SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 90737 / December 21, 2020

Admin. Proc. File No. 3-19138

In the Matter of the Application of

BRUCE ZIPPER

and

DAKOTA SECURITIES INTERNATIONAL, INC.

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDING

Registered securities association expelled firm from membership in association, and barred firm's president from association with member firms, for misconduct related to president's continued engagement in firm's business while suspended and statutorily disqualified from association; for books-and-records violations; and for supervisory violations. *Held*, findings of violation are sustained in part and set aside in part, the sanctions are set aside, and the proceeding is *remanded* for a redetermination of sanctions.

APPEARANCES:

Bruce Zipper, pro se and for Dakota Securities International.

Andrew J. Love for FINRA.

Appeal filed: April 8, 2019
Last brief received: August 5, 2019

Dakota Securities International, a broker-dealer and former FINRA member firm, and Bruce Zipper, Dakota's president, seek review of FINRA disciplinary action taken against them.[1] FINRA found that Dakota and Zipper violated FINRA's By-Laws and FINRA and NASD rules because Zipper continued to engage in Dakota's securities business while suspended and statutorily disqualified from associating with a FINRA member firm. FINRA also found that Dakota and Zipper violated the Securities Exchange Act of 1934 and rules thereunder as well as FINRA rules because Dakota kept inaccurate books and records. FINRA found further that Dakota engaged in related supervisory violations. FINRA imposed on Zipper two bars from associating with a FINRA member firm, and on Dakota three expulsions from FINRA membership. We sustain in part and set aside in part FINRA's findings of violations, set the sanctions aside, and remand to FINRA for a redetermination of sanctions.

I. BACKGROUND

This proceeding stems from Zipper's conduct while he was suspended from association with Dakota. Zipper, who has worked in the securities industry since 1981, founded Dakota in 2004. Except for during the period of his suspension, Zipper held the roles of Dakota's president, chief executive officer, financial operations principal, and chief compliance officer. He was also Dakota's majority owner until 2018, when he sold his interest to his wife. Until October 2018, Dakota was a broker-dealer that serviced retail customers.[2]

After FINRA's Department of Member Regulation ("Member Regulation") conducted a routine examination of Dakota in 2015, FINRA's Department of Enforcement ("Enforcement") initiated an investigation into Zipper's failure to update his Uniform Application for Securities Industry Registration and Transfer ("Forms U4"). Zipper allegedly omitted a material fact on his Form U4, and allegedly failed to timely amend his Form U4 to disclose three judgments against

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[1] *Dep't of Enforcement v. Dakota Securities Int'l, Inc. and Bruce Martin Zipper*, Complaint No. 2016047565702 (FINRA NAC Mar. 18, 2019).

[2] According to FINRA's BrokerCheck, Dakota filed a Form BDW (Uniform Request for Broker-Dealer Withdrawal) with FINRA in August 2018, while this proceeding was pending. 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 Bruce Zipper*, Exchange Act Release No. 84334, 2018 WL 4727001, at *1 n.2 (Oct. 1, 2018). BrokerCheck indicates that Dakota's membership terminated in October 2018, two months after the filing date of the Form BDW. This action has no bearing on this disciplinary proceeding. *See Perpetual Secs., Inc.*, Exchange Act Release No. 56613, 2007 WL 2892696, at *1 n.1, 11 (Oct. 4, 2007) (affirming disciplinary action against, and expulsion from FINRA membership of, a firm that had filed a Form BDW before the enforcement action was instituted); *see also Newport Coast Secs., Inc.*, Exchange Act Release No. 88548, 2020 WL 1659292, at *11 n.83 (Apr. 3, 2020) ("FINRA retains jurisdiction to commence an action against a member for two years after its resignation from, or termination or cancellation of, membership.").

him. Zipper and Enforcement settled the matter arising from the investigation by entering into a Letter of Acceptance, Waiver and Consent (the "AWC").[3]

In the AWC, Zipper consented to willful violations that subjected him "to a statutory disqualification with respect to association with a member." Zipper also consented to a three-month suspension from associating with a FINRA member firm and a $5,000 fine. According to the AWC, 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."

As part of the settlement negotiations, Zipper told FINRA that a suspension from association in all capacities would prevent him from continuing to work with Dakota's clients and asked FINRA to accept a suspension from association in any principal capacity instead. FINRA insisted on an all-capacities suspension. Zipper executed the AWC on April 1, 2016, and FINRA's counsel executed it consistent with FINRA's rules on April 22, 2016.[4]

Zipper's suspension was to begin on May 16, 2016, but FINRA delayed the start of his suspension by two weeks. Zipper had asked for more time to prepare for his absence because Dakota was a small firm and Zipper had many responsibilities. During this delay, Zipper spoke with FINRA staff about the circumstances under which he might be allowed to intervene in Dakota's business while suspended. FINRA staff repeatedly told him that while suspended he could not associate with Dakota in any way. Zipper was told that if an issue arose that only he could handle, he or the principal at Dakota who replaced him during his suspension could raise the issue with FINRA staff, who would determine the appropriate response. No one at FINRA authorized Zipper in advance to intervene in Dakota's business for an issue that only he could handle, and no one authorized him to make that case-by-case determination himself.

Zipper's three-month suspension ran from May 31, 2016, through August 30, 2016 (the "Suspension Period"). FINRA informed Zipper about the period of his suspension in a letter. It wrote Zipper: "The purpose of this letter is to ensure that you do not conduct a securities business during the suspension period in accordance with Rule 8311, with respect to 'Effect of a Suspension, Revocation, Cancelation, or Bar,' of the FINRA Manual. Your suspension will be in effect from **May 31, 2016 through August 30, 2016**. Failure to disassociate you from the

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[3] The facts of the underlying investigation, which are largely not relevant to our analysis here, are recounted in our opinion and order on reconsideration on Zipper's application for review of the AWC. *See Bruce Zipper*, Exchange Act Release No. 81788, 2017 WL 4335072 (Sept. 29, 2017) (granting FINRA's motion to dismiss for lack of jurisdiction because Zipper's AWC included a valid and binding waiver of appellate rights, he was not entitled to discovery on his allegations of FINRA bias, and his application for review was in any event untimely), *reconsideration denied*, Exchange Act Release No. 84324, 2018 WL 4692884 (Oct. 1, 2018).

[4] After FINRA accepted the AWC, Zipper sought to withdraw from it on the ground that he was unaware of its consequences. FINRA did not allow Zipper to withdraw; once FINRA accepted the offer, Zipper was bound to the agreement. *Zipper*, 2018 WL 4692884, at *5.

firm during this suspension may result in FINRA instituting a disciplinary proceeding" (emphasis in original). After the Suspension Period ended, Zipper filed an application for review with the Commission that sought to challenge the AWC. We dismissed the AWC for lack of jurisdiction, and denied Zipper's motion for reconsideration.[5]

This proceeding arose after Member Regulation found evidence that Zipper had violated the AWC and of anomalies in Dakota's books and records during a routine examination.

A. Zipper associated with Dakota during his suspension and despite his statutory disqualification.

Dakota remained in business during the Suspension Period. Robert Lefkowitz—a Dakota registered representative and Zipper's "close friend"—registered as a general securities principal, took over as the firm's president and CEO, and generally acted for Zipper. Lefkowitz became responsible for responding to incoming telephone calls and emails, opening new accounts, answering client inquiries, handling Dakota's finances, and entering trades for Zipper's clients.

Nonetheless, Dakota continued to operate from its principal place of business in Zipper's home during the Suspension Period. Lefkowitz visited the house "to periodically do administrative duties." Dakota received mail there, stored files there, and kept a computer with access to the firm's systems there. The computer was not password protected, and Lefkowitz did not restrict Zipper's access to the computer itself or to the firm's trading system and email. Zipper reviewed reports of Dakota's trading activity, as well as customer account holdings and statements.

1. Zipper assisted Dakota customers, reviewed their accounts, and recommended specific securities transactions during his suspension.

Although Lefkowitz was responsible for supervising the firm's electronic correspondence and was notified when Zipper received an email, he did not review Zipper's emails and did not learn that Zipper was using his Dakota email address to conduct firm business while suspended. Zipper routinely accessed his Dakota email while suspended, and he emailed customers repeatedly during the Suspension Period. Zipper also sent several emails from a personal Gmail address.[6] Most of Zipper's emails during this period included a signature block identifying him as Dakota's "President." In several emails, he recommended specific securities transactions.

