconduct at issue here. (RP 5147.) In his motion, Kielczewski asked the Hearing Officer to direct Enforcement to issue a Rule 8210 request to Huntington for any documents and information that Huntington previously withheld based on attorney-client privilege and attorney work product. Huntington was not a party to this disciplinary action, but the Hearing Officer granted Huntington's motion to intervene to have counsel present at the

[11] Kielczewski is incorrect that the Hearing Officer's rulings are subject to de novo review. (Br. at 14.) Instead, the Commission reviews the Hearing Officer's rulings for an abuse of discretion. *See Robert J. Prager*, 58 S.E.C. 634, 664 (2005).

hearing for the limited purpose of raising objections to questions that may elicit privileged information while firm employees testified.[12] (RP 673.)

Kielczewski's motion was governed by FINRA Rule 9252. Under Rule 9252(a), a respondent's request for FINRA to invoke Rule 8210 to compel the production of documents at a hearing must be made in writing no later than 21 days prior to the scheduled hearing date. In reviewing such requests under Rule 9252(b), the Hearing Officer considers among other things, whether the information sought is material and relevant and whether the request to invoke Rule 8210 is "unreasonable, oppressive, excessive in scope, or unduly burdensome."

Kielczewski was first put on notice that Huntington was asserting attorney-client privilege over certain documents and information in July 2019, more than four months before the scheduled hearing. Enforcement produced to Kielczewski on July 19, 2019, Huntington's June 23, 2017 responses to FINRA's initial requests made after Huntington fired Kielczewski for cause.[13] In those responses, Huntington stated it was producing its "non-privileged findings" and "all non-privileged documents." (RP 5183-84, 5186-87.) In September 2019, following his review of Enforcement's production, Kielczewski asked Enforcement to issue additional Rule 8210 requests to Huntington, which Enforcement did on September 10, and 19, 2019. (RP 5171, 5188.) Kielczewski, however, did not request that Enforcement seek clarification from

---

[12] Huntington was also permitted to file a response to Kielczewski's post-hearing motion to compel. (RP 5137, 5145-63.)

[13] FINRA Rule 9251(a) governs the inspection and copying of documents in the possession of interested FINRA staff in connection with disciplinary proceedings. Enforcement may withhold any documents protected by FINRA Rules 9251(b)(1) and (b)(2), which include documents subject to attorney-client privilege and attorney work product. It is undisputed that Enforcement produced to Kielczewski all the documents it received from Huntington in compliance with FINRA Rule 9251. Kielczewski is seeking documents that Huntington never produced to FINRA.

Huntington concerning its use of the phrases "non-privileged findings" and "non-privileged documents." (RP 5171, 5187-88.)

Kielczewski again was put on notice of Huntington's assertion of privilege in October 2019, almost two months before the hearing. On October 7, 2019, Huntington produced additional documents to FINRA in response to two post-complaint Rule 8210 requests for information sought by Kielczewski. Huntington's cover letters accompanying the productions stated that Huntington was providing "copies of all non-privileged electronic communications," and that Huntington "does not waive any applicable privileges including without limitation, the attorney-client and work-product privileges," again signaling Huntington could be withholding documents. (RP 739-41, 5188.) Enforcement provided Kielczewski with Huntington's October 7 productions, along with Huntington's accompanying cover letters, on October 11, 2019, which was 53 days before the final prehearing conference. (RP 5188.).

On December 2, 2019, nine days before the hearing in this matter was scheduled to take place, and in connection with his opposition to Huntington's motion to intervene, Kielczewski asserted for the first time that Huntington improperly withheld documents from its Rule 8210 productions. (RP 443-51.) At the final pre-hearing conference, the Hearing Officer informed the parties and Huntington that the hearing would go forward as scheduled. (RP 523-24.) After the hearing ended, Kielczewski filed a post-hearing motion to compel. (RP 5119-34.)

The Hearing Officer properly found that Kielczewski's challenge to the adequacy of Huntington's Rule 8210 responses was untimely under FINRA Rule 9252, and Kielczewski had not set forth good cause for his delay in challenging Huntington's withholding of documents. (RP 5295-96.) Kielczewski took no steps to determine if Huntington had withheld documents from its responses and, if so, on what basis. Nor did he seek an extension of the Rule 9252 filing

deadline. Rather, Kielczewski chose instead to challenge Huntington's assertion of privilege as part of his opposition to Huntington's motion to intervene nine days before the hearing, which was untimely under FINRA Rule 9252.

Kielczewski was represented by counsel throughout these proceedings, including when Enforcement produced Huntington's responses. Kielczewski had months in advance of the Rule 9252 deadline to review those responses, which referenced Huntington's production of "copies of all non-privileged, electronic communications," "non-privileged findings," and "all non-privileged documents," in which Huntington stated that it "does not waive any applicable privileges, including without limitation, the attorney-client and work-product privileges." At the hearing and in Kielczewski's January 2020 post-hearing motion to compel, Kielczewski's attorney agreed that this language "could support an inference that documents were being withheld." (RP 1575, 5122.) Nonetheless, Kielczewski did not object timely. Kielczewski also did not attempt to clarify whether Huntington was withholding any documents after reviewing Huntington's June 2017 production that Enforcement provided to Kielczewski in July 2019.[14]

Kielczewski attempts to downplay his delay by claiming he filed his motion once he received notice of the withheld documents. (Br. at 18-19.) The Hearing Officer was correct to

[14] To justify his failure to act on Huntington's assertion of privilege timely, Kielczewski asserts that he acted reasonably because FINRA did not bring a Rule 8210 action against Huntington for its purported incomplete responses over the course of two years. Thus, according to Kielczewski, because FINRA brought no disciplinary action, it was not clear to FINRA that Huntington was withholding documents. (Br. at 19.) Kielczewski's inaction was not reasonable. Any decision on whether to bring disciplinary action, including who and what to charge, is within FINRA's prosecutorial discretion and provides Kielczewski no respite from his own inaction. *See Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993). Moreover, Kielczewski's attorney admitted that the language Huntington used in its responses "could support an inference that documents were being withheld." (RP 1575, 5122.) Nonetheless, Kielczewski did not act on this for months after receiving Huntington's responses.

focus on when the claim of privilege was available to Kielczewski's counsel, not when counsel realized that privileged material may have been withheld. Indeed, Kielczewski waited until nine days before the start of the hearing to raise his first objections contained in an opposition to Huntington's motion to intervene. (RP 443-67.) Further, Kielczewski's attorney acknowledged that Enforcement had produced Huntington's October 7, 2019 cover letters, on October 11, 2019, that indicated documents may have been withheld, but counsel had not seen them before December 3, 2019, because of an error by the technology vendor he had retained to assist with discovery review and which he had "failed to pick up on." (RP 743.) Counsel's admitted technology error does not excuse Kielczewski's untimely filing.

Kielczewski contends that the "precise nature" of the information he seeks is unknown but involves his "onboarding" and "termination." (Br. at 16.) Kielczewski has not established that these documents, if they exist, are material. Kielczewski is "entitled only to items material to his defense and is not entitled to conduct a fishing expedition in an effort to discover something that might assist him in his defense, or in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory." *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at 60 n.54 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *cf. Dep't of Enf't v. Respondent*, Complaint No. 2012034936005, 2015 FINRA Discip. LEXIS 72, at *2-3 (FINRA OHO Jan. 27, 2015) ("FINRA Rule 9251(a) establishes the outside limit of discovery in FINRA disciplinary proceedings, which is substantially less than the scope of discovery permitted in federal court under the Federal Rules of Civil Procedure.").

Kielczewski asserts that Huntington waived attorney-client privilege by responding to FINRA Rule 8210 requests without identifying the withheld documents and information and the bases for withholding them or, alternatively, producing a privilege log of documents withheld.

