SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62178 / May 26, 2010

Admin. Proc. File No. 3-13678

In the Matter of the Application of

JOHN M.E. SAAD
Law Office of Gregory Bartko, LLC
c/o Gregory Bartko, Esq.
3475 Lenox Road, Suite 400
Atlanta, GA 30326

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Misappropriation

Registered securities association found that registered representative, while associated with member firm, intentionally filed a false reimbursement claim and misappropriated member firm's funds. *Held*, association's findings of violations and sanctions are *sustained*.

APPEARANCES:

*Gregory Bartko, Esq.*, for John M.E. Saad.

*Marc Menchel*, *Gary Dernelle*, and *Carla Carloni*, for the Financial Industry Regulation Authority, Inc.

Appeal filed: November 4, 2009
Last brief received: February 17, 2010

## I.

John M.E. Saad, formerly a registered representative associated with Homer, Townsend & Kent ("HTK"), a FINRA member firm, appeals from FINRA disciplinary action.[1] FINRA found that Saad misappropriated funds of HTK's parent company, member firm Penn Mutual Life Insurance Co. ("Penn Mutual"), in violation of NASD Rule 2110 by accepting reimbursement based on Saad's submission of false expense reimbursement requests and receipts. FINRA barred Saad in all capacities and assessed costs.[2] We base our findings on an independent review of the record.

## II.

The parties do not dispute the underlying facts in this matter. In the summer of 2006, Saad served as Penn Mutual's regional director in Atlanta, Georgia, and was registered with Penn Mutual's broker-dealer affiliate, HTK, as an investment company products and variable contracts limited representative, general securities representative, and general securities principal. Saad testified at his disciplinary hearing that his chief duties were recruiting insurance agents to sell Penn Mutual's insurance products as independent contractors and helping existing Penn Mutual independent contractors build their business.

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[1] On July 26, 2007, we 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 certain member-regulation, enforcement, and arbitration functions of the New York Stock Exchange ("NYSE"). *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Although the investigation into Saad's misconduct was initiated before the consolidation, the complaint was filed afterwards. For simplicity's sake, we refer only to FINRA.

[2] NASD Rule 2110 requires that members "observe high standards of commercial honor and just and equitable principles of trade."

As part of the effort to consolidate and reorganize NASD's and NYSE's rules into one FINRA rulebook, NASD Rule 2110 (which was otherwise unchanged) was codified as FINRA Rule 2010, effective December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the conduct at issue occurred before NASD Rule 2110 was codified as FINRA Rule 2010, we will continue to refer to NASD Rule 2110. NASD Rule 2110 is applicable to Saad through NASD General Rule 115 (now FINRA Rule 140), which provides that persons associated with a member have the same duties and obligations as a member. *See generally Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135 (Dec. 10, 2009), 97 SEC Docket 23299, 23300 n.4 (describing NASD Rules 2110 and 140 with respect to the rule consolidation).

Saad's career at Penn Mutual started promisingly. He was a large producer, traveled extensively on recruiting trips, and earned various production awards. By the end of 2005, however, Saad's production declined, to the point he "had almost halted travel for a period of time." By June 2006, Saad received a production warning from Penn Mutual. During his disciplinary hearing, Saad blamed his drop in productivity on an illness of one of his year-old twin sons, although he acknowledged that he neither told his employer about his son's health problems nor requested time off as a result.

**A. Saad's Fabricated Receipts and False Expense Report**

Saad testified that, the month after receiving the production warning, he had "a really good recruiting opportunity" in Memphis, Tennessee, scheduled for Monday, July 10, 2006. Saad testified that he intended to travel to Memphis the day before the meeting. On the way to the airport, however, he learned the meeting had been canceled. Upon learning of the canceled meeting, Saad "panicked because my travel was down dramatically." Saad testified that he instead checked into an Atlanta-area hotel for two nights: Sunday, July 9 and Monday, July 10. Saad explained that he did not go into the office during this time "[b]ecause I had told me [sic] staff that I was going to be in Memphis. I was concerned with the fact that when that appointment cancelled, that if I had gone to the office, that it would have been evident that I hadn't done any travel."

Two weeks later, Saad flew to Penn Mutual's home office, where, Saad testified, "they formally told me, essentially, that it was a 60-day production warning." He explained, "Essentially, I was told that production had fallen, and they needed to see results."

A week after this production warning, Saad submitted his July expense report for processing. Typically, Saad paid office expenses and overhead directly out of an office account into which Penn Mutual wired $6,300 at the beginning of each month. However, for expenses Saad incurred personally, including travel, Saad would submit a month-end expense report, along with receipts, to the office administrator, who would then submit the materials to Penn Mutual. Once approved, Saad would transfer the approved amount out of the office account into his personal account or use that money to pay his credit card bill directly.

By the time Saad submitted his July expense report, he "felt total pressure . . . to show that this recruiting trip [to Memphis] had occurred." He added, "I had to show that I was somewhere because the only way that the home office could verify my travel or work ethic or whatever was being questioned was on my expense reports." Saad submitted an expense report that included a receipt of $478 for a round-trip airline itinerary, showing travel from Atlanta to Memphis on July 9, 2006 and returning on July 11, 2006. Saad also included a hotel receipt of $274.44 that showed a two-night stay in a Memphis-area hotel for July 9 though July 11, 2006. These receipts, of course, were fakes. Saad admitted that he fabricated them by copying information and company logos from the Internet.

Unrelated to the claimed Memphis trip, Saad also submitted a $392.19 receipt for the purchase of a cell phone, dated July 14, 2006. The section on the receipt indicating the name of the cell phone recipient was blacked out, and a handwritten note on the receipt stated: "new cell phone, old Treo broke." Saad acknowledged writing the note on the receipt, but could not recall whether he had blacked out the recipient's name (although, he acknowledged during his investigative "on-the-record" testimony, "I'm assuming I probably did").

Regardless of whether he blacked out the name, Saad admitted he had not purchased the cell phone to replace his phone. He instead purchased the phone for Magdaline Moser, an insurance agent affiliated with Aflac, Inc.'s Atlanta office. Saad testified that he hoped to recruit Moser to sell Penn Mutual products and that, in exchange for the cell phone, Moser would introduce him to other prospects in Aflac's Atlanta office.

Saad stated that he had never before purchased a cell phone for someone he was recruiting, but claimed "I had the right to expense items that I felt necessary to help them with their production." He also claimed that he had purchased other equipment, such as laptops, for people he was recruiting and "thought that a cell phone is something that could have helped with [Moser's] production." When asked why – if the expense was legitimate, as he claimed – he altered the receipt instead of just submitting it at face value, Saad responded, "if I put down that I spent a cell phone [sic] for a new rep, then, you know, I just wanted – you know, I was under the pressure of the situation that I just said, you know, I'm just going to put it down as my own, but I should have put it down as exactly the way it should have been put down and expensed it that way." The Hearing Panel, "having observed Respondent's demeanor while testifying," did not find credible Saad's claim that his purchase of a cell phone for Moser "was consistent with previously approved business equipment." Moreover, Saad stated during his on-the-record testimony that his purchase of a cell phone for Moser "probably wouldn't have been" an approved expense.

**B. Discovery of Saad's Falsified Expense Report**

The falsehoods in Saad's expense report might have gone unnoticed, except Saad also submitted an authentic, unaltered receipt for four drinks purchased on Sunday evening, July 9, at an Atlanta hotel lounge. The office administrator questioned Saad about the drink receipt, noting it showed Saad was in Atlanta – not Memphis – on the evening of July 9. Saad withdrew the receipt and threw it away, because, he explained, "if she [the office administrator] knew that I was in Atlanta, then it wouldn't help my production."

The office administrator retrieved the receipt from the trash. She submitted it, along with her concerns, to Penn Mutual's home office, writing that Saad's receipts for Memphis were part of a "BOGUS TRIP." When Penn Mutual approached Saad about his claimed expenses, Saad

admitted he had not gone to Memphis. He offered to reimburse Penn Mutual, but Penn Mutual declined reimbursement and terminated him.[3]

**C. FINRA Investigation**

Approximately two months after Saad was terminated, FINRA asked Saad to provide information about his discharge by HTK and whether he improperly submitted expense reports for expenses not actually incurred, and, if so, why.[4] Saad responded that, "[a]fter an extensive audit, it was determined that on my July 2006 expense report a charge of under $750 for a business trip that had yet to occur was posted." He added, "I must stress that I was given authority to manage expenses for more than $75,000 annually over the past 5 ½ years (over $350,000). It is an under $750 business expense from one (1) expense report that Penn Mutual has found to be 'improperly submitted' after an extensive audit."

Approximately six months later, in April 2007, a FINRA examiner telephoned Saad to ask again about his termination. According to a FINRA file memorandum about that conversation, Saad acknowledged "HTK's issue with the airfare and hotel expense is valid," but claimed that he did not know Moser and that he did not know why HTK was questioning his cell phone expense. Saad, however, later admitted buying the cell phone for Moser during his on-the-record testimony.

In July 2007, FINRA informed Saad that it would bring a disciplinary proceeding against him for "submitting false expense reports to Penn Mutual, the parent company of [HTK], and receiving reimbursement to which you were not entitled, in violation of NASD Conduct Rule 2110." FINRA wrote that, if Saad wished to settle the matter, he could sign an enclosed Letter of Acceptance, Waiver and Consent, pursuant to which Saad would "consent to the imposition of a bar from the securities industry."

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[3] HTK also terminated Saad, effective September 16, 2006. Saad testified at his disciplinary hearing that he was then associated with National Life Insurance Company, but not registered to sell securities.

[4] The Office of Insurance for the Commonwealth of Kentucky ("Kentucky Office of Insurance") also asked Saad to provide a detailed response to "a complaint involving your actions as an agent." Saad answered that, "[a]fter an extensive audit, [Penn Mutual] determined that on my July 2006 expense report a charge of under $750 for a business trip that had yet to occur was posted." Saad added, "I asked [Penn Mutual] if I could repay the isolated expense deemed 'improperly submitted' but they declined to accept my offer. They in turn decided to terminate my employment." The Kentucky Office of Insurance informed Saad approximately six weeks later that, "[a]t this time, there is insufficient evidence to support administrative action against you."

Saad declined FINRA's offer, and FINRA filed a complaint against Saad in September 2007. The complaint contained one cause of action: "Conversion of Funds" in violation of NASD Rule 2110. The specific allegations were that "Saad submitted false expense reports and receipts to Penn Mutual . . . resulting in payments to Saad of $1,144.63 to which he was not entitled," including the false airline, hotel, and cell phone expenses. The complaint concluded, "Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110."

**D. FINRA Hearing and Appeal**

A FINRA hearing panel (the "Hearing Panel") held a disciplinary hearing on April 16, 2008. Saad admitted to falsifying receipts, submitting a falsified expense report, and, as a result, receiving $1,144.63 in reimbursement. Saad explained that he had purchased the cell phone "for an individual that I was recruiting, and I felt I had the latitude to make that call." He added, "with regard to the Memphis trip, I feel that I was basically not where I should have been, but at the same time was here working for good reason under the pressure that I was under felt that, unfortunately, I had to do that."

Before Saad testified, FINRA presented testimony from the examiner who conducted the investigation into Saad's conduct. The examiner testified, in part, that there was "no question whatsoever" that Saad initially denied knowing Moser. When Saad was also asked during his hearing about whether he had denied knowing Moser, he responded, "I don't recall making that comment. At that time, if I – if it was a situation I was being questioned, I had no idea – you know, all these questions, I mean, they could have been asked, I just don't remember any at that time." Saad urged the Hearing Panel "to give me some consideration with my family and my career on the line, that you could look at this situation where it wasn't necessarily that funds were converted, but a situation where it was more of an accounting misnomer that occurred."

In a decision dated August 19, 2008, the Hearing Panel found Saad had "deliberately decided to deceive his employer in two separate reimbursement transactions, once with the false travel expenses and again with the cell phone." The panel concluded that Saad "converted Penn Mutual's funds, in violation of NASD Conduct Rule 2110, when he obtained reimbursement for fictitious expenses," and assessed costs and imposed a bar in all capacities, noting that "[a]ccording to the *FINRA Sanction Guidelines*, a bar is standard for conversion regardless of the amount converted."

Saad appealed to FINRA's National Adjudicatory Council ("NAC"), which affirmed the Hearing Panel's findings of violations and sanctions. The NAC found "that Saad's deceitful conduct was premeditated and egregious." The NAC also noted that, unlike the Hearing Panel, "[w]e have not based our sanctions on a finding that Saad converted Penn Mutual's funds. Instead, we base our decision on the fact that no mitigating factors exist." This appeal followed.

## III.

NASD Rule 2110 requires associated persons to "observe high standards of commercial honor and just and equitable principles of trade." As we have held, "conduct that reflects negatively on an applicant's ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade."[5] FINRA's disciplinary authority under NASD Rule 2110 is also "broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security."[6]

Here, Saad admits he intentionally falsified receipts, submitted a fraudulent expense report, and accepted $1,144.63 in unentitled reimbursement. Saad's submission of the falsified expense report, and resulting financial benefit, reflects negatively on both Saad's ability to comply with regulatory requirements and his ability to handle other people's money. The entry of accurate information in firm records is a foundation for FINRA's regulatory oversight of its members, and "[i]t is critical that associated persons, as well as firms, comply with this basic requirement."[7] We thus find Saad's conduct to be inconsistent with just and equitable principles of trade and that, as a result, Saad violated NASD Rule 2110.[8]

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[5] *Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8986; *see also Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam) (affirming Commission's finding that representative violated just and equitable principles of trade by misappropriating funds belonging to a political club while serving as that organization's treasurer), *aff'g*, 52 S.E.C. 339, 342 (1995) (holding that "Vail commingled his and the Club's funds for the sake of his own personal convenience" and, in doing so, "make[s] us doubt his commitment to the high fiduciary standards demanded by the securities industry"); *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) ("Conduct Rule 2110 applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money.").

[6] *Vail*, 101 F.3d at 39; *see also Manoff*, 55 S.E.C. at 1162 (noting that application of Rule 2110 to business-related conduct not involving a security "is well-established"); *Thomas E. Jackson*, 45 S.E.C. 771, 772 (1975) ("Although [applicant's] wrongdoing in this instance did not involve securities, the NASD could justifiably conclude that on another occasion it might.").

[7] *Charles E. Kautz*, 52 S.E.C. 730, 734 (1996) (stating that "regardless of his Firm's policy or knowledge . . . it is a violation of NASD Rules to enter false information on official Firm records"); *see also Ortiz*, 93 SEC Docket at 8986-87 (finding that representative violated NASD Rule 2110 by submitting false information to his employer, a member firm).

[8] *See, e.g.*, *Manoff*, 55 S.E.C. at 1161 (finding that representative's unauthorized use of co-worker/customer's credit card numbers violated just and equitable principles of trade); *James A. Goetz*, 53 S.E.C. 472, 477-78 (1998) (finding that representative violated just and

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## IV.

Saad does not dispute any relevant facts and expressly admits "that his actions violated NASD Rule 2110." He nevertheless challenges the proceeding because, he claims, FINRA "failed to give him clear notice of the specific charge alleged." Saad claims FINRA violated his due process rights by labeling the sole cause of action in its complaint as "Conversion," but subsequently sanctioning him on a basis other than conversion. He claims he was "rendered incapable of preparing an appropriate defense," and he analogizes FINRA's "actions [as] tantamount to a Judge deciding to convict a defendant of bank fraud when the defendant was only charged with and provided a defense against money laundering." We disagree.

"'As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, notice is sufficient.'"[9] Here, FINRA specified in its complaint that Saad had violated Rule 2110 by submitting false expense reports and receipts to Penn Mutual and receiving, as a result, $1,144.63 in unentitled reimbursement. Saad, who was represented by counsel since at least the time FINRA issued its complaint, had a full opportunity to defend himself against these factual allegations, which he admitted.[10] FINRA staff also notified Saad before filing the complaint that they believed a bar was an appropriate sanction for

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[8] (...continued)
equitable principles of trade by misleading his member firm into believing he had contributed $1,600 in personal funds to a private school to procure a matching gift in that amount for the school).

[9] *Janet Gurley Katz*, Exchange Act Rel. No. 61449 (Feb. 1, 2010), ___ SEC Docket ___, ____ (quoting *Steven E. Muth*, Exchange Act Rel. No. 52551 (Oct. 3, 2005), 86 SEC Docket 1217, 1233 n.40), *appeal filed*, No. 10-1068 (D.C. Cir. Mar. 26, 2010); *see also Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C. Cir. 1979) (noting that, in administrative proceedings, "[i]t is sufficient if the respondent 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation") (quoting *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 350 (1938)); *Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22036 (noting that self-regulatory organizations, such as FINRA, generally "are not state actors and thus are not subject to the Constitution's due process requirements"), *appeal filed*, No. 09-5325 (2d Cir. Dec. 28, 2009).

[10] *See William C. Piontek*, 57 S.E.C. 79, 90-91 (2003) (finding that respondent who "understood the issue[s]" and "'was afforded full opportunity' to litigate" them had sufficient notice of the charges against him (quotations and citations omitted)); *Jonathan Feins*, 54 S.E.C. 366, 378 (1999) ("Administrative due process is satisfied where the party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding.").

his conduct.[11] Saad cites to no argument or evidence that his supposed lack of notice prevented him from introducing.[12] We thus conclude Saad was adequately aware of the issues in controversy and the potential sanctions involved.[13]

**V.**

Saad further challenges the sanction imposed as excessive. Exchange Act Section 19(e)(2) directs us to sustain FINRA'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.[14] Saad contends that his actions here warranted a "much less severe sanction" and asserts that, in barring him, FINRA placed him "in

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[11] FINRA's position was also consistent with the range of sanctions recommended by the FINRA Sanction Guidelines. *See infra* notes 25-27 and accompanying text.

[12] Saad claims "[t]he initial charge of Conversion of Funds put [him] in the unenviable position of starting at the worst sanction and trying to justify a lesser sanction," and he spends a substantial portion of his appeal arguing that his conduct did not amount to conversion. We need not address those issues. The NAC did not find that Saad's misconduct amounted to conversion, and we review only the NAC's decision on appeal. *See Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17 ("[I]t 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.").

[13] In his initial Application for Review to the Commission, Saad asserted that FINRA's introduction of the drink receipt was part of an overall bias "obstruct[ing] Mr. Saad's right to a fair and impartial hearing." Although the drink receipt was included in the parties' joint exhibit, Saad argued that FINRA's tactics, including introduction of the drink receipt, was evidence that, "[f]rom the onset, this was clearly a trial of adultery and not an administrative proceeding of securities violation(s) or the protection of the public." Saad also argued in his Application for Review that FINRA had misled him about his need for an attorney during his on-the-record interview with FINRA's enforcement staff. The FINRA examiner who interviewed Saad, however, denied that she ever advised Saad that he did not need an attorney, and the letter summoning Saad to appear for the on-the-record interview (along with the accompanying addendum) included several statements advising Saad that he could be represented by counsel.

Saad did not mention these two arguments in his Opening Brief to the Commission, and in his Reply Brief, he stated, "though he still believes in those arguments, he understands he waived those arguments." After conducting our *de novo* review of the record, we find that these two arguments concerning bias and Saad's on-the-record testimony provide no basis for overturning FINRA's decision.

[14] 15 U.S.C. § 78s(e)(2). Saad does not allege, and the record does not show, that FINRA's action imposed an undue burden on competition.

the same category of risk to the public as those individuals who actually misused or converted customer funds, some of whom were not even barred." Saad supports his claims by pointing to what he asserts are (i) inconsistencies between FINRA's sanction determination here and those made in other FINRA disciplinary proceedings; (ii) a misapplication of relevant FINRA sanction guidelines; and (iii) mitigating circumstances. We discuss each in turn.

**A. Prior Disciplinary Proceedings**

Saad cites nearly fifty FINRA disciplinary actions (the majority of which are settlements) he believes "illustrates the unconscionable result reached in this case."[15] Saad notes, for example, that FINRA agreed to impose a two-year suspension on another representative who allegedly submitted inaccurate travel and expense reports and, as a result, obtained approximately $600 from his member firm.[16] Saad asks why, if FINRA was willing to settle for a two-year suspension in that case, his offer to settle for a similar sanction "was not acceptable in his case."[17]

It is well established, however, that the appropriateness of a sanction "depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action taken in other proceedings."[18] "This is especially true with regard to

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[15] The sanctions imposed in these actions ranged from as short as ten days to as long as a bar.

[16] *Gary Steven Swiman*, FINRA Case No. 2008012094801 (2009) (accepting settlement of a two-year suspension).

[17] Saad states in his brief that he submitted an offer of settlement to FINRA on December 27, 2007 "that provided for three months of suspension, a $5,000 fine, and restitution."

[18] *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5134 (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) ("The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.")), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *see also Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) ("The Commission is not obligated to make its sanctions uniform, so we will not compare this sanction to those imposed in previous cases."); *Hiller v. SEC*, 429 F.2d 856,

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settled cases, where, as we have frequently pointed out, pragmatic factors may result in lesser sanctions."[19]

**B. Application of Sanction Guidelines**

Saad next asserts that FINRA misapplied its own Sanction Guidelines when it relied on the Sanction Guideline for "conversion or improper use of funds." Saad claims his "actions, though admittedly wrong, constituted falsification of records and do not constitute conversion or improper use of funds." He argues FINRA instead should have consulted the guideline for "falsification of records."

Saad, however, did more than just falsify an expense report. He also misappropriated employer funds, and FINRA may consider all the facts and circumstances surrounding the misconduct at issue when deciding to impose a bar.[20] Saad alleges that the guideline for improper use applies only to misconduct involving the misuse of "customer funds" – which his misconduct did not involve. However, the guideline for "improper use of funds" is not so limited.[21] While the guideline cites NASD Rule 2330 (which prohibits members from making "improper use of a customer's funds or securities") as one of the rules violations to which the guideline applies, the guideline also states that it applies to violations of NASD Rule 2110, the rule at issue here. Moreover, the guidelines make clear they "are not intended to be absolute"

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[18] (...continued)
858 (2d Cir. 1970) ("[W]e cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding.").

[19] *Anthony A. Adonnino*, 56 S.E.C. 1273, 1295 (2003), *aff'd*, 111 Fed. Appx. 46 (2d Cir. 2004); *see also Gary Kornman*, Exchange Act Rel. No. 59403 (Feb. 19, 2009), 95 SEC Docket 14246, 14260-61 (affirming bar and rejecting applicant's comparison to an allegedly similar, settled matter that involved a lesser sanction), *aff'd*, 592 F.3d 173 (D.C. Cir. 2010).

[20] *Cf. Katz*, __ SEC Docket at ___ (finding NYSE had not erred when it based its imposition of a bar, in part, on conduct not charged in the complaint); *J. Stephen Stout*, 54 S.E.C. 888, 915 n.64 (Oct. 4, 2000) (finding respondent's ongoing involvement in an arbitration scheme to be relevant when deciding to affirm a bar because his conduct "pose[d] a high risk of future securities law violations"); *Joseph J. Barbato*, 53 S.E.C. 1259, 1282 (1999) (finding respondent's contact of Division witnesses to be relevant when deciding to affirm a bar because respondent's conduct suggested he may commit future violations).

[21] Saad's only authority for his interpretation of the guideline for "improper use" is a case from the United States Court of Appeals for the Ninth Circuit, *Carter v. SEC*, which Saad claims "describ[es] the NASD Conduct Rule 'Improper Use of Funds' as misuse of customer funds not rising to conversion." 726 F.2d 472 (9th Cir. 1983). *Carter*, however, does not involve, or even mention, NASD Rule 2330, "misuse of funds," or "conversion." *See Carter*, 726 F.2d at 473-74.

and, "[f]or violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations."[22] The sanction guidelines, in other words, "merely provide a 'starting point' in the determination of remedial sanctions."[23]

FINRA reasonably determined here that the guideline for improper use was the most analogous, and we have affirmed sanctions that relied on that guideline in similar circumstances.[24] Furthermore, FINRA's decision to impose a bar is consistent with either guideline. The guideline for improper use, which FINRA used, recommends a bar unless "the improper use resulted from respondent's misunderstanding of his or her customer's intended use of the funds or securities, or other mitigation exists."[25] The guideline for falsification of records recommends a bar in "egregious" cases and a lesser sanction only in cases "where mitigating factors exist."[26] Here, FINRA found Saad's conduct to be "egregious" and "that no mitigating factors exist." FINRA's decision to impose a bar was thus consistent with the guideline for either conversion or falsification of records.[27]

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[22] FINRA Sanction Guidelines 1 (2007 ed.), *available at* http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf.

[23] *Hattier, Sanford & Reynoir*, 53 S.E.C. 426, 433 n.17 (1998) (affirming fine in excess of guideline's recommended range), *aff'd*, 163 F.3d 1356 (5th Cir. 1998); *see also Peter C. Bucchieri*, 52 S.E.C. 800, 806 (1996) ("NASD's guidelines are not meant to prescribe fixed penalties but merely to provide a 'starting point' in the determination of remedial sanctions.").

[24] *See Manoff*, 55 S.E.C. at 1165-66 & n.16 (noting that "[b]ecause there was no specific NASD Sanction guideline that applied to the unauthorized use of credit cards, the NASD relied on the guideline for 'Conversion or Improper Use'"); *Eliezer Gurfel*, 54 S.E.C. 56, 63 n.15 (1999) (affirming bar for forging signature on firm's commission checks and depositing funds in personal bank account that fell within the range of both the Sanction Guideline for "conversion or improper use" and "forgery and/or falsification of records"), *petition denied*, 205 F.3d 400 (D.C. Cir. 2000).

[25] Sanction Guidelines, at 38.

[26] Sanction Guidelines, at 39.

[27] "Although the Commission is not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2)." *CMG Institutional Trading, LLC*, Exchange Act. Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13814 n.38.

## C. Mitigating Factors

Saad finally contends that "the record supports that indisputable mitigating factors exist pursuant to the Guidelines which neither FINRA nor the NAC chose to address." In particular, Saad argues that his misconduct was an "aberrant" lapse in judgment and that, "[w]hile he is not looking for a reward for doing what he should have been doing, it is important to note that he engaged in this conduct during an extremely short period of his career while he was under severe stress with a hospitalized infant and a stressful job environment." He claims FINRA also failed to consider that HTK had fired him before FINRA detected his misconduct and that his misconduct did not involve customers or large amounts of money.[28]

FINRA, however, devotes several pages of its opinion to rejecting Saad's various mitigation claims. FINRA expressly rejected the notion that "Saad's misconduct is essentially a one-time lapse in judgment." FINRA detailed Saad's decision "to allow his staff and Penn Mutual to believe he traveled to Memphis" and his continued willingness to be "less than fully truthful during the initial phases of FINRA's and other regulators' investigations of this matter." As FINRA observed, Saad also "had many opportunities to reverse his initial lapse in judgment." But, "[r]ather than expose himself, he chose to compound his lies with an ongoing and intentional charade in support of which he fabricated documents." FINRA also noted that an otherwise clean disciplinary history was not mitigating[29] and that, "[a]lthough Saad's wrongdoing in this instance did not involve customer funds or securities, Saad's willingness to lie to Penn Mutual and HTK and obtain funds to which he was not entitled indicates a troubling disregard for fundamental ethical principles which, on other occasions, may manifest itself in a customer-related or securities-related transaction."[30]

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[28] *See* Sanction Guidelines, at 7 (stating that a FINRA adjudicator should consider, among other things, (i) whether the member firm disciplined the respondent for the misconduct at issue prior to regulatory detection, (ii) the "number, size and character of the transactions at issue," and (iii) "the level of sophistication of the injured or affected customer").

[29] *See, e.g.*, *Manoff*, 55 S.E.C. at 1165-66 (rejecting claim that lack of disciplinary record justifies conduct).

[30] *See, e.g.*, *Gurfel*, 54 S.E.C. at 58, 64 (affirming bar where former registered representative converted firm's commission checks to his own use); *Leonard J. Ialeggio*, 53 S.E.C. 601, 605 (1998) ("[T]hat Ialeggio abused only his employer's trust is not mitigative."), *aff'd*, 185 F.3d 867 (9th Cir. 1999) (Table); *Mayer A. Amsel*, 52 S.E.C. 761, 768 (1996) (affirming bar despite the fact that "no customer suffered as a result of any of his actions"); *Ronald H. V. Justiss*, 52 S.E.C 746, 750 (1996) (finding bar to be warranted because, although applicant's misconduct "did not involve direct harm to customers, it flouts the ethical standards to which members of this industry must adhere").

Saad engaged in highly troubling conduct that raises serious doubts about his fitness to work in the securities industry, "a business that is rife with opportunities for abuse."[31] Saad lied to his employer about going on a recruiting trip, and he fabricated receipts, submitted a falsified expense report, and accepted unjustified reimbursement as a result of that lie. Saad also sought reimbursement for a cell phone he misled his employer into believing he purchased for himself through a falsified receipt and expense report, and Saad attempted, at least initially, to recoup money he spent at an Atlanta-area hotel lounge at the same time he claimed he was in Memphis. After his employer caught and fired him, Saad further misled investigators by telling them he sought reimbursement for a trip that "had yet to occur" and by denying that he had purchased the cell phone for someone other than himself.[32] As FINRA summarized, "Saad's actions reveal a willingness to construct false documents and then lie about them that suggests that his continued participation in the securities industry poses an unwarranted risk to the investing public."[33]

Imposition of a bar is not intended to punish Saad, but "to protect the public interest from future harm at his hands."[34] Saad's behavior, including accepting reimbursement based on false

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[31] *Amsel*, 52 S.E.C. at 768 (affirming bar where applicant "exhibited a disturbing disregard for the standards that govern the securities industry").

[32] Saad attempts to explain some of his statements to investigators by arguing that, "[i]n the initial investigation, Saad was not represented by a lawyer, was very concerned about the repercussions of his statements and he cannot be faulted for being cautious with his statements." At best, however, these excuses explain Saad's failure to remember certain details when FINRA first interviewed him. They do not explain Saad's misleading claims about whether he sought reimbursement for an upcoming trip or his outright lie about buying the cell phone for himself. "Providing false information in any form, be it data submitted to the clearing process, or forms or testimony to a self-regulatory organization, is an especially serious matter." *Hal S. Herman*, 55 S.E.C. 395, 405 (2000) (affirming bar and noting that representative's submission of false information "emphas[izes] the appropriateness of the sanction imposed here").

[33] *See, e.g.*, *Ortiz*, 93 SEC Docket at 8989-90 (affirming bar where representative attempted to conceal misconduct by supplying false information during an investigation); *Gregory W. Gray, Jr.*, Exchange Act Rel. No. 60361 (July 22, 2009), 96 SEC Docket 19038, 19053 (affirming imposition of sanctions by considering aggravating factors, including that applicant sought to conceal his conduct); *Fox & Co. Invs.*, Exchange Act Rel. No. 52697 (Oct. 28, 2005), 86 SEC Docket 1895, 1912-13 (finding imposition of a bar to be neither excessive or oppressive where applicants, among other things, concealed their conduct); *Robin Bruce McNabb*, 54 S.E.C. 917, 928-29 (2000) (sustaining bar where applicant attempted to conceal his misconduct), *aff'd*, 298 F.3d 1126 (9th Cir. 2002).

[34] *Conrad P. Seghers*, Investment Advisers Act Rel. No. 2656 (Sept. 26, 2007) 91 SEC Docket 2293, 2307 (quoting *Leo Glassman*, 46 S.E.C. 209, 212 (1975)) (affirming bar

(continued...)

receipts and efforts to conceal his misconduct, provides no assurance he will not repeat his violations. A bar will prevent Saad from putting customers at risk and will serve as a deterrent to others in the securities industry who might engage in similar misconduct.[35]

For these reasons, we find that FINRA's decision to bar Saad is neither excessive nor oppressive and that the sanction serves a remedial rather than punitive purpose.

An appropriate order will issue.[36]

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

Elizabeth M. Murphy
Secretary

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[34] (...continued)
despite respondent's suggestion that the Commission should consider "the financial circumstances and hardship suffered by Seghers and his family" by noting, in part, "that the sanctions that we impose are not intended to punish"), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008); *see also William Louis Morgan*, 51 S.E.C. 622, 629-30 (1993) (affirming bar despite applicant's claim "that because of the bar he and his family are suffering undue hardship").

[35] *See McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005) (noting that deterrent value is a relevant factor in deciding sanctions); *see also, e.g.*, *Manoff*, 55 S.E.C. at 1165-66 (affirming bar for using another's credit card numbers to effect unauthorized transactions); *Herman*, 55 S.E.C. at 405 (affirming bar and noting that "[p]roviding false information in any form . . . emphas[izes] the appropriateness of the sanction imposed here"); *Gurfel*, 54 S.E.C. at 63-64 (affirming bar for misappropriating firm's insurance commissions).

[36] We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62178 / May 26, 2010

Admin. Proc. File No. 3-13678

In the Matter of the Application of

JOHN M.E. SAAD
Law Office of Gregory Bartko, LLC
c/o Gregory Bartko, Esq.
3475 Lenox Road, Suite 400
Atlanta, GA 30326

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by the Financial Industry Regulation Authority, Inc. against John M.E. Saad be, and hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary