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May 27, 2020

VIA ELECTRONIC MAIL

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Room 10915
Washington, DC 20549-1090
apfilings@sec.gov

**RE: In the Matter of the Application of Wilson-Davis & Co., Inc.,
James C. Snow, and Byron B. Barkley
Administrative Proceeding No. 3-19666**

Dear Ms. Countryman:

Enclosed please find the Brief of FINRA in Opposition to Application for Review in the above-captioned matter.

Please contact me at (202)728-8816 if you have any questions.

Sincerely,

/s/ Colleen E. Durbin

Colleen E. Durbin

cc: Richard F. Ensor, Esq.
Anne T. Freeland, Esq.

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Wilson-Davis & Co., Inc., James C. Snow, and Byron B. Barkley

For Review of Disciplinary Action Taken by

FINRA

Administrative Proceeding No. 3-19666

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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BEFORE THE
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I. INTRODUCTION

From January 1, 2011 through April 30, 2014, Wilson-Davis & Company, Inc. ("Wilson-Davis" or the "Firm"), James Snow, the Firm's president, chief compliance officer ("CCO"), and anti-money laundering compliance officer ("AMLCO"), and Byron Barkley, the Firm's head of trading and vice-president, blatantly disregarded their supervisory obligations. These failures resulted in the Firm violating not only FINRA Rules, but also federal securities regulations. Wilson-Davis has been the subject of prior disciplinary actions involving supervisory failures. The latest, at issue in this appeal, involves the Firm's near total dereliction of its supervisory responsibilities over one of the registered representatives in its branch office, Anthony Kerrigone, whose trading activity caused the Firm to violate Regulation SHO ("Reg SHO"). Between July 7, 2012 and April 29, 2013, Wilson-Davis, acting through Kerrigone, failed to find locates for at least 122 short transactions effected in four low-priced stocks (the "Stocks"). Kerrigone claimed to be acting as a market maker and improperly relied on the bona-fide market maker exemption pursuant to Rule 203(b)(2) of Reg SHO, promulgated under the Securities Exchange Act of 1934 ("Exchange Act"), causing the Firm to willfully violate Rule 203(b)(1) of Reg SHO.

Applicants claim that reasonable minds can differ as to whether the Firm's trading constituted bona-fide market making, but its trades and quotes relative to the inside market undercut that claim. Wilson-Davis, through Kerrigone, improperly used a speculative short selling strategy, executing trades away from the Firm's published quotes, in an attempt to capture market gains without making any attempt to borrow the shorted stock and without acting as a bona-fide market maker. Kerrigone's improper short selling occurred because the Firm and Barkley failed to reasonably supervise Kerrigone's activity.

Kerrigone's illegal short selling strategy was just one example of Wilson-Davis's broken system of supervision. The Firm and Snow also failed to reasonably supervise Randy Carlson, an equity trader at Wilson-Davis. Carlson was permitted to work at the Firm without a heightened supervision plan, as required by a FINRA Hearing Panel order and the Firm's own written supervisory procedures ("WSPs"). When the Firm belatedly prepared a plan, it was wholly inadequate. In addition, Wilson-Davis and Snow failed to implement a reasonable supervisory system to supervise the Firm's registered personnel and failed to reasonably supervise instant message communications ("IMs") for its registered representatives.

Finally, the Firm and Snow's supervisory failings extended to the Firm's anti-money laundering ("AML") program. The Firm and Snow failed to establish and implement AML policies and procedures reasonably expected to cause the detection and reporting of suspicious transactions and failed to conduct adequate AML training.

FINRA's National Adjudicatory Council ("NAC") found that this was an egregious case with no mitigating factors and several aggravating factors, including a broader pattern of noncompliance illustrated by Wilson-Davis's prior disciplinary history. The NAC fined Wilson-Davis for its violations of Reg SHO as well as its supervisory and AML violations. Barkley and Snow were fined and suspended for their violations. The sanctions imposed are remedial and commensurate with the gravity of Applicants extensive misconduct that represented a reckless disregard for their regulatory responsibilities.

Applicants' startling supervisory deficiencies allowed Kerrigone, and in turn the Firm, to violate federal securities laws and compromise market integrity. Applicants other supervisory and AML violations are equally egregious and require appropriately consequential sanctions. Applicants' misconduct squarely reflects on their ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the investing public. Accordingly, the Commission should affirm the NAC's decision in all respects.

II. FACTUAL BACKGROUND

A. Wilson-Davis, James Snow, and Byron Barkley

Wilson-Davis has been a FINRA registered broker-dealer since December 1968. The firm maintains its principal place of business in Salt Lake City, Utah, and has three branch offices. During the relevant period, there were between 32 and 44 representatives registered with the Firm. The Firm's business consists primarily of trading penny stocks for its customers and its own account. (RP 81.) Such sales constitute an important source of revenue. (RP 1572.) The

Firm earned its revenue largely from retail sales commissions and profits earned by its traders through their proprietary trading accounts. (RP 82.)[1]

During the relevant period, Wilson-Davis was largely managed by three principals: Snow, Barkley, and Lyle Davis ("Davis"), all of whom worked out of the Salt Lake City office. Paul Davis, at that time over 80 years old, served as the Firm's chairman of the board. (RP 3910.) His involvement in the Firm's daily operations during this time was very limited during this period. (RP 1666-67). Lyle Davis was the Firm's financial operations principal, secretary, treasurer, and a vice-president. (RP 3910)

Snow entered the securities industry in June 1996 when he registered with Wilson-Davis. (RP 82.) He is registered as a general securities representative and a general securities principal. Snow also served as the Firm's president, CCO, and AMLCO during this time. (JX-20.) In addition, Snow also was responsible for the Firm's written supervisory procedures ("WSPs"). (RP 4166.)

Barkley entered the securities industry in 1969 when he joined Wilson-Davis. (JX-21.) He is registered as a general securities representative, general securities principal, and an equity trader limited representative. He is a part owner of Wilson-Davis and served as the Firm's vice president and the head of its trading department during the relevant period. *Id*.

B. Anthony Kerrigone

Kerrigone was an equity trader at Wilson-Davis and worked in a branch office in Centennial, Colorado. (RP 936, 1663-64.) Barkley was responsible for supervising Kerrigone's

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1 "RP" refers to the page numbers in the certified record of this case filed with the Commission on January 13, 2020. "CX," "RX," and "JX" refer to exhibits admitted at the FINRA hearing and are part of the certified record.

trading. (RP 937-38, 1017.) Kerrigone primarily traded small cap, bulletin board, and pink sheet stocks. Between 2008 and 2013, when Kerrigone was employed at Wilson-Davis, trading accounted for an even more substantial part of the Firm's revenue. (RP 1005, 1309.) Pursuant to his contract with Wilson-Davis, Kerrigone's compensation was determined by a percentage of his trading profits—60 percent, which increased by 10 percent if he made over $20,000 in a month, minus expenses. Between 2011 and 2013, Kerrigone was the single biggest revenue generator. (RP 1310, 8057.) Kerrigone, who worked on a commission based on his trading profits, made in excess of $15 million between 2011 and 2013. (JX 12.)

C. Kerrigone's Trading

Kerrigone's primary role was trading in the Firm's proprietary accounts as a market maker. (RP 936.) Kerrigone specifically focused on penny stock companies that traded in high volume following promotional campaigns. Kerrigone researched stocks to find those that were experiencing a run up in price because of promotional campaigns even though the securities often had no value.[2] There were no formal limits on Kerrigone's intraday trading. Initially, he had a deposit of $25,000 with the firm that limited his overnight positions. (CX-61.) Eventually however, the deposit requirement was eliminated and Kerrigone could carry a $1.5-2 million position overnight. (CX-22.) Kerrigone also had discretion to set the prices on the stocks he traded. *Id*.

In effect, and his trading patterns clearly demonstrate, Kerrigone sought to exploit the upward movements of penny stocks that appeared to be the subjects of pump-and-dump schemes. He routinely entered the market in a given stock by accumulating a short position as

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[2] As Barkley testified, Kerrigone looked for stocks that were "generally worthless" but were increasing in price because of promotional efforts. (RP 1042-43.)

promotional activity created buying interest and its price began to rise. (RP 1078-79.) He posted both bid and ask quotes but, while building a short position, he posted bids far enough away from the inside to deter sellers from hitting his bid. (RP 2177, 2187, 2199, 2235.) He then followed the stock and started covering his short position when the price began to fall. When that occurred, he shifted his quotes, posting competitive bids and moving his asks far enough away from the inside to dissuade buyers from wanting to sell to him. *Id*. He frequently bought and sold far away from Wilson-Davis's own published quotes. *Id*. Kerrigone exited the market in these stocks after covering his short position. The time during which he traded a stock was typically just a few days. (RP 2175, 2185, 2195, 2231.)

Between July 9, 2012 and April 29, 2013, Wilson-Davis, acting through Kerrigone, failed to find locates for 122 short transactions in four low-priced stocks — PM&E, Inc., Preventia, Inc., China Teletech Holding and Lot 78, Inc. (LOTE). There was limited or no trading activity in the Stocks until shortly before Kerrigone began trading in them. (RP 2179, 2191, 2225, 2293.) Kerrigone ceased trading each of the stocks within a few days. (RP 2175, 2185, 2195, 2231.) The Stocks were the subjects of promotional campaigns, including press releases and internet touting, around the time of Kerrigone's trading. (RP 2379, 2577, 2657, 2725; CX-28; CX-29; CX-30; CX-32.) Kerrigone's trading in the stocks generally followed a shorting followed by covering pattern.

1. Preventia, Inc.

Preventia, Inc. was a firm that purported to operate an electronic trading platform. (CX 28.) There was limited or no trading in the market for the company's stock until promotional activity began in July 2012. (RP 636; CX-3.) On July 9, 2012, the website "hotstocked.com" published a promotional article touting the company. (RP 636-37; CX-28.) That day, price and volume in the stock spiked, and Kerrigone decided to make a market in the stock by submitting a "market maker application" to his superiors at Wilson-Davis. (RP 638; CX-3.) Kerrigone's market maker application to his superiors at Wilson-Davis explained that he decided to make a market in the stock because of a "trading opportunity." (RP 610; JX-13.)

Kerrigone then entered the Preventia market by short selling. (RP 604-05.) Kerrigone shorted the stock exclusively during his first day of trading. (RP 605.) As Kerrigone continued to short the stock, Wilson-Davis' posted bid quotes were always significantly away from the inside bid. (RP 625; CX-4.) During this first day of trading, Kerrigone accumulated a net short position of approximately 32,400 shares. (RP 604; CX-1.) Shortly after the market opened on the second day, the price of the stock started to decline and Kerrigone started purchasing shares to close out his short position. (CX-1; CX-2.) Once he shifted direction, Kerrigone was exclusively a buyer, and by the close had bought enough Preventia to nearly fully cover his short position. (CX-1.) During this period, he posted offer quotes for Wilson-Davis that were significantly away from the inside offer approximately 94 percent of the time, ensuring that he would not sell additional stock. (RP 626; CX-4.) Because the stock price declined substantially between Kerrigone's shorts and his subsequent covering purchases, he generated trading profits of $4,032. (CX-1.) Kerrigone never traded in Preventia again after his brief entry into the market. (RP 606; CX-1.) And the Firm never borrowed or made arrangements to borrow the shares Kerrigone sold short. (RP 605.)

2. PM&E, Inc.

Kerrigone also traded in a penny stock company called PM&E, Inc. PMEA was purportedly a solar power technology company. (CX-29.) Like Preventia, there was limited or no trading in the stock before a flurry of activity in November 2012. (RP 667-68; CX-3.) On

November 12, 2012, "hotstocked.com" published a promotional article touting the company. (CX-29.) That day, price and volume in the stock spiked, and Kerrigone entered the market. (RP 667-69; CX-8.) Kerrigone's market maker application to his superiors at Wilson-Davis again explained that he decided to make a market in the stock because of a "trading opportunity." (JX-14.)

Kerrigone entered the market of PMEA on November 21 by shorting. (RP 649-50.) Kerrigone executed his initial short sale with another firm at a price more than 28 percent away from Kerrigone's own quote. (RP 650-51.) As Kerrigone continued to short the stock, Wilson-Davis's posted bid quotes were never at the inside, and usually significantly away from the inside. (RP 651-53; CX-7.) During this first day of trading, every transaction (except one) by Kerrigone was a short sale, and he accumulated a net short position of approximately 35,000 shares. (RP 661-62; CX-6.) In the afternoon on the second day, the price of the stock started to decline and Kerrigone started purchasing shares to close out his short position. (RP 662; CX-6; CX-10.) By the close on the second day, Kerrigone had bought enough PMEA to cover his shorts and ended in a net flat position. (RP 646; CX-6.) Because the stock price declined substantially between Kerrigone's shorts and his subsequent covering purchases, he generated trading profits of $8,495. *Id*. Kerrigone never traded in PMEA again after his brief entry into the market. (RP 668-69; CX-6.) Kerrigone left the market the next day, after one small short sale and subsequent cover, and the Firm never borrowed or made arrangements to borrow the shares Kerrigone sold short. (RP 644.)

While Kerrigone was shorting, Wilson-Davis posted posted competitive bid and ask quotes. (CX-9.) Its posted bid quotes were never at the inside, and usually were more than 10 percent lower than the inside quote, making it unlikely that the Firm's posted bids would result in any actual purchase transactions. (RP 657-58; CX-7; CX-9.) And when Kerrigone later covered his short position, Wilson-Davis posted competitive bid and ask quotes approximately 7 percent of the time. (CX-9.) Its posted offer quotes were almost never at the inside, and usually more than 10 percent higher than the inside quote, making it unlikely that the Firm's posted offers would result in any actual sale transactions. (RP 658-59; CX-7; CX-9.)

3. China Teletech Holding

China Teletech Holding was a company that purportedly sold pre-paid calling cards and mobile phone handsets in China. (CX-30.) Like the other companies, there was limited or no trading in the security until the latter part of February 2013. (RP 703-05; CX-13.) On about February 20, 2013, an article appeared on "hotstocked.com" touting the company. (CX-30.) The next day, price and volume in the stock spiked. (RP 704-05; CX-13.) Kerrigone entered the CNCT market. His market maker application to his superiors at Wilson-Davis explained that he decided to make a market in the stock because of a "trading opportunity." (JX-15.)

Kerrigone entered the CNCT market on February 21 by exclusively selling the stock short, building a net short position of approximately 2.8 million shares by the third day of trading. (RP 672; CX-11.) Throughout the morning of that third trading day, Kerrigone continued shorting the stock with dozens more short sales (and a small number of buy transactions), accumulating a net short position of over 5 million shares. (RP 674-75; CX-11.) Then, shortly after noon as the price of the stock started to decline, Kerrigone reversed direction and started purchasing shares in significant quantities. (RP 676; CX-11.) Notwithstanding a small number of short sales that afternoon, by the end of the day he had reduced his net short position by more than 2 million shares. (RP 676-77; CX-11.)

Kerrigone continued trading in the stock for two more days. By the end of the fifth trading day, February 27, 2012, Kerrigone was net flat in his trading position, having purchased enough stock to cover his entire 5 million share short position. (RP 678; CX-11.) Because the stock price declined substantially between when Kerrigone started shorting the stock and his subsequent covering purchases, he generated trading profits of $116,532 over the five days of trading. (RP 678; CX-11; CX-13.) After this period, Kerrigone never traded in the stock again. (RP 678; CX-11.) The Firm never borrowed or made arrangements to borrow the shares Kerrigone sold short. (RP 672-73.)

4. Lot 78, Inc.

The Firm's trading in LOTE vividly highlights Kerrigone's strategy. Kerrigone began trading in LOTE on April 24, 2013. CX-16. Unlike the other stocks, Kerrigone's trading did not start immediately after promotional activity—instead, the promotion began on March 10, 2013, more than a month before Wilson-Davis entered the market. (CX-16; CX-32.)

Kerrigone's trading varied slightly from his typical pattern. He briefly accumulated a long position by purchasing LOTE stock at the market open on April 24, before changing direction less than an hour later by selling more than 1.1 million shares, resulting in a net short position of approximately 476,000 shares. (RP 714-15; CX-16.) Similar to the other stocks, Wilson-Davis did not borrow the securities it sold short. (RP 716.) Kerrigone continued to increase his short position to approximately 1 million shares by the end of the trading day. (RP 718-19; CX-16.) Kerrigone's last purchase of the day was at a price of $2.45 per share. (RP 719; CX-16.)

The next day, Kerrigone began purchasing stock to cover his short position, but found that unlike the prices of the other stocks, the price of LOTE continued to increase. CX-16. After a single purchase of 256,878 shares at $3.34 per share, Kerrigone stopped making substantial efforts to cover and traded in only small volumes of LOTE as the stock price continued to rise throughout the day. (RP 720-22; CX-16.) Kerrigone's last trade of the day was at $4.05 per share. (RP 721; CX-16.) Despite the fact that Kerrigone's net short position decreased by approximately 250,000 shares as a result of his purchase, the value of his outstanding LOTE short position increased from approximately $2.4 million to $2.9 million as a result of the rising price of the stock. (RP 718-24; CX-16.)

On the third day after Kerrigone entered the market, the price of LOTE continued to rise. (CX-16.) That morning, Kerrigone purchased another 199,132 shares to reduce his short position to approximately 544,576 shares, this time at a price of $ 4.81 per share. (RP 719-23; CX-16.) Kerrigone again traded only small volumes of the stock, with his last trade of the day at $6.05 per share. (RP 724; CX-16.) Although the number of shares in his short position was again reduced, the increased share price meant that the value of the outstanding position that Kerrigone still needed to cover had increased to over $3.2 million. *Id*.

Despite the rising price of LOTE, Firm policy required Kerrigone to cover his short position quickly. (RP 1167-70; RX-30.) Kerrigone finally covered his net short position on the fourth trading day. (CX-16.) He did so by executing a purchase of 545,388 shares at a price of $7.89 per share. (RP 724-25; CX-16.) After that fourth day, Kerrigone never traded in LOTE again. (RP 724; CX-16.) Because LOTE's stock price did not follow Kerrigone's anticipated trajectory and he had to purchase his covering shares at prices substantially higher than where he shorted, his trading in the stock resulted in a loss to Wilson-Davis of more than $4.2 million. (RP 728; CX-16.) Shortly thereafter, Wilson-Davis required Kerrigone to reimburse the Firm for its LOTE losses and asked him to leave the Firm. (RP 983-85; CX-35.)

D. Supervision of Kerrigone's Trading

The Firm made no effort to ensure that Kerrigone's activity was consistent with genuine market making activity. (RP 1053-1056.) The Firm's inadequate supervisory system, written procedures, and supervision of Kerrigone's trading activity led to its failure to find locates in the stocks, resulting in not only the Firm's violation of Reg SHO, but also its damaging position in LOTE, resulting in the loss of millions of dollars.

During the relevant period, Wilson-Davis's WSPs noted that the Firm was obligated to borrow securities before entering short sales except where it was engaged in "bona fide market making transactions in [non-NASDAQ OTC] securities where the firm publishes a two-sided quotation in an independent quotation medium." (RP 7314, 1175-76.) But the WSPs provided no guidance as to how supervisors were to determine whether a given short sale was executed in connection with bona fide market making activity. (RP 1175-78.)

Nor did the Firm's supervisors attempt to make such determinations. Barkley was responsible for supervising Kerrigone's trading. (RP 937-38, 1017.) He also was responsible for the Firm's compliance with Reg SHO and ensuring that Kerrigone's trading was consistent with the bona-fide market maker exemption. (RP 1160-61.) Once Barkley approved a stock as part of the market maker application approval process, however, he simply assumed that all short sales in the stock were exempt as bona-fide market making. (RP 1058.) Neither Barkley nor anyone else at the Firm did anything to actually ensure that Kerrigone's trading constituted bona-fide market making activity. (RP 1059-62.) Barkley's failure to oversee Kerrigone's trading was conspicuously on display with respect to LOTE. Barkley was unconcerned with whether Kerrigone's quotes were consistent with bona-fide market making. Instead, he paid attention only to the size of Kerrigone's short position and the risk it presented to the firm. (RP 1147-51.)

Despite knowing that publishing a two-sided quotation was an important indicium of bona-fide market making, Barkley was not concerned with whether Kerrigone was posting competitive bids but rather with the prospect that such bids would raise the price of the stock and make it more expensive to cover the short. (RP 1151, 1181.)

E. Supervision of Registered Personnel

1. Heightened Supervision

Wilson-Davis's procedures required, based on specified criteria, that Snow identify candidates for heightened supervision and determine the scope of such supervision. (RP 3958-60.) One of the criteria was the filing of a complaint by a regulator. *Id*. In such an event, the Firm's WSPs required the compliance department (Snow) and the representative's supervisor to consider whether to establish a plan of heightened supervision and for compliance personnel to prepare a written memorandum outlining the action taken or not taken.

On December 27, 2010, Enforcement filed a complaint against the Firm, Randy Carlson, and Paul Davis. (RP 41.) The complaint alleged that the Firm and Carlson violated Section 5 of the Securities Act of 1933 and that Davis failed to supervise Carlson. *Id*. The Firm and Davis settled the charges against them and, on October 4, 2011, Enforcement filed an amended complaint against Carlson. (RP 2973, 2985, 3001.) Following a hearing, the Hearing Panel issued a decision on June 8, 2012, finding that Carlson violated Section 5. (RP 3015.) Among other sanctions, the panel ordered that Carlson could be employed by a member firm only if he was subject to heightened supervision for one year. *Id*. Wilson-Davis failed to create or implement a heightened supervision plan for Carlson until August 6, 2012. (RP 3033, 87.) Wilson-Davis and Snow did not even consider implementing a plan before that date. (RP 1392, 1484-87.) In the meantime, the Firm allowed Carlson to continue transacting Section 5-related business. (RP 1476-79, 3035.)

2. Supervisory System

During the relevant period, Wilson-Davis did not have a coherent system to supervise its representatives and principals, and the matter in which the Firm attempted to supervise personnel was inconsistent with its WSPs. These supervisory failures resulted in part because the individuals responsible for implementing the WSPs were not performing their duties as set forth in the WSPs.

For example, Wilson-Davis's procedures for the supervision of registered personnel included the use of "head count lists" that identified Snow as the supervisor for registered representatives with retail accounts. (RP 5907; 1584.) But Snow, who was himself responsible for the firm's procedures, testified he did not have that supervisory responsibility. (RP 8023; 8025; 1582.) Snow testified that Davis was responsible for supervising the Firm's sales personnel. (RP 1665-66.) But Davis was only in the office a few hours a day during the relevant period, and there were no procedures regarding who was to assume his supervisory responsibilities in his absence. (RP 1490.) There were also no clear supervisory roles with regard to the registered principals; rather, the principals claimed generally that they supervised each other. (RP 1265-66; 1506.)

3. Instant Messaging

Pursuant to the WSPs, the Firm and Snow were required to review IMs, which were subject to the firm's review and record retention policies. Instead, Snow delegated the review of IMs to an unregistered individual. (RP 1605-06.) In addition, Snow did not take any action to ensure that the delegated function was being properly executed. *Id*.

F. Anti-Money Laundering

1. AML Policies and Procedures

Snow, the Firm's AMLCO, was responsible throughout the relevant period for ensuing the Firm's AML program was adequately tailored to the risks posed by the Firm's business and for establishing an AML program to mitigate those risks. (JX-1.) Wilson-Davis's AML procedures required Snow to implement the AML policies and program, detect transactional red flags indicative of suspicious activity, investigate those red flags, and report suspicious activity by filing a Suspicious Activity Report ("SAR") when required. *Id*.

The Firm's AML policies and procedures were not properly tailored to the risks posed by the Firm's penny stock business. Specifically, the procedures failed to include a list of red flags indicative of the suspicious and potentially manipulative trading associated with transacting in penny stocks, including but not limited to matched orders, wash sales, and pre-arranged trading.

While the Firm had generic procedures prohibiting manipulation, the Firm had no procedures defining how to identify and investigate such trading schemes. The procedures also did not reference any reports which could be utilized to identify such prohibited transactions.

Wilson-Davis and Snow also did not implement the Firm's AML policies and procedures reasonably. Even though Snow was explicitly delegated the responsibility to review for suspicious trading activity, he relied solely on others to bring suspicious transactions to his attention, although there was not a process for such transactions to be identified and escalated. (RP 4030-31; CX-63.)

2. Valley High Mining Company

The failure to adequately review for suspicious activity resulted in Snow and the Firm failing to detect or investigate potentially suspicious trading activity in Valley High Mining

Company ("VHMC"), a highly illiquid penny stock. Wilson-Davis began making a market in VHMC in April 2012 after the president of VHMC asked Snow to have the Firm make a market in the stock. (RP 1637-39.)

On April 10, 2012, on the Firm's the first day of trading VHMC, a Wilson-Davis customer account bought 2,500 shares of VHMC from another Wilson-Davis customer account for $0.40 per share. (RP 787-88.) A cross trade between customers of the Firm was posted at 3:59 p.m. and was well above the previous reported trade of $.025 per share. *Id*. The next day, Lyle Davis reviewed a report that detailed all customer trades at the Firm. (RP 1336-37.) According to Davis, he reviewed the report to look for cross trades, wash sales, or other out of the ordinary transactions. *Id*. The VHMC cross trade between the firm customers was apparently reviewed by Davis, who hand-wrote the word "okay" next to the trade. *Id*. According to Davis, it was his practice to discuss questionable trades with the broker who made the trade, but he never documented any review or inquiry he performed, and there is no evidence in the record that he or anyone at the Firm discussed with its customers the facts surrounding any trade.

The trading activity in VHMC at the Firm occurred from April 2012 through November 2012, during which time its price rose to approximately $4.95 per share. (CX-23.) At that price, VHMC, a shell company, had a market value of just over $75 million. (RP 790.) The cross-trading activity described above, in addition to other information known to the Firm regarding VHMC, raised several red flags indicative of potentially suspicious trading activity that the Firm should have recognized and investigated, but did not. These red flags include: that prior to the Firm's trading activity, VHMC was a dormant, little-known penny stock; there was publicly available information indicating familial or other affinities between the Firm's customers and the individual who was once the sole director of VHMC; Wilson-Davis customers constituted a high percentage of the overall market volume of VHMC and its customer trades in VHMC included numerous instances of apparent pre-arranged trades and matched orders; the share price of VHMC rose significantly during this period—from $0.40 to almost $5; and the Firm dominated both the buy and sell side of VHMC trading during this period, often making up 100 percent of the market.

Notwithstanding the high percentage of the trading volume controlled by the Firm, the steep and rapid price rise, and the relationships of the customers to a company insider, Wilson-Davis and Snow failed to review the trading activity from an AML perspective. Nobody ever discussed the facts surrounding the trades with the customers. Neither the trader, Barkley, nor anyone else at the Firm brought any of the activity to Snow's attention for AML review. (RP 1639-40.)

3. AML Training

During the relevant period, the Firm failed to provide adequate AML training to its employees upon whom Snow claimed to have relied on for escalating concerns within the Firm related to suspicious activity. Despite Wilson-Davis's business in penny stocks, the Firm and Snow failed to provide Firm personnel with adequate training and materials regard the risks and red flags associated with penny stock activity. As an example, had the Firm trader assigned to make a market for VHMC received adequate AML training, he should have been able to recognize the suspicious activity discussed above and subsequently brought it to the attention of Snow.

III PROCEDURAL BACKGROUND

On December 16, 2016, Enforcement filed a complaint alleging that Wilson-Davis willfully violated Rule 203(b)(1) of Reg SHO and FINRA Rule 2010 by short selling without first borrowing the securities. (RP 1-58.) The complaint alleged that Applicants failed to supervise Kerrigone's short selling, in violation of NASD Rule 3010 and FINRA Rule 2010. The complaint further alleged that the Firm and Snow failed to adequately supervise trading and other activities at the Firm in violation of NASD Rule 3010 and FINRA Rule 2010, and failed to establish and implement adequate AML procedures tailored to the Firm's business, in violation of FINRA Rules 3310 and 2010. Applicants filed an answer denying the allegations contained in the complaint and a hearing was held. (RP 79-114).

On February 27, 2018, the Hearing Panel issued its decision, finding that Applicants engaged in the misconduct alleged in the complaint. (RP 8227-8260.) On February 28, 2018, Applicants appealed the Hearing Panel decision to the NAC. (RP 8216-66.) On December 19, 2019, the NAC issued its decision affirming the Hearing Panel's findings of liability but modifying the Hearing Panel's sanctions. (RP 8497-8525.) For its Reg SHO violations, the NAC fined Wilson-Davis $350,000 and ordered disgorgement of $51,624. For its failures to supervise and implement adequate AML procedures in violation of NASD Rule 3010 and FINRA Rules 3310 and 2010, the NAC fined Wilson-Davis $750,000 and directed the Firm to retain an independent consultant. *Id*.

For his failures to supervise and implement adequate AML procedures in violation of NASD Rule 3010 and FINRA Rules 3310 and 2010, the NAC fined Snow $77,000, suspended him in all capacities for three months and in his principal and supervisory capacities for one year, to be served concurrently, and ordered him to requalify as a principal by examination before acting in that capacity again. *Id*.

For his failure to supervise the short sales in violation of NASD Rule 3010 and FINRA Rule 2010, the NAC fined Barkley $52,000, suspended him in all capacities for three months and in his principal and supervisory capacities for one year, to be served concurrently, and ordered him to requalify as a principal by examination before acting in that capacity again. This appeal followed. (RP 8529.)

IV. DISCUSSION

The Commission must dismiss this application for review if it finds that Applicants engaged in conduct that violated federal securities laws and FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Exchange Act, and FINRA imposed sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition. 15 U.S.C. § 78s(e).

The record contains a wealth of documentary evidence that conclusively supports that Wilson-Davis violated Reg SHO, that the Firm, Snow, and Barkley failed to adequately supervise, and that Wilson-Davis and Snow failed to establish and implement AML procedures and conduct adequate AML training. The NAC's findings of liability are sound, and the fines, suspensions, and additional undertakings are appropriately remedial. Applicants provide no relevant or material basis upon which the Commission should modify the sanctions, which are abundantly supported by record evidence. The Commission should therefore dismiss the application for review.

A. Wilson-Davis Violated Reg SHO

1. Regulation SHO

Reg SHO of the Exchange Act governs short sales. Rule 203(b) of Reg SHO prohibits a broker-dealer from accepting a short sale order in an equity security from another person or effecting a short sale in an equity security for its own account unless the broker-dealer has borrowed the security, entered into a bona-fide arrangement to borrow the security, or has "reasonable grounds" to believe that the security can be borrowed so that it can be delivered on the delivery date. 17 CFR § 242.203(b)(ii). This is generally referred to as the "locate" requirement. Rule 203(b) also requires the broker-dealer to document its compliance with the "locate" requirement. 17 C.F.R. § 242.203(b)(2)(iii). Market makers, who ensure liquidity in the market, are exempted from the locate requirement if they are engaged in bona-fide market making activities in the security for which the exception is claimed.[3]

The proposing and adopting releases for Reg SHO provide guidance as to what may constitute bona-fide market making activities and what may not:

> Bona-fide market making does not include activity that is related to speculative selling strategies or investment purposes of the broker-dealer and is disproportionate to the usual market making patterns or practices of the broker-dealer in that security. In addition, where a market maker posts continually at or near the best offer, but does not also post at or near the best bid, the market maker's activities would not generally qualify as bona-fide market making for purposes of the exception.

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[3] The Commission has stated that "a market maker engaged in bona-fide market making is a broker-dealer that deals on a regular basis with other broker-dealers, actively buying and selling the subject security as well as regularly and continuously placing quotations in a quotation medium on both the bid and ask side of the market." *See, e.g.*, *Amendments to Regulation SHO*, Exchange Act Release No. 58775, 2008 SEC LEXIS, at *60 (Oct. 14, 2008). A market maker is a firm that stands ready to buy and sell a particular stock on a regular and continuous basis at a publicly quoted price. Firms acting in this role provide liquidity in order to reduce volatility and help maintain a fair and orderly market. Because market makers are required to purchase or sell stock for their own account, they incur market risk.

Short Sales, Exchange Act Release No. 50103, 2004 SEC LEXIS 1636, at *50 (July 28, 2004).

Furthermore, it is the market maker's burden to show that a short sale was effected "in furtherance of . . . bona fide market making activities" and was not subject to the requirements of Rule 203(b)(1). *Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Relating to Amending Rule 30.20 to Conform to the Requirements of Regulation SHO*, Exchange Act Release No. 50920, 2004 SEC LEXIS 3041, at *17 (Dec. 22, 2004).

2. Wilson-Davis's Activities Did Not Evidence Bona-Fide Market Making

Conceding that securities regulators have concluded that the trading Kerrigone engaged in was not bona-fide market making, Wilson-Davis nonetheless argues that it was reasonable at the time for the Firm to conclude that it was engaging in legitimate market-making activity. The Firm proffers examples of Kerrigone's trading that it argues supports this belief. Regardless of what the Firm believed at the time, the NAC correctly concluded that the Firm violated Reg SHO. The record amply supports the NAC's conclusion and the decision should be affirmed by the Commission.

There is no dispute that Wilson-Davis made at least 122 short sales in connection with Kerrigone's speculative trading strategy in the Stocks and that the Firm failed to comply with the borrow requirement in connection with each of these short sales. A firm that effects short sales has the burden to demonstrate that it qualifies for an exception to the locate requirement. *See Wilson-Davis & Co..*, Exchange Act Release No. 80533, 2017 SEC LEXIS 1242, at *9, n.10 (Apr. 26, 2017), *citing FTC v. Morton Salt Co.*, 334 U.S. 37, 44 (1948). Wilson-Davis bore the burden of demonstrating that its trading was bona-fide market making, and the NAC correctly determined that it failed to meet that burden.

Applicants argue that the NAC ignored indicia of bona-fide market making that lead Wilson-Davis to believe it was acting as such. Wilson-Davis's belief at the time is irrelevant to liability. Regardless, the record does not support that Wilson-Davis's trading was bona-fide market making. First, Wilson-Davis argues that it believed it was acting as a bona-fide market maker because it was "'actively buying and selling the subject security' from various brokers and constantly posted bid and ask quotes.'" Brief in Support of Application for Review ("Br.") at 13-14. In addition, Applicants note Reg SHO permits market makers to carry short positions over night. Applicants erroneously assert that the reason the NAC concluded they were not bona-fide was because they carried a short position overnight. This is incorrect. The NAC concluded that carrying the short position overnight was a part of Kerrigone's directional trading strategy that evidenced that Wilson-Davis was not participating in bona-fide market making activities when selling the stocks short.

While Applicants point to "indicia" that they insist led the Firm to believe that it was a bona-fide market maker, the weight of the evidence demonstrates in stark terms that the Firm was in fact violating Reg SHO. The record reflects that Kerrigone intentionally entered into an artificially inflated market to implement his short-selling strategy and later covered his shorts when the market collapsed. During the time of the short selling, the Stocks were quoted on either the OTCBB or pink sheets and immediately prior to Kerrigone's short sales, the Stocks were subject to questionable promotional activity. Kerrigone traded in the stocks for a few days, and not for more than a week, and the Firm had little to no history of making a market in the stocks prior to the commencement of Kerrigone's short selling. Wilson-Davis frequently engaged in short sales at prices away from its own posted quotations. Such trading activity reveals that a firm's quotes are window dressing and not market making. "[A] market maker that continually executes short sales away from its posted quotes would generally not be considered to be engaging in bona-fide market making." *SEC 2008 Release*, 2008 SEC LEXIS 2319, at *65.

Next, Applicants argue that the Firm was acting as a bona-fide market maker because it incurred an economic risk. Br. at 14. They point to the losses suffered from the Firm's trading in LOTE. But the SEC guidance speaks in terms of a market maker putting its capital at risk by posting quotes, offering to sell or buy to provide liquidity to market participants who may accept its offer or bid. It does not speak in terms of the market maker's aggressively selling or buying, initiating orders away from its own quotes or the "risk" associated with an aggressive proprietary trading strategy.

Third, Applicants argue that at the very "heart" of its belief that it was acting as a bona-fide market maker is the liquidity it provided to the market and that the NAC ignored the "important benefits" of liquidity and pricing efficiency that Wilson-Davis provided. Br. at 14-16. None of these conclusions are supported by the record. The NAC was correct in finding that Wilson-Davis's evident desire to generally trade in a single direction, and not do business with sellers when shorting (or buyers when covering) distinguishes it from a genuine market maker. The SEC guidance emphasizes that even during periods of market imbalance, "[a] pattern of trading that includes both purchases and sales in roughly comparable amounts to provide liquidity to customers or other broker-dealers would generally be an indication that a market maker is engaged in bona-fide market making activity." *SEC 2008 Release,* 2008 SEC LEXIS 2319, at *63. Wilson-Davis' trading revealed no such pattern. A market maker's willingness to provide liquidity to a market, imbalanced or not, is evidenced by its "[c]ontinuous quotations that are at or near the market *on both sides* and that are communicated and represented in a way that makes them widely accessible to investors and other broker-dealers. " *Id*. at *64; *see also Shamrock Partners, Ltd.*, 53 S.E.C. 1008, 1011-12 (1998) ("[T]o be treated as a market maker, a dealer must, among other things, advertise its willingness to buy and sell securities for its own account and stand ready to buy and sell to other dealers at its quoted prices"); *R.B. Webster Invs., Inc.*, Exchange Act Release No. 35754, 1995 SEC LEXIS 1309, at *5 (May 23, 1995) ("[i]n order to be treated as a market maker, a dealer must be willing to both buy and sell the security at issue in the inter-dealer market on a regular or continuous basis").

On the other hand, "where a market maker posts continually at or near the best offer, but does not also post at or near the best bid, the market maker's activities would not generally qualify as bona-fide market making." *SEC 2008 Release*, 2008 SEC LEXIS 2319, at *65; s*ee also R.B. Webster Invs.*, 1995 SEC LEXIS 1309, at *6 (applicant was not a market maker where applicant's "ask quotations were deliberately higher than any other dealer's," and as a result "never sold any of the stock to other dealers"); *Dep't of Enforcement v. Legacy Trading Co.*, Complaint No. 2005000879302, 2010 FINRA Discip. LEXIS 20, at *28 (FINRA NAC Oct. 8 2010) (respondent was not engaged in bona-fide market making where it "almost never posted the inside bid or ask in connection with the short sales"). Wilson-Davis's quotations in each of the Stocks were rarely at or near the market on both sides. See CX-4.

Applicants argue that because the Firm's short selling did not flood the markets, Wilson-Davis was acting as a bona fide market maker. This factor alone, however, does not support Applicants' burden of showing that its short selling was in furtherance of the Firm's bona-fide market-making activities.

Applicants go on to argue that Enforcement and the NAC focused on a non-existent "10% rule" (what percentage of time the Firm was more than 10 percent off the inside of the bid, the offer, or both) while ignoring other pertinent facts such as the "reality of a human trading" and what was happening with the Stocks on ARCA.[4] Br. at 17-19. Again, these arguments fail in the face of the record.[5] The NAC decision explicitly stated that it was not creating or endorsing any "10 percent rule." On the contrary, the NAC noted that the Hearing Panel did not base its finding that the Firm was not acting as a bona-fide market maker solely on the evidence that its quotes were more than 10 percent away from the inside bid or offer, but considered all the relevant facts and circumstances in making its finding. The NAC concluded that the fact that the Firm's quotes were not competitive is useful because of the *frequency* with which this happened. SEC guidance states that "[c]ontinuous quotations that are at or near the market on both sides and that are communicated and represented in a way that makes them widely accessible to investors and other broker-dealers are also an indication that a market maker is engaged in bona-fide market making activity." *SEC 2008 Release*, 2008 SEC LEXIS 2319, at

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[4] Applicants chide the NAC decision for ignoring what was happening with the Stocks on ARCA. But ARCA displays anonymous bid or ask quotes so it did not display Wilson-Davis's name to the market. Furthermore, Applicants' expert did not include ARCA data in his analysis. It was Applicants' burden show that it was acting as bona-fide market maker, and they failed to meet that burden.

[5] Applicants misrepresent the NAC decision when they complains that "[t]he NAC was also demonstrably inaccurate when it found that Kerrigone ***always*** began selling into markets with "relatively inactive" stocks and thus there was no "trade imbalance or lack of liquidity in any of the Stocks when Kerrigone began short selling." (emphasis added) Br. at 18-19. The NAC decision only states that "Wilson-Davis ***did not present any evidence*** to show that there was an actual trade imbalance or a lack of liquidity in any of the Stocks when Kerrigone began short selling." (emphasis added). Moreover, the NAC decision is referring to all the Stocks when it used the description of "relatively inactive," while Applicants cherry pick the trading activity in LOTE (which had trading activity before Kerrigone entered the market) in an attempt to challenge the basis of the NAC's findings.

*64. The guidance does not define "near," but the NAC concluded that 10 percent is a reasonable measure of quotes being away from the inside so as to be considered not near the market. *See Legacy Trading, Co*, 2010 FINRA Discip. LEXIS 20, at *28 (FINRA NAC Oct. 8, 2010) (finding respondent was not engaged in bona-fide market making when it "almost never posted the inside bid or ask in connection with the short sales"). Wilson-Davis's quotations in each of the four Stocks were rarely at or near the market on both sides. Indeed, the record reflects that Wilson-Davis's quotes were frequently far more than 10 percent away from the inside—as far away as 250 percent.[6]

The record demonstrates that rather than acting as a bona-fide market maker, Wilson-Davis sold the Stocks short as part of a speculative trading strategy. Because the short sales were not subject to the market maker exemption, Wilson-Davis violated Rule 203(b)(1) of Reg SHO and FINRA Rule 2010.

B. Applicants' Failures to Supervise

The NAC correctly found that Applicants failed to supervise four aspects of the Firm's business. Specifically, the NAC concluded that Wilson-Davis, Barkley, and Snow failed to supervise Kerrigone's short selling, and Wilson-Davis and Snow failed to supervise the Firm's registered representatives and principals, failed to supervise the Firm's IMs, and failed to engage in heightened supervision. Applicants' provide no basis for overturning the NAC's findings and its decision should be affirmed.

[6] Applicants also argue that their misconduct was not egregious because there is no evidence that the trading negatively impacted anyone other than Wilson-Davis. This is argument is not a defense against liability.

1. Wilson-Davis, Barkley, and Snow Failed to Supervise Kerrigone's Short Selling

NASD Rule 3010(a) required firms to "establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD rules."[7] NASD Rule 3010(b) required that these systems be documented in the firm's WSPs. The procedures must be tailored to the firm's business, and must set forth mechanisms for ensuring compliance and detecting violations, and not merely set forth what conduct is prohibited. *See*, NASD IM-3010-1; *Gary E. Bryant*, 51 S.E.C. 463, 470-71 (1993); *John A. Chepak*, 54 S.E.C. 502, 506 (2000); *A.S. Goldmen & Co.*, 55 S.E.C. 147, 166 (2001).

The record supports the NAC's conclusion that Wilson-Davis did not have reasonable supervisory systems and procedures to address compliance with Reg SHO. Snow was responsible for the Firm's supervisory system and written procedures, and his actions were woefully insufficient. (RP 91.) The Firm and Snow failed to have procedures to identify the limits of the bona fide market maker exception to the locate requirement; detect and prevent misuse of that exception; monitor for compliance with Reg SHO; provide guidance on how supervisors should conduct Reg SHO reviews; inform supervisors as to how to document reviews performed with respect to Regulation SHO; or establish protocols for escalating issues noted by supervisors in the course of discharging their responsibilities related to Regulation SHO reviews.

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[7] NASD Rule 3010 was superseded by FINRA Rule 3110 after the relevant period.

Barkley was responsible for supervising trading and ensuring compliance with Reg SHO but he did nothing to supervise Kerrigone's trading or ensure that it complied with the regulation. Applicants argue that Barkley was "interacting" at least once a day with Kerrigone. Br. at 31. However, mere "interaction" does not equal adequate supervision. Rather, under the NASD and FINRA rules, Barkley was required to supervise Kerrigone in a manner "that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD [and FINRA] [r]ules." NASD Rule 3010(a).

Barkley did not supervise Kerrigone in a manner designed to achieve compliance with Reg SHO. Although Barkley monitored Kerrigone's trading in the Stocks in real time and communicated frequently with Kerrigone, Barkley did not regularly monitor the market maker quotes Kerrigone was displaying to the market at the time of his trading. Consequently, Barkley failed to detect quotations in the Stocks that were far away from competitive levels on either the buy or sell side. Barkley's assumption that Kerrigone was acting as a bona-fide market maker after rubber-stamping Kerrigone's market maker application with no meaningful monitoring of Kerrigone's and other dealers' quotes violated NASD 3010(a) and FINRA Rule 2010. Barkley never analyzed the trading data to determine whether it constituted bona-fide market making. Therefore, the Commission should affirm the NAC's findings that Wilson-Davis and Snow failed to establish and maintain a reasonable supervisory system and WSPs for Reg SHO compliance, and the Firm and Barkley failed to reasonably supervise Kerrigone's trading.

2. Wilson-Davis and Snow Failed to Provide Adequate Heightened Supervision

Wilson-Davis's procedures required it to determine whether heightened supervision was necessary for Randy Carlson when FINRA filed a complaint against him. Wilson-Davis failed to do so. It then failed to subject Carlson to heightened supervision until two months after the Hearing Panel issued its decision, finding Carlson liable for Section 5 violations.

Applicants argue that their heightened supervision plan was actually only "six trading days" late because the "hearing panel order provided Wilson-Davis with 6 ½ weeks to develop and implement the plan" because the decision was not "final." Br. at 33. Applicants' argument ignores Wilson-Davis's explicit procedures requiring it to assess whether heightened supervision of Carlson was necessary at the time the complaint was filed. In fact, Wilson-Davis never considered Carlson as a possible candidate for heightened supervision at the time that FINRA filed its Complaint. It was not until nearly two years later that the Firm devised a heightened supervisory plan for Carlson. Even after the hearing panel issued its decision, Wilson-Davis nonetheless waited two month to implement its plan.

When Wilson-Davis finally implemented the heightened supervision plan, it was unreasonable and ineffective.[8] The plan the Firm finally put in place did little more than require Carlson to follow procedures already required under Firm policy. (RP 3033.) It did not, as the firm's WSPs required, identify a supervisor and provide for certification by that supervisor. (RP 1489-90.) Nor was the plan implemented adequately. Davis, who was found to have failed to supervise Carlson with regard to the Section 5 violation, was, by default, the supervisor assigned to oversee the heightened supervision. (RP 1490.) But Davis, who was then in his eighties, was only in the office a few hours a day and was himself unsure he was responsible for the

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[8] Applicants argue that it provided unrebutted testimony that Carlson's heightened supervisory plan was strictly enforced and that Paul Davis and others would pay close attention to Carlson's stock intake. Br. at 34. This argument, however, ignores the findings that the plan itself was deficient.

supervision. (RP 1372-73; 1398; 1490.) No supervisor ever certified the Firm's and Carlson's compliance with the plan.

Applicants contend that they presented evidence about the impact of heightened supervision on Carlson and his business and maintain that the plan was strictly enforced. Br. at 34. Even assuming this is true, it does not cure the inadequacies of the heightened supervision plan. A strictly enforced, but deficient, supervisory plan still violates FINRA rules.

Applicants also argue that the Firm's enhanced Section 5 procedures, put in place as a result of the underlying disciplinary proceeding against Carlson, provided for the necessary supervision. But the argument ignores the requirements of the Firm's own WSPs as well as those ordered by the Hearing Panel.

3. Wilson-Davis and Snow Failed to Establish and Maintain a Reasonable Supervisory System to Supervise Registered Personnel

NASD Rule 3010(a)(5) required "[t]he assignment of each registered person to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities." Notice to Members 99-45 explained that that "requirement … serves several functions. It provides the person being supervised with a clear line of authority and specifically identifies for the supervisor the persons for which he or she has responsibility." 1999 NASD LEXIS 20, at *17-18 (June 1999). Wilson-Davis, acting through Snow, failed to assign each registered person to an appropriately registered person responsible for supervising that individual's activities.

Applicants contend that the NAC erred in relying on the "head count" lists and that no "head count" lists were circulated or relied upon by the Firm. Before the Hearing Panel, Lyle Davis testified that the head count list was a draft and not intended to be a finished product. Regardless of whether the head count list was inaccurate or unreliable, Wilson-Davis had no other written records that reflected its supervisory and reporting structure, as required by its WSPs. Wilson-Davis and Snow therefore failed to establish this aspect of the Firm's supervisory system.

4. Wilson-Davis and Snow Failed to Supervise IM Communications

Applicants do not dispute that Wilson-Davis and Snow failed to reasonably supervise the IM communications of the Firm's representatives. Snow delegated the review of IMs to an unregistered person, and failed to take reasonable steps to ensure that the delegated function was executed properly. Snow admits that this delegation was improper. (RP 1606.)

Thus, for the foregoing reasons, the Commission should affirm the NAC's findings that Applicants failed to reasonably supervise, in violation of NASD Rule 3010(a) and FINRA Rule 2010.

C. Wilson-Davis's and Snow's AML Violations

The NAC concluded that the Firm's AML program was not reasonably designed to achieve compliance with its AML responsibilities and the applicable SAR reporting requirements, and that the Firm did not adequately implement its AML program or conduct appropriate AML training. Because the record is replete with evidence to support the NAC's findings, the Commission should affirm.

FINRA Rule 3310(a) requires member firms to "[e]stablish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of transactions required under 31 U.S.C. § 5318(g) and the implementing regulations thereunder." The latter provision is broad and requires firms to report any suspicious transactions or possible violations of law. A firm's AML procedures must accordingly provide for the "monitoring of account activities, including but not limited to, trading and the flow of money into and out of" accounts.

NASD Notice to Members 02-21, 2002 NASD LEXIS 24, at *21 (April 2002). This is not, as the NASD emphasized in a 2002 notice to members, "a 'one-size fits-all' requirement." *Id.* at *19. Rather, a firm's AML procedures "must reflect [its] business model and customer base." *Id.* at *17. The NASD counseled members, "in developing an appropriate AML program … [to] consider factors such as its size, location, business activities, the types of accounts it maintains, and the types of transactions in which its customers engage." *Id*. at *20. *See also, Dep't of Enforcement v. Lek Sec. Corp.*, Complaint No. 2009020941801, 2016 FINRA Discip. LEXIS 63 (FINRA NAC Oct. 11, 2016), *aff'd Lek Sec. Corp.*, Exchange Act Release No. 82981, 2018 SEC LEXIS 830 (Apr. 2, 2018); *Dep't of Enforcement v. Domestic Sec., Inc.*, Complaint No. 2005001819101, 2007 FINRA Discip. LEXIS 8 (FINRA Hearing Panel Aug. 14, 2007), *aff'd* 2008 FINRA Discip. LEXIS 44 (FINRA NAC Oct. 2, 2008).

The NAC found that Wilson-Davis and Snow failed to establish and implement reasonable AML policies and procedures to detect, investigate, and report suspicious trading activity, and were not tailored to address the risks posed by the Firm's penny stock business. Applicants maintain that there were no red flags for the Firm to investigate and, in any event, there was no finding of actual manipulation or unlawful trading. As an initial matter, there need not be a finding of an actual underlying manipulation to conclude that Applicants violated FINRA's supervisory rules. *See. Lek Sec. Corp.*, 2016 FINRA Discip. LEXIS 63, at *35, 36.

Applicants also maintain that Lyle Davis, who was responsible for reviewing all customer trades, reviewed all cross-trades for any transactions that might be suspicious. But the only evidence of any review undertaken to identify cross trades was Lyle Davis's review of a daily customer trade blotter.[9] While the report appears to have permitted Davis to consider the possibility of a cross trade in the case of VHMC, there is no documented evidence that he did anything to further investigate.[10] Generating a report of a list of trades is not adequate where the Firm did not institute any particular procedures for investigating the items identified in the report. *See Lek Sec. Corp.*, 2016 FINRA Discip. LEXIS 63, at *22-23. Similarly, Applicants argue that Snow, as a competent supervisor, applied a "team approach" to the review of the trading at issue. Br. at 31. However, even if Snow had properly delegated review of the trading, Applicants' argument ignores that Snow, as the Firm's ALMCO, was responsible for ensuring that Wilson-Davis's AML program was adequately tailored to the particular risks of its penny stock business. The NAC properly concluded it was not. As a result of these failures, Snow failed to detect and investigate a number of red flags indicative of potentially suspicious trading activity in VHMC.

Applicants also argue that the Firm's customers trading in VHMC were well-known to Wilson-Davis, and that one of its customers who testified was a well-respected lawyer, all of which "can mitigate potential red flags." Br. at 28. Applicants are mistaken. While knowledge

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[9] Applicants maintain that the NAC only focused on Snow's AML responsibility and ignored Lyle Davis's review of trades. This is incorrect. The NAC explicitly considered and dismissed as inadequate Lyle Davis's review. The NAC noted that Lyle Davis reviewed the reports to look for cross trades, wash sales, or other out of the ordinary transactions and it was his practice to discuss questionable trades with the broker. The NAC concluded, however, that Davis never documented any review or inquiry he performed, and there is no evidence in the record that he or anyone at the Firm discussed with its customers the facts surrounding the trade.

[10] Applicants concede that "the most that could be said is that Wilson-Davis did not adequately document its efforts to watch for signs of manipulative or unusual trading." Br. at 30. But this concession fundamentally misses the point of policies and procedures to reasonably detect and report suspicious transactions. Without written policies and documents of what steps were taken to scrutinize transactions, an AML program is not reasonably designed to be effective. *See Lek Sec. Corp.*, 2016 FINRA Discip. LEXIS 63, at *23.

of one's customers "could potentially be a mitigating factor," it is not the only factor, and only one factor in many. It certainly does not outweigh the numerous red flags present in this case. The stock of VHMC—a shell company—experienced an unexplained, significant increase in price during a period when Wilson-Davis dominated the market, primarily through cross trades between Firm customers. There is no evidence that anyone at Wilson-Davis ever conducted any investigation to determine the reasons for the price increase or the trading.

The record supports the NAC's finding that Wilson-Davis and Snow failed to establish and implement reasonable AML policies and procedures; failed to detect and investigate suspicious trading activity; and failed to provide adequate AML training to Firm staff in violation of FINRA Rules 3310(a) and (e) and 2010. The Commission should therefore affirm these findings.

D. The Proceedings Before the NAC Were Fair

Applicants maintain that the proceedings before the NAC were "patently unfair." Br. at 3. Their argument is meritless. Applicants infer that because the subcommittee of the NAC empaneled to hear oral argument in this matter ("the Subcommittee") asked pointed and direct questions of Enforcement, that those questions forecast that the Subcommittee would produce a draft that was sympathetic to Applicants, which must have been rejected by the entire NAC. Br. at 3-6. Applicants suggest that because neither Subcommittee member was a current NAC member when the proposed decision was discussed by the full NAC, the consideration of their matter was somehow unfair.

The Commission should not indulge Applicant's baseless speculations.[11] Simply because the Subcommittee members asked pointed questions at oral argument does not mean that it intended to rule in favor of Applicants. In this case, the NAC formulated its opinions based on the robust record, including Applicants' lengthy disciplinary history, and imposed liability and sanctions against Applicants based on that overwhelming evidence.

All aspects of the appellate process complied with FINRA Rules, which have been approved by the Commission. FINRA Rule 9331 states that "[a] Subcommittee shall be composed of two or more persons who shall be current ***or former*** members of the National Adjudicatory Council . . ." (emphasis added).[12] FINRA rules expressly permit the NAC, "after considering all matters presented in the appeal or review and the written recommended decision of the Subcommittee," to "affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction." FINRA Rule 9349. As the Commission has observed previously, "the exercise of the NAC's power to impose additional sanctions in appropriate circumstances does not infringe on the right of appeal. The mere fact that the NAC increased the sanctions here does not render [the sanction] invalid on fairness grounds." *Joseph Abbondante*, 58 S.E.C. 1082, 1111 (2006) (sustaining increased sanctions imposed by the NAC), *aff'd*, 209 F. App'x 6 (2d Cir. 2006). The record provides no support for its argument that the appellate process was unfair.

The Applicants also attack the fairness of the disciplinary process as a whole, listing its grievances with the process. Each grievance articulated, however, relates only to the

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[11] In addition, if the intent of Applicants is to spur the Commission into peeling back the curtain of the NAC's deliberative process, such an effort would only compromise the effectiveness of deliberations.

[12] Applicants did not object to the Subcommittee when they were advised who they would be. They should not be allowed to complain after the decision has been issued.

proceedings before the Hearing Panel and FINRA Rules governing the disciplinary process. If Applicants were so troubled by the perceived unfairness of the process at stages that predated the NAC's involvement, they should have made those grievances known at the appropriate time. *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *34 n.35 (Sept. 30, 2016). Applicants, however, affirmatively chose to proceed with the hearing before the Hearing Panel without making any such motions. Nor have Applicants given any concrete examples of how the purportedly unfair rules impacted their ability to mount their defense.

For these reasons, the Commission should dismiss Applicants' challenges to the fairness of the FINRA disciplinary process.

E. The Sanctions Are Appropriate to Protect Investors and the Public Interest and to Promote Market Integrity

The Commission should affirm that NAC's sanctions, which are well-supported and are neither excessive not oppressive. Section 19(e)(2) of the Exchange Act provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). In considering whether sanctions are excessive or oppressive, the Commission gives significant weight to whether the sanctions are consistent with the framework provided in FINRA's Sanction Guidelines ("Guidelines"). *See Vincent M. Uberti*, Exchange Act Release No. 58917, 2008 SEC LEXIS 3140, at *22 (Nov. 7, 2008) (noting that Guidelines serve as "benchmark" in Commission's review of sanctions).

The sanctions the NAC imposed on Wilson-Davis, Snow, and Barkley are neither excessive nor oppressive and serve to protect investors, market integrity, and the public interest. To assess the appropriate sanctions, the NAC consulted the Guidelines for each violation at issue, applied the principal and specific considerations outlined in the Guidelines, and considered all relevant evidence of aggravating and mitigating circumstances. The Commission should therefore affirm the sanctions imposed in their entirety.

1. The Sanctions Imposed by the NAC for Wilson-Davis's Reg SHO Violations are Appropriately Remedial

The Guidelines address directly violations of Reg SHO. *FINRA Sanction Guidelines* 65 (2019). The Guidelines recommend a fine of $5,000 to $16,000 for a first action, a $10,000 to $77,000 fine for a second action, and $10,000 to $155,000 for subsequent actions. *Id.* The Guidelines also direct an adjudicator to consider fines in greater amounts when the violations are egregious, involve a pattern or patterns of misconduct, took place over an extended period of time, or can be quantified by a number or percentage. *Id.* at n.1. Similarly, the Guidelines state that "[i]n all egregious cases, whether a first, second or subsequent action, consider a fine greater than or equal to the high of the range for a first, second or subsequent action." *Id.* at 65. Finally, the Guidelines direct the NAC to consider the Principle Considerations in Determining Sanctions that apply to all sanction determinations when assessing the severity of Applicants' violations. *Id*.

The NAC articulated several aggravating factors that demonstrated that Wilson-Davis's misconduct was egregious. Wilson-Davis acted recklessly. *Guidelines*, at 8 (Principal Consideration No. 13). The Firm's misconduct involved 122 trades over a period of close to a year. The short sales also resulted in monetary gain[13] for the Firm and affected other market

[13] While the Firm's short-selling violations were wildly unsuccessful with respect to LOTE, the Firm profited on three out of the four Stocks, which resulted in the NAC's order of disgorgement. Applicants maintain that it was inappropriate to consider the profits for the three stocks as aggravating. However, the Firm's losses in LOTE are not mitigating—it cannot receive any credit or offset for losses incurred because of its misconduct.

participants. *Id*. at 7, 8 (Principal Consideration Nos. 8, 9, 11, 17).[14] The Firm abused its access to markets and market-maker status to engage in speculative trading in an effort to profit, at the expense of market investors.

Applicants argue that the sanction imposed is punitive rather than remedial because the Firm is unlikely to engage in the same type of misconduct again. This is not the standard for determining whether a sanction is punitive. As Applicants note, "[t]he purpose of FINRA's disciplinary process is to protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent." *Guidelines*, at 2. What the Applicants fail to highlight is the next sentence, which directs adjudicators "to design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct." *Id*. "Courts have recognized that a sanction does not become punitive simply because the person on whom it is imposed feels punished. Courts have also recognized that all sanctions will have some deterrent effect." *John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216, at *4-5 (Aug. 23, 2019). The sanctions analysis does not begin and end with whether Wilson-Davis is likely to violate Reg SHO again. Adjudicators must look at deterring future misconduct by the violating firm and deterring other firms from engaging in similar violations.

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[14] Applicants try repackaging their malfeasance in an effort to make it look less egregious. For example, they maintain that "there were only 13 days on which challenged trades were made." Br. at 24. This is disingenuous. While the actual trades occurred on specific dates, the Reg SHO violations spanned many months.

Applicants also rely on the Supreme Court's ruling in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) to support their claim that the sanction imposed for the Firm's Reg SHO violations was punitive rather than remedial and that "a fine of $350,000 for Reg SHO violations is necessarily punitive because it does not compensate any alleged victim." Br. at 21, 27. They also contend that the Commission's ruling in *John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216 (Aug. 23, 2019) applies only to non-monetary sanctions. Br. at 22. Applicants are incorrect. As an initial matter, the Commission rejected *Kokesh's* applicability to FINRA's sanctions in its decision in *Saad*. The Commission found that the Supreme Court confined its analysis in *Kokesh* to the sole question of whether disgorgement is a penalty for purposes of the five-year statute of limitations in Section 2462. *Saad*, 2019 SEC LEXIS 2216, at *3. Second, the Exchange Act explicitly authorizes a national securities association to "appropriately discipline[]" rule violations by "suspension, … fine, censure … or barring from being associated with a member …" Exchange Act Section 15A(b)(7). A sanction Congress authorized, which the Exchange Act directs the Commission to review using an excessive or oppressive standard cannot always be punitive under the proper reading of the Exchange Act. *Cf. id*., at *12-13. Third, while the sanction at issue in *Saad* was non-pecuniary—a bar—the Commission has recently stated that pecuniary sanctions, such as disgorgement, are also not invalidated by *Kokesh*:

> As with all FINRA sanctions that the Commission reviews, FINRA disgorgement is evaluated on a case-by-case basis to ensure that, consistent with the Exchange Act, it is neither excessive nor oppressive and aligns with remedial purposes and the public interest. But because each of the remedies at FINRA's disposal has the capacity to varying degrees to act as a deterrent, and because we may not affirm FINRA sanctions that are punitive, it would undermine our ability to effectively regulate the securities industry to hold all disgorgement punitive—and thus impermissible because it may have a deterrent effect.

Kimberly Springsteen-Abbott, Exchange Act Release No. 88156, 2020 SEC LEXIS 394, at *50-51 (Feb. 7, 2020).

Applicants maintain that sanctions imposed against Wilson-Davis were inappropriate given the sanction imposed in other matters for Reg SHO violations. It is well established 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." *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *115-16 (July 2, 2013). Furthermore, "comparisons to sanctions in settled cases are inappropriate because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement such as the avoidance of time-and-manpower-consuming adversary proceedings." *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *33 (Feb. 20, 2014). Thus, the fact the fine levied against Legacy Trading was significantly lower has no bearing on the appropriateness of the sanction assessed against Wilson-Davis.

Applicants also assert that the NAC should have awarded it more mitigation for similar violations addressed by the Commission. The Guidelines direct adjudicators that, where appropriate, they should consider sanctions previously imposed by other regulators. *Guidelines* at 5. The NAC did that—it discounted the fine based on the fine imposed by the Commission and did not, as asserted by Applicants, increase the fine or hold it out as an aggravating factor. (RP 8525.)

Wilson-Davis recklessly disregarded their obligations associated with legitimate market making, harming market integrity. The Firm has persistently refused to acknowledge their misconduct, ignores the voluminous evidence against it and the applicable regulatory guidance. Both remedial and deterrent purposes are served by the imposition of a meaningful sanction that will remediate the misconduct, deter the Firm from future misconduct and other firms from violating Reg SHO, and protect market integrity and the public interest. The significant monetary fine imposed by the NAC is warranted and should be affirmed by the Commission.[15]

2. The Sanctions Imposed by the NAC for Applicants' Supervisory and AML Violations are Appropriately Remedial

The NAC properly concluded that Applicants' supervisory and AML violations were egregious and reflective of the Firm's systemic supervisory failures. The Commission uphold the NAC's imposition on Wilson-Davis of a $750,000 fine and the requirement to retain an independent consultant. The NAC highlighted that the shortcomings touched major components of the Firm's business. When Kerrigone was at the Firm, it had no procedures to ensure compliance with Reg SHO, and Barkley failed to provide any meaningful supervision. The Firm also knew that its penny stock business was a high risk area subject to trading abuses, but failed to take adequate steps to address those risks. It failed to take adequate steps to provide heightened supervision to a broker named in a regulator's complaint. It even failed to clearly articulate to its personnel who was supervising them.

The Guidelines for Systemic Supervisory Failures recommend a fine of $10,000 to $77,000 for responsible individuals, and a fine of $10,000 to $310,000 for the responsible firm. *Guidelines*, at 105. When aggravating factors predominate, the Guidelines direct the adjudicator to consider a higher fine and a suspension between 10 business days and two-years. *Id.* The NAC is directed to consider imposing undertakings, ordering the firm to revise its supervisory

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15 Applicants point to the fact that Kerrigone entered into an AWC with FINRA for his Reg SHO violations, but received only a six-month suspension as $10,000 fine. However, it is well-established "that settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle." *Guidelines* at 1.

systems and procedures, or ordering the firm to engage an independent consultant to recommend changes to the firm's supervisory systems and procedures. *Id*. at 106.

The NAC appropriately concluded that Barkley's failure to supervise Kerrigone's short sales was egregious and imposed a $52,000 fine, suspended in all capacities for three months and in his principal and supervisory capacities for one year, to be served concurrently. For his part, Barkley's blind assumption that Kerrigone was acting as a bona-fide market maker resulted in the failure to scrutinize Kerrigone's market maker applications and his trading activity. This allowed Kerrigone's illegal short-selling to escape detection. *Id*. at 105. (Principal Consideration No. 1). The substantial volume of the transactions, the "number and dollar value of the transactions not adequately supervised as a result of the deficiencies" is also aggravating. *Id*. (Principal Consideration No. 5). Even though Barkley did not appear to act intentionally, his supervisory lapses were grossly negligent. *Id*. at 8 (Principal Consideration No. 13).

The NAC also found correctly that Snow's and Barkley's supervisory violations were accompanied by aggravating factors. Snow and Barkley largely abdicated their responsibilities to ensure compliance with the rules. Their systematic violations reflected a lack of appreciation and understanding of supervisory obligations. The NAC's requirement that Snow and Barkley requalify by examination before serving in any registered capacity is completely justified. *See Leonard John Ialeggio*, 53 S.E.C. 601, 604 (1998) (requalification requirement is a "reasoned means of reeducating [applicant] about his regulatory responsibilities to both his customers and his employer.")

As to Wilson-Davis's and Snow's failures to implement adequate procedures regarding the short-selling activities and failures to implement adequate AML policies and procedures, the NAC concluded the failures were egregious. *Id*. at 106. Related to the supervision of Reg SHO compliance, Wilson-Davis and Snow failed to craft procedures adequate to ensure that it was acting as a bona-fide market maker and then failed to supervise Kerrigone's trading activity. The Firm's supervisory deficiencies allowed Kerrigone's violative conduct to occur and escape detection. *Id*. at 105 (Principal Consideration No. 1). Wilson-Davis did not allocate its resources to prevent or detect the Reg SHO violations, which resulted in harm to the markets. Id. (Principal Consideration No. 3). Furthermore, the number and dollar value of the transactions not adequately supervised is also aggravating. *Id*. (Principal Consideration No. 5).

In addition, as its AML procedures noted, the Firm and Snow were well aware that the Firm's penny stock business was vulnerable to trading abuses. However, they failed to take reasonable steps to ensure that the Firm and its registered persons were capable of addressing those risks by identifying the red flags they encountered, particularly as illustrated by the myriad red flags raised by the trading in VHMC. *Id*. (Principal Consideration No. 2).

The NAC also appropriately concluded that Wilson-Davis's and Snow's failure to timely and appropriately devise a plan of heightened supervision for Carlson was an egregious supervisory failure. The Firm and Snow failed to consider imposing a heightened supervisory plan in direct contravention of the Firm's WSPs. *Id.* (Principal Consideration No. 2). The plan the Firm finally put in place did little more than require Carlson to follow procedures already required under Firm policy. (RP 3033.) It did not, as the Firm's WSPs required, identify a supervisor and provide for certification by that supervisor. (RP 1489-90.) No supervisor ever certified the Firm's and Carlson's compliance with the plan. This additional aspect of the Firm's and Snow's violation further supports the fines, independent consultant requirement, and requalification.

Finally, Wilson-Davis's and Snow's failure to ensure that the Firm's employees were provided a clear supervisory chain of command and their failure to adequately supervise the firm's instant messages further reflect a Firm culture that did not prioritize its supervisory or AML obligations.

Conspicuously absent from Applicants' brief is any acknowledgement of the Firm's long and troubled disciplinary history.[16] From 2007 onward, Wilson-Davis has entered into numerous settlements with both FINRA and the Commission to resolve various regulatory violations. (RP 8107-24.) For example, from 2007 through 2014 (the last settlement before the instant disciplinary proceedings), the Firm entered into several Letters of Acceptance, Waiver & Consent ("AWCs") with FINRA for misconduct that involved a host of supervisory failures. (RP 8108-18.) For the past 13 years, the Firm has been incapable of implementing and enforcing adequate supervisory policies and procedures. The Guidelines state that disciplinary sanctions should be more severe for recidivists. *Guidelines*, at 2. "Sanctions imposed on recidivists should be more severe because a recidivist, by definition, already has demonstrated a failure to comply with FINRA's rules or the securities laws." *Id*. It is clear that none of these prior

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[16] Wilson-Davis's misconduct continues. On May 15, 2019, the Commission entered into a settlement with Wilson-Davis based on the Commission's findings that:

> [f]rom at least January 2013 through July 2017 (the "relevant period"), [Wilson-Davis], a registered broker-dealer, failed to file Suspicious Activity Reports ("SARs") when it knew, suspected, or had reason to suspect that certain penny stock transactions it executed on behalf of its customers involved the use of its firm to facilitate fraudulent activity or had no business or apparent lawful purpose. During the relevant period, Wilson ignored numerous red flags listed in its AML policies, failed to properly investigate certain conduct, and ultimately failed to file SARs on the suspicious activity.
> https://www.sec.gov/litigation/admin/2019/34-85867.pdf

Pursuant to SEC Rule of Practice 323, 17 C.F.R. § 201.323, we ask that the Commission take official notice of its settlement with Wilson-Davis for the Firm's AML violations.

settlements have helped the Firm improve its conduct, hence why the NAC considered that a significant sanction should be imposed. The Guidelines also note that "[b]ased on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall outside the ranges recommended and may consider aggravating and mitigating factors in addition to those listed in these guidelines." *Guidelines*, at 1. *See Meyers Assocs., LP*, Exchange Act Release No. 86193, 2019 SEC LEXIS 1626, at *70 (June 24, 2019) (affirming the fine imposed by the NAC that exceeded the Guidelines' recommended fine for systemic supervisory failures "as neither excessive nor oppressive and appropriately remedial.") Wilson-Davis's extensive disciplinary history is aggravating and supports a higher sanction.

Overall, Wilson-Davis's supervisory and AML deficiencies affected market integrity and market transparency. *Guidelines*, at 106 (Principal Consideration No. 7). The lack of quality controls and procedures available to the Firm's supervisors are additionally aggravating. *Id.* (Principal Considerations No. 8).

Nevertheless, Applicants argue that there was no customer harm and that the "evidence shows that Wilson-Davis did certain things right." Br. at 32. Neither of these are mitigating. As previously stated, absence of customer harm is not mitigating. Nor is the fact that Firm was able to comply with some of its regulatory obligations.[17]

The Firm also maintains that FINRA is piling on to impose a fine and an independent consultant requirement on the Firm as well as concurrent suspensions on Barkley and Snow. We disagree. The systemic nature of the violations at play indicate that Applicants are unable or

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[17] Applicants dedicate a large portion of their sanction discussion trying to compare the sanctions imposed on them to those of other firms. Such comparisons are unpersuasive. *See Kimberly Springsteen-Abbott*, 2020 SEC LEXIS 394, at *39.

unwilling to comply with their overall regulatory obligations as well as their supervisory obligations. By imposing requalification and independent consultant requirements, the NAC is trying to ensure that Applicants are capable of complying with their obligations in the future.

The sanctions in this case should serve not only to ensure that Wilson-Davis, a recidivist firm, effectively discharges its supervision and AML responsibilities going forward, but also to underscore to all members the seriousness of a firm's failure to do so. The sanctions assessed by the NAC accomplish that goal.

V. CONCLUSION

The record before the Commission amply supports the NAC's conclusions that Wilson-Davis, Snow, and Barkley violated Regulation SHO and supervision and AML rules. The NAC correctly deemed the violations to be egregious and assessed sanctions that are remedial and also commensurate with the gravity of the violations. Thus, the Commission should sustain FINRA's action in all respects and dismiss the application for review.

Respectfully submitted,

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May 27, 2020

CERTIFICATE OF COMPLIANCE

I, Colleen Durbin, certify that this Brief of FINRA in Opposition to Application for Review complies with the length limitation in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,656 words.

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CERTIFICATE OF SERVICE

I, Colleen Durbin, certify that on May 27, 2020, I caused a copy of FINRA's Brief in Opposition to Application for Review – in the matter of Application for Review of Wilson-Davis & Co., Inc., James C. Snow, and Byron B. Barkley, Administrative Proceeding No. 3-19666, to be served via electronic mail on:

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