On May 31, 2016, the first day of the Suspension Period, Zipper emailed one client to assist her with online access to her brokerage account. He had also spoken with Dakota's clearing firm about the client's problems accessing her account. He emailed the same client again four more times in June and August to forward brokerage account statements to her.

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5 *See supra* note 3.

6 Zipper conceded at the hearing that using his personal email account to conduct firm business was "unusual," "very rare[]," and "probably" violated Dakota's WSPs.

Zipper testified that he believed his suspension started June 1, but he continued to email Dakota clients after that date. He emailed two other clients on June 3, 2016 under the subject "Great income stock with upside appreciation." Zipper explained why "I like this stock a lot," and ended the email: "Great company, great dividend, and will have three stocks instead of one in October all making money. I strongly recommend this stock . . . to both of you. . . . [T]his old time blue chip would look good in each of your portfolios. Let me know if interested."

Zipper emailed a fourth client on June 6, 2016 under the subject "portfolio adjustment." Zipper said that after "reviewing your portfolio" he was recommending selling shares of two stocks in the client's Dakota account. He "suggest[ed]" that the client "sell them both, raise . . . cash and sit back and wait or add to other stocks in the portfolio," and identified one such position that the client could "consider" increasing. In a second email to the client the next day under the subject "forgot one position," Zipper identified "another good company you own" that the client could consider upon selling the other stocks.

Zipper sent another email to one of these clients on July 25, 2016 under the subject "stock idea." Zipper recommended the client buy shares of a stock he already owned. He described the issuer's business model, its price to earnings ratio, and described it as "dirt cheap" and "[o]ne of the bargains on [W]all [S]treet." He told the client: "[M]y suggestion is to buy another 700 share[s] (10K) and take your position to 1400 shares. [L]et me know if interested."

2. Zipper handled financial and operations matters for the firm during his suspension.

Besides recommending securities transactions to Dakota clients, Zipper also conducted Dakota's securities business during the Suspension Period by handling financial and operations matters for the firm. On May 31, 2016, the first day of his suspension, Zipper received an email from the firm's third-party email provider about several past due invoices and requesting payment on the account balance. He responded less than an hour later: "check going out today." Zipper acknowledged that Lefkowitz could have handled this issue. Zipper continued to communicate with the vendor during the Suspension Period.

Later on May 31, Zipper wrote from his personal Gmail account to COR Clearing, Dakota's clearing firm, to discuss Dakota's failure to meet its excess net capital requirement. Zipper told COR Clearing that "I give you my word that the May numbers will be there." He later acknowledged that contacting the clearing firm "would have been prohibited under the terms of the suspension," but testified that he believed the suspension did not start until June 1. Zipper's May 31 email asked for a "call tomorrow"—June 1—and promised to "get back to you tomorrow." Zipper could not recall whether he spoke with anyone at COR Clearing on June 1.

About twenty minutes after emailing COR Clearing, Zipper again wrote from his personal email account to Carlos Fuenmayor, who at the time was a minority owner of Dakota

and also owned a company that was one of Dakota's creditors.[7] Zipper told Fuenmayor that he was "using [his] personal email for privacy reasons." He said that the clearing firm "saw we are under the 25K minimum net cap excess," and that he "didn't want to speak to [the clearing firm] and give any assurances . . . until I spoke to you." Zipper then asked Fuenmayor to write off a debt Dakota owed to his company so that Zipper could tell COR Clearing that this would address the firm's failure to meet its excess net capital requirement. At the hearing, Zipper stated that these efforts during the Suspension Period reflected his "need[] to get the Dakota financing position in a better spot or [otherwise] Dakota could lose its clearing firm."

Zipper continued to email COR Clearing during the Suspension Period. On May 31, Zipper emailed COR Clearing from his personal email account to ask if it would waive a penalty imposed on Dakota for not obtaining preapproval for a customer's large-volume sale of a penny stock. Zipper and COR Clearing had another email exchange about the penalty on June 13.

On August 22, near the end of the Suspension Period, Zipper again emailed Fuenmayor about the firm's financial situation because a customer had filed a securities arbitration claim against Dakota and one of its registered representatives. Zipper wrote that he had spoken with the customer's attorney "today" to negotiate a $5,000 payment to resolve the claim, and that he expected the attorney to send him the settlement agreement "by end of week." At the hearing, Zipper testified that he had "worked with the attorney on that arbitration case for weeks"—during the Suspension Period—to reach the settlement. In his email to Fuenmayor, Zipper also said that he had spoken with Dakota's financial and operations principal "today" about efforts to complete Dakota's Financial and Operational Combined Uniform Single (FOCUS) Report to be filed with FINRA. He reminded Fuenmayor about the May 31 request for assurance that Fuenmayor would write off Dakota's debt. And he asked Fuenmayor to meet "later this week" so they could "come up with a strategy going forward for Dakota."

3. FINRA denied Dakota's membership continuance application, and Zipper continued associating with Dakota despite being statutorily disqualified.

On May 4, 2016, before the start of the Suspension Period, Member Regulation notified Dakota that the AWC made Zipper statutorily disqualified under Exchange Act Section

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[7] Fuenmayor was associated with Dakota between September 2013 and October 2016, and was registered with Dakota between February 2015 and October 2016. We take official notice from BrokerCheck that Fuenmayor later entered into an AWC with FINRA in which he consented to findings that during the time he was associated but not registered with Dakota, he violated NASD Rules 1021 and 1031, and FINRA Rule 2010, by acting as a General Securities Principal and a General Securities Representative without being registered in either capacity. He consented to a $20,000 fine and a 15-month suspension from association with any FINRA member firm in any capacity. *See Carlos Ricardo Fuenmayor*, No. 2015047215403 (FINRA AWC June 4, 2019); *see also Keith D. Geary*, Exchange Act Release No. 80322, 2017 WL 1150793, at *4 n.11 (Mar. 28, 2017) (taking official notice of a FINRA settlement).

3(a)(39),[8] and that FINRA's By-Laws therefore disqualified him from associating with a member firm.[9] Member Regulation explained that Dakota could file an MC-400 Membership Continuance Application to request permission for Zipper to continue to associate with it despite his disqualification.[10] Under FINRA's rules and policies at the time, once Zipper's suspension ended on August 31, 2016, FINRA could allow him to associate with Dakota from the time it submitted its MC-400 application until FINRA acted on the application.[11]

On July 26, 2016, while Zipper remained suspended, Dakota submitted its MC-400 application requesting to continue its membership while employing Zipper as a general securities representative notwithstanding his statutory disqualification. FINRA's National Adjudicatory Council ("NAC") denied Dakota's application on October 2, 2017.

The NAC found that Zipper had "improperly associat[ed] with [Dakota] during his three-month suspension" and that this "serious misconduct" showed that Zipper was "currently unable to demonstrate that he can comply with FINRA's rules and regulations." FINRA informed Zipper that he must "immediately . . . terminate his association with Dakota" unless the Commission stayed the effect of the NAC's order denying the MC-400 application.

Dakota timely filed with the Commission an application for review of FINRA's denial of the MC-400 application. Although Dakota filed two separate motions to stay the effect of the denial, we twice denied a stay on the ground that it had not established that a stay was warranted.[12] We later affirmed FINRA's denial of Dakota's MC-400 application.[13]

Notwithstanding the NAC's denial of the MC-400 application on October 2, 2017 and the fact that FINRA informed Zipper that as a result he had to immediately terminate his association with Dakota, Zipper continued to associate with Dakota through November 2017.

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8 *See* 15 U.S.C. § 78c(a)(39).

9 *See* FINRA By-Laws, Art. III, § 4.

10 *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).

11 *See Mitchell T. Toland*, Exchange Act Release No. 73664, 2014 WL 6601012, at *2 (Nov. 21, 2014) ("FINRA permits certain individuals subject to statutory disqualification to continue to associate with their employers pending resolution of the employers' membership continuance applications."); *id*. at *2 n.12 (reciting FINRA's statement that it may permit continued association with a member firm during the pendency of a MC-400 application).

12 *See Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555 (Nov. 27, 2017); *Bruce Zipper*, Exchange Act Release No. 82633, 2018 WL 719029 (Feb. 5, 2018).

13 *See Zipper*, 2018 WL 4727001.

B. Zipper and Dakota misidentified the representative of record on hundreds of transactions.

Before, during, and after the Suspension Period, Zipper and Lefkowitz often intentionally misidentified the representative of record when entering trades in Dakota's trading system. Each registered person at Dakota had a representative code that was included on the order memorandum and trade confirmation for each transaction entered in Dakota's trading system. Three codes are relevant here: the code of a person formerly registered with Dakota (DS01); Zipper's code (DS02); and a third code that Zipper and the former representative shared (DS03). Dakota's books and records also showed which person's terminal entered the order.

Zipper used the former representative's code and their shared code for hundreds of trades. Lefkowitz also used all three codes for hundreds of orders during the Suspension Period to falsely reflect that Zipper or the former representative had entered or accepted the order. Dakota's books and records for these orders therefore reflected inaccurate information about the identity of the person who entered or accepted the order on behalf of the customer. Zipper testified that they did this because they "didn't want to double pay" to each register in a state in which a Dakota registered representative was already registered as a broker.

C. FINRA brought this enforcement action against Zipper and Dakota.

On November 8, 2017, Enforcement filed a complaint against Zipper and Dakota alleging that they violated FINRA's By-Laws and FINRA and NASD rules as a result of Zipper's conduct while suspended and statutorily disqualified; that they violated the Exchange Act and rules thereunder and FINRA rules by maintaining inaccurate books and records; and that Dakota violated FINRA rules by failing to establish and maintain an adequate supervisory system. A Hearing Panel held a two-day hearing on March 13 and 14, 2018, at which Zipper, Lefkowitz, Dakota's corporate representative, and four current and former FINRA staff testified. The Hearing Panel issued a decision on June 18, 2018, finding Zipper and Dakota liable on all charged violations. The Hearing Panel barred Zipper and expelled Dakota from FINRA membership. After Zipper and Dakota appealed, the NAC issued a decision on March 18, 2019, affirming the Hearing Panel's findings of violation and the sanctions imposed. On April 8, 2019, Zipper and Dakota filed an application for review with the Commission.[14]

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[14] Zipper initially filed briefs for himself and Dakota, which he was ineligible to represent under our Rule of Practice 102(b). Under Rule 102(b), corporations can be represented by "an attorney at law" or "a bona fide officer of [the] corporation." 17 C.F.R. § 201.102(b). Zipper is not an attorney and, according to Dakota's state corporate filings and BrokerCheck, was not a bona fide officer of Dakota after he sold his interest to his wife. Dakota requested to join Zipper's briefs after we directed the firm to address whether it sought permission to join his briefs or to file its own briefs. *See Bruce Zipper*, Exchange Act Release No. 86981, 2019 WL 4411974, at *1 (Sept. 16, 2019). We granted Dakota's request to join Zipper's briefs. *See Bruce Zipper*, Exchange Act Release No. 87202, 2019 WL 4858218, at *1 (Oct. 2, 2019).

II. VIOLATIONS

Exchange Act Section 19(e)(1) governs our review of this self-regulatory organization ("SRO") disciplinary action. Under Section 19(e)(1), we must sustain this disciplinary action if we find that Zipper and Dakota engaged in the conduct FINRA found, that their conduct violated the provisions of the securities laws or FINRA rules that FINRA found them to have violated, and that such provisions and rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[15] We base our findings on an independent review of the record and apply the preponderance of the evidence standard.[16]

A. Zipper and Dakota violated FINRA's By-Laws and FINRA's rules because Zipper associated with Dakota while suspended from association.

The NAC found that Zipper and Dakota each violated Article III, Section 3(b) of FINRA's By-Laws, NASD Rule 1031, and FINRA Rule 2010, and that Dakota violated FINRA Rule 8311, because Zipper associated with Dakota during his suspension and Dakota allowed him to do so. We affirm the findings that Zipper and Dakota violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rule 2010 and that Dakota violated FINRA Rule 8311, but we set aside the finding that Zipper and Dakota violated NASD Rule 1031.

1. Zipper and Dakota engaged in the conduct that FINRA found.

The record supports the NAC's findings that Zipper associated with Dakota during the Suspension Period and that Dakota allowed him to do so. Zipper regularly accessed Dakota's trading system to review the firm's trading activity and customer accounts. On numerous occasions, he discussed his customers' accounts with them and recommended specific securities transactions. He also conducted Dakota's securities business by working with Dakota's clearing firm to resolve an excess net capital deficiency, requesting that Dakota's minority owner forgive a loan to help resolve that deficiency, negotiating the settlement of an arbitration claim filed by a customer against the firm, and communicating with Dakota's email vendor.

Applicants do not dispute that Zipper associated with Dakota and engaged in these activities, or that Dakota allowed him to do so. Instead, they argue that this conduct was consistent with Zipper's suspension. Applicants argue first that the AWC did not prohibit Zipper's activities in connection with Dakota during his suspension, and second that FINRA staff in any case orally authorized Zipper to conduct these activities.[17]

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15 15 U.S.C. § 78s(e)(1).

16 *See Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *5 (Feb. 13, 2015).

17 We considered and rejected these arguments in Zipper's appeal from the NAC's denial of Dakota's membership continuance application. *See Zipper*, 2018 WL 4727001, at *5-6. Our analysis of these arguments here is consistent with our disposition of that appeal.

a. The terms of Zipper's AWC, FINRA's rules, and Dakota's written supervisory procedures all prohibited Zipper from associating with Dakota during his suspension.

According to applicants, Zipper's suspension from association prohibited him from taking and placing orders; conducting the business of a member firm; and "hav[ing] any contact with any FINRA Members." But in their view it did not prohibit him from "ha[ving] contact with a NON FINRA Member"—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 contradict this claim. His AWC specifically prohibited him from "associat[ing] with any FINRA member *in any capacity, including clerical or ministerial functions,* during the . . . suspension." This language precluded Zipper from engaging in *any* aspect of Dakota's securities business—including contacting customers, recommending securities transactions, contacting third parties about their business with Dakota, negotiating a resolution of an arbitration claim, and trying to resolve Dakota's excess net capital deficiency. As a result, the AWC itself put Zipper on notice that he could not engage in the activities in which he engaged.

FINRA Rule 8311 likewise prohibited Dakota from allowing Zipper to undertake any conduct that would render him an "associated person" of Dakota during the term of his suspension.[18] An "associated person" includes one "engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member."[19] We have held that one whose functions are "part of the conduct of a securities business" is an associated person "engaged in that business."[20] The record supports a finding that Zipper engaged in functions that were part of the conduct of a securities business.[21]

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18 *See* FINRA Rule 8311.

19 FINRA By-Laws, Article I(ee).

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

21 *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 an associated person).

Dakota's WSPs, which Zipper prepared, also provided that during a suspension employees may not "have direct or indirect contact with customers" or "give investment advice or counsel." And shortly before Zipper's suspension began, he personally updated the WSPs to read: "Starting on June 1, 2016 [*sic*] and ending on August 31 2016 Bruce Zipper . . . will be on a 90 day suspension and will not be involved in the company's business for that time period."

In addition to the clear terms of the AWC, FINRA's rules, and Dakota's WSPs, Zipper's correspondence with Enforcement attorney Kevin Rosen demonstrates that Zipper knew he could not conduct Dakota's securities business while suspended. Two days before executing the AWC, Zipper emailed Rosen to ask why FINRA sought a suspension in all capacities and if Rosen would "reconsider" a suspension in a principal capacity only "so that I can not act as a principal but still be allowed to have conversations with lifetime clients." He acknowledged that a suspension in all capacities meant he would "not hav[e] the ability to discuss [his clients'] investments" with them. Rosen responded that FINRA would only accept a suspension from association in all capacities. Zipper thus knew the AWC did not allow him to contact customers about Dakota's business.

Applicants argue that Dawn Calonge, the Surveillance Director of Member Regulation, testified that Zipper could contact non-FINRA members about Dakota's securities business during his suspension. But applicants mischaracterize Calonge's testimony. Zipper asked Calonge whether he could communicate "with an email vendor of Dakota Securities, who is not a FINRA member." Calonge began to explain that Zipper was suspended "in all capacities," and Zipper asked why the AWC included that language. As Calonge again began to explain further that she is "not in Enforcement," Zipper cut her off: "No further questions. . . . I'm done." Contrary to Zipper's suggestion on appeal, Calonge was not testifying that she did not know what an "all capacities" suspension entailed.

In any case, Zipper conceded at the hearing that even under his interpretation of the AWC he was not allowed to communicate with FINRA members and their associated persons about Dakota's securities business. Yet during the Suspension Period he emailed Fuenmayor—Dakota's co-owner and a registered securities principal—about the firm's excess net capital deficiency. And he emailed Dakota's clearing firm, a FINRA member, about that deficiency.

b. FINRA did not authorize Zipper to associate with Dakota.

Applicants' other argument is that Zipper did not violate his suspension because FINRA authorized him to associate with Dakota while suspended. According to applicants, either Rosen or Calonge authorized Zipper to conduct Dakota's securities business while suspended if an issue arose that only he could handle. The record does not support this argument.

Rosen testified that while Zipper raised multiple times the possibility of him conducting Dakota's securities business while suspended if an issue arose that only he could handle, he never authorized Zipper to do so. Rather, Rosen testified that each time he told Zipper that he "had to make arrangements for a principal to take your responsibilities over during your suspension" and that Zipper could not involve himself in Dakota's business while suspended.

Rosen also testified that he lacked authority to grant Zipper's request, as other FINRA personnel would have to decide whether to grant an exception on a one-time basis.

The Hearing Panel found Rosen's testimony on this issue credible and Zipper's testimony not credible. "Ultimately," the Hearing Panel concluded, "we do not believe Zipper." We generally accord considerable weight and deference to the fact-finder's credibility determination.[22] The NAC found no evidence in the record that would lead it to not defer to these credibility determinations, and nor do we. Rather, the evidence corroborates Rosen's testimony. Rosen emailed his colleagues on April 1, 2016, the day Zipper executed the AWC, to say that Zipper had raised the issue, and that Rosen told him to have Lefkowitz "contact our office" for further instructions so Zipper did not "cross[] the suspension line."

Calonge also denied that she authorized Zipper to conduct Dakota's securities business if an issue arose that only he could handle. Although Lefkowitz said that he asked Calonge and a colleague for this permission and that they gave it, Calonge denied that this conversation occurred. She said Lefkowitz "never asked" that Zipper help resolve a situation that Lefkowitz could not handle, and that she never told him that Zipper could. Calonge testified: "The message to [Lefkowitz] was clear. Again, Mr. Zipper could not associate with the firm in any capacity." As with Rosen, the NAC deferred to the Hearing Panel's determinations that Calonge's testimony was credible and that Lefkowitz's was not, and we do as well.

We also reject applicants' argument that Calonge testified that in a hypothetical situation Zipper could conduct Dakota's securities business where he was "the only one who could resolve" an issue. Calonge testified that, in some circumstances in response to a specific request, FINRA staff might not object to a suspended person intervening in the business of a small firm for a limited and specified purpose of "reasonably trying to get the firm compliant." She also said that, had Zipper "come to us and asked, we would evaluate the facts of that circumstance, and then we would tell you whether or not we would object." "But," Calonge added, "that never did happen." Calonge testified that Zipper asked repeatedly before his suspension about getting involved in Dakota's business, and FINRA's "consistent" response at the time was that he could not do so. During his suspension, Calonge testified that Zipper never asked for and never received permission to involve himself in Dakota's business.[23]

In any case, applicants do not argue that Calonge authorized Zipper to make securities recommendations to clients during his suspension. Calonge was not aware that FINRA had ever

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[22] *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *8 (May 27, 2015).

[23] Calonge noted two instances, which both occurred after Zipper's suspension ended, when Dakota requested and FINRA granted permission for an individual suspended or disqualified from associating with the firm to help solve a technical or operational issue in order to implement a handover of responsibility to a person then allowed to associate with Dakota.

permitted a suspended representative to make a securities recommendation, and testified that she "cannot even imagine a scenario where we would ever say that was okay."

2. Zipper's and Dakota's conduct violated Article III, Section 3(b) of FINRA's By-Laws, FINRA Rule 8311, and FINRA Rule 2010.

The NAC found that Zipper associated with Dakota while he was suspended and statutorily disqualified, and that the firm permitted him to do so, in violation of Article III, Section 3(b) of FINRA's By-Laws, FINRA Rules 8311 and 2010, and NASD Rule 1031. We agree that Zipper and Dakota violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rule 2010 and that Dakota violated FINRA Rule 8311 because those provisions prohibited Zipper from associating with Dakota while suspended and statutorily disqualified. But we set aside the findings that Zipper and Dakota violated NASD Rule 1031 because that rule does not prohibit the conduct in which Zipper and Dakota engaged.

First, we sustain the finding that Zipper and Dakota violated Article III, Section 3(b) of FINRA's By-Laws. That section provides that "[n]o person shall . . . continue to be associated with a member . . . if such person . . . becomes subject to a disqualification . . . and no member shall be continued in membership, if any person associated with it is ineligible . . . under this subsection."[24] Zipper was statutorily disqualified as a result of his AWC; FINRA's By-Laws thus disqualified him from associating with a member firm, and prohibited Dakota from continuing its membership while allowing Zipper to remain associated with it. As discussed above, Zipper associated with Dakota during the Suspension Period despite being subject to the statutory disqualification. Dakota (through Lefkowitz) allowed Zipper to do so.[25]

Although applicants argue that they did not intentionally violate the AWC, the record indicates that they did. The plain terms of the AWC and Zipper's communications with FINRA all notified Zipper that he was disqualified and could not associate with any FINRA member "in any capacity, including clerical or ministerial functions, during the . . . suspension." Yet Zipper, who signed the AWC, did just that.

Second, we sustain the finding that Dakota violated FINRA Rule 8311, which prohibits a member firm from allowing "a person . . . subject to a suspension . . . or other disqualification . . . to be associated with it in any capacity that is inconsistent with the sanction imposed or the disqualified status, including a clerical or ministerial capacity."[26] Zipper's suspension meant that Dakota could not allow Zipper to engage in clerical or ministerial tasks for the firm—let alone

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24 FINRA By-Laws, Art. III, § 3(b).

25 *See Merrimac Corp. Sec.*, Exchange Act Release No. 86404, 2019 WL 3216542, at *19 (July 17, 2019) ("[I]t is well-established that a firm may be held accountable for the misconduct of its associated persons because it is through such persons that a firm acts.").

26 FINRA Rule 8311.

allow him to recommend securities to clients or conduct the firm's business. We found in an earlier proceeding that Zipper's conduct while suspended supported a finding that he "associated with Dakota in a manner inconsistent with his suspension" under Rule 8311.[27] We make that same finding here. And Dakota (through Lefkowitz) allowed him to do so.

Third, we sustain the finding that Zipper and Dakota violated FINRA Rule 2010, which requires members and associated persons, in the conduct of their business, to "observe high standards of commercial honor and just and equitable principles of trade."[28] Our long-standing and judicially-recognized policy is that the violation of another FINRA rule—such as Zipper's violation of the FINRA By-Laws, and Dakota's violation of Rule 8311–itself constitutes a violation of FINRA Rule 2010.[29] In addition, a member or associated person likewise violates Rule 2010 by failing to comply with the terms of a FINRA suspension order.[30] Zipper and Dakota failed to observe high standards of commercial honor and just and equitable principles of trade in each of these ways. Because Zipper violated the FINRA By-Laws and Dakota violated Rule 8311, they thereby also violated Rule 2010. And because Zipper associated with Dakota notwithstanding his suspension and disqualification, and Dakota allowed him to do so notwithstanding the suspension order, both applicants likewise violated Rule 2010.

Fourth, we set aside the finding that Zipper and Dakota violated NASD Rule 1031 when Zipper engaged, and Dakota allowed him to engage, in activities requiring registration during the Suspension Period. NASD Rule 1031 provides that any person engaged in the securities business of a FINRA member firm and functioning as a "representative" must be registered with FINRA, and that the person must pass a qualification examination before the registration may "become effective."[31] Zipper held several FINRA registrations with Dakota during the Suspension Period, including as a general securities representative as required under NASD Rule

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27 *Zipper*, 2018 WL 4727001, at *5.

28 FINRA Rule 2010; *see also* FINRA Rule 140(a) (providing that FINRA's rules "shall apply to all members and persons associated with a member" and that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules").

29 *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *8 n.29 (July 2, 2013); *see also, e.g.*, *Katz v. SEC*, 647 F.3d 1156, 1158 n.2 (D.C. Cir. 2011) (recognizing that a violation of an SRO or Commission rule also violates an SRO's prohibition against engaging in conduct inconsistent with just and equitable principles of trade).

30 *See Perpetual Sec.*, 2007 WL 2892696, at *7 (holding that "disregard for NASD's Suspension Order is itself a failure to observe just and equitable principles of trade").

31 NASD Rule 1031 was replaced by FINRA Rule 1200 series effective in 2018. *See Order Approving Proposed Rule Change*, Exchange Act Release No. 81098, 82 Fed. Reg. 32,419 (July 13, 2017). The NAC applied the rules in effect at the time of the misconduct.

1031.[32] The NAC offered no authority or reasoned basis for its conclusion that a person suspended from associating with any member firm, who is nonetheless "registered," violates NASD Rule 1031 by engaging in conduct requiring registration. Nor are we aware of any case holding that a person who is suspended from association but who is not ordered to requalify by examination violates NASD Rule 1031 by engaging in such conduct.[33] Accordingly, Zipper and Dakota did not violate NASD Rule 1031 through Zipper's conduct while suspended.[34]

The NAC held that by "engag[ing] in activities requiring registration during the Suspension Period" Zipper violated "NASD Rule 1031 and FINRA Rule 2010." To the extent the NAC predicated a violation of FINRA Rule 2010 on the fact that it found Zipper to have violated NASD Rule 1031,[35] we set aside the finding of a Rule 2010 violation as well. To the extent that NAC meant to find a violation of Rule 2010 based on the fact that Zipper engaged in activities requiring registration while suspended, we find that violation of Rule 2010 to be subsumed by the finding that Zipper violated Rule 2010 by associating with a member firm while suspended. As the NAC explained here, "[a]ctivities requiring registration are a subset of those that constitute 'associating' with a FINRA member firm." We have sustained FINRA's finding that Zipper violated Rule 2010 by associating with a member firm while suspended.

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[32] *Cf. Richard F. Kresge*, Exchange Act Release No. 55988, 2007 WL 1892137, at *13-14 (June 29, 2007) (holding that president of NASD member firm violated Rule 1031 by allowing an associated person "to act as a representative of the Firm without being so registered").

[33] *Cf. Hans N. Beerbaum*, Exchange Act Release No. 55731, 2007 WL 1376365 (May 9, 2007) (finding that applicant violated NASD Rule 1021 by engaging in conduct requiring registration as a general securities principal while his principal registration was suspended where he had been ordered to requalify by examination but had not yet requalified); NASD Rule 1021 (providing that before a registration may "become effective" a person must pass an examination).

[34] *See Frank W. Leonesio*, Exchange Act Release No. 23524, 1986 WL 625415, at *4 (Aug. 11, 1986) (sustaining NASD's finding that Leonesio's misrepresentation to investors that the securities he offered them were risk-free violated its rule prohibiting conduct inconsistent with just and equitable principles of trade but setting aside its finding that this conduct violated its rule prohibiting an associated person of an NASD member firm from guaranteeing "a customer against loss in any securities account of such customer carried by the member or in any securities transaction effected by the member with or for such customer" because "Leonesio conducted his sales activities outside the scope of his employment with his member firm" and "[c]onsequently, the language of Rule 19(e) does not cover his misrepresentations").

[35] *See supra note* 29.

3. Article III, Section 3(b) of FINRA's By-Laws, FINRA Rule 8311, and FINRA Rule 2010 are, and were applied in a manner, consistent with the Exchange Act's purposes.

We find that Article III, Section 3(b) of FINRA's By-Laws, FINRA Rule 8311, and FINRA Rule 2010 are, and were applied in a manner, consistent with the Exchange Act's purposes. Exchange Act Section 15A(b)(6) requires that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.[36] Article III, Section 3(b) of FINRA's By-Laws, FINRA Rule 8311, and FINRA Rule 2010 are consistent with these purposes because they require that individuals and member firms adhere to any limits on their activities that result from disciplinary action. FINRA's application of these provisions here was consistent with these purposes because we have held that the violation of FINRA's disciplinary orders is "very serious misconduct" that presents a risk to investors.[37] Holding Zipper and Dakota liable for failing to adhere to the terms of Zipper's suspension furthers the integrity of FINRA's disciplinary proceedings and its oversight function in service of the public interest.

B. Zipper and Dakota maintained inaccurate books and records.

Separate from and in addition to the violations related to Zipper's suspension, the NAC also found that Zipper and Dakota violated FINRA Rules 4511 and 2010 by intentionally misidentifying the representative of record for hundreds of transactions in the firm's books and records. The NAC also found that Dakota willfully violated Exchange Act Section 17(a) and Exchange Act Rule 17a-3 by maintaining inaccurate books and records. These findings are supported by the record, and we affirm them.[38]

FINRA Rule 4511(a) requires that members and their associated persons "make and preserve books and records as required under the FINRA rules, the Exchange Act and the applicable Exchange Act rules."[39] Exchange Act Section 17(a)(1) requires broker-dealers to "make and keep for prescribed periods such records . . . as the Commission, by rule,

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36 *See* 15 U.S.C. § 78o-3(b)(6).

37 *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 WL 3554584, at *13 (Sept. 13, 2010).

38 We do not consider FINRA's argument on appeal that Dakota also maintained inaccurate books and records with respect to unsolicited orders marked "solicited." "[B]ecause the NAC neither made findings regarding [this] conduct, nor imposed sanctions regarding that conduct, there is no finding of violation or final disciplinary action before us" with respect to this charge. *Amr Elgindy*, Exchange Act Release No. 49389, 2004 WL 865791, at *5 (Mar. 10, 2004).

39 FINRA Rule 4511(a) (imposing this duty on FINRA members); *see* FINRA Rule 0140(a) ("The Rules shall apply to all . . . persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under the Rules.").

prescribes."[40] Exchange Act Rule 17a-3 prescribes that broker-dealers "make and keep current . . . [a] memorandum of each brokerage order . . . given . . . for the purchase or sale of a security" showing the identity of any "person who entered or accepted the order on behalf of the customer."[41] A broker-dealer may satisfy this requirement by recording an identification number or code assigned for the person entering the customer's order, instead of the person's name.[42]

Implicit in the recordkeeping rules is the requirement that records be accurate.[43] Causing a firm to enter false information in its books and records violates both FINRA Rules 4511 and 2010.[44] Similarly, the violation of FINRA Rule 4511 is itself a violation of Rule 2010.[45]

1. Zipper and Dakota engaged in the conduct that FINRA found.

The record supports the NAC's finding that for hundreds of trades between February 22, 2016, and November 16, 2016, Zipper and (through him and Lefkowitz) Dakota intentionally recorded in Dakota's books and records a representative code that inaccurately identified the person entering the customer order. Dakota assigned each registered person an identification code that was included on the order memorandum for each transaction. An individual formerly registered with Dakota was assigned DS01; Zipper was assigned DS02; and the former representative and Zipper were assigned shared code DS03. Dakota's books and records also showed which person's terminal entered the order. Zipper and Lefkowitz admitted at the hearing that they recorded a representative code that inaccurately identified the person entering the customer order before, during, and after Zipper's suspension. Zipper's use of the former representative's codes after the former representative left Dakota, and Lefkowitz's use of the former representative's codes and Zipper's codes during the Suspension Period, caused Dakota's

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40 15 U.S.C. 78q(a)(1).

41 17 C.F.R. § 240.17a-3(a)(6)(i).

42 *See Books and Records Requirements for Brokers and Dealers under the Securities Exchange Act of 1934*, Exchange Act Release No. 44992, 2001 WL 1327088 (Oct. 26, 2001), 66 Fed. Reg. 55,817, 55,819 (Nov. 2, 2001).

43 *Meyers Assocs. LP*, Exchange Act Release No. 86497, 2019 WL 3387091, at *10 & n.77 (July 26, 2019) (collecting citations).

44 *See, e.g., Blair C. Mielke*, Exchange Act Release No. 75981, 2015 WL 5608531, at *15 (Sept. 24, 2015) ("Associated persons responsible for a member firm's failure to maintain accurate and complete books and records are responsible for causing the firm's violations of [NASD] Rule 3110 [the precursor to FINRA Rule 4511]."); *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *16 & n.127 (Nov. 15, 2013) (finding that causing firm's books and records to be inaccurate and incomplete violated NASD Rules 3310 and 2110 [the precursor to FINRA Rule 2010]) (citing cases).

45 *See supra* note 29 and accompanying text.

books and records to reflect inaccurate information about the identity of the person who entered or accepted those orders on behalf of the customers.

2. Zipper's and Dakota's conduct violated Exchange Act Section 17(a), Exchange Act Rule 17a-3, and FINRA Rules 4511 and 2010.

We agree with the NAC that Dakota violated Exchange Act Section 17(a) and Exchange Act Rule 17a-3, and that Zipper and Dakota violated FINRA Rules 4511 and 2010, by maintaining inaccurate books and records. It is undisputed that Zipper and Lefkowitz, and through them Dakota, intentionally misidentified the representative of record on Dakota's books and records hundreds of times. By keeping an inaccurate trade blotter showing the person who entered or accepted the order on behalf of the customer, they made and kept inaccurate records of the identity of the person who entered or accepted these orders on behalf of Dakota's customers. We also agree that Dakota's violations of Exchange Act Section 17(a) and Exchange Act Rule 17a-3 were willful, and, as a result, subject the firm to a statutory disqualification.[46]

The record amply supports the NAC's finding that Zipper and Dakota acted with intent to mislead state securities regulators "in order to avoid New Jersey's [broker] registration requirements." Zipper acknowledged that he and the former representative used each other's codes to save registration costs, as they "didn't want to double pay" to register both of them in a given state. As a result, they acted with scienter.[47] Zipper and Lefkowitz were, at the time of their respective misconduct, the president and CEO of Dakota and had control over the firm. Like the NAC, we therefore attribute the misconduct of Zipper and Lefkowitz to Dakota.[48] The finding that Dakota acted with scienter is sufficient to find that Dakota acted willfully.[49]

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46 15 U.S.C. § 78c(a)(39)(F) (stating that a person is subject to a statutory disqualification if, among other things, he has committed any act enumerated in Exchange Act Section 15(b)(4)(D), which refers, among other things, to willful violations of the Exchange Act).

47 *See Peter W. Schellenbach*, Exchange Act Release No. 30030, 1991 WL 288493, at *3 (Dec. 4, 1991) (affirming NASD's findings where scienter requirement was "satisfied by [applicant's] deliberate intent to deceive regulators"), *aff'd*, 989 F.2d 907 (7th Cir. 1993).

48 *See supra* note 25; *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at *16 (Sept. 28, 2017) ("[S]ince [applicant] is the only officer of [the firm] and controlled the company, his scienter can be imputed to [the firm] as well.").

49 *See, e.g.*, *Bennett Grp. Fin. Servs.*, Exchange Act Release No. 80347, 2017 WL 1176053, at *4 n.30 (Mar. 30 2017) ("Our finding of scienter . . . demonstrates that Bennett's violations were willful."); *see also Robare v. SEC*, 922 F.3d 468, 479-80 (D.C. Cir. 2019) (holding that a finding of recklessness is sufficient to prove a violation of Section 207 of the Investment Advisers Act of 1940, which prohibits willfully omitting to state in an investment adviser registration application a material fact that is required to be stated therein).

Applicants ask us to set aside the NAC's findings of books-and-records violations generally and FINRA's finding that they "falsified" books and records specifically because they did not intend to deceive customers or regulators, no one was deceived, and FINRA's findings imply an intent that they lacked. But violations of Exchange Act Section 17(a), Exchange Act Rule 17a-3, and FINRA Rule 4511 do not require scienter.[50] In any case, as discussed above, we find that Zipper and Dakota acted with scienter in committing these violations.

Zipper and Dakota argue that Dakota's registered representatives would not have had to register in New Jersey, and therefore they had no reason to mislead regulators to avoid New Jersey's registration requirement, because they were eligible for an exemption from that registration requirement on the ground that they effected securities transactions for five or fewer New Jersey residents' customer accounts.[51] But while Zipper told the Hearing Panel he would look for a copy of a waiver he said that he received from New Jersey regulators allowing him to effect trades under this exemption, neither he nor Dakota produced any such records. In light of Zipper's testimony that the reason he and the former registered representative used each other's codes was to save money on registration fees, we agree with the NAC that the record establishes that Zipper and Dakota intentionally falsified their records to mislead regulators.

Applicants also argue, without submitting any testimony from Dakota's customers, that we should set aside the finding of books-and-records violations because their customers consented to and approved of their misidentification of representative codes. But even assuming Dakota's customers approved of and did not complain about its longstanding practice of misidentifying the representative of record, Dakota is still liable for its rules violations.[52]

3. Exchange Act Section 17(a), Exchange Act Rule 17a-3, and FINRA Rules 4511 and 2010 are, and were applied in a manner, consistent with the Exchange Act's purposes.

We find that Exchange Act Section 17(a), Exchange Act Rule 17a-3, and FINRA Rules 4511 and 2010 are, and were applied in a manner, consistent with the Exchange Act's purposes of protecting investors and the public interest. We have previously said in this context that

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50 *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *12 (May 27, 2015) (finding that NASD Rule 3110, the predecessor to FINRA Rule 4511, has no scienter requirement); *Orlando Joseph Jett*, Exchange Act Release No. 49366, 2004 WL 2809317, at *23 (Mar. 5, 2004) ("Scienter is not required to violate Exchange Act Section 17(a)(1) and the rules thereunder."); *see also Order Approving Proposed Rule Change*, Exchange Act Release No. 63784, 2011 WL 281611 (Jan. 27, 2011), 76 Fed. Reg. 5,850 (Feb. 2, 2011).

51 *See* N.J. Rev. Stat. § 49:3-56(b).

52 *See, e.g., Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 WL 5092727, at *7 (Dec. 7, 2010) ("FINRA's 'power to enforce its rules is independent of a customer's decision not to complain.'") (citation omitted).

Exchange Act Section 17(a), Exchange Act Rule 17a-3, and FINRA Rules 4511 and 2010 are consistent with those purposes because they "require[] that member firms conduct their business operations with regularity and that their records accurately reflect those operations."[53] And the requirement that books and records be accurate ensures that the Commission and the SROs can effectively monitor and detect irregularities at brokers to protect the public interest.[54] Because Dakota's books and records were not accurate, FINRA's application of these provisions in this case was consistent with the purposes of the Exchange Act.[55]

C. Dakota failed to maintain and enforce an adequate supervisory system.

The NAC found that Dakota failed to maintain and enforce a system of written supervisory procedures to supervise its business and associated persons in violation of FINRA Rules 3110 and 2010.[56] Dakota does not dispute that it engaged in this misconduct. We conclude that the record amply supports the NAC's finding of violation.

1. Dakota engaged in the conduct that FINRA found.

Although Dakota's WSPs addressed how the firm would supervise its business with respect to suspended and disqualified persons, as well as how it would supervise the creation of its books and records, the firm failed to enforce those WSPs during the Suspension Period.

Zipper prepared Dakota's WSPs dated October 30, 2013, which provided that during a suspension employees may not "have direct or indirect contact with customers" or "give investment advice or counsel." On May 15, 2016, shortly before his suspension began, Zipper updated the WSPs to read that between June 1 and August 31, 2016 "Bruce Zipper . . . will be on a 90 day suspension and will not be involved in the company's business for that time period."

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53 *Meyers Assocs.*, 2019 WL 3387091, at *10 (citation omitted).

54 *See Edward J. Mawod & Co.*, Exchange Act Release No. 13512, 1977 WL 187427, at *5 n.39 (May 6, 1977) (stating recordkeeping requirements are "a keystone of the surveillance of brokers and dealers by our staff and by the securities industry's self-regulatory bodies").

55 *First Colo. Fin. Servs. Co., Inc.*, Exchange Act Release No. 40436, 1998 WL 603229, at *3 (Sept. 14, 1998) (stating that violations of the recordkeeping requirements "adversely impact the monitoring function exercised by regulatory authorities"); *see also Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at *7 (Mar. 19, 2013) (citations omitted) (stating that a failure to register in a state "undermined . . . important investor protection provisions").

56 FINRA's complaint also alleged that, during the Suspension Period, Dakota failed to establish and maintain a supervisory system reasonably designed to review Dakota's electronic correspondence in accordance with FINRA rules. The Hearing Panel found Dakota liable for this violation, but its decision is not before us on review; it is the NAC decision we consider here, and the NAC did not find Dakota liable for this violation. *See supra* note 38.

Dakota's WSPs also addressed the creation of its books and records. The October 2013 WSPs said that Exchange Act "Rule 17a-3 identifies the types of books and records to be retained," that "SROs also specify certain record requirements," and that "[d]esignated supervisors are responsible for retaining required records for areas under their supervision." Those WSPs identified Zipper as the designated supervisor responsible for "compliance" and "operations and trading desk supervision." Zipper's May 2016 updates to the WSPs did not specifically designate Lefkowitz as the supervisor responsible for those areas but provided that he "will be the acting CEO and oversee the running of the company."

Despite establishing WSPs relating to suspended and disqualified persons, Dakota failed to maintain and enforce a system of written supervisory procedures adequate to ensure that Zipper did not associate with Dakota during the Suspension Period. The firm hired Lefkowitz to take over Zipper's responsibilities during that time, but he (and thus Dakota) took insufficient steps to prevent Zipper from associating with Dakota. A computer that continued to have unrestricted access to Dakota's files and trading system was located in Zipper's home, which also was the firm's principal place of business. Lefkowitz did not prohibit Zipper from using his Dakota email for firm business and—even though he was responsible for reviewing firm communications during the Suspension Period—did not review Zipper's communications to ensure that he was not associating with Dakota or engaging in firm business while suspended. Zipper testified that he set up the email system to blind carbon copy (BCC) Lefkowitz on all incoming emails to Zipper. As a result, Lefkowitz received copies of customers' replies to emails that Zipper had sent out showing that he was conducting Dakota's securities business. Lefkowitz failed to investigate or follow-up on these red flags.

Dakota also failed to supervise the creation of its books and records between February 22 and November 16, 2016. For part of this period Zipper served as Dakota's president, CEO, and CCO, and for part of this period Lefkowitz served as Dakota's president, CEO, and CCO. Zipper and Lefkowitz each admit that during this period when they were serving in these roles they intentionally misidentified the representative of record when entering hundreds of transactions in Dakota's trading system, which caused Dakota's books and records to be inaccurate with respect to those transactions.

2. Dakota's conduct violated FINRA Rules 3110 and 2010.

FINRA Rule 3110(a) requires that each FINRA member establish and maintain a supervisory system that is reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA rules.[57] It is well established that "[t]he presence of procedures alone is not enough. Without sufficient implementation, guidelines and strictures do not ensure

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57 FINRA Rule 3110(a).

compliance."[58] A violation of FINRA Rule 3110 is a violation of FINRA Rule 2010.[59] And Dakota is responsible for the failures of its associated persons.[60]

We find that Dakota failed to maintain and enforce a supervisory system with respect to suspended and disqualified persons that was reasonably designed to achieve compliance with the firm's obligation not to allow Zipper to associate with it while suspended. Dakota's WSPs provided that Zipper was to take no part in the firm's business while suspended. Yet Lefkowitz knew that Zipper continued to access the firm's email and trading systems. Lefkowitz also knew that Zipper was communicating with firm clients by email, including to recommend securities transactions, because he was copied on customers' replies to emails that Zipper had sent. Lefkowitz's failure to maintain and enforce Dakota's supervisory system to ensure that Zipper was not associating with the firm in violation of FINRA By-Laws and rules and Dakota's WSPs was not reasonable.

We likewise find that Dakota failed to maintain and enforce a supervisory system with respect to the creation of its books and records. Zipper and Lefkowitz were each responsible under the WSPs for "retaining required records for areas under their supervision" consistent with Exchange Act Rule 17a-3, including operations and trading. Yet Zipper and Lefkowitz failed to maintain and enforce a supervisory system that was reasonably designed to achieve compliance with the firm's obligation to accurately identify on the firm's books and records the person who accepted the order on the client's behalf. To the contrary, each testified that he intentionally misidentified the representative of record for hundreds of transactions, causing Dakota's books and records to be inaccurate with respect to those transactions.

3. FINRA Rules 3110 and 2010 are, and were applied in a manner, consistent with the Exchange Act's purposes.

Exchange Act Section 15A(b)(6) requires that FINRA design its rules to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.[61] We have "'long emphasized that the responsibility of broker-dealers to supervise their employees is a critical component of the federal regulatory scheme.'"[62] Because FINRA's application of Rules 3110 and 2010 was

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58 *Rita H. Malm*, Exchange Act Release No. 35000, 1994 WL 665963, at *4 n.17 (Nov. 23, 1994).

59 *See Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 WL 4258143, at *10 n.36 (Aug. 12, 2016), *petition denied*, 719 F. App'x 724 (9th Cir. 2018).

60 *See supra* note 25; *see also Meyers Assocs.*, 2019 WL 2593825, at *10 (stating that a "supervisor's violation of a 'duty to supervise may be imputed to the firm'") (citation omitted).

61 15 U.S.C. § 78*o*-3(b)(6).

62 *KCD Fin. Inc.*, Exchange Act Release No. 80340, 2017 WL 1163328, at *10 (Mar. 29, 2017) (citation omitted); *see also Order Granting Approval of a Proposed Rule Change to Adopt*

appropriate in this case given the unreasonableness of Dakota's failures to supervise, we find that those rules are, and were applied in a manner, consistent with the Exchange Act's purposes.

* * *

Applicants ask us to set aside the NAC's findings on the ground that these proceedings were "filled with bias from FINRA." But applicants have waived any argument that the Hearing Panel or the NAC were biased, and the record does not support a finding that any impermissible bias on the part of FINRA staff, the Hearing Panel, or the NAC infected this proceeding.

Applicants did not preserve any claim as to the Hearing Panel because they did not move timely for disqualification of the Hearing Officer or panel members under FINRA Rules 9233 and 9234.[63] And they waived any arguments regarding the NAC's bias because they did not develop such arguments in their briefs on appeal.[64] In any case, our independent review of the record reveals no evidence that the Hearing Officer, Hearing Panel, or the NAC were biased.[65]

Applicants primarily claim that this proceeding was the product of FINRA staff bias against them. To support their bias claim, applicants mainly rely on Zipper's efforts to relocate the hearing on Dakota's MC-400 application from Washington, D.C. to Florida. The hearing panel in that proceeding initially denied his request on the basis that Zipper's claimed financial burden was an insufficient reason to relocate the hearing. But the hearing panel subsequently

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Rules Regarding Supervision in the Consolidated FINRA Rulebook, as Modified by Amendment No. 1, Exchange Act Release No. 71179, 2013 WL 6794111, at *31-32 & n.230 (Dec. 23, 2013) (discussing Rule 3110); *Notice of Filing of a Proposed Rule Change*, Exchange Act Release No. 58095, 2008 WL 2971979, at *2 (July 3, 2008) (discussing Rule 2010).

63 *See Merrimac Corp. Sec.*, 2019 WL 3216542, at *25 (stating that applicant waives bias claim by failing to timely move for disqualification) (citing *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at *21 (Sept. 28, 2017)); FINRA Rule 9233(b) (stating that party seeking to disqualify a Hearing Officer on grounds of alleged bias must move within fifteen days of learning facts that are grounds for disqualification); FINRA Rule 9234(b) (stating that party seeking to disqualify Hearing Panelist must move within fifteen days of the earlier of learning facts that are grounds for disqualification or of being notified of the appointment).

64 *See, e.g., Merrimac Corp. Sec.*, 2019 WL 3216542, at *25 & n.158 (stating that even with respect to pro se parties we will address "only those arguments developed with sufficient clarity" and treating "offhand assertions that are insufficiently developed" as waived).

65 *See, e.g., Mission Sec. Corp.*, 2010 WL 5092727, at *11 ("To prevail on a claim of adjudicatory prejudice, [applicants] must meet two prongs: the [decisionmaker's] supposed bias must stem from an extrajudicial source *and* result in a decision on the merits based on matters other than those gleaned from participation in a case.") (cleaned up).

reversed itself and agreed to a hearing in Florida.[66] In any event, the hearing panel's actions in that separate proceeding do not establish impermissible bias in this proceeding.[67]

Although Applicants also cite certain language in Enforcement's arguments or the NAC's findings they say has painted them "in the worst light possible," they do not explain how this is evidence of impermissible staff bias. Regardless, we have either not relied on the arguments applicants object to or have found them amply supported by the record. To the extent that applicants challenge FINRA's characterizations as false and defamatory, or ask us to take action against FINRA, those claims "cannot be adjudicated in the appeal before us."[68]

Finally, applicants suggest that FINRA staff have conspired to throw them out of the industry and have inappropriately pursued the underlying AWC and this proceeding. We have already held that Zipper's AWC waived any claim that FINRA staff "'overreach[ed]' by merely issuing a Cautionary Action Letter to Dakota for its failure to ensure that associated persons updated their Forms U4 while 'throw[ing] the book' at him."[69] Applicants offer no reason to revisit that finding here. Construing applicants' suggestion as a challenge to FINRA's charging decision in *this* proceeding, that is "an exercise of prosecutorial discretion that is not reviewable here."[70] In any case, as discussed above, there was a strong evidentiary basis for the allegations against Zipper and Dakota. Nothing in the record substantiates a claim of bias.

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66 *See Bruce M. Zipper*, Exchange Act Release No. 80599, 2017 WL 1735952 (May 4, 2017) (granting request to withdraw application for review).

67 *See, e.g., Fred A. Borries, Jr.*, Exchange Act Release No. 32896, 1993 WL 365092, at *1 (Sept. 14, 1993) (observing when asked to "review the NASD's actions in an unrelated disciplinary action" that it is ordinarily "not appropriate in the context of [an] appeal to review the NASD's actions in a proceeding that is not before us," and in any event "find[ing] no evidence of any NASD 'conspiracy' . . . or of any unfair treatment").

68 *Zipper*, 2017 WL 4335072, at *4; *see also Keith Patrick Sequeira*, Exchange Act Release No. 85231, 2019 WL 995508, at *8 & n.53 (Mar. 1, 2019) (declining to consider claims about allegedly libelous statements FINRA made as "outside the scope of this proceeding"), *aff'd*, 816 F. App'x 703 (3d Cir. 2020) (finding that this conclusion was "proper[ ]").

69 *Zipper*, 2018 WL 4727001, at *9.

70 *Id.*; *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 selective-prosecution or arbitrary-discrimination claims, and in our judgment the record would not support them.

III. SANCTIONS

Exchange Act Section 19(e)(2) directs us to sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive.[71] As part of our review, we consider any aggravating or mitigating factors.[72] We also consider whether the sanctions are remedial or punitive.[73] In imposing sanctions, the NAC relied on FINRA's Sanction Guidelines in effect at the time of the Hearing Panel's decision.[74] Although not binding on us, we have used the Guidelines as a benchmark.[75]

The NAC, like the Hearing Panel, imposed two bars on Zipper and three expulsions on Dakota.[76] It barred Zipper for associating with Dakota and engaging in activities requiring registration while suspended and statutorily disqualified, and barred him again for his books-and-records violations. The NAC likewise expelled Dakota for allowing Zipper's association and registration violations, for its books-and-records violations, and for its supervisory violations.

A. We remand for FINRA to determine the appropriate sanctions for Zipper's improper association with Dakota while suspended and statutorily disqualified in light of our determination to set aside the finding of a violation of Rule 1031.

The NAC barred Zipper for improperly associating with Dakota while suspended and statutorily disqualified and engaging in activities requiring registration while suspended. It likewise expelled Dakota for allowing Zipper to engage in this misconduct. The NAC considered its finding that Zipper and Dakota violated NASD Rule 1031 in imposing these unitary sanctions for all of Zipper's and Dakota's conduct in contravention of the AWC. It also concluded that applicants' "violations of FINRA's . . . registration rules were egregious."

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71 15 U.S.C. § 78s(e)(2). We may also set aside a sanction if we find that it imposes an unnecessary or undue burden on competition. *Id*. The record does not show, nor do applicants claim, that FINRA's sanctions impose any unnecessary or inappropriate burden on competition.

72 *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013).

73 *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065-66 (D.C. Cir. 2007).

74 *See FINRA Sanction Guidelines* (2017).

75 *See, e.g.*, *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 & n.68 (June 14, 2013) (using the Guidelines as a benchmark but explaining they are not binding).

76 We have "previously sustained FINRA's imposition of more than one bar on a single applicant." *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 WL 3087507, at *7 n.34 (June 2, 2016); *see, e.g.*, *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 WL 3228694, at *15 (Nov. 8, 2006). Given our determination to remand all sanctions to FINRA, we need not address whether imposing any given concurrent bar or expulsion would be appropriately remedial and necessary for the protection of investors.

Because we set aside the NAC's finding that Zipper and Dakota violated NASD Rule 1031, we remand for the NAC to determine the appropriate sanctions for applicants' violations of Article III, Section 3(b) of FINRA's By-Laws and FINRA Rules 8311 and 2010 only.[77] We do not hold that the sanctions the NAC imposed for those remaining violations were excessive or oppressive; rather, we hold that the NAC should determine in the first instance the appropriate sanctions for the remaining violations without considering any violation of NASD Rule 1031 or separate misconduct related to the registration rules.

B. We remand for FINRA to explain the basis for its determination to bar Zipper and expel Dakota as a result of their books-and-records violations.

The NAC barred Zipper and expelled Dakota as a result of their books-and-records violations. In *John M.E. Saad*, we recently reiterated that we "must evaluate any bar FINRA imposes on its own facts to determine if it is remedial and not punitive (and thus not excessive or oppressive)."[78] Permissible FINRA "bars seek not to punish past transgressions, but to prevent such misconduct from occurring in the future."[79] In assessing whether a bar or expulsion is excessive or oppressive, we must be able to discern from the record and the NAC's discussion that the sanction does more "than say, in effect, petitioners are bad and must be punished."[80]

The NAC held "that Zipper's and Dakota's misconduct in falsifying the firm's books and records was intentional, pervasive, and carried out with the specific intent to mislead regulators" and it "therefore bar[red] Zipper and expel[led] Dakota." But we cannot tell from the NAC's analysis whether it imposed these sanctions because applicants' intentional and pervasive recordkeeping violations—carried out with an intent to mislead—demonstrated that a bar and expulsion were necessary to protect the public, or instead solely because they had committed that misconduct.[81] We remand for the NAC to more clearly explain the basis for its conclusion that the books-and-records violations warranted a bar and expulsion.[82]

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77 *See, e.g., Merrimac Corp. Sec.*, 2019 WL 3216542, at *22 (remanding for the NAC "to determine the appropriate sanctions for [remaining] violations that we sustain").

78 *John M.E. Saad*, Exchange Act Release No. 86751, 2019 WL 3995968, at *5 (Aug. 23, 2019).

79 *Id*. at *12.

80 *Id*. at *4 (quoting *PAZ Secs., Inc. v. SEC*, 494 F.3d 1059, 1064 (D.C. Cir. 2007)).

81 *See Saad*, 2019 WL 3995968, at *5 ("A sanction based solely on past misconduct without regard for the public interest . . . would be impermissibly punitive and thus excessive or oppressive.").

82 *See Keith Patrick Sequeira*, Exchange Act Release No. 81786, 2017 WL 4335070, at *5 (Sept. 29, 2017) (stating that a remand is appropriate where FINRA does not clearly explain the basis for its conclusions and the sanctions it imposes); *see also, e.g., Jonathan Feins*, Exchange Act Release No. 37091, 1996 WL 169441, at *2 (Apr. 10, 1996) (remanding SRO disciplinary

C. We remand for FINRA to clarify the basis for its determination to expel Dakota for its supervisory violations in light of our determination to set aside the finding that Zipper and Dakota violated NASD Rule 1031.

The NAC expelled Dakota for its supervisory violations. It based this unitary sanction on all of Dakota's supervisory misconduct, which enabled the books-and-records violations and also "enabled Zipper to continue associating with it, and engage in activities requiring registration, throughout his three-month suspension." We cannot tell from this statement whether the NAC based the unitary sanction for the supervisory violations in part on a finding that the supervisory violations enabled a violation of NASD Rule 1031. Because we have determined to set aside the finding that Zipper and Dakota violated NASD Rule 1031, we remand for the NAC to clarify the basis for its determination that Dakota's supervisory violations warranted an expulsion and, to the extent necessary, to determine in the first instance the appropriate sanction for the supervisory misconduct without considering any violation of NASD Rule 1031 or separate misconduct related to the registration rules.

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An appropriate order will issue.[83]

By the Commission (Chairman CLAYTON and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

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action reviewed under Exchange Act Section 19(e) for explanation of factual findings); *Donald R. Gates*, Exchange Act Release No. 36109, 1995 WL 497444, at *2-3 (Aug. 16, 1995) (remanding NASD disciplinary action reviewed under Section 19(e) for explanation of factual conclusions).

[83] 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. 90737 / December 21, 2020

Admin. Proc. File No. 3-19138

In the Matter of the Application of

BRUCE ZIPPER

and

DAKOTA SECURITIES INTERNATIONAL, INC.

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA IN PART, SETTING ASIDE DISCIPLINARY ACTION TAKEN BY FINRA IN PART, AND REMANDING TO FINRA

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

ORDERED that FINRA's findings of violations against Bruce Zipper and Dakota Securities International, Inc., are sustained in part and set aside in part and the proceeding is remanded to FINRA for a redetermination of the appropriate sanctions.

By the Commission.

Vanessa A. Countryman
Secretary