

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES AND EXCHANGE ACT OF 1934
Rel. No. 65347 / September 16, 2011

Admin. Proc. File No. 3-14054

In the Matter of the Application of

DENNIS S. KAMINSKI
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999 Peachtree Street, NE
Atlanta, Georgia 30309-3996

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY
PROCEEDINGS

Failure to Supervise

Former principal of member firm of registered securities association failed to establish and maintain a supervisory system reasonably designed to achieve compliance with applicable securities laws, regulations, and association rules. *Held*, association's findings of violation and sanction imposed are *sustained*.

APPEARANCES:

Peter J. Anderson and Cheryl L. Haas-Goldstein, of Sutherland Asbill & Brennan LLP, for Dennis S. Kaminski.

Marc Menchel, Alan Lawhead, James Wrona, and Vickie R. Olafson, for NASD.

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Last brief received: December 21, 2010

I.

Dennis S. Kaminski, formerly a general securities principal and senior executive officer of Mutual Service Corporation ("MSC"), an NASD member firm, seeks review of NASD disciplinary action.¹ NASD found that Kaminski violated NASD Conduct Rules 3010 and 2110² by failing to supervise MSC's review of the firm's variable annuity trading. For those violations, NASD suspended Kaminski for eighteen months in all capacities, fined him \$50,000, and required that he requalify before acting in any capacity requiring qualification.³ We base our findings on an independent review of the record.

II.**A. Kaminski's Experience and Responsibilities at MSC**

Kaminski has worked in the securities industry since 1975. He began working for MSC in March 1986. Kaminski's responsibilities at MSC changed over the years, but he supervised the firm's compliance department throughout his tenure. In 2004, when the alleged misconduct occurred, Kaminski served as an executive vice president of the firm and its chief administrative officer. He was also a member of MSC's management committee. Kaminski was responsible for the firm's day-to-day operations and oversaw its compliance, operations, and legal departments. Kaminski supervised the head of the firm's compliance department, vice president Michael Poston, who consistently sought Kaminski's approval on all significant actions. Kaminski also supervised the head of the firm's operations department, senior vice president Susan Coates. In October 2004, Poston left the firm, and Kaminski assumed the position of acting chief compliance officer. In November 2008, Kaminski left MSC and began working for Summit Brokerage Services where, as of the time of his appeal, he was registered, among other capacities, as a general securities principal.

¹ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517.* Because the disciplinary action here was instituted before that date, we continue to use the designation NASD.

² NASD Rule 3010(a) requires a member firm to "establish and maintain a system to supervise the activities" of its registered representatives, registered principals, and other associated persons that is "reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules." Rule 2110 requires that members "observe high standards of commercial honor and just and equitable principles of trade."

³ NASD also assessed joint and several hearing costs of \$19,857 against Kaminski and the two other parties in the disciplinary proceeding.

B. Settlement of Prior NASD Disciplinary Proceeding

In December 2001, MSC executed a Letter of Acceptance Waiver and Consent ("AWC") to settle an NASD disciplinary proceeding involving alleged deficiencies in MSC's supervisory procedures with respect to the firm's variable annuity transactions. The AWC stated that NASD had charged MSC with violating NASD rules, including Rules 3010 and 2110, by failing to (1) establish, maintain, and enforce adequate written supervisory procedures with respect to the firm's variable annuity transactions; (2) establish and maintain a system to supervise registered representatives' exchanges of variable products; (3) evidence principals' suitability reviews of variable annuity transactions; and (4) obtain customer information necessary for determining the suitability of variable products transactions. MSC consented to a censure and a \$35,000 fine, undertook to improve its written supervisory procedures, and agreed to provide NASD with evidence that it had implemented revised supervisory procedures. Kaminski participated in the settlement on behalf of MSC.

As part of its commitments under the AWC, MSC submitted a Corrective Action Statement to NASD that documented the firm's actions to improve its supervisory procedures. Among the corrective actions implemented by MSC was the creation of a separate unit within the compliance department, the Trade Review Team ("TRT"). MSC represented that the TRT would implement a more extensive and detailed review of variable annuity transactions and "1035 exchanges."⁴ The firm's written supervisory procedures required members of the TRT to have Series 24 supervisory licenses.⁵ Gari C. Sanfilippo, a registered general securities principal, was a compliance supervisor in the TRT.

MSC also created the New Variable Business Pending Approval Report (the "Red Flag Blotter") to capture daily variable products transactions and "1035 exchanges" that triggered certain warning signals or red flags.⁶ The TRT reviewed the details of each transaction that

⁴ A "1035 exchange" is a tax-exempt exchange of one annuity contract for another, pursuant to 26 U.S.C. § 1035.

⁵ A Series 24 supervisory license authorizes a general securities principal to "supervise all areas of the member's investment banking and securities business, such as underwriting, trading and market making, advertising, or overall compliance with financial responsibilities." *Qualifications FAQ - Examinations*, FINRA-Compliance-Registration, available at <http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/RegisteredReps/Qualifications/p011087> (last visited on August 15, 2011).

⁶ The Red Flag Blotter was designed to capture variable annuity transactions that triggered the following warning signals: missing age or financial information; customer over age seventy; transaction amount in excess of fifteen percent of customer's net worth; customer's annual income less than \$25,000; transaction amount greater than or equal to twenty-five percent
(continued...)

appeared on the Red Flag Blotter, assessed suitability, approved or rejected each transaction (generally within a three-day window) and forwarded the Red Flag Blotter to the operations department for final firm approval.