(Br. at 14-17.) The cases and SEC Enforcement manual that he cites are inapplicable here. While FINRA Rule 9251(c) states that the Hearing Officer may order Enforcement to submit a privilege log for materials *that Enforcement withheld* based on privilege, attorney work product, or other reasons set out in subsection (b), nothing in FINRA rules empower Kielczewski to demand a privilege log from a third party as part of FINRA's investigation leading to the initiation of its complaint. Moreover, the Commission has explicitly held that the requirement in Exchange Act Section 15A(b)(8) that FINRA provide a fair procedure in its proceedings "does not extend to investigations." *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *61 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012); 15 U.S.C. § 78o-3. The purpose of an investigation is not to determine whether a violation occurred but rather to determine whether FINRA has gathered evidence meriting further proceedings, which is what occurred in this case. *See id*. Kielczewski attempts to recast his failures to timely file under Rule 9252 to fault Huntington and Enforcement. Kielczewski, however, was on notice for many months that Huntington may have withheld documents from Enforcement on privilege grounds but did not object timely. The Hearing Officer found this delay "fatal" to Kielczewski's motion, and the NAC correctly found that Kielczewski did not carry his burden to show that the Hearing Officer abused his discretion. (RP 5296, 5671); *see Li-Lin Hsu*, Exchange Act Release No. 78899, 2016 SEC LEXIS 3585, at *10 n.12 (Sept. 21, 2016).

2. Kielczewski Has Not Shown the Failure to Produce Documents or a Privilege Log Was Not Harmless Error

Even if Enforcement failed to produce something required under Rule 9251, which it did not, Kielczewski has not shown that the vague information he seeks, or a privilege log, would have made any difference to the ultimate outcome of this proceeding such that the failure to produce these items was not harmless error. *See* FINRA Rule 9251(g) ("In the event that a

Document required to be made available to a Respondent pursuant to this Rule is not made available by the Department of Enforcement, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that the failure to make the Document available was not harmless error."). Kielczewski fails to establish how this unspecified information about his "onboarding" or "termination" is material to whether Kielczewski sold the Fund away from Huntington without written approval, which he admits he did, and lied to Huntington about it and his other activities for the Fund and lied about it on compliance forms and on five Forms U4, which he admits were inaccurate. Thus, this information would not have had any impact on the ultimate outcome of this proceeding. Kielczewski has not demonstrated that a failure to produce privileged documents or a log was not harmless error.

3. The Proceedings Against Kielczewski Were Fair

Kielczewski had more than ample opportunity to defend himself, and FINRA afforded him the fair procedure required under the Exchange Act. Kielczewski received notice of the allegations of violations; participated in a multi-day hearing; and had the opportunity to present evidence and make written and oral arguments. *See* 15 U.S.C. § 78o-3(b)(8), (h)(1); *Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding requirements of the Exchange Act met when FINRA brought specific charges, respondent had notice of charges and an opportunity to defend himself, and FINRA kept a record of proceedings).

Kielczewski asserts that FINRA staff impeded his development of a record because of Huntington's withheld documents and assertions of privilege. (Br. at 14.) Contrary to Kielczewski's assertions, the Hearing Officer permitted Kielczewski to fully explore Huntington's assertions of attorney-client and work-product privilege at the hearing. (RP 523-

24, 1560-96, 1664-82.) Indeed, the record reflects that the testimony Kielczewski elicited provides no support for his assertion that Huntington improperly asserted privilege or that Huntington's privilege objections deprived him of any documents or information material to his defense. (RP 1560-96, 1664-82.) The Hearing Officer gave Kielczewski wide latitude when questioning witnesses and sustained Huntington's objections when witnesses testified they could not respond without referring to communications with firm counsel. (RP 1560-96, 1664-82.) *See Guang Lu*, 58 S.E.C. 43, 58-60 (2005) (finding no error in denial of motion to compel production of documents from firm supervisor when respondent was able to cross-examine supervisor at the hearing), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006). The Hearing Officer's allowance of questions on this topic negates any implication that the proceeding was unfair. Moreover, Kielczewski's own actions, or failure to act, were responsible for his inability to request additional information from Huntington. As discussed, the Hearing Officer did not abuse his discretion when finding that Kielczewski was on notice for many months that Huntington had withheld documents from Enforcement on privilege grounds, but Kielczewski did not object timely as required by FINRA rules. The proceedings against Kielczewski were fair.

The record fully supports the NAC's findings that Kielczewski engaged in PSTs without written firm approval, made false statements to Huntington, and willfully filed a misleading Form U4 and four Form U4 amendments. None of Kielczewski's procedural arguments have merit. The Commission should therefore sustain these findings.

