SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 60937 / November 4, 2009

Admin. Proc. File No. 3-13414

In the Matter of

KEVIN M. GLODEK

c/o William A. Rome, Esq.
Hoffman & Pollok LLP
260 Madison Ave., 22nd Floor
New York, New York 10016

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

Material Misstatements

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered representative made material misstatements to customers in connection with the offer and sale of securities, in violation of the federal securities laws and the rules of registered securities association. *Held*, association's findings of violation and the sanctions imposed are *sustained*.

APPEARANCES:

William A. Rome and *Lisa Rosenthal*, of Hoffman & Pollok LLP, for Kevin M. Glodek.

Marc Menchel, *Alan Lawhead*, *Gary J. Dernelle*, and *Jennifer C. Brooks*, for NASD.

Appeal filed: March 24, 2009
Last brief received: July 2, 2009

I.

Kevin M. Glodek, formerly a general securities representative associated with NASD member firm William Scott & Co. ("William Scott"), appeals from NASD disciplinary action against him.[1] NASD found that Glodek made material misrepresentations to certain of his customers in violation of Section 10(b) of the Securities Exchange Act of 1934,[2] Rule 10b-5 thereunder,[3] and NASD Conduct Rules 2110 and 2120.[4] NASD fined Glodek $25,000 and suspended him in all capacities for six months.[5] We base our findings on an independent review of the record.

II.

Glodek does not dispute NASD's findings of violations and the imposition of the $25,000 fine, but appeals the six-month suspension. We discuss NASD's findings to provide background for our discussion of the sanctions. Glodek entered the securities industry in 1993 and, after associating with several other firms, became associated with William Scott in March 1994. This matter springs from material misrepresentations that Glodek made to certain customers regarding Metropolitan Health Networks, Inc.'s ("MDPA") stock while Glodek was at William Scott.

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[1] Glodek is presently employed as a general securities representative with another NASD member firm.

[2] 15 U.S.C. § 78j(b).

[3] 17 C.F.R. § 240.10b-5.

[4] NASD Conduct Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade," and a violation of any NASD rule constitutes a violation of Rule 2110. *Stephen H. Gluckman*, 54 S.E.C. 175, 185 (1999). NASD Conduct Rule 2120 prohibits members from effecting transactions, or inducing the purchase or sale of a security, by means of any manipulative, deceptive, or fraudulent device.

[5] On July 26, 2007, the Commission approved a proposed rule change filed by National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and the member-regulation, enforcement, and arbitration functions of the New York Stock Exchange. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517 (Aug. 1, 2007) (SR-NASD-2007-053). Because NASD instituted the disciplinary action before that date, it is appropriate to continue to use the designation NASD.

A. MDPA's Business

MDPA was incorporated in 1996 to, according to its annual report, "develop a vertically and horizontally integrated healthcare delivery network." This business model, however, proved unsuccessful, and the company incurred substantial losses through 1999. MDPA's unaudited 1999 quarterly financial statements contained "going concern" statements from company management. The statements noted that MDPA had incurred substantial losses since its inception and that "the Company's ability to continue as a going concern is dependent upon achieving continued profitable operations and positive cash flows from operations or obtaining additional debt or equity financing." The December 1999 unaudited financial statements included the proviso that "[t]hese conditions raise substantial doubt about the Company's ability to continue as a going concern."

MDPA subsequently changed its business plan in 2000 to specialize in "managed care risk contracting." As a result of this new strategy, MDPA secured a managed care contract with Humana Medical Plan, Inc., Humana Health Insurance Company, and Employers Health Insurance Company (collectively, "Humana"). The contract with Humana accounted for more than 95% of MDPA's revenues during the fiscal year that ended on December 31, 2000, and the six months that ended on June 30, 2001, and MDPA acknowledged that "the loss of this contract with the HMO could significantly impact the operating results of the Company." MDPA's annual report for 2000 indicated that it generated $119,000,000 in annual revenues and $4,900,000 in annual profit, although a September 2001 restatement of the 2000 financial statements reduced the reported profit by $400,000.

During the period at issue in this proceeding, MDPA's common stock traded on the Over-the Counter Bulletin Board**.** In March 2001, the stock price ranged from $1.00 per share on March 1 to $1.84 on March 30. On April 30, 2001, the stock price reached a new high, closing the day at $3.12. The stock price peaked on May 7, at $3.34, and declined for the remainder of 2001. By the end of 2001, the stock price had fallen below $1.50 per share. In his testimony, Glodek acknowledged that MDPA was a speculative security.

B. Glodek's Advisory Agreements with MDPA

In 2002, while conducting a routine examination of William Scott, NASD discovered that Glodek had entered into an advisory agreement with MDPA in January 2000. Under the agreement's terms, MDPA gave Glodek a warrant to purchase 225,000 shares of MDPA common stock, at $0.17 per share, in exchange for assisting MDPA in negotiating an agreement with the owner of certain of MDPA's convertible stock. Glodek exercised the warrant and purchased 225,000 shares of MDPA restricted stock approximately ten months later, in October 2000.

In January 2001, Glodek and MDPA extended the advisory agreement for one year and broadened Glodek's responsibilities to include (i) bringing MDPA a strategic market maker, "which would serve as 'eyes and ears' in the trading box," (ii) maintaining a "working

relationship" with MDPA's former CEO, (iii) maintaining a line of communication with MDPA "on a daily basis and periodically rais[ing] capital for the Company's daily operations," (iv) "market[ing] the Company to accredited investors to increase activity on the open market," and (v) introducing MDPA to "mid-tier hedge funds to develop awareness of the market." Pursuant to the extended advisory agreement's terms, Glodek received an additional 150,000 shares of MDPA common stock in September 2001.

After discovering the advisory agreement, NASD reviewed the transcripts of telephone conversations that Glodek had with certain of his customers between March 19, 2001, and April 30, 2001.[6]

C. Glodek's Statements to His Customers

NASD concluded, and Glodek does not dispute, that Glodek made material misstatements related to price predictions, MDPA's AMEX listing, MDPA's debt load, and MDPA's earnings projections.

1. Price Predictions

On several occasions, Glodek provided his customers with specific predictions of MDPA's future stock price.[7] For example, on March 22, 2001, Glodek's customer, Kevin Conners, expressed concern about the price of MDPA's stock, which was then trading at approximately $1.50 per share. Conners expressed to Glodek that he was "getting upset" because MDPA had not issued its 2000 financial statements at that point and that it was a "down market with everybody coming up with earnings problems." Glodek responded by telling Conners that he thought MDPA's stock price "will go to $5 and I'll be blowing out of it between five and ten," and added that "hopefully within two weeks we'll see it's over $2." A few day later, on March 27, 2001, Glodek told another customer, Alan Auerbach, that "[m]y price target . . . is like $5 on the stock." MDPA's stock price closed that day's trading at $1.78. On March 29, 2001, Lindsay Willey complained to Glodek about losses in his account, to which Glodek responded that "I think that the MDPA goes back to $5, I really feel comfortable about it." A few days later, on April 1, 2001, Glodek reiterated to Willey that "I hope that, you know, over the next two to three months we'll be selling the stock, half of our position out at $5."

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[6] NASD chose these dates because MDPA's stock exhibited a large price increase between January and April 2001. William Scott, however, had only begun recording telephone conversations on March 19, 2001. NASD introduced into evidence thirty-five telephone recordings, which included conversations between Glodek and William Scott customers.

[7] Although, as noted above, MDPA's financials improved in 2000 over the company's performance during earlier periods, there was no specific news about MDPA during the period at issue that led Glodek to make the price predictions at issue.

On April 10, 2001, Glodek made a similar statement when customer Pat Kelly asked whether MDPA was "going to do anything in the near term" that would warrant Kelly maintaining his position in MDPA stock rather than liquidating his holdings in favor of another stock. Glodek responded, "I mean, the deal could be the greatest deal, I don't know, but I wouldn't sell [MDPA] here 'cause it's so undervalued." Glodek also stated that MDPA is "going to be $5 hopefully within the next two to three months."

2. Statements that AMEX Listing Was Imminent

Glodek also made several representations that MDPA would qualify for listing on the American Stock Exchange, Inc. ("AMEX") once the company's share price reached $2 or $3 per share. For example, on March 27, 2001, Glodek told Auerbach that MDPA's "[s]tock will probably drift over $2. And then you'll see it approved for . . . the AMEX and then the stock will be off from there."

Glodek, however, had a brief conversation with MDPA's president, Fred Sternberg, on April 10, 2001, during which Glodek asked Sternberg "when do we [MDPA] drop an application for the [AMEX]?" Sternberg responded, "I really haven't had . . . final approval [from the MDPA board of directors]," and stated, "We don't know if it's national NASDAQ or American, and I can't really tell you when." Glodek's prediction of an imminent listing also focused on stock price and ignored the other factors AMEX utilizes when evaluating applications, such as the company's accounts receivables, the outstanding shareholder equity, and the large percentage of business generated from a single payer source.[8]

Later in April 2001, Glodek told customer Mel Ogrin that, if MDPA reported quarterly financial numbers "the way I predict them to come out," then "the stock will easily be over $3. And if that's the case, the company qualifies for AMEX." Glodek added that, "if it's on AMEX, you're going to get another run out of it." A day later, on April 26, 2001, Glodek told Kelly that MDPA was "basically qualifying for AMEX here by Memorial Day weekend." Four days later, MDPA's stock rose above $3 per share, at which time Glodek told Kelly, "[n]ow we're waiting for the numbers to do out [sic] and they just qualified for AMEX under my understanding, so they get the okay to get on the AMEX we're going to get a whole 'nother run of the stock."

3. Statements that MDPA was a Debt-Free Company

Glodek told several customers that MDPA was a debt-free company. For instance, Glodek told Auerbach on March 27, 2001 that "they [MDPA] have no debt." Glodek described MDPA to three other customers over the next two weeks variously as a "company [that] has no debt," a "company [that] went from astronomical amounts of debt in '99 to a debt-free company

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[8] MDPA ultimately applied for a listing on AMEX in June 2001, and AMEX questioned it about all of these areas. MDPA subsequently withdrew its application and did not begin trading on the AMEX until more than two and one-half years later on November 22, 2004.

in 2000," and "a company with no debt." MDPA's financial statements for the fiscal year ending December 31, 2000, however, showed that the company had long-term debt of more than $1.2 million, approximately half of which matured in 2001, and owed more than $2.5 million in unpaid payroll tax liabilities to the Internal Revenue Service.

4. Earnings Projections

Glodek also made quarterly earnings projections regarding MDPA to customer Michael Rosenbaum. On March 26, 2001, Glodek told Rosenbaum that MDPA's earnings were due the following day and that "they're going to do 120 million for the year, and earn about six million in cash . . . . For this quarter right now . . . . Yeah they earned like six million dollars already supposedly in the first quarter, that's what I'm hearing." In reality, MDPA's net income for the first quarter was approximately $1.2 million, which was only 20% of what Glodek predicted MDPA would earn.

D. Procedural History

After reviewing Glodek's recorded telephone conversations, NASD filed a complaint against him on August 1, 2005. NASD alleged that Glodek's statements described above included material misstatements in connection with the offer and sale of securities and that this violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120. After conducting a two-day hearing, an NASD Hearing Panel concluded that Glodek had acted recklessly and committed the violations charged by NASD. The Hearing Panel suspended Glodek in all capacities for sixty days and imposed a $25,000 fine.

NASD appealed the Hearing Panel's determination of sanctions to NASD's National Adjudicatory Council ("NAC"), seeking a bar. Glodek cross-appealed, initially asserting that the Hearing Panel's findings of violations were erroneous, but later abandoned his cross-appeal to the NAC and instead argued that the NAC should affirm the Hearing Panel's decision.

On February 24, 2009, the NAC affirmed the Hearing Panel's findings of violations and the $25,000 fine but modified the imposition of sanctions by increasing the suspension from sixty days to six months. In its decision, the NAC disagreed with the Hearing Panel's decision that there was no pattern to Glodek's misstatements. The NAC concluded that Glodek's misstatements were serious and not an isolated occurrence given that Glodek made at least fourteen misstatements over a period of six weeks to eight different customers. The NAC also noted that Glodek had a personal financial interest in MDPA's stock price and that, although several of Glodek's customers testified on his behalf, NASD "look[s] beyond the interests of particular investors in assessing the need for sanctions to protect investors generally." This appeal followed.

III.

Glodek does not dispute that he made reckless misstatements of material facts about MDPA to his customers in connection with their purchases of MDPA stock and does not dispute that those misstatements violated the antifraud provisions of the securities laws. Our *de novo* review of the record finds that the record supports NASD's findings of violations.

Glodek's specific predictions for MDPA's stock price were made repeatedly and without basis. His prediction of MDPA's quarterly earnings to Rosenbaum was similarly without basis and inaccurate. MDPA was a speculative security, as Glodek acknowledged. We have held that predictions of specific and substantial increases in the price of a speculative security within a relatively short period of time are fraudulent.[9] We have also held that predictions of specific and substantial increases in the price of any security, whether speculative or not, that are made without a reasonable basis are fraudulent.[10] NASD found, and Glodek has not disputed, that Glodek lacked an adequate basis to make these predictions about the future share price and earnings of MDPA and that he acted recklessly in making these misstatements to his customers. While several customers testified that they did not rely on these predictions, NASD is not required to prove reliance.[11]

Although NASD found that Glodek's conduct was merely reckless, rather than intentional, his misstatements with respect to MDPA being debt free and on the verge of listing on the AMEX are troubling. By simply looking at MDPA's financial statements, Glodek would have learned that, during the period that he told several customers that MDPA had no debt, MDPA still had significant debt given the size of its earnings and the length of its operating history. With respect to Glodek's statements that MDPA's listing on AMEX was imminent, Glodek had spoken to MDPA's president about this on April 10, 2001, and he knew (or, in the case of Auerbach, would have known) that MDPA had not filed the necessary application for a listing on AMEX and that MDPA's president had no idea when or for which exchange it might submit an application. In fact, MDPA was not listed on AMEX until 2004. In addition, Glodek's

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[9] *See, e.g., Philip A. Lehman*, Exchange Act Rel. No. 54660 (Oct. 27, 2006), 89 SEC Docket 536, 540; *Dane E. Faber*, 57 S.E.C. 297, 306 n.15 (2004) (citing *Steven D. Goodman*, 54 S.E.C. 1203, 1210 (2001); *Joseph Barbato*, 53 S.E.C. 1259, 1273 (1999); *Cortlandt Investing Corp.*, 44 S.E.C. 45, 50 (1969)); *Donald A. Roche*, 53 S.E.C. 16, 18-19 n.2 (1997) (citing *Irving Friedman*, 43 S.E.C. 314, 320 (1967); *Alfred Miller*, 43 S.E.C. 233, 235 (1966) (noting that such "predictions are a 'hallmark' of fraud")).

[10] *Steven E. Muth*, Exchange Act Rel. No. 52551 (Oct. 3, 2005), 86 SEC Docket 1217, 1229; *Barbato*, 53 S.E.C. at 1273 n.19 (citing *C. James Padgett*, 52 S.E.C. 1257, 1265 (1997), *aff'd sub nom. Sullivan v. SEC*, 159 F.3d 637 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 1070 (1999)); *Roche*, 53 S.E.C. at 19 n.3 (citing *Lester Kuznetz*, 48 S.E.C. 551, 553 (1986)).

[11] *Robert Tretiak*, 56 S.E.C. 209, 223 n.26 (2003).

comments to customers indicate that the share price was the sole determining factor as to whether the stock would be listed on AMEX when, in reality, other factors played an important role in that determination. The record supports NASD's finding that Glodek's misstatements were made recklessly. Accordingly, we find that Glodek violated Exchange Act Section 10(b), Exchange Act Rule 10b-5,[12] and NASD Conduct Rules 2110 and 2120.

IV.

Glodek challenges only the six-month suspension NASD imposed. We must sustain NASD's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive, oppressive, or impose an unnecessary or inappropriate burden on competition.[13]

We find that a six-month suspension is warranted in this case. The NASD Sanction Guidelines (the "Sanction Guidelines") recommend imposition of a fine of $10,000 to $100,000, and a suspension of ten business day to two years; in egregious cases, the Sanction Guidelines recommend a bar.[14]

Although the NAC increased the suspension, the resulting sanction, contrary to Glodek's contention that NASD "demands the most severe sanctions possible," is nonetheless at the lower end of the Sanction Guidelines for non-egregious conduct. Moreover, conduct that violates the antifraud provisions of the securities laws "is especially serious and subject to the severest of sanctions."[15] Glodek's misconduct was at least reckless, and the misstatements were repeated at least fourteen times over the six-week period examined by NASD. As discussed below, NASD

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[12] "[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 (1988). If "there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision," the information is material. *SEC v. Rogers*, 790 F.2d 1450, 1458 (9th Cir. 1986).

[13] 15 U.S.C. § 78s(e)(2). Glodek does not allege, and the record does not show, that NASD's sanctions imposed an undue burden on competition. We find that the $25,000 fine is neither excessive nor oppressive.

[14] *NASD Sanction Guidelines* at 93 (2007). Although the Commission is not bound by the Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *Wanda P. Sears*, Exchange Act Rel. No. 58075 (July 1, 2008), 93 SEC Docket 7395, 7403. NASD found that Glodek's conduct was not egregious.

[15] *Vincent M. Uberti*, Exchange Act Rel. No. 58917 (Nov. 7, 2008), 94 SEC Docket 11406, 11416 n.26 (quoting *Marshall E. Melton*, 56 S.E.C. 695, 713 (2003)) (affirming imposition of bar where applicant had released fraudulent misleading research reports).

considered certain factors to be mitigating and accordingly elected not to impose the maximum two-year suspension for a non-egregious violation under the Sanction Guidelines. We find that a six-month suspension for Glodek's violations of the antifraud provisions is not excessive or oppressive, and we sustain it.

Glodek challenges the six-month suspension imposed by NASD on three principal grounds: 1) that the NAC improperly increased the suspension initially imposed by the Hearing Panel; 2) that NASD did not explain why a shorter suspension would be insufficient; and 3) that NASD did not give adequate weight to mitigating factors.

Glodek argues that NASD abused its power when the NAC increased the length of the suspension that the Hearing Panel initially imposed. Glodek takes the position that the sixty-day suspension assessed by the Hearing Panel is the appropriate sanction for his violations. Although Glodek cites the Hearing Panel's decision in his appeal, "it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review."[16] We have repeatedly held that the NAC reviews the Hearing Panel's decision *de novo* and has broad discretion to review the Hearing Panel's decisions and sanctions.[17] In addition, NASD Rules 9348 and 9349 state that, on appeal from a Hearing Panel decision, the NAC "may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction."[18] We therefore find no abuse of power in NASD's decision to impose a six-month suspension.

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[16] *Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17.

[17] *See Michael B. Jawitz*, 55 S.E.C. 188, 200 & n.24 (2001) (stating that the NAC conducts a *de novo* review and has broad discretion to review any finding in the Hearing Panel decision) (citing *Timothy L. Burkes*, 51 S.E.C. 356, 359 (1993), *aff'd*, 29 F.3d 630 (9th Cir. 1994) (Table)); *cf. Morton Bruce Erenstein*, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3126 (acknowledging NAC's power to conduct a *de novo* review and make its own independent findings), *petition denied*, No. 07-15736 (11th Cir. 2008) (Unpublished). *See also Chris Dinh Hartley*, 57 S.E.C. 767, 776 (2004) (finding NASD's sanctions were not excessive or oppressive where the NAC increased a suspension imposed by Hearing Panel from thirty days to ninety days for violations involving registered representative selling away from his member firm employer); *James B. Chase,* 56 S.E.C. 149, 162 (2003) (finding NASD's sanctions not excessive or oppressive where NAC increased Hearing Panel's suspension from six months to one year for violations involving unsuitable investment recommendations); *Jim Newcomb*, 55 S.E.C. 406, 418 (2001) (finding NASD's sanctions not excessive or oppressive where NAC increased Hearing Panel's suspension from ninety days to two years for violations involving registered representative selling away from his member firm employer).

[18] These Rules were also quoted in the April 11, 2007, letter from NASD delivering the Hearing Panel decision to Glodek and informing him of his right to appeal the decision to the NAC.

Glodek argues that the NAC could not assess a six-month suspension unless its decision was "based on a factual and/or legal finding that sixty days was not sufficient to serve the remedial purpose of those sanctions." However, NASD is not required to state why a lesser sanction would be insufficient in order to justify the sanction it imposed as being remedial.[19] A sanction is appropriate "so long as its choice meets the statutory requirements that a sanction be remedial and not 'excessive or oppressive.'"[20]

Glodek cites NASD's finding that his conduct was not egregious in support of his argument that a sixty-day suspension is a more appropriate sanction for his violations than a six-month suspension. However, the finding that his misconduct was not egregious simply indicated that the Sanction Guidelines did not recommend a bar for these violations. A suspension of up to two years for non-egregious violations such as Glodek's falls within the recommended range.

Glodek also argues that the NAC's description of his misconduct as "serious" misconduct did not provide an adequate basis for its determination to increase the suspension initially imposed by the Hearing Panel because "simply calling the misconduct 'serious' does not explain anything," and that "the term 'serious' is not used anywhere in the Guidelines that apply to this case." Glodek adds that NASD's reliance on "a standard of 'serious[ness]'" was a violation of his due process rights because the term failed to give him fair notice of what type of conduct was prohibited. We have held that generally self-regulatory organizations, such as NASD, are not state actors and thus are not subject to the Constitution's due process requirements.[21] Further, the description of Glodek's conduct as "serious" did not impede the fairness of the proceeding. Glodek was aware that NASD staff was seeking a bar on appeal to the NAC, giving him notice of the gravity with which the staff viewed his conduct.[22] Glodek thus cannot credibly claim that he

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[19] *Paz Sec., Inc. v. SEC,* 566 F.3d 1172, 1176 (D.C. Cir. 2009). *Cf. Horning v. SEC*, 570 F.3d 337, 346 (D.C. Cir. 2009) (holding that Commission need not state why a lesser sanction would be insufficient as long as it "articulated a reasonable, protective rationale for the penalties it selected.").

[20] *Paz*, 566 F.3d at 1176.

[21] *See, e.g., Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket, 13833, 13855 ("[I]t is well established that self-regulatory organizations are not subject to the Constitution's due process requirements."), *appeal docketed*, No. 09-1550 (3d Cir. Feb. 24, 2009).

[22] We have used the adjective "serious" to describe actions that we found to be deserving of sanctions. *See, e.g.*, *Scott B. Gann*, Exchange Act Rel. No. 59729 (Apr. 8, 2009), 95 SEC Docket 15818, 15823 (affirming bar where applicant's conduct was "especially serious and subject to the severest sanctions" (quoting *Jose P. Zollino*, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598, 2608), *appeal docketed*, No. 09-60435 (5th Cir. June 5,

(continued...)

lacked fair notice that "serious" misconduct could result in a six-month suspension. Further, it was the nature of Glodek's conduct, recklessly making fraudulent misstatements, that led to NASD's determination to impose a six-month suspension, not the description of that conduct as being "serious."

In support of his argument that a sixty-day suspension would be a more appropriate sanction for his violations than the six-month suspension ultimately imposed, Glodek contends that a number of factors mitigate the severity of his violations. In choosing not to impose either the bar sought by its staff or the maximum two-year suspension under the Sanction Guidelines for non-egregious conduct, NASD gave "some credit to the fact that MDPA recently had become profitable," thus providing "some basis for Glodek's enthusiasm" in making the unfounded price and earnings predictions. NASD also noted that none of the customers suffered financial losses as a result of Glodek's admitted fraudulent misconduct. NASD further treated as mitigating the fact that three of the four customers who testified stated that they were aware of Glodek's advisory relationship with MDPA at the time he made the misstatements, as well as the fact that several of the customers were sophisticated investors.

Glodek points to other facts that he alleges further mitigate his misconduct. Although Glodek does not deny that he made the misstatements captured on the taped telephone conversations, he asserts that the taped conversations occurred over only a specific six-week period, included conversations only on Glodek's telephone extension, and did not include all conversations on Glodek's extension during the time period. Although Glodek indicates that he believes evidence not in the record might put the misstatements he made on the taped telephone conversations in a different context, he cites no evidence to support this allusion, nor does he deny the accuracy of the transcripts of the conversations.

Glodek further notes that the violations related to fourteen calls out of a total of approximately 600 originally obtained as part of the NASD investigation. NASD rejected Glodek's argument that the misstatements were not part of a pattern of misconduct, and we find that the record supports this determination. Glodek made fourteen misstatements to eight different customers over a six-week period. We disagree with Glodek's characterization of this misconduct as a "small number of violative statements." Instead, we find that the repetition of positive statements about MDPA misstating its true condition, admittedly made recklessly and without basis over a six-week period, evidences a pattern of misconduct by Glodek.

Glodek also cites the testimony of four of the customers to whom Glodek made the violative misstatements, who stated that Glodek did not mislead them, that they did not rely on

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[22] (...continued)
2009)); *Gary Kornman*, Exchange Act Rel. No. 59403 (Feb. 19, 2009), 95 SEC Docket 14246, 14261 (affirming bar where applicant had engaged in "serious misconduct"), *appeal docketed*, No. 09-1074 (D.C. Cir. Feb. 25, 2009); *Sidney C. Eng*, 53 S.E.C. 709, 722 (1998) (concluding bar was an appropriate sanction "given the serious nature of [applicant's] misconduct").

his misstatements, and that they did not lose any money as a result of the misstatements. Several of the customers also testified that they had invested in or had business relationships with MDPA prior to discussing the stock with Glodek, and that they were aware of Glodek's business relationship with MDPA and his financial interest in MDPA's stock price. Regardless of the customers' testimony, Glodek acknowledges that he violated the antifraud provisions of the securities laws. The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate Glodek's misconduct.[23]

Glodek further argues that his lack of any prior disciplinary history and his "cooperation, and perhaps equally importantly, that he did not do anything to impede the investigation" mitigate the seriousness of his at least reckless misconduct and warrant a reduction of his suspension. We have consistently rejected the argument that a lack of disciplinary history should be considered as a mitigating factor in connection with the imposition of sanctions in NASD proceedings.[24] It also does not mitigate the seriousness of Glodek's misconduct that he "did not do anything to impede the investigation." When Glodek registered with NASD, he agreed to abide by its rules, and compliance with his obligation to cooperate with an investigation is not a mitigating factor.[25]

We agree with NASD that Glodek's misstatements represent serious fraudulent misconduct. Registered representatives must not make repeated, reckless, and unfounded misstatements to their customers in connection with the sale of securities, and doing so warrants the imposition of meaningful sanctions. Even though he has admitted the violations, Glodek continues to state that he "did not deceive his customers," indicating that he does not appreciate the seriousness of his misconduct. Glodek continues to be employed as a registered

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[23] *See Ronald J. Gogul*, 52 S.E.C. 307, 312 n.20 (1995) (finding the fact that no customer complained about an investment was "not persuasive" in support of respondent's argument that sanctions should be reduced).

[24] *John D. Audifferen*, Exchange Act Rel. No. 58230 (July 25, 2008), 93 SEC Docket 8129, 8148; *Michael A. Rooms*, Exchange Act Re. No. 51467 (April 1, 2005), 85 SEC Docket 444, 450, *aff'd*, 444 F.3d 1208 (10th Cir. 2006).

[25] *See, e.g., Michael Frederick Siegel*, Exchange Act Rel. No. 58737 (Oct. 6, 2008), 94 SEC Docket 10501, 10519 n. 44 (citing *Rooms*, 85 SEC Docket at 450-51 (finding sanction neither excessive nor oppressive where respondent noted lack of disciplinary history)), *appeal docketed*, No. 09-1379 (D.C.Cir. Dec. 3, 2008); *Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 801 & nn.20 & 22 (finding cooperation during NASD investigation and a lack of disciplinary history not mitigating) (citing cases); *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (3d Cir. 1994)). The Sanction Guidelines provide that an associated person's "substantial assistance" to NASD during an investigation is generally mitigating. Glodek's cooperation was consistent with the responsibility he agreed to fulfill when he became an associated person and does not constitute substantial assistance.

representative with an NASD member firm, and the securities industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants."[26] Given Glodek's lack of understanding of his obligations as a securities professional and his continued employment in the securities industry, a six-month suspension will have the remedial effect of protecting the investing public from harm by impressing upon Glodek and other registered representatives the importance of avoiding reckless, unfounded statements about stocks they recommend to their brokerage customers.[27] We find that the six-month suspension achieves the goals of being remedial and deterring future violations, without being excessive or oppressive.[28]

We find that the sanctions imposed against Glodek are neither excessive nor oppressive and are appropriate remedial sanctions for the violations, and we sustain NASD's findings of violations.[29]

An appropriate order will issue.

By the Commission (Commissioner WALTER, AGUILAR and PAREDES); Chairman SCHAPIRO and Commissioner CASEY not participating.

Elizabeth M. Murphy
Secretary

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[26] *Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995). *See also, e.g.*, *Frank Kufrovich*, 55 S.E.C. 616, 627 (2002) ("A propensity for dishonest behavior is of particular concern in the securities industry, an industry that presents numerous opportunities for abuses of trust."); *Mayer A. Amsel*, 52 S.E.C. 761, 768 (1996) (noting that the securities industry is "rife with opportunities for abuse").

[27] *See SEC v. PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (stating that "general deterrence" may be "considered as part of the overall remedial inquiry," quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

[28] Although we might have reached a different conclusion as to the appropriate sanction for Glodek's fraudulent conduct, we do not have authority to increase a sanction imposed by a self-regulatory organization, but only to determine whether the sanction is excessive or oppressive.

[29] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 60937 / November 4, 2009

Admin. Proc. File No. 3-13414

In the Matter of

KEVIN M. GLODEK

c/o Hoffman & Pollok LLP
Attention: William A. Rome, Esq.
260 Madison Ave., 22nd Floor
New York, New York 10016

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING ACTION OF REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the disciplinary action taken by NASD against Kevin M. Glodek be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary