

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 84334 / October 1, 2018

Admin. Proc. File No. 3-18256

In the Matter of the Application of

BRUCE ZIPPER

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DENIAL OF
MEMBERSHIP CONTINUANCE APPLICATION

Registered securities association denied member firm's application to permit continued association of its chief executive officer who was subject to a statutory disqualification. *Held*, application for review is *dismissed*.

APPEARANCES:

Bruce Zipper, pro se.

Andrew J. Love for FINRA.

Appeal filed: October 18, 2017
Last brief received: January 29, 2018

Bruce Zipper appeals from a FINRA decision denying an MC-400 Membership Continuance Application filed by his firm Dakota Securities International ("Dakota"), a broker-dealer and FINRA member firm. The application sought permission for Dakota to continue in membership while associating with Zipper, and approval of Zipper's continued association with

Dakota, notwithstanding his statutory disqualification.¹ We dismiss Zipper’s appeal.²

I. BACKGROUND

A. Zipper became subject to a statutory disqualification.

Zipper founded Dakota in 2004 and has been its chief executive officer and chief compliance officer since that time. On April 1, 2016, Zipper resolved a potential FINRA disciplinary matter by executing a Letter of Acceptance, Waiver, and Consent (the “AWC”), which FINRA accepted on April 22, 2016.³ The AWC provided that Zipper “willfully failed to timely amend his Form U4 [Uniform Application for Securities Industry Registration or

¹ *In the Matter of the Continued Ass’n of Bruce Zipper*, SD-2129 (FINRA NAC Oct. 2, 2017), http://www.finra.org/sites/default/files/NAC_SD-2129_Zipper_100217_0_0.pdf; *see also infra* Section II.A.1 (discussing Zipper’s statutory disqualification).

² According to FINRA’s BrokerCheck, Dakota filed a Form BDW (Uniform Request for Broker-Dealer Withdrawal) with FINRA on August 13, 2018. BrokerCheck also indicates that there is a pending complaint against the firm; a FINRA hearing panel found the firm liable, and the firm appealed to the National Adjudicatory Council on June 19, 2018. We take official notice in this opinion of information on BrokerCheck, available at <http://brokercheck.finra.org>. *See* Rule of Practice 323, 17 C.F.R. § 201.323 (rule of practice relating to official notice); *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records). Article IV, Section 5 of FINRA’s By-Laws provides that resignation from membership shall not take effect while any complaint or action is pending against the member unless FINRA, in its discretion, declares the resignation effective. *See* FINRA By-Laws, Art. IV, § 5; *see also Mission Secs. Corp.*, Complaint No. 2006003738501, 2010 WL 685801, at *1 n.3 (FINRA NAC Feb. 24, 2010). As of the date of this opinion, Zipper has not moved to withdraw this appeal, and FINRA has not acted on Dakota’s Form BDW. Accordingly, we address the merits of Zipper’s appeal.

³ *See generally Order Approving Proposed Rule Change*, Exchange Act Release No. 38908, File No. SR-NASD-97-28, 1997 WL 441929, at *37 (Aug. 7, 1997) (“[A]n AWC is a letter that a person or a member agrees to execute to resolve a potential disciplinary matter in a pre-complaint environment.”). Dakota and Zipper entered into a second AWC on April 22, 2016, in which they agreed, among other things, that they had failed to establish, maintain, and enforce an adequate supervisory system to ensure that business-related text messages—sent and received by a Dakota-registered principal in connection with Dakota’s securities-related business—were subject to supervision, retention, and preservation. Zipper agreed to a fine and a one-month suspension in a principal capacity from associating with a FINRA member firm, to be served concurrently with the first AWC, and further agreed that this second AWC also subjected him to a statutory disqualification. The NAC did not rely on this as a basis for finding him disqualified, and this second AWC is therefore not at issue here.

Transfer] to disclose [three] judgments,” and that this willful omission made him “subject to a statutory disqualification with respect to association with a member.” Zipper consented to a three-month suspension from associating with a FINRA member firm and a \$5,000 fine. He also “specifically and voluntarily” waived the right to appeal the AWC to the Commission or to a U.S. Court of Appeals.⁴ The AWC provided further that Zipper’s suspension prohibited him from “associat[ing] with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the . . . suspension.”

Zipper’s suspension ran between May 31, 2016, and August 31, 2016. Dakota promoted Robert Lefkowitz to act as its chief executive officer during Zipper’s suspension. Lefkowitz registered as a general securities principal just before Zipper’s suspension so he could do so.

B. Dakota filed a membership continuance application.

On May 4, 2016, FINRA’s Department of Member Regulation notified Dakota that the AWC made Zipper statutorily disqualified under Section 3(a)(39) of the Securities Exchange Act of 1934,⁵ and that FINRA’s By-Laws therefore disqualified him from associating with a member firm.⁶ Member Regulation explained that Dakota could file an MC-400 Membership Continuance Application in accordance with Article III, Section 3(d) of FINRA’s By-Laws to request permission for Zipper to continue to associate with it despite his disqualification.⁷

Dakota submitted its MC-400 Application on July 29, 2016, requesting to continue its membership while employing Zipper as a general securities representative notwithstanding his statutory disqualification. The application included a supervisory plan of six sentences. In that plan, Lefkowitz represented that he knew Zipper “well,” “believe[d]” he could “monitor all business at the company,” and “[felt] more than capable of making sure Dakota’s business is run correctly and with proper supervision.” In an addendum filed in January 2017, Dakota added

⁴ In April 2017, Zipper filed with the Commission an application for review of this AWC. We granted FINRA’s motion to dismiss because the appellate waiver in the AWC was enforceable; Zipper was not entitled to discovery; and his application for review was untimely. *See Bruce M. Zipper*, Exchange Act Release No. 81788, 2017 WL 4335072 (Sept. 29, 2017).

⁵ *See* 15 U.S.C. § 78c(a)(39).

⁶ *See* FINRA By-Laws, Art. III, § 4 (stating that a person is subject to “disqualification” from association with a member firm if such person is subject to “statutory disqualification” as defined in Exchange Act Section 3(a)(39)).

⁷ *See* FINRA By-Laws, Art. III, § 3(d) (providing that FINRA may grant relief from the ineligibility to associate if it determines that relief is consistent with the public interest and the protection of investors); *see also* FINRA Rules 9521-27 (setting forth procedures for a member firm to sponsor the proposed association of a person subject to disqualification).

more details and proposed that Lefkowitz would be Zipper's primary supervisor and that Elizabeth Dianne Alexander would be the alternate supervisor.

Member Regulation recommended denying Dakota's application. A subcommittee of FINRA's Statutory Disqualification Committee (the "Hearing Panel") scheduled a hearing for July 12, 2017. FINRA notified Dakota that both Zipper and "his immediate supervisor should plan to attend" and "should be prepared to discuss the events surrounding his disqualifying event, his proposed duties at the firm, and the manner in which he will be supervised."

On June 28, 2017, two weeks before the hearing, Lefkowitz offered, and FINRA the next day accepted, an AWC in which he consented to findings that he permitted Zipper to associate with Dakota improperly during Zipper's suspension. Lefkowitz consented to a \$5,000 fine and a five-month suspension from associating with any FINRA member firm in a principal capacity. Lefkowitz's suspension ran from July 17, 2017, to December 16, 2017.

On July 12, 2017, the Hearing Panel held a hearing at which Zipper and Lefkowitz testified. Dakota proposed in light of Lefkowitz's impending five-month suspension that Elizabeth Dianne Alexander and Drew Alexander (no relation), two registered representatives, serve as Zipper's primary and alternate supervisors. Neither appeared at the hearing. During the hearing, members of the Hearing Panel observed that Dakota's supervisory plan lacked sufficient detail to explain how the firm and the proposed supervisors would conduct heightened supervision of Zipper. The Hearing Panel permitted Zipper and Lefkowitz to revise Dakota's plan during a break and present the revised plan before the hearing concluded.

In a post-hearing submission, Zipper acknowledged that Dakota had been "terribly unprepared to answer the questions relating to . . . supervisory plans." He sought and the Hearing Panel granted permission to submit another revised plan.

After the hearing, the Hearing Panel submitted its written recommendation to FINRA's full Statutory Disqualification Committee, which in turn presented a written recommendation to FINRA's National Adjudicatory Council (the "NAC").

C. FINRA denied the application and Zipper appealed to the Commission.

The NAC denied the application on October 2, 2017. It found that Zipper was statutorily disqualified as a result of the AWC and that "Zipper's continued association with [Dakota] is not in the public interest and would create an unreasonable risk of harm to the market or investors." First, the NAC found that Zipper improperly associated with Dakota while suspended and that Zipper's serious misconduct during his suspension showed that he was "currently unable to demonstrate that he can comply with FINRA's rules and regulations." Second, the NAC found Zipper's proposed supervisors inadequate. One proposed supervisor had "minimal (if any) direct supervisory experience during her career," and the other had "no direct supervisory experience." Lefkowitz and the two proposed supervisors also lacked the necessary independence to supervise Zipper because Zipper owned Dakota, had previously supervised each of the proposed

supervisors, and had the power to fire them. Third, the NAC rejected Dakota’s proposed heightened supervisory plan. The NAC observed that it “falls short of what is required to ensure that a statutorily disqualified individual be subject to stringent supervision,” such as details explaining how and where Zipper would be supervised.

On October 18, 2017, Zipper filed this application for review with the Commission of FINRA’s denial of Dakota’s membership continuance application.⁸ He also filed two motions, on October 31, 2017 and January 25, 2018, to stay FINRA’s denial. Both motions were denied because Zipper had not met his burden of establishing that a stay was warranted.⁹

II. ANALYSIS

Exchange Act Section 19(f) governs our review of FINRA’s denial of a membership continuance application.¹⁰ We must dismiss the appeal if (1) the specific grounds on which FINRA based its denial exist in fact; (ii) the denial was in accordance with FINRA’s rules; and (iii) FINRA’s rules are, and were applied in a manner, consistent with the Exchange Act’s purposes.¹¹

A. The specific grounds for FINRA’s denial of Dakota’s MC-400 Application exist in fact.

1. Zipper is subject to a statutory disqualification.

The record supports FINRA’s finding that Zipper is subject to a statutory disqualification because FINRA accepted an AWC in which Zipper consented to a finding that he omitted material information required to be reported on his Form U4. FINRA’s By-Laws provide that no person shall continue to be associated with a FINRA member if such person becomes subject to a “disqualification,” and they define a disqualification as “any statutory disqualification as such term is defined in Section 3(a)(39)” of the Exchange Act.¹² Section 3(a)(39)(F) provides, in

⁸ See *Nicholas S. Saava*, Exchange Act Release No. 72485, 2014 WL 2887272, at *1 n.5 (June 26, 2014) (associated person may appeal FINRA’s denial of firm’s application).

⁹ See *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555 (Nov. 27, 2017) (order denying stay); *Bruce Zipper*, Exchange Act Release No. 82633, 2018 WL 719029 (Feb. 5, 2018) (order denying second motion for stay). Zipper also filed an “inquiry” into the status of this application and a “motion for expedited decision,” which we deny as moot in light of our disposition.

¹⁰ 15 U.S.C. § 78s(f).

¹¹ *Id.* Section 19(f) also requires us to set aside FINRA’s action if we find that the action imposes an undue burden on competition. *Id.* Zipper does not claim, nor does the record support a finding, that FINRA’s denial imposes such a burden.

¹² See FINRA By-Laws, Art. III, §§ 3(b), 4.

pertinent part, that a person is subject to a “statutory disqualification” if—with respect to applications to become associated with an SRO member or any “report required to be filed with” an SRO—such person has “omitted to state in any such . . . application” or “report . . . any material fact which is required to be stated therein.”¹³

Persons seeking registration as a registered representative must file with FINRA a complete and accurate Form U4, and have “a continuing obligation to timely update information required by Form U4 as changes occur.”¹⁴ As a result, “a person is subject to statutory disqualification by operation of Exchange Act Section 3(a)(39)(F) whenever there has been . . . a determination that a person willfully failed to disclose material information on a Form U4.”¹⁵ In the AWC, Zipper consented to findings that he “willfully omitted to state a material fact on a Form U4.” Zipper’s contention that he had no “intent to deceive” is irrelevant because he consented to a finding that his violation was willful. As the AWC itself stated, this made him “subject to a statutory disqualification with respect to association with a member.”

Zipper argues that it is not “fair” to disqualify him for a “mistake in clerical updating” of his Form U4. According to Zipper, other regulators have permitted respondents to continue in business despite more serious misconduct. We reject Zipper’s argument to the extent he challenges the underlying statutory disqualification: “[c]onsiderations of ‘fairness’ or policy arguments do not bear upon the automatic statutory disqualification imposed.”¹⁶

2. Zipper engaged in intervening misconduct by associating with Dakota in a manner inconsistent with the terms of his suspension.

The record also supports the NAC’s finding that “Zipper engaged in serious misconduct after entry of the Disqualifying AWC by improperly associating with the Firm during his three-month suspension.” Despite his suspension from association with any FINRA member firm, Zipper acted as an associated person by communicating with customers and other third parties about firm business, and by making securities recommendations to firm customers.

FINRA Rule 8311 provides that a member shall not allow a person subject to suspension “to be associated with it in any capacity that is inconsistent with the sanction imposed or disqualified status, including a clerical or ministerial capacity.”¹⁷ A person suspended from

¹³ 15 U.S.C. § 78c(a)(39)(F).

¹⁴ *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 WL 1039460, at *4 (Mar. 15, 2016).

¹⁵ *Id.* at *9 & n.54.

¹⁶ *Id.* at *9. In Part II.C, we address this argument to the extent Zipper challenges the fairness of FINRA’s denial of the membership continuance application.

¹⁷ FINRA Rule 8311.

associating with any FINRA member firm therefore may not act as an associated person of any such firm during the suspension. An “associated person” includes one “engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member.”¹⁸ We have held that one whose functions are “part of the conduct of a securities business” is an associated person “engaged in that business.”¹⁹

Zipper admits that he emailed customers repeatedly while he was suspended, and that in these emails he recommended specific securities transactions. Zipper also emailed customers with account updates, and emailed third parties about firm-management matters. He also spoke with customers on the phone and maintained Dakota’s main office and proprietary documents in his personal residence. The record supports a finding that Zipper engaged in functions that were part of the conduct of a securities business.²⁰ As a result, Zipper, associated with Dakota in a manner inconsistent with his suspension from association with any FINRA member in any capacity.

Zipper argues that these communications were consistent with the terms of his suspension. According to Zipper, a suspension from association prohibits taking and placing orders; conducting the business of a member firm; and speaking or “dealing with” FINRA staff, other FINRA member firms, or their associated persons. But in his view it does not prohibit “speak[ing] with non-FINRA people”—such as friends, relatives, and customers not associated with FINRA member firms—with respect to their securities transactions or accounts.

Zipper’s own AWC, FINRA Rule 8311, and Dakota’s written supervisory procedures (“WSPs”) all disprove his claim. His suspension from associating with a FINRA member firm extended beyond prohibiting taking and placing orders, conducting the business of a member firm, speaking with FINRA, other firms, or associated persons. His AWC specifically prohibited him from “associat[ing] with any FINRA member firm in *any capacity, including clerical or*

¹⁸ FINRA By-Laws, Art. I(rr).

¹⁹ *Stephen M. Carter*, Exchange Act Release No. 26264, 1988 WL 902876, at *1 (Nov. 8, 1988).

²⁰ *See, e.g., Joseph Patrick Hannan*, Exchange Act Release No. 40438, 1998 WL 611732, at *1, 4 (Sept. 14, 1998) (unregistered person who was paid hourly wage, answered telephones, opened and logged mail, photocopied, and prepared sales reports was an associated person); *Vladislav Steven Zubkis*, Exchange Act Release No. 40409, 1998 WL 564562, at *3-4 (Sept. 8, 1998) (unregistered person who controlled member firm, acted as chief executive officer of issuer whose stock the firm sold, paid some firm expenses, “took care of” firm registered representatives, and possessed some firm documents was an associated person); *Carter*, 1988 WL 902876, at *1 (unregistered person who acted as “customer cashier” and in that role “received securities and checks, recorded them in the firm’s computer system, prepared firm checks for signature in payment of customer balances, prepared deposit slips, and furnished account balances and other information to customers” acted as associated person).

ministerial functions, during the . . . suspension” (emphasis added). This language prevented him from engaging in *any* aspect of the securities business—including contacting customers about their securities transactions and holdings, and contacting third parties about their business with Dakota.²¹ Rule 8311 likewise prohibited Dakota from allowing Zipper to undertake any such conduct that would render him an “associated person” of Dakota during the term of his suspension.²² Dakota’s WSPs also provided that, during a suspension, employees may not “have direct or indirect contact with customers” or “give investment advice or counsel.”

Zipper argues further that an undocumented oral side agreement with FINRA staff authorized these communications. He testified that Kevin Rosen, with whom he negotiated the AWC, advised that he could “reach out to a client” to recommend securities when he was “the only one” who could do so. Zipper believed, for example, that he could recommend securities so long as he “[knew] the background of the stock” he was recommending and Lefkowitz did not.

We reject Zipper’s argument. The purported side agreement is inconsistent with the terms of the AWC that Rosen negotiated, which prohibited associating with Dakota “in any capacity.” And Zipper offered no corroborating evidence of this agreement. Indeed, Zipper’s testimony is facially implausible and inconsistent with his other arguments: it would be unnecessary for Rosen to exempt communications with customers and vendors if, as Zipper says he believed, his suspension prohibited him only from speaking with FINRA staff, member firms, and their associated persons. Because Zipper concedes that Rosen told him he could have “absolutely nothing to do with the business of Dakota Securities itself,” at least some of his communications also fell outside the scope of any exception he claims Rosen provided.

3. Dakota proposed inadequate supervisors.

The record likewise supports the NAC’s finding that Dakota’s proposed supervisors “lack the necessary supervisory experience to supervise a statutorily disqualified individual such as Zipper.” In assessing a proposed heightened supervisory plan for a statutorily disqualified person, “the quality of the supervision to be accorded that person is of the utmost importance.”²³ A firm seeking to continue to associate with a disqualified individual has the “responsibility to marshal” the relevant witnesses and evidence.²⁴ Here, neither of the two proposed supervisors,

²¹ As the NAC correctly found, Zipper’s suspension did not prohibit him “from speaking to his customers [who were also] friends and family,” but rather “speaking with his customers about securities transactions and recommending securities during that time.”

²² See FINRA Rule 8311.

²³ *Citadel Sec. Corp.*, Exchange Act Release No. 49666, 57 SEC 502, 2004 WL 1027581, at *4 (May 7, 2004).

²⁴ *Robert J. Sayegh*, Exchange Act Release No. 37953, 52 SEC 1110, 1996 WL 662498, at *2 (Nov. 15, 1996). Although Lefkowitz testified at the hearing, he could not supervise Zipper once he became subject to his own five-month suspension.

Elizabeth Dianne Alexander and Drew Alexander, were present at or testified at the hearing. We find that neither proposed supervisor had the necessary experience to supervise Zipper.

The record shows that Elizabeth Dianne Alexander has little direct supervisory experience. Although the firm touted her “35 years of experience in the brokerage business,” no evidence suggests that she served in supervisory roles.²⁵ Asked about her supervisory experience, Lefkowitz conceded that he was “not that familiar with her past experience” and believed she had never before supervised a statutorily disqualified person. As for Drew Alexander, his registration as a general securities principal had been terminated at the time of the hearing. Drew Alexander also appears to have no direct supervisory experience.

We also agree with the NAC that Dakota has “not demonstrated that Zipper’s proposed supervisors possess the necessary independence to supervise Zipper.” We have previously emphasized the importance that a proposed supervisor “possess[es] the necessary independence to supervise” a statutorily disqualified person.²⁶ It is “difficult for employees to supervise effectively the activities of the owner of a firm” because owners “will almost certainly continue to exercise control over the firm’s operations, including the ability to fire an employee charged with the responsibility to supervise the firm’s owner.”²⁷ Here, for example, Zipper owns 70% of Dakota, hired his proposed supervisors, and could fire them. Under the circumstances here, Zipper’s supervisors would not be independent.

In his reply brief on appeal, Zipper notes that after the hearing Dakota hired Gary Cuccia as its new CEO and financial operations principal. He also asserts that FINRA believes Cuccia is “more than qualified to run Dakota,” and that Dakota’s “business plan has been revised and now implemented to [FINRA’s] satisfaction.”²⁸ We construe this as a request that we consider the adequacy of a new proposed supervisor for the first time on appeal, but we deny that request.

²⁵ Cf. *George J. Kolar*, Exchange Act Release No. 46127, 2002 WL 1393652, at *4 (June 26, 2002) (explaining that ascertaining a particular person’s status as a “‘supervisor’ depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility or authority to affect the conduct of the employee whose behavior is at issue”).

²⁶ *Robert J. Escobio*, Exchange Act Release No. 83501, 2018 WL 3090840, at *6 (June 22, 2018).

²⁷ *Asensio & Co.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *7 (Dec. 20, 2012) (quoting *Citadel Sec.*, 2004 WL 1027581, at *4); see, e.g., *Kirk A. Knapp*, Exchange Act Release No. 31556, 51 SEC 115, 1992 WL 365568, at *10 (Dec. 3, 1992) (owner of over 90% of firm, barred from acting as general securities principal, still exercised control and fired new president of firm when president disagreed with owner).

²⁸ We assume, though Zipper does not specify, that Cuccia is intended to supervise him.

We assess the NAC's denial of Dakota's application based on the record before it because attempts to substitute proposed supervisors on appeal without "fil[ing] an amended application" deprive FINRA of the opportunity "to conduct additional proceedings to consider [the proposed supervisor's] qualifications and determine whether to permit [the] association . . . in light of the change in circumstances."²⁹ Here, Dakota did not file an amended application to reflect Cuccia's new role. Dakota did not even hire Cuccia until five weeks after the NAC issued its denial and Zipper appealed—even though Member Regulation argued in a filing before the hearing that in its view the proposed supervisors lacked the required experience. Zipper also did not mention Cuccia's hiring until his reply brief, and generally "any argument raised for the first time in a reply brief shall be deemed to have been waived."³⁰ We do not consider Cuccia's hiring in our review of FINRA's denial of this membership continuance application.

4. Dakota proposed a deficient supervisory plan.

Finally, the record supports (and Zipper does not contest) the NAC's finding that Dakota's proposed supervisory plan was inadequate. "When a firm proposes to employ a statutorily disqualified individual, we have held that 'stringent supervision' is required."³¹ "As we have previously concluded, a supervisory plan lacks the necessary intensive scrutiny when the supervisor will not be in close, physical proximity to the statutorily disqualified person."³² The cover letter to the final plan submitted after the hearing specified that Dakota would move its main office from Zipper's personal residence to "a business office located in an office building in South Florida." It also said that Lefkowitz was to "manage[] and run" that office and supervise registered representatives there, even though Lefkowitz was to be suspended in a principal capacity during part of that time. The final plan did not specify whether Elizabeth Dianne Alexander would supervise Zipper at the new office. As for Drew Alexander, the plan did not specify whether he would supervise Zipper at the new office or remotely from his office in Jacksonville. Supervision under such circumstances is inadequate.³³

The record likewise supports the NAC's finding that the final supervisory plan was inadequate because it lacked specifically tailored provisions demonstrating that the proposed supervisors would carry out an appropriately heightened level of supervision. "We have

²⁹ *Morton Kantrowitz*, Exchange Act Release No. 44239, 55 SEC 98, 2001 WL 435668, at *2 (May 1, 2001).

³⁰ *See* Rule of Practice 450(b), 17 C.F.R. § 201.450(b).

³¹ *Asensio & Co.*, 2012 WL 6642666, at *7 (citations omitted).

³² *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 WL 2138439, at *5 (July 17, 2009).

³³ *See id.*; *see, e.g., Frank Kufrovich*, Exchange Act Release No. 45437, 55 SEC 616, 2002 WL 215446, at *4 (Feb. 13, 2002) (finding supervisory plan to be inadequate, in part, because the supervisor would "not be physically present in close proximity . . . during all working days").

previously found that supervisory plans that contain provisions ‘no different from the supervision . . . afforded to all employees’ and that ‘lack[] detail’ are insufficient.”³⁴ A proposed supervisory plan must “reflect the careful consideration required to effectively supervise a [statutorily] disqualified individual and [include] specifically tailored provisions designed to prevent and deter future misconduct.”³⁵ Here, the final plan omitted pertinent details such as how much time Elizabeth Dianne Alexander would spend supervising Zipper, how she would review Zipper’s email correspondence, how she would document compliance with the plan, and how often she would review Zipper’s compliance with his obligation to update his Form U4.³⁶ We likewise find it troubling that the final plan did not indicate that Elizabeth Dianne Alexander would be compensated for her time supervising Zipper, given Zipper’s testimony that she had “almost zero business” from active accounts and earned “very little” commission income from the firm.

B. FINRA’s denial of Dakota’s MC-400 Application was in accordance with FINRA’s rules.

We find that FINRA’s denial of Dakota’s application was in accordance with FINRA’s rules. FINRA’s rules provided for, and Dakota and Zipper received, a hearing in connection with the application.³⁷ FINRA first scheduled the hearing for May 17, 2017, in Washington DC. Although FINRA initially denied Zipper’s request to relocate the hearing, FINRA eventually continued and relocated the hearing for July 12, 2017, in Boca Raton, Florida. FINRA properly provided advance notice of the hearing,³⁸ Dakota and Member Regulation exchanged witness

³⁴ *Escobio*, 2018 WL 3090840, at *7 (citation omitted).

³⁵ *Saava*, 2014 WL 2887272, at *16.

³⁶ *See Escobio*, 2017 WL 3090840, at *7 (proposed supervisory plan “did not specify which staff members would assist [proposed supervisor], how they would be trained, or what they would report”); *Saava*, 2014 WL 2887272, at *15-16 (proposed supervisory plan did not “set forth procedures for reviewing or monitoring [the disqualified person’s] communications with customers” and was “not sufficiently tailored to . . . prevent similar conduct in the future”); *Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at *10 (Mar. 19, 2013) (plan “contained inconsistencies about how often [the proposed] primary supervisor would review [the disqualified person’s] daily transactions”); *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 WL 3554584, at *10 (Sept. 13, 2010) (“plan lack[ed] detail” about how the supervisor “would conduct his reviews, or what records would be kept”).

³⁷ *See* FINRA Rule 9524(a)(1).

³⁸ *See* FINRA Rule 9524(a)(2), (5).

and exhibit lists before the hearing,³⁹ and Dakota received Member Regulation's recommendations on the application ten business days before the hearing.⁴⁰

FINRA's rules also provided, and Dakota and Zipper received, the opportunity to be heard in person, to be represented by an attorney, and to submit any relevant evidence at the hearing.⁴¹ Zipper and Lefkowitz—and through them, Dakota—declined to be represented by counsel but appeared *pro se* at the hearing. Dakota presented evidence, including testimony from Zipper and Lefkowitz. And the Hearing Panel exercised its discretion to permit Dakota to submit a revised supervisory plan at the hearing and a final heightened supervisory plan after the hearing, and to consider several unsolicited post-hearing submissions from Dakota.

FINRA complied further with its post-hearing procedures. The NAC issued its decision after the Hearing Panel submitted a written recommendation to the Statutory Disqualification Committee, which in turn presented a written recommendation to the NAC.⁴² And the NAC's decision included, as required, a description of the basis for the proceeding, a description of the business to be engaged in, and a statement in support of the disposition.⁴³

Zipper contends not that FINRA violated its rules by denying Dakota's membership continuance application but that FINRA "violated [its] own rules" by bringing charges against him when FINRA staff had publicly suggested Form U4 violations were not an enforcement priority. However, Zipper does not identify what rule FINRA violated. Zipper likewise objects that FINRA "overreach[ed]" by merely issuing a Cautionary Action Letter to Dakota for its failure to ensure that associated persons updated their Forms U4 while "thr[owing] the book" at him. That charging decision was an exercise of prosecutorial discretion and is not reviewable here.⁴⁴ In any case, Zipper's arguments are an impermissible collateral attack on the AWC.⁴⁵

³⁹ See FINRA Rule 9524(a)(3)(B).

⁴⁰ See FINRA Rule 9524(a)(3)(A).

⁴¹ See FINRA Rule 9524(a)(4).

⁴² See FINRA Rule 9524(a)(10), (b)(1).

⁴³ See FINRA Rule 9524(b)(2).

⁴⁴ See *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) (holding that because "NASD disciplinary proceedings are treated as an exercise of prosecutorial discretion," its "decisions to initiate investigations are given wide latitude," and "courts will not inquire into [NASD's] ill motive unless there is a showing of selective enforcement, or an attempt to discriminate by arbitrary classification"). Zipper does not assert a selective prosecution claim, and in our judgment the record would not support one.

⁴⁵ See *Gershon Tannenbaum*, Exchange Act Release No. 31080, 50 SEC 1138, 1992 WL 213844, at *3 (Aug. 24, 1992) ("It is always true in a case of this sort that a respondent cannot mount a collateral attack on findings that have previously been made against him.").

Zipper next alleges that FINRA staff are biased against him and engaged in a conspiracy to “throw[him] out of this industry.” But it is the NAC, “not the staff, that makes decisions. Even if a member of the staff were biased, that would not mean that the [NAC] is biased.”⁴⁶ Regardless, we find nothing in the record to substantiate a claim of bias.⁴⁷

C. FINRA’s rules are, and were applied in a manner, consistent with the Exchange Act.

We find that FINRA’s rules are, and were applied in a manner, consistent with the Exchange Act’s purposes. FINRA may grant a firm’s membership continuance application in its discretion only if it determines that the continued association of the disqualified person would be “consistent with the public interest and the protection of investors.”⁴⁸ “[T]he burden rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested employment.”⁴⁹ For the NAC’s denial of an application to be consistent with the Exchange Act, it must “independently [evaluate the] application, based upon the totality of the circumstances, and . . . explain the bases for its conclusion.”⁵⁰ FINRA has “broad discretion” to evaluate whether the firm sponsoring the application will uphold high business standards.⁵¹ We

⁴⁶ *Donner Corp. Int’l*, Exchange Act Release No. 55313, 2007 WL 516282, at *16 (Feb. 20, 2007).

⁴⁷ *See Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *18 (Jan. 30, 2009) (rejecting claim of bias based on denial of MC-400 application alone, and explaining that a respondent must demonstrate that bias “stem[ming] from an extrajudicial source . . . result[ed] in a decision on the merits based on matters other than those gleaned from participation in a case”), *aff’d*, 416 F. App’x 142 (3d Cir. 2012). We deny Zipper’s motion to compel discovery to support his claim of bias for the same reasons we rejected that request in his appeal of the AWC. *See Zipper*, 2017 WL 4335072, at *4 (rejecting Zipper’s request for discovery based on his “unsubstantiated allegation[] that FINRA is biased,” and further rejecting a request to investigate FINRA that could not “be adjudicated in the appeal before us”).

⁴⁸ *Arouh*, 2010 WL 3554584, at *12 (citing Exchange Act Section 15A(g)(2), 15 U.S.C. § 78o-3(g)(2), and *William J. Haberman*, Exchange Act Release No. 40673, 53 SEC 1024, 1998 WL 786945, at *2 n.7 (Nov. 12, 1998)); *see also* FINRA By-Laws, Art. III, § 3(d) (FINRA grants MC-400 application only if it determines that approval “is consistent with the public interest and the protection of investors”).

⁴⁹ *Mitchell T. Toland*, Exchange Act Release No. 73664, 2014 WL 6601012, at *6 (Nov. 21, 2014) (quoting *Emerson*, 2009 WL 2138439, at *4).

⁵⁰ *Arouh*, 2010 WL 3554584, at *12 (quotation marks omitted).

⁵¹ *M.J. Coen*, Exchange Act Release No. 17820, 47 SEC 558, 1981 WL 38215, at *5 (May 28, 1981).

“have also afforded FINRA discretion in determining whether persons subject to statutory disqualification should be permitted to associate with a member firm.”⁵²

In denying Dakota’s application, the NAC applied the framework set forth in *Paul Edward Van Dusen*⁵³ and its progeny. The *Van Dusen* framework is “applicable where the misconduct making an individual subject to statutory disqualification was previously the subject of a Commission or SRO sanction of specified duration.”⁵⁴ Under that framework, FINRA cannot deny a membership continuance application made after the expiration of a suspension that FINRA imposed by relying “solely on th[e] same underlying misconduct” that formed the basis for the statutory disqualification and the imposition of the suspension.⁵⁵ And although the misconduct underlying the suspension that has expired “may play a role in the consideration of a membership continuance application,” it “should not be the primary focus of a determination” regarding that application.⁵⁶ Rather, FINRA should “generally confine its analysis to new information.”⁵⁷ FINRA should consider “[1] misconduct in which a statutorily disqualified person may have engaged since the misconduct that gave rise to the statutory disqualification, [2] the nature and disciplinary history of a prospective employer, and [3] the proposed supervisory structure to which the statutorily disqualified person would be subject.”⁵⁸

The NAC applied *Van Dusen* appropriately here. It relied on Zipper’s serious intervening misconduct and the inadequacy of the supervisors and supervisory plan that Dakota proposed. The NAC based its conclusion on the totality of the circumstances, supported its conclusions with substantial evidence and precedent, and explained the bases for its conclusions.

As to Zipper’s intervening misconduct, “we have consistently recognized that, in order to ensure protection of investors, a self-regulatory organization . . . such as FINRA may demand a high level of integrity from securities professionals.”⁵⁹ We have considered violations of a bar

⁵² *Arouh*, 2010 WL 3554584, at *13.

⁵³ Exchange Act Release No. 18284, 47 SEC 668, 1981 WL 315505 (Nov. 24, 1981).

⁵⁴ *Toland*, 2014 WL 6601012, at *4.

⁵⁵ *May Capital Grp. LLC*, Exchange Act Release No. 53796, 2006 WL 1312955, at *5 (May 12, 2006).

⁵⁶ *Id.* at *6 (citations omitted).

⁵⁷ *Arthur H. Ross*, Exchange Act Release No. 30956, 50 SEC 1082, 1992 WL 188932, at *2 (July 27, 1992).

⁵⁸ *Harry M. Richardson*, Exchange Act Release No. 51236, 2005 WL 424920, at *2 (Feb. 22, 2005) (citing *Van Dusen*, 1981 WL 315505, at *3).

⁵⁹ *Arouh*, 2010 WL 3554584, at *13 (cleaned up).

order to be serious misconduct,⁶⁰ and the same is true with respect to violations of a suspension order.⁶¹ Zipper’s serious intervening misconduct—and his continued belief that he could contact customers to recommend securities despite being suspended—supports the NAC’s finding that Dakota did not “demonstrate that [Zipper] can comply with FINRA’s rules and regulations.”⁶²

We likewise agree with the NAC that deficiencies in the supervisors and supervisory plan that Dakota proposed counseled against granting Dakota’s application. Here, the proposed supervisors lacked the experience and independence necessary to stringently supervise Zipper or to reliably implement *any* supervisory plan. These concerns were well documented in the record and may serve as a basis to deny the application.⁶³ So may the inadequacy of the proposed supervisory plan.⁶⁴ The final plan provided no guidance about where Zipper and his supervisors would be located, how the supervisors could insure the necessary scrutiny of his activities, how much time they would spend doing so, or how they would be compensated for doing so. It also provided insufficient detail about how they would review his communications, document compliance, and ensure that his Form U4 remained updated. We find that FINRA properly determined based on the evidence before it that Dakota failed to meet its burden as to this specific application, and that it did so in a manner consistent with the Exchange Act’s purposes.

⁶⁰ *Id.*; cf. *Kirk A. Knapp*, Exchange Act Release No. 30391, 1992 WL 40436, at *10 (Feb. 21, 1992) (firm’s majority owner engaged in “very serious misconduct” when he, among other things, “flouted the NASD’s bar by exercising a managerial role”).

⁶¹ *See, e.g., David C. Ho*, Exchange Act Release No. 54481, 2006 WL 2959662, at *6 (Sept. 22, 2006) (violation of suspension showed “disregard for [SRO’s] disciplinary authority”).

⁶² *See Toland*, 2014 WL 6601012, at *4, 8 (denying membership continuance application due to individual’s intervening misconduct, firm’s disciplinary history, and firm’s failure to demonstrate adequate supervision); *Arouh*, 2010 WL 3554584, at *15 (denying membership continuance application because disqualified individual improperly associated with the firm as a principal while subject to a bar order, which constituted “serious intervening misconduct”).

⁶³ *See Meyers Associates, L.P.*, Exchange Act Release No. 81778, 2017 WL 4335044, at *8 (Sept. 29, 2017) (affirming denial based on, among other things, “the inability of the firm’s proposed supervisors to stringently supervise Meyers as a statutorily disqualified individual and owner of the Firm”); *see also Kantrowitz*, 2001 WL 435668, at *2 (proposed supervisor’s “lack of supervisory experience”).

⁶⁴ *Citadel Sec.*, 2004 WL 1027581, at *4 (denying membership continuance application based on, among other things, disqualified person’s other “prior disciplinary history” and the firm’s “fail[ure] to propose an effective plan [of] supervis[ion]”).

We reject Zipper’s argument that FINRA’s denial acts as a “permanent bar[],” and that this “penalty” is “excessive.”⁶⁵ As we have said, “FINRA does not subject a person to statutory disqualification as a penalty or remedial sanction,” but rather “by operation of” statute.⁶⁶ Nor did FINRA impose a penalty by denying Dakota’s application. FINRA simply determined, in this case, “that it would not grant relief from a disqualification previously incurred.”⁶⁷ Another firm that proposed adequate supervisors and a supervisory plan tailored to Zipper’s situation might show that Zipper’s continued association would be in the public interest.⁶⁸

Zipper also challenges the fairness of FINRA’s action. Although fairness considerations do not bear on the operation of Zipper’s statutory disqualification,⁶⁹ we may assess whether FINRA’s denial of the membership continuance application “is substantively fair.”⁷⁰ Zipper contends in several filings that it is unfair that FINRA has “permanent[ly] barr[ed him] from the industry” for his failure to update his Form U4—a violation that he attempts to minimize as a “clerical” error—when a different regulator has permitted a national bank to remain in business despite allegedly “committing outright felonies and fraud.” But the relevant inquiry is not the “disqualifying event” but rather “whether, under the ‘totality of the circumstances,’ a person’s continued association with a member firm is inconsistent with the public interest and the protection of investors.”⁷¹ Zipper’s cursory reference to action by a different regulator—with respect to a different entity and under an unspecified standard—does not demonstrate that FINRA acted unfairly in applying the *Van Dusen* framework here.

We likewise reject Zipper’s contention that FINRA’s denial of his application was unfair in light of Zipper’s 35 years of experience in the industry, his lack of prior arrests or customer complaints for which he was broker of record, and the lack of any harm to customers or to

⁶⁵ The “excessive or oppressive” standard under Exchange Act Section 19(e)(2) does not apply here. See 15 U.S.C. § 78s(e)(2); *Interactive Brokers LLC*, Exchange Act Release No. 80164, 2017 WL 1035745, at *3 n.14 (Mar. 6, 2017) (distinguishing standards of review).

⁶⁶ *McCune*, 2016 WL 1039460, at *9; see also *Coen*, 1981 WL 38215, at *3 (noting “misconception” that FINRA imposes a penalty by denying MC-400 application).

⁶⁷ *Kufrovich*, 2002 WL 215446, at *6.

⁶⁸ See *supra* text accompanying note 29.

⁶⁹ See *supra* text accompanying note 16.

⁷⁰ *Richardson*, 2005 WL 424920, at *5; see also *May Capital Grp.*, 2006 WL 1312955, at *4-5 (“One of the purposes of the Exchange Act that Section 19(f) requires us to consider is fairness.”).

⁷¹ *Weiss*, 2013 WL 1122496, at *7 (rejecting applicant’s attempt to compare his disqualifying event to those “in other FINRA denials of continuing membership”).

Dakota. Even if true, any mitigative value would be outweighed by Zipper's intervening misconduct, and the inadequacy of the proposed supervisors and supervisory plan.⁷²

* * *

Accordingly, for all these reasons, we have determined to dismiss Zipper's appeal.

An appropriate order will issue.⁷³

By the Commission (Chairman CLAYTON and Commissioners STEIN, JACKSON, PEIRCE and ROISMAN).

Brent J. Fields
Secretary

⁷² See, e.g., *Toland*, 2014 WL 6601012, at *4, 8 & n.56 (affirming denial even taking into account the assertedly minimal significance of five older customer complaints, and noting that “lack of disciplinary history is not mitigating . . . because an associated person should not be rewarded for acting in accordance with his duties as a securities professional”) (quoting *Kent M. Houston*, Exchange Act Release No. 71589A, 2014 WL 936398, at *78 (Feb. 20, 2014)); *Arouh*, 2010 WL 3554584, at *15 (affirming denial based on improper association during bar and inadequate supervisory plan, despite no evidence of customer complaints); cf. *McCune*, 2016 WL 1039460, at *9 (positing that omission of material information from Form U4 may have harmed third parties deprived of important disclosures, even absent specific evidence of customer harm). We have noted in other contexts that “[t]he absence of . . . customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally.” *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at *7 (Feb. 24, 2012).

⁷³ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 84334 / October 1, 2018

Admin. Proc. File No. 3-18256

In the Matter of the Application of

BRUCE ZIPPER

For Review of Action Taken by FINRA

ORDER DISMISSING REVIEW PROCEEDINGS

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

ORDERED that the application for review filed by Bruce Zipper is hereby dismissed.

By the Commission.

Brent J. Fields
Secretary