Kevin L. Cohen, a junior compliance examiner, was responsible for reviewing the Red Flag Blotter. Cohen reported to Poston, who, in turn, reported to Kaminski. Cohen testified that, on an average day, the Red Flag Blotter detailed information on approximately thirty to forty-five transactions and that it generally took the TRT at least three hours each day to review these transactions. Following its review of each transaction, the TRT would indicate whether it approved or denied the transaction, along with its reasons for the decision. Cohen explained that the TRT was "the primary unit responsible for overseeing and making sure that [MSC's] representatives were recommending transactions that were suitable to [the firm's] customers."

After the TRT completed its review, MSC's operations department conducted a second review. Denise Roth, a first vice president of MSC's operations department, performed the second review and provided final approval of the transactions. Roth reported to Coates, who, like Poston, reported to Kaminski.

Numerous witnesses testified to the importance of the Red Flag Blotter review. Kaminski testified that the Red Flag Blotter was important "because it deals with the review of a business line that . . . has a lot of volume" and it allowed the firm "to determine if there was any suitability issues" with MSC's variable annuity sales.⁷ Poston stated that the Red Flag Blotter was "very important," "critical," and "the most important report we had" because it allowed MSC to keep current on problem transactions for a product that Poston described as "a risk area." Poston further noted that the Red Flag Blotter gave the compliance department "the ability to pick up questionable 1035 exchanges, which were of particular interest" to MSC, and "it allowed [the compliance department] to further investigate the matter and/or take appropriate action, if necessary . . . on a real time basis." Coates explained that it was important that the Red Flag Blotter be reviewed in a timely manner to ensure that MSC's transaction complied with applicable Commission and NASD rules. The Red Flag Blotter also enabled MSC to reverse unsuitable variable annuity transactions without cost within the "free look" period provided by most issuers.

⁶ (...continued)

of customer's annual income; transaction amount greater than \$150,000; IRA within a qualified account; holding period of less than five years; surrender charges greater than \$1,000; and inappropriate sub-account allocations.

⁷ Coates estimated that in 2004 variable annuity transactions comprised thirty percent of MSC's total business. During 2004, MSC processed variable annuity transactions worth more than \$900 million, of which twenty-eight percent were "1035 Exchanges."

C. MSC's Compliance Department

In 2004, MSC's compliance department was responsible for performing numerous daily functions. Among other duties, the compliance department was responsible for training and support, reviewing sales material, inspecting approximately 350 branch offices, handling issues for approximately 350 investment advisors, and investigating customer complaints. The compliance department also was responsible for conducting surveillance through the TRT. The TRT daily reviewed approximately twenty exception reports and blotters and reviewed approximately ten more reports on a weekly or monthly basis. During this period, MSC acquired several smaller independent firms throughout the country, significantly increasing the firm's size and adding to the demands of MSC's compliance department.

At the same time, MSC became the subject of numerous regulatory sweeps and investigations that placed significant demands on the compliance department. For example, NASD required MSC to notify mutual fund customers who purchased MSC's Class A mutual fund shares that they may be eligible for breakpoint discounts (the "Breakpoint Project"). The Breakpoint Project required MSC to send approximately 85,000 claim forms to customers who had purchased Class A shares, track the letters, and review and respond to customer claims.

During 2004, MSC's compliance department became significantly understaffed. By January 2004, the compliance department's normal staff of approximately seventeen was down to approximately twelve, and more left as the year continued. By the end of the year, the compliance department had six examiners, three of whom were "brand new," no administrative assistant or first vice president, and no permanent chief compliance officer. Poston also testified that MSC paid compliance personnel salaries that were not competitive, making it difficult for MSC to replace staff who left.

Poston sent Kaminski numerous memoranda and emails dated between January 2004 and October 2004, advising Kaminski of the compliance department's urgent need for additional staff, inability to hire qualified staff at the salaries offered, increasing staff departures, and difficulty in meeting the department's responsibilities and increased workload. For example, at Kaminski's direction in late 2003, Poston prepared and sent Kaminski a memorandum, dated January 8, 2004, outlining the compliance department's staffing problems and requirements in detail. In this memorandum, Poston requested that an "additional position be allocated to the TRT function since it's [sic] role, and importance has been expanding." Kaminski did not reply to Poston's memorandum.

Poston wrote Kaminski another memorandum, dated March 31, 2004, stating that "current compliance staffing is below standards we have established in the past and that immediate action should be taken to increase our compliance resources." Poston also wrote that there was a "serious experience gap," with only Poston having extensive compliance experience, and reminded Kaminski that Poston was still "awaiting authorization" to hire additional personnel for the TRT. Poston concluded his memorandum by stating that "some of these

compliance resource shortfalls . . . could be viewed as serious." In an April 2004 email, Poston again informed Kaminski that the firm was having difficulty hiring additional staff for the compliance department because the salaries it was offering were too low.⁸ Poston testified that he told an April 2004 meeting of senior management, which included Kaminski, that the compliance department was "really in a state of crisis in that [it] had significant burdens with the breakpoint analysis going on" and was "falling behind on [its] surveillance reports," its "regularly scheduled branch office inspections," and "a host of other related types of activities." Poston testified that he was unable to schedule further meetings with Kaminski or other MSC management to address the staffing problems facing the compliance department.

Kaminski also received other warnings about the TRT's staffing problems. In an email dated March 4, 2004, which Coates forwarded to Kaminski and Poston, Roth wrote that the "[variable annuity] exception transactions are at least two weeks behind [and that] [i]t appears that the TRT is understaffed." Kaminski did not respond to Coates' email. Coates also forwarded to Kaminski an April 28, 2004 email from Roth in which Roth noted that Sanfilippo had advised him that the TRT needed assistance in keeping up with the Red Flag Blotters.

In late March 2004, Kaminski approved the hiring of temporary staff in the compliance department to assist with the increasing workload. However, Poston reported to Kaminski that the temporary staff was not sufficiently knowledgeable to be of assistance. Kaminski suggested that Poston obtain other temporary staff, but directed Poston to offer any new staff a lower salary.

Kaminski also testified during an on-the-record interview ("OTR") in March 2005 that he had numerous problems with Poston's leadership of the compliance department and the TRT.⁹ Kaminski stated that he became increasingly concerned about Poston's management abilities. According to Kaminski, Poston's performance was unsatisfactory with respect to "accountability," "delegated" authority, and "follow-up." Kaminski also noted that Poston's attendance at work was "erratic" and that Poff, MSC's president, and other senior officers were

⁸ In the email, Poston told Kaminski that eight job applicants refused to even meet with the firm when told the salary range. Kaminski responded by asking Poston to mention the problem casually to John Poff, President and Chief Operating Officer of MSC. Kaminski testified that he also brought the matter up with Poff.

⁹ In this investigative testimony, Kaminski maintained that he did not discover that the Red Flag Blotters were not being reviewed until informed of this by Sanfilippo in July 2004. In December 2005, Kaminski's counsel wrote to the NASD examiners that, upon further reflection, Kaminski wished to amend his investigative testimony to acknowledge that Poston had advised him in early March 2004 and then again in late May 2004 that the compliance department was having difficulty performing its review functions on a timely basis. Counsel's letter added, however, that Poston had assured Kaminski that the problems with the Red Flag Blotter reviews had been "fixed."

unhappy with Poston's technical, leadership, and analytical skills. Kaminski stated that he had informed Poston that Poston needed to improve his handling of his "duties and responsibilities."

Poff corroborated that Kaminski had been dissatisfied with Poston's job performance. During an OTR in September 2006, Poff testified that, in 2003 and 2004, Kaminski became increasingly concerned and dissatisfied with Poston's job performance. Poff mentioned, for instance, that Kaminski told him that he had once found Poston asleep at his desk. Poff also stated that Kaminski had told him that Poston had missed several deadlines and had been unresponsive to MSC branch office employees who had requested assistance from the compliance department.

D. Backlog of Red Flag Blotter Reviews

Because of its increased duties and reduced staffing, the compliance department fell behind in its daily review of the Red Flag Blotter. Cohen testified that, by February 2004, he had fallen two or more weeks behind in his daily review of the Red Flag Blotter. Poston testified that the Breakpoint Project had a "profound" effect on the compliance department's resources and that the compliance department was "having trouble keeping up with a lot of the TRT blotters beginning in 200[4] around the February/March time frame." Poston stated that the TRT was able to do periodic reviews of the Red Flag Blotter through mid-March, but wasn't able to "keep[] to our normal discipline of trying to get it done on a daily basis."

As the volume of Breakpoint Project customer claims increased, the compliance department fell further behind in its review of its surveillance reports, including the Red Flag Blotter. On or about March 15, 2004, after a meeting between Kaminski and Poston, MSC ceased the daily review of the Red Flag Blotter. From March 15 through May 31, 2004, the TRT conducted no reviews of the Red Flag Blotter.¹⁰

In May 2004, Kaminski and Poston determined that Cohen should resume his daily review of the Red Flag Blotter on June 1. When Cohen resumed his daily review, the TRT had a backlog of approximately 597 variable annuity transactions that had not been reviewed. Poston directed Cohen to ignore the backlog and review the Red Flag Blotter going forward from June 1.

In August 2004, Kaminski transferred three people from other MSC departments to the compliance department to assist the TRT in reducing its backlog of surveillance reports, including the Red Flag Blotter. Kaminski temporarily assigned Graham Taylor, a marketing services representative who specialized in retirement plans, to the TRT to assist in the review of the Red Flag Blotter backlog. While knowledgeable about variable annuities, Taylor had no compliance experience and did not have a Series 24 license. Kaminski did not recall that the firm's procedures required that a registered principal with a Series 24 license conduct the Red

¹⁰ The TRT ceased reviewing the Red Flag Blotter during this period, but MSC continued to compile the data and to produce the Red Flag Blotter.

Flag Blotter review or that Taylor was not a Series 24 principal. Kaminski advised Taylor that Kaminski would be his direct supervisor, but that Taylor would take his day-to-day instructions from Sanfilippo and Cohen. Thereafter, Kaminski was largely unaware of Taylor's day-to-day activities.