F. The Sanctions that the NAC Imposed on Kielczewski Are Neither Excessive Nor Oppressive

The NAC carefully considered numerous factors, including the serious nature of Kielczewski's misconduct of selling away over $10 million in Fund securities to firm customers, in determining that suspending Kielczewski for 18 months, fining him $50,000, and requiring

him to requalify as a general securities representative were appropriate sanctions. FINRA's PST rule "play[s] a crucial role in FINRA's regulatory scheme, and its abuse calls for significant sanctions." *Dep't of Enf't v. Seol*, Complaint No. 2014039839101, 2019 FINRA Discip. LEXIS 9, at *57 (FINRA NAC Mar. 5, 2019). Moreover, FINRA rules obligate individuals to make truthful and accurate disclosures. Kielczewski's false statements on Huntington's compliance questionnaire and his repeated acts of providing misleading information that was reflected on Forms U4 raise serious questions about his ability to comply with regulatory requirements. Given the seriousness of Kielczewski's misconduct, these sanctions are neither excessive nor oppressive. *See* 15 U.S.C. § 78s(e)(2).

The Commission looks to FINRA's Sanction Guidelines ("Guidelines") as a benchmark for its review. *See Gopi Krishna Vungarala*, Exchange Act Release No. 90476, 2020 SEC LEXIS 4938, at *35 (Nov. 20, 2020). In arriving at a unitary sanction for the totality of Kielczewski's misconduct, the NAC carefully considered the Guidelines for PSTs; falsification of records; misrepresentations; and false, inaccurate, or misleading Forms U4.[15] (RP 5673-78.) The NAC's sanctions are within the parameters of the Guidelines and consistent with these recommendations.

The NAC properly determined that Kielczewski's misconduct was accompanied by numerous aggravating factors while crediting Kielczewski with some mitigation. (RP 5676-77.) The NAC found aggravating that, for more than two years, Kielczewski participated in five PSTs with five firm customers who invested over $10 million in the Fund. *See Guidelines*, at 7-8

[15] *See FINRA Sanction Guidelines* 14, 37, 71, 89 (2020), https://www.finra.org/sites/default/files/2021-10/Sanctions_Guidelines_2020.pdf. The NAC decision sets forth the detailed sanction recommendations and considerations for each of the specific Guidelines that the NAC applied in determining sanctions. (RP 5674-76.)

(Principal Consideration Nos. 8, 9, 17); *see id.* at 14-15 (Guideline-Specific Consideration Nos. 1, 2, 3, 8). While Kielczewski attempts to minimize the severity of his actions as involving "only five customers" and "only five transactions" and downplays these facts as "not, collectively, aggravating," the dollar amount *alone* of his PSTs warrants at least a one-year suspension under the Guidelines. *Guidelines*, at 14 (recommending a one-year suspension to a bar when PSTs exceed $1,000,000); (Br. at 27). Even one PST involving one customer can be serious misconduct, particularly when it involves over $1 million.

Moreover, Kielczewski's involvement in WI and RI's initial $1.94 million transaction in January 2014 and HG's two $1.5 million transactions in December 2015 and August 2016 are additional evidence of Kielczewski's pattern of participation in undisclosed PSTs, which serves to further aggravate sanctions. *See Guidelines*, at 7 (Principal Consideration No. 8); *see also Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *22 n.33 (July 1, 2008) (finding for purposes of determining sanctions, adjudicators may consider similar uncharged conduct). Because Kielczewski was an owner of the Fund that he was promoting to firm customers, his participation in the PSTs also had the potential for his monetary gain.[16] *See*

[16] Kielczewski cites to myriad factors under the Guidelines that are not mitigating. (Br. at 26-29.) The Guidelines state that the "absence [of certain factors] does not draw an inference of mitigation." *Guidelines*, at 7. Rather "[t]he relevance and characterization of a factor depends on the facts and circumstances of a case and the type of violation." *Id.* Thus, "the absence of an aggravating factor under the Sanction Guidelines is not necessarily mitigating." *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *30 (Feb. 24, 2012). The Guidelines and Commission precedent are clear: it is not mitigating that Kielczewski has no prior disciplinary history, that he earned no commissions or profits from his misconduct, or that no customers were harmed. *See Kent M. Houston*, Exchange Act Release No. 71589A, 2014 SEC LEXIS 863, at *30 (Feb. 20, 2014) ("[L]ack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional."); *Braff*, 2012 SEC LEXIS 620, at *26 ("The absence of monetary gain or customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally."). Kielczewski argues there is no evidence of "violations of

[Footnote continued on next page]

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

Kielczewski's effort to impute knowledge to Huntington of his PSTs and cast his misconduct in isolation fails because the evidence shows that Kielczewski never provided Huntington with verbal notice of any of the PSTs and he intentionally misled the firm about whether he was involved in soliciting firm customers to invest in the Fund. *See id.* at 7, 8 (Principal Consideration Nos. 10, 13); *see id.* at 15 (Guideline-Specific Consideration No. 13). Kielczewski repeatedly misled Huntington in emails, compliance questionnaires, and five Forms U4 by denying that he was soliciting firm customers or otherwise participating in PSTs or other activities for the Fund. Thus, Kielczewski's repeated failures to disclose his participation in the PSTs was not an isolated incident but rather a coordinated effort to conceal from Huntington the full extent of his business for the Fund.

Kielczewski contends that he gave Huntington "enough disclosure" about his Mariemont relationship and therefore the firm was "on notice" of potential issues with selling away.[17] (Br.

[cont'd]

law or SRO rules" in the sales of the Fund. (Br. at 27.) The relevant facts are that Kielczewski sold away millions of dollars of the Fund to firm customers without providing the mandatory written notice to Huntington and then lied about it over and over.

[17] To support his mitigation claims, Kielczewski highlights that he answered affirmatively that he participates in PSTs when answering Huntington's preregistration form in December 2013. Kielczewski argues this disclosure gave the firm "meaningful notice that his relationship with Mariemont might warrant further exploration." (Br. at 25.) Huntington indeed sought his clarification of these disclosures. (RP 2860.) A principal and head of the firm's registration group asked Kielczewski to explain his affirmative response concerning participating in PSTs and noted that the firm does not "normally allow these types of transactions." (RP 311, 1006, 1380.) The principal forwarded Kielczewski's response to Huntington's CCO at the time, Gregory. (RP 2859.) Gregory asked Kielczewski to clarify whether his role with Mariemont Capital was "just that of a passive investor/owner (you do not engage in private securities transactions)?" (*Id.*) Once Huntington questioned him further, however, Kielczewski walked

[Footnote continued on next page]

at 25-26.) The NAC already credited Kielczewski with mitigation when it found that the record reflected discussions between Chapman and Kielczewski prior to Kielczewski officially joining Huntington concerning, to some degree, his ongoing relationship with Mariemont.[18] (RP 2034-35, 2048, 2057-58, 2068-70.) The burden, however, was on Kielczewski to disclose in writing fully and truthfully—prior to participating in the PSTs—the proposed transactions and his role,

---

[cont'd]

back his original disclosure. Kielczewski assured Gregory that his role was passive, explaining that he "must have misunderstood what the private securities transactions question was." (RP 2859.) Rather than mitigation, this evidence reflects Kielczewski's pattern of misinforming Huntington and falsely minimizing the true extent of his Fund activities once he knew that Huntington would not allow it.

Likewise, Kielczewski's later disclosure of overlapping firm and Fund customers provides him with no mitigation. (*See* Br. at 25.) He did not disclose his participatory role in the PSTs with those customers, and instead, stated he had only "a passive role in Mariemont Capital," that he did "not solicit funds for Mariemont Capital," and "confirmed" that "the corporate clients in [Kielczewski's] book who are also investors in the fund were solicited by the fund's principal, Kevin Taylor." (RP 314, 3195-96.)

[18] Kielczewski's reliance on prior FINRA decisions in *Dep't of Enf't v. Ghosh*, *Dep't of Enf't v. Mathieson*, *Dep't of Enf't v. Miller*, and *Dep't of Enf't v. Brown* are inapposite and provide him with no mitigation. (Br. at 26, 28.) Appropriate sanctions are dependent upon the facts and circumstances of each case and "cannot be precisely determined by comparison with action taken in other proceedings." *See Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *40 (Dec. 11, 2014), *aff'd*, 637 F. App'x 49 (2d Cir. 2016). None of the cases upon which Kielczewski relies encompass the facts and circumstances of this one. For example, unlike in *Ghosh*, Huntington gave Kielczewski no "intermixed directives" about disclosing PSTs and his business activities for the Fund. *See Ghosh*, Complaint No. 2016051615301, 2021 FINRA Discip. LEXIS 32, at *49 (FINRA NAC Dec. 16, 2021). Huntington was clear from the time it hired Kielczewski that he could not solicit for the Fund—a directive that he flouted almost immediately. In comparison to *Miller*, *Mathieson*, and *Brown*, the dollar amount of Kielczewski's selling away was substantially higher, and he repeatedly misled Huntington about the PSTs and other activity for the Fund on firm compliance forms and five Forms U4. *See Miller*, Complaint No. 2012034393801, 2018 FINRA Discip. LEXIS 13, at *40-48 (FINRA NAC May 23, 2018); *Mathieson*, Complaint No. 2014040876001, 2018 FINRA Discip. LEXIS 9, at *23-25 (FINRA NAC Mar. 19, 2018); *Brown*, Complaint No. 2014042690502, 2017 FINRA Discip. LEXIS 36, at *66-69 (FINRA OHO Aug. 2, 2017). The vast differences between Kielczewski's misconduct and the respondents in the cited decisions more than justifies the higher sanctions that Kielczewski received.

which he admittedly did not. "It is well established that an associated person cannot excuse his own misconduct by shifting the onus of compliance to his managers or to his firm." *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *51 (Feb. 10, 2012).

While admitting most of his misconduct, Kielczewski attempts to portray himself as naïve and blameless with respect to his participation in the PSTs. He claims that none of the transactions took place after Huntington advised him there was an issue. (Br. at 27.) The record undercuts his claim. Kielczewski knew from the outset of his employment that Huntington prohibited participation in virtually all PSTs. Kielczewski admitted that he knew he "couldn't solicit [customers] in terms of being a person that signs on the account subscription documents to on-board them. I can't do those things that I thought was soliciting," and said that "Taylor would do that." (RP 2273-75.) In addition, Huntington's written supervisory procedures prohibited registered representatives from participating in PSTs. (RP 310, 2861-62.) Nonetheless, within two days of starting at Huntington in January 2014, Kielczewski began soliciting customer HG about a "new potential investment" in the Fund. (RP 3407.) A few weeks later, he sent WI a blank subscription agreement for the Fund along with a copy of his own completed subscription agreement for the Fund to serve as a guide on how to complete it. (RP 1054-55, 3833-64.) In late January 2014, Kielczewski sent to Taylor WI and RI's completed subscription agreement for their planned investment in the Fund. (RP 3877-98.) Soon thereafter, he helped facilitate SC's and WI and RI's investments in the Fund. (RP 320, 3904-13.) By the time Kielczewski completed Huntington's December 2015 annual compliance questionnaire denying engaging in any PSTs, he had, in fact, participated in more than $6 million in PSTs in the Fund. (RP 1133-34, 3171-73.)

For nearly three years, Kielczewski repeatedly and intentionally misrepresented to Huntington that he was merely a passive investor in the Fund, that he did not solicit investments on behalf of the Fund, and that he devoted "0 hours" to Fund activities. *See Guidelines*, at 7, 8 (Principal Consideration Nos. 9, 13). Kielczewski's representations were unquestionably false. The compliance documents, including the questionnaire that Kielczewski completed inaccurately in advance of FINRA's examination of Huntington, and Forms U4 are important documents, both for the firm and FINRA. The Commission has described the Form U4 as "a critically important regulatory tool that assists regulatory agencies in determining and monitoring the fitness of securities professionals." *See McGee*, 2017 SEC LEXIS 987, at *39. Kielczewski's misleading statements undermined the utility of the Form U4 not only for Huntington, but for FINRA.

The NAC concurred with the Hearing Panel's determination that Huntington's termination of Kielczewski's employment based on the same conduct at issue in this case was a mitigating factor under the Guidelines. *See Guidelines*, at 5 (General Principle No. 7). The NAC also relied on the Hearing Panel's observations of Kielczewski at the hearing that he was "chastened and contrite" because of his termination and that Kielczewski expressed some remorse for his conduct, which warranted slight mitigative weight. (RP 5350 & n.320.) Kielczewski, however, failed to express remorse until after Huntington discovered his misconduct and failed to acknowledge all his misconduct or fully appreciate its seriousness, which limited the degree of mitigation. (RP 5350 &n.320, 5677); *see Guidelines*, at 7 (Principal Consideration No. 2).

Overshadowing any mitigation, however, were the aggravating factors present in this case. FINRA's rules governing PSTs and the corresponding required disclosures are

prophylactic measures designed to ensure that firms can supervise PSTs and protect the investing public and themselves from the risk of loss. Under the circumstances, the 18-month suspension, $50,000 fine, and requalification order[19] imposed upon Kielczewski are appropriate to protect the investing public and to deter Kielczewski from engaging in similar conduct in the future.[20] The Commission should affirm the NAC's sanctions.

[19] Kielczewski does not consistently challenge the NAC's requirement to requalify. (*Compare* Br. at 25, *with* Br. at 29.) Nonetheless, ordering Kielczewski to requalify by examination is appropriate because he demonstrated a lack of knowledge or familiarity with the rules and laws governing the securities industry. *See Guidelines*, at 6 (General Principle No. 8). Throughout these proceedings, Kielczewski claimed he did not know what the term "private securities transactions" meant or about the FINRA rules governing them. (RP 2335-37.) Requalification is warranted under these facts.

[20] Kielczewski's reliance on FINRA's cases against Lek Securities and Wilson-Davis to support a business line restriction instead of an 18-month suspension is misplaced. (Br. at 29.) These two matters were settlements with member firms that involved different misconduct and are inapposite to his misconduct. The NAC correctly followed the relevant Guidelines and considerations under the facts of this case when determining the suspension, fine, and requalification order were appropriate.

OS Received 03/07/2022

V. CONCLUSION

The Commission should sustain FINRA's action in all respects and dismiss Kielczewski's application for review.[21]

Respectfully submitted,

/s/ *Jennifer Brooks*
Jennifer Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083
jennifer.brooks@finra.org
nac.casefilings@finra.org

March 7, 2022

[21] On February 3, 2022, Kielczewski filed a motion requesting oral argument. Because the issues have been thoroughly briefed and can be adequately determined based on the record, the Commission should deny Kielczewski's request for oral argument. *See* Commission Rule of Practice 451, 17 C.F.R. § 201.451(a) (providing for Commission consideration of appeals based on the "papers filed by the parties" unless the "decisional process would be significantly aided by oral argument"); *Holeman*, 2019 SEC LEXIS 1903, at *2 n.1.

OS Received 03/07/2022

CERTIFICATE OF SERVICE

I, Jennifer Brooks, certify that on this 7th day of March 2022, caused a copy of the foregoing Brief of FINRA in Opposition to Application for Review, In the Matter of the Application of William Joseph Kielczewski, Administrative Proceeding File No. 3-20636, to be served through the SEC's eFAP system on:

Vanessa A. Countryman
The Office of the Secretary
U.S. Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, DC 20549-1090

I further certify that, on this date, I caused copy of FINRA's brief in the foregoing matter to be served by electronic service on:

Andrew St. Laurent, Esq.
Harris, St. Laurent & Wechsler LLP
40 Wall Street, 53rd Floor
New York, NY 10005
(646) 248-6010 (phone)
andrew@hs-law.com

Justin L. Chretien
Carlton Fields
1025 Thomas Jefferson Street, NW, Suite 400
Washington, DC 20007
(202) 965-8113 (phone)
jchretien@carltonfields.com

Natalie A. Napierala
Carlton Fields
405Lexington Avenue, 36th Floor
New York, NY 10174
(212) 785-2747 (phone)
nnapierala@carltonfields.com

Respectfully submitted,

/s/ *Jennifer Brooks*
Jennifer Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083
jennifer.brooks@finra.org
nac.casefilings@finra.org

CERTIFICATE OF COMPLIANCE

I, Jennifer Brooks, certify that this brief complies with the Commission's Rules of Practice by omitting or redacting any sensitive personal information described in Rule of Practice 151(e).

I, Jennifer Brooks, also certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition not to exceed 14,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,474 words.

/s/ *Jennifer Brooks*
Jennifer Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083
jennifer.brooks@FINRA.org
nac.casefilings@finra.org

OS Received 03/07/2022