Sanfilippo and Cohen assigned Taylor to review the 597 variable annuity transactions on the backlogged Red Flag Blotters, and Cohen trained Taylor on how to conduct this review.¹¹ All of the witnesses agreed that, after Cohen trained Taylor, he worked largely unsupervised. During his review of the backlogged Red Flag Blotters, Taylor began backdating documents to create the impression that his reviews had occurred closer to the transaction dates.¹²

E. NASD Examinations and Investigations

On May 18, 2004, several senior MSC officers, including Kaminski, Poston, Poff, and MSC's Chairman and CEO John Dixon, met with NASD staff in Atlanta to discuss, among other matters, MSC's supervisory practices for its variable annuity business, which was an ongoing concern of NASD (the "May 2004 Meeting"). Kaminski sent an email to Poston before the meeting instructing him not to provide any incriminating information to NASD staff. During the meeting, the MSC officers showed NASD staff copies of the firm's Red Flag Blotter. However, neither Kaminski nor the other MSC officers told NASD staff that the firm was not currently reviewing the Red Flag Blotter.¹³ Kaminski also incorrectly advised NASD staff that the firm had implemented a monthly surveillance report for the firm's "1035 exchanges" when, in fact, it did not begin this report until the fall of 2004. Poston sent Kaminski an email the next day stating that the meeting had gone better than expected and commented that "[i]n some ways, it's too easy answering their [NASD's] concerns." Poston further wrote that "[w]e were able to dodge yet again" and "[m]aybe we're getting too good at this game."

In the fall of 2004, NASD began an investigation into whether MSC's variable annuity "1035 exchanges" for 2003 and 2004 had been suitable for the firm's customers.¹⁴ The

¹¹ Cohen did not review most of Taylor's work. Cohen instead spot-checked a sample of about five to ten of the backlogged transactions per week. Sanfilippo did not review any of Taylor's work.

¹² Roth similarly backdated her approval dates on backlogged Red Flag Blotters to correspond to the dates Taylor inputted.

¹³ Kaminski also failed to inform NASD of the Red Flag Blotter suspension in a July 14, 2004 letter he sent to the NASD in response to allegations of the firm's continuing NASD rule violations.

¹⁴ This was separate from the earlier NASD examination that led to the meeting
(continued...)

investigation began because of the firm's high level of variable annuity exchanges. In January 2005, as part of that investigation, Kaminski provided testimony in an OTR (the "January 2005 OTR"), but did not inform NASD examiners of the suspension and backlog in reviewing the Red Flag Blotter.

F. NASD Disciplinary Proceeding

In July 2007, the NASD Department of Enforcement ("Enforcement") charged Kaminski with one count of "fail[ing] to carry out [his] supervisory responsibilities" and "fail[ing] to reasonably supervise the firm's review of its variable annuity transactions" in violation of NASD Rules 3010(a) and 2110.¹⁵ An evidentiary hearing was held at which Kaminski was represented by counsel, gave testimony, and submitted exhibits into evidence. At the hearing, Kaminski did not dispute that he was aware of staffing problems in the compliance department in early 2004. However, there was conflicting testimony as to Kaminski's responsiveness to these problems and to his knowledge of their impact on the TRT's timely review of the Red Flag Blotter.

Poston testified that he and Kaminski generally held weekly meetings to discuss the workings of the department, but that during the period at issue, they met more frequently and discussed the Red Flag Blotter backlog and the compliance department's staffing problems in great detail. He told Kaminski that it was necessary to "get[] more experienced people" in order to timely review the Red Flag Blotter and other surveillance reports. Poston testified further that Kaminski failed to provide additional staff and resources. Coates testified that she too had numerous conversations with Kaminski in which she expressed her concern that the TRT was understaffed.

Kaminski testified that, contrary to Poston's and Coates's assertions, he responded in a "positive" and "timely manner" to requests for additional staff and resources. Kaminski further testified that, while he "seldom push[ed] for adding staff," he felt that the demands of the Breakpoint Project justified new hiring and authorized Poston to hire temporary staff. Kaminski could not recall discussing the TRT's problems in timely reviewing the Red Flag Blotter with Poston or Coates or receiving Roth's emails about those problems.

There was also conflicting testimony about whether Kaminski ordered or participated in the decision to suspend the review of the Red Flag Blotter. According to Poston, Kaminski decided to suspend the review so that the Breakpoint Project could proceed and told Poston of this decision during a meeting in Kaminski's office on or about March 15, 2004, after which Poston ordered Cohen to suspend his review of the Red Flag Blotter. Poston's administrative

¹⁴ (...continued)

between NASD examiners and senior MSC personnel on May 18, 2004.

¹⁵ Enforcement also brought charges against Coates, Poston, Roth, Sanfilippo, Cohen and Taylor.

assistant, Julie Hamilton, testified that Poston and Kaminski held a closed door meeting just before Poston announced the suspension of the Red Flag Blotter review. Hamilton testified further that Poston did not possess the authority to make such a decision unilaterally. Poston also testified that, following Kaminski's decision to suspend the review, Poston regularly updated Kaminski about the status of the backlog and the compliance department's continued problems.

Kaminski, by comparison, testified that he became aware in April or May 2004 that there was a backlog of blotters unreviewed by the TRT, but that it was not until July that he learned that the Red Flag Blotter review had been suspended. Kaminski denied that Poston had told him in March or April 2004 that it would be necessary to temporarily suspend the Red Flag Blotter review. Kaminski also denied ordering the suspension.

On December 16, 2008, the Hearing Panel found that Kaminski had violated NASD Rules 3010(a) and 2110 by failing to reasonably supervise MSC's review of its variable annuity transactions between approximately March 15, 2004 and May 31, 2004. The Panel determined that Kaminski should be suspended in all principal capacities for six months and fined \$50,000. The Hearing Panel found Kaminski's testimony that he was unaware of the Red Flag Blotter suspension until July 2004 not to be credible when viewed against Poston's consistent testimony that Kaminski ordered the suspension. The Hearing Panel also found that, during Poston's tenure at MSC, he consistently sought approval from Kaminski on all significant actions. The Hearing Panel determined that Kaminski knew by March 2004 that the compliance department was "in crisis" and that he ordered the compliance department to suspend its review of the Red Flag Blotter so that it could focus on completing the Breakpoint Project.

Pursuant to NASD Rule 9312,¹⁶ the Review Subcommittee of the NASD National Adjudicatory Council ("NAC") elected to review the Hearing Panel's sanction determination with respect to Kaminski. The NAC concluded that Kaminski's misconduct was egregious. It held that Kaminski was involved in MSC's settlement of the 2001 NASD disciplinary action concerning the firm's failure to properly supervise its variable annuity trading, and that he knew that MSC had instituted the procedures for reviewing the Red Flag Blotter, in part, as a response to that disciplinary action. The NAC found that, despite this knowledge, Kaminski failed to reasonably supervise MSC's review of its variable annuity transactions. The NAC affirmed the \$50,000 fine imposed on Kaminski, but increased the six-month principal suspension to an eighteen-month suspension in all capacities and required that Kaminski requalify before acting in any capacity requiring qualification.

¹⁶ NASD Rule 9312 permits members of the NAC or the Review Subcommittee to call for the review by the NAC of a Hearing Panel decision.

III.

Section 19(e) of the Securities Exchange Act of 1934 provides that, in reviewing a disciplinary proceeding by a self-regulatory organization ("SRO"), we shall determine whether the associated person engaged in the conduct found by the SRO, whether the conduct violated the SRO rules at issue, and whether those rules were applied in a manner consistent with the purposes of the Exchange Act.¹⁷ In conducting our review, we apply a preponderance of the evidence standard to determine whether the record supports NASD's findings that Kaminski's conduct violated NASD's Rules.

NASD Rule 3010(a) requires that a member "establish and maintain" a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with [NASD Rules]." In addition to an adequate supervisory system, "[t]he duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation."¹⁸ "Once indications of irregularity arise, supervisors must respond appropriately."¹⁹ "In large organizations it is especially imperative that those in authority exercise particular vigilance when indications of irregularity reach their attention."²⁰ "The standard of 'reasonable' supervision is determined based on the particular circumstances of each case."²¹

Kaminski was an executive vice president who oversaw MSC's operations and compliance departments, the two departments that provided all of MSC's variable annuity transaction oversight. Kaminski had participated in the settlement negotiations with NASD in 2001 that resulted in the creation of the Red Flag Blotter, and he admitted below that it was an important compliance tool.

We agree with NASD that Kaminski "ignored staffing shortages, failed diligently to inform senior management of compliance needs, placed individuals from other departments in compliance positions for which they were not qualified, failed effectively to communicate to senior management the need to restrict business expansion to that which could be supervised adequately, and failed to limit the firm's activities when resources were not made available."

¹⁷ 15 U.S.C. § 78s(e).

¹⁸ *Michael T. Studer*, 57 S.E.C. 1011, 1023-24 (2004); *see also John B. Busacca, III*, Exchange Act Rel. No. 63312 (Nov. 12, 2010), 99 SEC Docket 34481, 34498 n.48.

¹⁹ *La Jolla Capital Corp.*, 54 S.E.C. 275, 285 (1999).

²⁰ *Wedbush Sec., Inc.*, 48 S.E.C. 963, 967 (1988).

²¹ *John A. Chepak*, 54 S.E.C. 502, 513 n.27 (2000) (citing *Christopher J. Benz*, 52 S.E.C. 1280, 1284 (1997), *appeal denied*, 168 F.3d 478 (3d Cir. 1988) (Table)).

Kaminski received numerous red flags from Poston, Coates, and other members of his staff that MSC's compliance department was having difficulty meeting its responsibilities in the face of increased regulatory requirements and the rapid expansion of its business, but he failed to act decisively to address them. Kaminski knew about the compliance department's staffing problems as early as 2003 when he directed Poston to prepare a written report to address these problems. In response to this directive, Poston sent Kaminski detailed memoranda outlining the department's staffing problems and seeking additional experienced staff and resources. Coates and Poston met with Kaminski weekly to discuss compliance, operations, and regulatory concerns, including inadequate staffing. Poston "constantly" provided updates to Kaminski on the department's status, and Coates spoke to Kaminski several times about inadequate staffing and other problems with the compliance department.

Kaminski responded with actions that failed to address the urgency of the department's staffing needs. He suggested that Poston write up another summary of the department's problems that Kaminski would present to the executive committee. Although Kaminski approved the hiring of temporary staff in the compliance department to assist with the increasing workload, when Poston reported to Kaminski that the temporary staff was not sufficiently knowledgeable, Kaminski suggested that Poston try to obtain other temporary staff, but directed that Poston offer them lower pay.

Kaminski also had serious doubts about Poston's ability to perform the duties delegated to him. Kaminski testified that he was alarmed with Poston's performance during 2003 and 2004. Poff testified that Kaminski once found Poston asleep at his desk. Poff further testified that he and Kaminski discussed several deadlines Poston had missed and the fact that Poston had been unresponsive to associated persons who sought compliance assistance. Despite these doubts, Kaminski failed to follow up and ensure that Poston was properly exercising his delegated supervisory duties. Rather, he left Poston to his own devices, providing only minimal assistance and guidance despite Poston warning him repeatedly of the mounting problems in the compliance department. Thus, when Kaminski became aware in March 2004 that the TRT had fallen behind in its review of the Red Flag Blotters, he had already received ample red flags that the compliance department was in crisis because of regulatory and business pressure.

However, rather than take the steps necessary to address these problems, Kaminski ordered the TRT to suspend its review of the Red Flag Blotter on or about March 15, 2004. As noted, MSC created the Red Flag Blotter as a result of settlement negotiations with NASD, in which Kaminski had participated, to remedy deficiencies in MSC's supervision of variable annuity transactions. He and others testified below about the importance of the Red Flag Blotter as a critical compliance tool. It allowed MSC to monitor the suitability of its variable annuity sales, a product that comprised a significant portion of MSC business and was viewed as a "risk area." The Red Flag Blotter identified questionable 1035 exchanges, permitted the compliance department to investigate and/or take action on a real time basis, and generally permitted MSC timely to reverse unsuitable variable annuity transactions without cost to customers. By ordering

the TRT to suspend its review of the Red Flag Blotter instead of devoting attention and resources to the compliance department, Kaminski demonstrated a significant failure of supervision.

Kaminski claims that he did not order the TRT to suspend its review of the Red Flag Blotter in March 2004, and that he did not learn of the suspension until July 2004. However, Poston testified that he spoke with Kaminski about the advisability of suspending the Red Flag Blotter review and that Kaminski directed him to suspend the review so that the Breakpoint Project could proceed. Poston also testified that, following Kaminski's decision to suspend the review, Poston regularly updated Kaminski about the status of the backlog and the compliance department's continued problems. The NASD Hearing Panel found Kaminski's testimony "not credible" that he was unaware of the suspension until well after it had occurred, finding instead that Kaminski had given the order to suspend the review so that the compliance department could focus on completing the Breakpoint Project. We give considerable weight and deference to the credibility findings of an initial fact-finder because such findings are based on hearing the witnesses' testimony and observing their demeanor.²²

Evidence in the record corroborates the Hearing Panel's credibility determination. Hamilton, Poston's administrative assistant, testified that Kaminski met with Poston just before Poston announced the suspension decision. She testified further that Poston did not have the authority to make a unilateral decision to halt the TRT's review of the Red Flag Blotter. Kaminski testified that Poston had never before made a decision as significant as halting a trading surveillance program without consulting Kaminski first. Based upon our review of the record, we see no reason to reject the Hearing Panel's credibility determinations.

Kaminski contends that when he was finally apprised of the critical nature of the problem, he "immediately took action . . . to clean up this mess" and "supported [Poston]'s request for additional resources . . . and the hiring of temporary employees." Kaminski along with Poston determined that Cohen should resume the Red Flag Blotter review, but Cohen was directed to ignore the backlog and only review the blotter going forward. Later Kaminski assigned Taylor to review the 597 variable annuity transactions on the Red Flag Blotter backlog, but Taylor was not a principal, did not have a Series 24 license, was not an expert in variable annuities, and had never worked in compliance. Kaminski testified that he was unaware that the firm's procedures required that the TRT personnel be registered principals with Series 24 licenses or that Taylor was not a Series 24 principal. Taylor did not understand that he was conducting any type of suitability review, and he testified that he did not believe he was qualified to conduct such a review. There was no dispute among the witnesses that Taylor was essentially unsupervised in his new position. During his review of the backlogged Red Flag Blotters, Taylor began backdating documents to create the impression that his reviews occurred closer to the transaction dates. Although Taylor reported to Kaminski, Kaminski testified that he "really did not know exactly what Mr. Taylor was doing." Kaminski failed to detect Taylor's backdating.

²² *Joseph J. Vastano, Jr.*, 57 S.E.C. 803, 811 (2004); *Anthony H. Barkate*, 57 S.E.C. 488, 499 (2004).

Accordingly, we find that Kaminski failed to reasonably supervise MSC's review of its variable annuity transactions in violation of NASD Rules 3010 and 2110.

IV.

Pursuant to Exchange Act Section 19(e)(2), we sustain NASD sanctions unless we find, giving due regard to the public interest and the protection of investors, that the sanctions are excessive, oppressive, or impose an unnecessary or inappropriate burden on competition.²³ NASD's Sanction Guidelines for failing to supervise provide for a monetary penalty of between \$5,000 and \$50,000 and a suspension in all supervisory capacities for up to thirty days.²⁴ In egregious cases, the Guidelines suggest "suspending the responsible individual in any or all capacities for up to two years or barring the responsible individual."²⁵ NASD found that Kaminski's conduct was egregious, and that a suspension of eighteen months in all capacities, along with a requirement that Kaminski requalify before acting in any capacity requiring qualification, and a fine of \$50,000, was warranted.

Proper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and NASD rules.²⁶ It is also a critical component to ensuring investor protection.²⁷ The Sanction Guidelines applicable to a failure to supervise violation advise adjudicators to consider the "[n]ature, extent, size and character of the underlying misconduct."²⁸ Kaminski's failure to adequately supervise the compliance department led to the suspension of the TRT's review of the Red Flag Blotter for more than two months and to 597 variable annuity transactions that had triggered one or more red flags not being timely reviewed. The Red Flag Blotter was one of MSC's most important trade surveillance tools and essential to ensuring that the firm complied with its suitability obligations under the federal securities laws and NASD's

²³ 15 U.S.C. § 78s(e)(2). Kaminski does not claim, nor does the record show, that NASD's action imposed an unnecessary or inappropriate burden on competition.

²⁴ We are "not bound by the Guidelines, [but] use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2)." *CMG Inst'l Trading, Inc.*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13814 n.38.

²⁵ *NASD Sanction Guidelines* at 108 (2007).

²⁶ *See Rita H. Malm*, 52 S.E.C. 64, 68 (1994) (holding that the responsibility for "[a]ssuring proper supervision is a necessary component of broker-dealer operations").

²⁷ *See Robert E. Strong*, Exchange Act Rel. No. 57426 (Mar. 4, 2008), 92 SEC Docket 2875, 2894 (noting that NASD's supervisory rules "serve important policy objectives related to investor protection").

²⁸ *NASD Sanction Guidelines* at 108.

rules. MSC created it as part of a settlement with NASD to address MSC's previous failure to supervise its variable annuity sales. After Kaminski became aware that the TRT had fallen behind in its review, he did not take steps to remedy this failure in the firm's procedures but instead ordered the TRT to suspend its review. Given MSC's disciplinary history, Kaminski's participation in the 2001 settlement with NASD that created the Red Flag Blotter, and the importance of the Red Flag Blotter in protecting MSC's customers, we find that Kaminski's supervisory failure was egregious.

The Sanction Guidelines also call for consideration of "[w]hether respondent ignored 'red flag' warnings that should have resulted in additional supervisory scrutiny."²⁹ As discussed above, Kaminski ignored or gave half-hearted responses to warnings from Poston and Coates about the compliance department's increasing staffing and resources deficiencies that should have resulted in additional supervisory scrutiny. He also failed to heed his own doubts and other red flags about Poston's abilities as a supervisor. We agree with NASD that, given these numerous red flags, Kaminski's failure to supervise was reckless.

The Sanction Guidelines further direct adjudicators to consider whether the respondent attempted to conceal information from NASD or provided inaccurate or misleading testimony or documentary information to NASD.³⁰ At the May 2004 Meeting, Kaminski failed to disclose that MSC had suspended the Red Flag Blotter review, despite the fact that the meeting was held for the express purpose of discussing, among other matters, MSC's supervisory practices for its variable annuity business. Before the meeting, Kaminski directed Poston to ensure that he did not provide any incriminating information to NASD staff. During the meeting, Kaminski misrepresented to NASD staff that MSC had implemented a "1035 exchange" surveillance report when, in fact, this did not occur until the fall of that year. In his January 2005 OTR, Kaminski again failed to advise NASD staff of the suspension of the Red Flag Blotter review.

Kaminski argues that he was denied a fair hearing because NASD considered his efforts to conceal his misconduct to be an aggravating factor without giving him sufficient notice or an opportunity to defend against the claim. NASD, however, did not find that Kaminski violated NASD rules by misleading staff. It instead considered his misleading conduct in its sanction determination as allowed by the Guidelines. As we have stated before, an adjudicator may consider matters that fall outside the underlying rule violation when determining whether the sanction serves a remedial purpose that will deter future misconduct and improve overall standards in the securities industry.³¹

²⁹ *Id.*

³⁰ *Id.* at 7 (Principal Consideration 12).

³¹ *See, e.g., J. Stephen Stout*, 54 S.E.C. 888, 915 n.64 (2000) (considering subsequent arbitration scheme when determining sanction in a suitability case); *Joseph J.*

Moreover, Kaminski had notice of and an opportunity to respond to NASD's claim that he failed to disclose problems with MSC's review of its variable annuity products. For example, Kaminski testified about the May 2004 Meeting and cross examined other witnesses who testified about the meeting, including Poston and an NASD examiner. He also had the opportunity to explain his OTR testimony, which was admitted into evidence at the hearing.³²

Kaminski asserts that NASD did not specifically ask about the Red Flag Blotter review at the May 2004 Meeting or in the January 2005 OTR. Kaminski maintains that he would have introduced evidence regarding the parameters of NASD's inquiries and elaborated on his responses. However, the May 2004 Meeting and January 2005 OTR did not take place in a vacuum, but rather in the context of NASD examinations and investigations of a firm that had demonstrated serious failures with respect to its supervision of variable annuity transactions. The Red Flag Blotter review, which MSC implemented as part of a settlement with NASD to remedy these deficiencies, had been suspended for more than two-months. Kaminski does not dispute that he failed to inform NASD of this fact at either the May 2004 Meeting or the January 2005 OTR. Under these circumstances, we agree with NASD that Kaminski's failure to inform NASD of the halt in the review of the Red Flag Blotters was an aggravating factor.

Kaminski maintains that the sanctions imposed on him are "disproportionally severe," noting that NASD has "previously imposed lower fines and far shorter suspensions for more serious misconduct." Kaminski also points out that the NAC reduced the bar that the Hearing Panel imposed on Cohen and Sanfilippo to an eighteen-month suspension in all capacities and a requirement that they requalify before acting in any capacity requiring qualification (the same suspension that NASD imposed on Kaminski) - despite the fact that they had been found responsible for falsifying books and records and misrepresenting compliance efforts. However, the NAC reduced the sanctions because it found, contrary to the Hearing Panel's findings, that although Cohen and Sanfilippo were registered principals, they were "fairly low in the compliance department chain of command" and were "not part of the firm's management structure," nor did they contribute to "establishing the gamesmanship culture at MSC." In any event, we consistently have held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by

³¹ (...continued)

Barbato, 53 S.E.C. 1259, 1282 (1999) (considering respondent's conduct in contacting witnesses in its sanction analysis of a fraud charge).

³² Kaminski argues that FINRA did not include the January 2005 OTR transcript among its proposed exhibits. However, his co-respondent, Sanfilippo, included the transcript among the proposed exhibits that he offered before the hearing, and the Hearing Officer admitted the transcript into the record during the hearing.

comparison with action taken in other cases.³³ Accordingly, we reject Kaminski's contention that the sanctions are disproportionately severe.

Kaminski further asserts that the sanction is "punitive" because suspending him in all capacities is not sufficiently tailored to his alleged misconduct, which involved only supervisory violations. Kaminski contends the appropriate sanction in these circumstances is a supervisory suspension. We disagree. Kaminski's disregard of his supervisory responsibilities led to a breakdown in the firm's compliance system and to what NASD accurately described as a "lax regulatory culture." Given Kaminski's lack of understanding of his obligations as a securities professional and his continued employment in the securities industry, a suspension of eighteen months in all capacities will have the remedial effect of protecting the investing public from harm by impressing upon Kaminski and others the importance of complying with the federal securities laws and NASD rules.³⁴

Kaminski points to several facts that he argues are mitigating and to which he asserts NASD gave insufficient consideration. Kaminski maintains that his "distinguished history" and "unblemished record in the industry" over his thirty-year career should be seen as a mitigating counterpoint to this singular "blemish" on his career. We have repeatedly stated that a "lack of disciplinary history is not a mitigating factor for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional."³⁵ Kaminski's argues that his "unilateral" and "swift" actions upon discovering the

³³ See, e.g., *John M.E. Saad*, Exchange Act Rel. No. 62178 (May 26, 2010), 98 SEC Docket 28591, 28600, appeal filed, No. 10-1195 (D.C. Cir. July 23, 2010); *Scott Epstein*, Exchange Act Rel. No. 59329 (Jan. 30, 2009), 95 SEC Docket 13833, 13865 n.75, appeal filed, No. 09-1550 (3rd Cir. Feb. 24, 2009); *John R. D'Alessio*, 56 S.E.C. 396, 427 (2003); *Robert A. Amato*, 51 S.E.C. 316, 321 n.25 (1993); see also *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 187 (1973) (holding that "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases"); *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (holding that, because the "Commission is not obligated to make its sanctions uniform," court would not compare sanction imposed in case to those imposed in previous cases).

³⁴ We find no merit in Kaminski's claim that the NAC erred in imposing sanctions that exceeded those sought by NASD Enforcement. We have repeatedly held that the NAC reviews the Hearing Panel's decision *de novo* and has broad discretion to modify the Hearing Panel's decisions and sanctions. See, e.g., *Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22035 n.17 (citing *Phillippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800), *aff'd*, 2011 WL 1086638 (2d Cir. 2011); FINRA Rules 9348 & 9349.

³⁵ *Epstein*, 95 SEC Docket at 13865 (quoting *Keyes*, 89 SEC Docket at 801 n.20);
(continued...)

suspension of the Red Flag Blotter review are mitigating. However, as discussed above, Kaminski repeatedly failed to address the growing problems with the Red Flag Blotter review and the compliance department.

We find no merit to Kaminski's claim that the NASD's failure to find that his supervisory failures caused customer harm was not a mitigating factor.³⁶ As several witnesses testified, the TRT's review of the Red Flag Blotter was a critical tool for monitoring the firm's sales of variable annuity products. Kaminski's supervisory failure resulted in the TRT not reviewing 597 variable annuity transactions in the Red Flag Blotter in a timely manner. As NASD found, the result of Kaminski's failure to supervise could have been devastating to the firm or its customers.

Accordingly, we find that a suspension of eighteen months in all capacities, along with a requirement that Kaminski requalify before acting in any capacity requiring qualification, and a fine of \$50,000 achieves the goals of being remedial and deterring future violations, without being excessive or oppressive.

An appropriate order will issue.³⁷

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

Elizabeth M. Murphy

³⁵ (...continued)

see also Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006) (holding that lack of disciplinary history not a mitigating factor); *Robert J. Prager*, 58 S.E.C. 634, 666–67 (2005) (finding no mitigation in respondent's "otherwise 'pristine' disciplinary record"); *Ernest A. Cipriani*, 51 S.E.C. 1004, 1007 & n.15 (1995) (rejecting respondent's "otherwise spotless" disciplinary record as a mitigating factor for purposes of sanctions).

³⁶ *See PAZ Sec. Inc.*, Exchange Act Rel. No. 57656 (April 11, 2008), 93 SEC Docket 5122, 5129 n.18 (holding that applicants' failures to comply with NASD rule "are not mitigated because those failures did not, in themselves, produce a monetary benefit to Applicants or result in injury to the investing public"), petition denied, 566 F.3d 1172 (D.C. Cir. 2009); *Coastline Fin., Inc.*, 54 S.E.C. 388, 396 (1999) (rejecting absence of customer harm as a mitigating factor for sanctions).

³⁷ We have considered all of the arguments advanced by the parties. We have rejected or sustained those arguments to the extent that they are inconsistent or in accord with the views expressed in this opinion.

Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65347 / September 16, 2011

Admin. Proc. File No. 3-14054

In the Matter of the Application of

DENNIS S. KAMINSKI
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Sutherland, Asbill & Brennan LLP
999 Peachtree Street, NE
Atlanta, Georgia 30309-3996

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NASD

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

ORDERED that the disciplinary action taken, and costs imposed, by NASD against
Dennis S. Kaminski be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary