SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 99248 / December 28, 2023

Admin. Proc. File No. 3-19666

In the Matter of the Application of

WILSON-DAVIS & CO.,
JAMES C. SNOW, and
BYRON B. BARKLEY

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDING

FINRA member firm and two of its principals appeal from a FINRA disciplinary action. FINRA found that the firm engaged in short selling without finding locates for 122 short transactions effected in four penny stocks; that the firm and both principals failed to reasonably supervise the short sales; and that the firm and one principal failed to devise a reasonable system to supervise registered personnel, to consider whether an employee should be subject to heightened supervision, to supervise instant messages, and to establish and implement reasonable anti-money laundering policies, procedures, and training. *Held*, FINRA's findings of violations are *sustained*, the sanctions it imposed are *sustained in part* and *set aside in part*, and the proceeding is *remanded*.

APPEARANCES:

Richard F. Ensor, *Anne T. Freeland*, and *Evan S. Strassberg* for Wilson-Davis & Co., James C. Snow, and Byron B. Barkley.

Alan Lawhead, *Andrew Love*, and *Celia L. Passaro* for FINRA.

Appeal filed: February 26, 2019
Last brief received: July 10, 2020

Wilson-Davis & Co., James C. Snow, and Byron B. Barkley seek review of a FINRA disciplinary action. Upon review of a hearing panel decision, FINRA's National Adjudicatory Council ("NAC") found that: (i) Wilson-Davis violated Rule 203(b)(1) of Regulation SHO under the Securities Exchange Act of 1934 ("Reg SHO") and FINRA Rule 2010 by engaging in short selling without finding locates for 122 short transactions effected in four penny stocks; (ii) Wilson-Davis, Snow, and Barkley violated NASD Rule 3010 and FINRA Rule 2010 by failing to reasonably supervise the short sales to ensure compliance with Reg SHO, and Wilson-Davis and Snow also violated those rules by failing to devise a reasonable system to supervise the firm's registered personnel, consider whether an employee should be subject to heightened supervision, and supervise the review of instant messages; and (iii) Wilson-Davis and Snow violated FINRA Rules 3310(a) and (e) and 2010 by failing to establish and implement reasonable anti-money laundering ("AML") policies and procedures and conduct adequate AML training.[1]

For Wilson-Davis's Reg SHO violations, FINRA ordered that the firm disgorge $51,624 plus prejudgment interest and imposed a $350,000 fine; for its supervisory and AML violations, FINRA imposed a $750,000 fine and ordered that the firm retain an independent consultant to recommend changes to its written supervisory procedures ("WSPs"). For Snow's supervisory and AML violations and Barkley's supervisory violation, FINRA (i) imposed a $77,000 fine on Snow and a $52,000 fine on Barkley; (ii) ordered that they both be suspended in all capacities for three months and in principal and supervisory capacities for one year (to run concurrently); and (iii) ordered that they both requalify as principals before acting in that capacity again.

We sustain FINRA's findings of violations against the Applicants. We also sustain the disgorgement plus prejudgment interest it imposed on Wilson-Davis for the Reg SHO violations, as well as the order to retain an independent consultant it imposed on Wilson-Davis for the supervisory and AML violations.[2] We set aside the fines FINRA imposed on Wilson-Davis for the Reg SHO violations and the supervisory and AML violations, as well as the sanctions imposed on Barkley and Snow for their violations; and we remand for FINRA to reconsider the appropriate sanctions in light of this opinion.

I. Violations

Under Exchange Act Section 19(e)(1), we review FINRA disciplinary action to determine (1) whether Applicants engaged in the conduct FINRA found, (2) whether that conduct violated the provisions FINRA found it to have violated, and (3) whether those provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.[3] We base our findings on an independent review of the record and apply a preponderance of the evidence standard.[4]

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[1] *Dep't of Enforcement v. Wilson-Davis & Co., Inc.*, Compl. No. 2012032731802, 2019 WL 7483496 (Dec. 19, 2019).

[2] We also sustain, and Applicants do not challenge, FINRA's order to pay costs.

[3] 15 U.S.C. § 78s(e)(1).

[4] *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, 9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

A. Wilson-Davis violated Rule 203(b)(1) of Reg SHO and FINRA Rule 2010 by engaging in short-selling without finding locates.

Reg SHO governs "short sales," which is defined as "any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller."[5] Rule 203(b) of Reg SHO prohibits a broker-dealer from effecting a short sale in an equity security for its own account unless the broker-dealer has satisfied the "locate" requirement—it has "[b]orrowed the security," has "entered into a bona-fide arrangement to borrow the security," or has "[r]easonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due."[6] Rule 203(b) requires the broker-dealer to document its compliance with the locate requirement.[7]

Wilson-Davis does not dispute its failure to satisfy the "locate" requirement for 122 short sale transactions in four stocks. Instead, it claims that it is entitled to the exemption to the locate requirement under Rule 203(b)(2)(iii) of Reg SHO for "[s]hort sales effected by a market maker in connection with bona-fide market making activities in the security for which this exception is claimed."[8] Wilson-Davis has the burden to establish the applicability of this exemption.[9]

A "market maker" is "any dealer who, with respect to a security, holds [itself] out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for [its] own account on a regular or continuous basis."[10] To qualify for the locate exemption, a market maker must "be a market maker in the security being sold, and must be engaged in bona-fide market making in that security at the time of the short sale."[11] A broker-dealer engaged in bona-fide market making "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."[12] While this is a facts-and-circumstances determination, indicia of bona-fide market making include: (i) placing "[c]ontinuous quotations that are at or near the market on both sides and that are

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5 17 C.F.R. § 242.200(a).

6 *Id.* § 242.203(b)(1).

7 *Id.* § 242.203(b)(1)(iii).

8 *Id.* § 242.203(b)(2)(iii).

9 *See FTC v. Morton Salt Co.*, 334 U.S. 37, 44 (1948) ("[T]he general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."); *FCS Sec.*, Exchange Act Release No. 64852, 2011 WL 2680699, at *5 (July 11, 2011) (stating that an applicant claiming an exemption to a regulation bears the burden of establishing that it is entitled to the exemption), *pet. denied*, 539 F. App'x 7 (2d Cir. 2013).

10 Exchange Act Section 3(a)(38), 15 U.S.C. § 78c(a)(38); 17 C.F.R. § 242.203(c)(1).

11 *Amendments to Regulation SHO*, Exchange Act Release No. 58775, 73 Fed. Reg. 61,690, 61,699 (Oct. 17, 2008).

12 *Id.* at 61,698 (internal quotation marks omitted).

communicated and represented in a way that makes them widely accessible to investors and other broker-dealers";[13] (ii) engaging in "[a] pattern of trading that includes both purchases and sales in roughly comparable amounts to provide liquidity to customers or other broker-dealers";[14] and (iii) incurring "economic or market risk with respect to the securities (*e.g.*, by putting their own capital at risk to provide continuous two-sided quotes in markets)."[15]

On the other hand, "clear examples of what types of activities would not be bona-fide market making activities" include the following: (i) "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"; (ii) "where a market maker posts continually at or near the best [ask], but does not also post at or near the best bid"; and (iii) "a market maker that continually executes short sales away from its posted quotes."[16]

A violation of Reg SHO also violates FINRA Rule 2010,[17] which requires the observance of "high standards of commercial honor and just and equitable principles of trade."

1. Wilson-Davis engaged in the conduct FINRA found.

The Reg SHO violations FINRA found concern trading by Anthony Kerrigone, a registered representative at Wilson-Davis who traded in one of its proprietary accounts as a market maker. Kerrigone received a 60% commission on his trading profits for Wilson-Davis. During this time period, Kerrigone was the firm's biggest producer. Barkley, who served as the firm's Vice President and Head of Trading, supervised Kerrigone's trading.

As Barkley testified, Kerrigone's general strategy at the firm was to identify "trading opportunit[ies]" presented by penny stock companies that traded in high volume following promotional campaigns orchestrated by third parties, some of which, Barkley testified, were pump-and-dump schemes. Barkley also testified that most stocks identified by Kerrigone as a trading opportunity had "no value" and "were generally worthless." When Kerrigone identified a penny stock that he wanted to trade, he would submit a market maker application to Barkley seeking permission to make a market in the stock. Barkley agreed that, after he approved the market maker application, Kerrigone's strategy was to accumulate a short position in the stock as

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13 *Id.* at 61,699; *see also Adams Sec., Inc.*, Exchange Act Release No. 31971, 1993 WL 71051, at *3 (Mar. 9, 1993) ("In order for a dealer to meet the statutory definition of market maker, it must in fact be willing both to buy and sell the security in question in the inter-dealer market. This requirement is not met if a dealer competes on just one side of the market.").

14 *Amendments to Regulation SHO*, 73 Fed. Reg. at 61,699.

15 *Id.*

16 *Id.* (citing *Short Sales*, Exchange Act Release No. 50103, 2004 WL 1697019, at *13 n.68 (July 28, 2004), 69 Fed. Reg. 48,008 (Aug. 6, 2004) (adopting release of Reg SHO)).

17 *See William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *8 n.29 (July 2, 2013) (holding that the violation of another Commission or FINRA rule constitutes a violation of FINRA Rule 2010), *pet. denied*, 751 F.3d 472 (7th Cir. 2014).

a "directional bet" that the price would increase due to the promotional campaign and decrease when Kerrigone covered the short position. Barkley testified that this strategy accounted for Kerrigone's trading profit and that, as a general practice, Kerrigone would not find locates for his short positions.

Kerrigone followed this strategy in trading the four penny stocks at issue here: Preventia, Inc. ("PVTA"), PM&E, Inc. ("PMEA"), China Teletech Holdings ("CNCT"), and Lot 78, Inc. ("LOTE"). All four stocks had limited or no trading volume until promotional activity sparked investor interest, which briefly caused their trading volumes to spike. Kerrigone submitted market maker applications to Barkley after the start of the promotional activity, then traded the stocks for only a few days, and then never traded them again. Kerrigone stated on each market maker application that he wanted to make a market because of a "trading opportunity."

With respect to PVTA, PMEA, and CNCT, within a day after newsletters appeared on "hotstocked.com" touting the securities as "the hottest stock" or "poised to explode," Kerrigone entered the market by shorting the stock for a few days while prices increased. Without finding locates, Kerrigone accumulated a short position of 34,900 shares of PVTA from July 9 to 11, 2012; a short position of 62,500 shares of PMEA from November 12 to 13, 2012; and a short position of 5 million shares of CNCT from February 21 to 25, 2013. During these periods, Kerrigone posted both bid and ask quotes for the firm, but the bid quotes were far enough away from the inside bid quotes other firms posted to deter sellers from hitting his quotes. Kerrigone's bid quotes were at least 10% lower than the inside bid: (i) 100% of the time for PVTA; (ii) 66% of the time for PMEA; and (iii) 92% of the time for CNCT. The farthest away from the inside that Kerrigone's bid quotes got was about 98% lower for PVTA, 87% lower for PMEA, and 90% lower for CNCT.

As the promotional campaigns waned and stock prices declined, Kerrigone changed course and bought shares for a few days to entirely cover his short positions and end flat. During these periods, Kerrigone's ask quotes were far enough away from the inside ask quotes that buyers were deterred from hitting his quotes. His ask quotes during these periods were at least 10% higher than the inside ask: (i) 94% of the time for PVTA; (ii) 88% of the time for PMEA; and (iii) 77% of the time for CNCT. The farthest away from the inside that Kerrigone's ask quotes got was about 353% higher than the inside ask for PVTA, 100% higher than the inside ask for PMEA, and 79% higher than the inside ask for CNCT. Kerrigone's strategy for PVTA, PMEA, and CNCT was successful as it generated trading profits of $129,059.

Kerrigone's directional bet did not succeed for LOTE because the stock price continued to rise during the period in which Kerrigone needed to close-out his short position.[18] On April 24, 2013, after about six weeks of promotional activity for LOTE, Kerrigone primarily sold LOTE short and accumulated a short position of about 1 million shares without finding locates, not even after the firm's principals became aware of the size of the position being carried overnight. Eighty-two percent of the time on April 24, Kerrigone's bid quotes for the firm were at least 10% lower than the inside bid. The farthest away from the inside that Kerrigone's bid quote got was about 99% lower than the inside bid. Over the next three trading days, Kerrigone

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[18] *See* Rule 204 of Reg SHO, 17 C.F.R. § 242.204 (concerning close-out requirements).

covered his entire short position and ended flat. But he did so gradually as LOTE's price rose from Kerrigone's last transaction price on April 24 of $2.45 to his last transaction price on April 29 of $8.86. During this period, Kerrigone's ask quotes for the firm were at least 10% higher than the inside ask 55% percent of the time. The farthest away from the inside that Kerrigone's ask quote got was 100% higher than the inside ask. Kerrigone's trading in LOTE resulted in a loss to Wilson-Davis of more than $4.2 million. The firm required that Kerrigone reimburse it for $1.9 million of that loss and asked him to resign.

2. Wilson-Davis's conduct violated Rule 203(b)(1) of Reg SHO and FINRA Rule 2010.

We find that Wilson-Davis violated Rule 203(b)(1) of Reg SHO and FINRA Rule 2010 because it did not find locates for 122 short transactions in PVTA, PMEA, CNCT, and LOTE, and did not establish that it was acting as a bona-fide market maker in those stocks. Kerrigone, through whom Wilson-Davis acted, sold the stocks short as part of a "speculative selling strategy"—one of the "clear examples" of activities that are not bona-fide market making.[19] Kerrigone's strategy was to sell short while promotional campaigns increased the prices of the penny stocks, and then cover the short positions during the periods in which Kerrigone expected the prices to decline. To effectuate this directional bet while purporting to act as a market maker, Kerrigone posted non-competitive bid quotes for the firm while he was shorting the stocks, and non-competitive ask quotes for the firm while he was covering the short positions.

Continually posting quotes "at or near the best [ask]" but not "at or near the best bid" is another "clear example[]" of not acting as a bona-fide market maker.[20] The fact that each of the four stocks had limited or no trading volume before the promotional campaigns, that Kerrigone traded in each of the stocks for only a few days and did not trade in the stocks again after covering his short positions, and that Kerrigone took on an extraordinary level of risk during those brief periods (as the $4.2 million loss in four trading days in LOTE demonstrates) further supports our finding that Kerrigone was pursuing a speculative selling strategy, rather than engaging in bona-fide market making activity.

Wilson-Davis contends that it exhibited various indicia of bona-fide market making and that FINRA's decision finding otherwise was flawed. We find those arguments without merit.

a. Wilson-Davis does not establish that it was engaged in bona-fide market making activity.

Wilson-Davis contends that it actively bought and sold the four stocks "from various brokers and constantly posted bid and ask quotes." But Wilson-Davis's contention is misleading because the firm did not actively buy and sell the stocks during the same time periods; rather it primarily sold short during the first time period and bought during the second time period. Further, to be indicia of bona-fide market making, a firm's quotes must be "at or near the market

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[19] *Amendments to Regulation SHO*, 73 Fed. Reg. at 61,699; *see also supra* note 16 and accompanying text.

[20] *Id*.

on both sides."[21] As Wilson-Davis admits in its brief, when Kerrigone was shorting the stocks he "maintain[ed] quotations that [we]re near the inside 'ask' but not necessarily near the inside bid." Kerrigone's bid quotes were often very far away from the inside bid—up to 98% away for PVTA, 87% away for PMEA, 90% away for CNCT, and 99% away for LOTE—and they were typically at least 10% away for all four stocks. The fact that sellers rarely hit Kerrigone's bid quote during the periods in which he was almost exclusively shorting the stocks supports our finding that the quotes were not at or near the inside bid and thus do not indicate bona-fide market making activity.[22]

Wilson-Davis also contends that it incurred economic risk from taking the other side of trades when there were short-term buy-and-sell-side imbalances in customer orders. But to be indicia of bona-fide market making, activities that result in the assumption of risk, such as taking the other side of trades when there is an imbalance, must entail the provision of "continuous two-sided quotes"[23] that are "at or near the market on both sides."[24] Because Wilson-Davis did not provide such two-sided quotes, the risk it incurred did not indicate bona-fide market making.[25] Rather, the risk was from a speculative selling strategy.

Wilson-Davis contends further that a market maker need not post competitive bid quotes for a security experiencing "heavy demand, minimal supply, and upward price volatility," because to do so would result in the market maker "more or less simultaneously buy[ing] the same quantity of the same stock" it was selling short and "thereby taking the very liquidity just provided." But requiring that Wilson-Davis post competitive bid quotes to be considered a bona-fide market marker did not mean it would need to simultaneously buy the same quantity of the

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[21] *Amendments to Regulation SHO*, 73 Fed. Reg. at 61,699; *see also supra* note 13 and accompanying text; *R.B. Webster Invs., Inc.*, Exchange Act Release No. 35754, 1995 WL 326000, at *2 (May 23, 1995) (finding that applicant was not willing to sell the security at issue "on a regular or continuous basis," and therefore was not a market maker, because its "ask quotations were deliberately higher than any other dealer's").

[22] *See Century Capital Corp. of South Carolina*, Exchange Act Release No. 31203, 1992 WL 258851, at *1 (Sept. 17, 1992) ("Century did not sell a single share of the . . . five stocks to another dealer. Thus, . . . its quotations were not validated by any inter-dealer sale that it made."); *Strathmore Sec., Inc.*, Exchange Act Release No. 7864, 1966 WL 83448, at *3 (Apr. 8, 1966) ("Since the firm made practically no sales to other dealers and in any event was never able to sell to other dealers at its ask quotations, it seems obvious that the firm's contention that it was making a market in these securities means only that it was acquiring shares for retail sales.").

[23] *Amendments to Regulation SHO*, 73 Fed. Reg. at 61,699; *see also supra* note 15 and accompanying text.

[24] *Amendments to Regulation SHO*, 73 Fed. Reg. at 61,699; *see also supra* note 13 and accompanying text.

[25] *See Thomas F. White & Co., Inc.*, Exchange Act Release No. 33477, 1994 WL 17044, at *2 (Jan. 14, 1994) (finding that, in the absence of other indicia of market making, the fact that firm "was at risk with respect to its purchases of . . . bonds did not qualify it as a market maker"), *pet. denied*, 68 F.3d 482 (9th Cir. 1995).

same stock that it was selling. Continuously posting competitive bid and ask quotes does not mean a firm will buy and sell equal amounts of a security simultaneously. It means that the firm is willing to buy and sell a security for its own account on a regular or continuous basis.[26] "A pattern of trading that includes both purchases and sales in roughly comparable amounts to provide liquidity to customers or other broker-dealers" who wish to buy or sell the security generally indicates bona fide market making activity.[27] Wilson-Davis could not be considered a bona-fide market maker if it was only providing competitive quotes to one side of the market.[28]

Wilson-Davis objects to FINRA's characterization of trading in the four stocks as "relatively inactive" when Kerrigone began short selling, as well as its conclusion that there was thus no "trade imbalance" or "lack of liquidity" at the time.[29] According to Wilson-Davis, LOTE in particular was not inactive before Kerrigone began shorting the stock. But FINRA's statement that the stocks were "relatively inactive" appears generally accurate as three of the stocks had limited or no trading volume within a couple of days before Kerrigone started shorting them and LOTE had limited or no trading volume about a month before Kerrigone started shorting it. In any event, we do not rely on FINRA's statement in rejecting Wilson-Davis's argument that it acted as a bona-fide market maker because it provided sell side liquidity; Wilson-Davis had to continuously post competitive quotes on both sides of the market to be considered a bona-fide market maker. Rather than doing so, it engaged in a speculative selling strategy—a "clear example" of not engaging in bona-fide market making activity.[30]

Finally, Wilson-Davis contends that, at the least, it "reasonably believed that short selling (while executing no or limited buys) into an incredibly active Pink Sheet market with a demand-side imbalance was indicative of bona fide market making." Wilson-Davis also suggests that it should not be liable because it provided liquidity and pricing efficiency to the market, and it did not engage in conduct, such as manipulation, that "Reg. SHO was established to target." But a broker may violate Reg SHO without engaging in market manipulation. And in light of our express directive that bona-fide market making activity includes posting continuous quotes at or near the market on both sides,[31] Wilson-Davis could not have believed reasonably that, regardless of any trade imbalance or actual execution on the buy side, it could be a bona-fide market maker without continuously posting quotes at or near the market on both sides.

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[26] *Amendments to Regulation SHO*, 73 Fed. Reg. at 61,698-61,699.

[27] *Id.*

[28] *See supra* note 16 and accompanying text.

[29] *Wilson-Davis & Co., Inc.*, 2019 WL 7483496, at *12.

[30] *Amendments to Regulation SHO*, 73 Fed. Reg. at 61,699; *see also supra* note 16 and accompanying text.

[31] *See supra* notes 12 & 13 and accompanying text; *see also Amendments to Regulation SHO*, 73 Fed. Reg. at 61,699 (recognizing that "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").

b. FINRA did not err in finding Wilson-Davis liable.

Wilson-Davis contends that FINRA improperly applied a "new regulatory standard" when it found that quotes deviating more than 10% from the inside bid or ask were a "reasonable measure" of being "not near the market" for purposes of the bona-fide market maker inquiry.[32] In Wilson-Davis's view, FINRA's articulation of this "standard" within an enforcement action was improper; FINRA instead should have engaged in rulemaking. Wilson-Davis also speculates that requiring quotes be no more than 10% away from the inside could be "over-inclusive and under-inclusive" for low-priced stocks subject to regular fluctuations.

We do not interpret this finding by FINRA as establishing a new regulatory standard, and in any case, we do not rely on it. Rather, as FINRA recognized, indicia of bona-fide market making activity includes placing continuous quotations that are at or near the market on both sides.[33] And Wilson-Davis's quotations do not meet that standard. The record supports FINRA's findings that "Wilson-Davis's quotations in each of the four Stocks were rarely at or near the market on both sides"[34] and were, in fact, "frequently far more than 10 percent away from the inside."[35]

These findings are sufficient to find that Wilson-Davis's quotations were not continuously at or near the market and therefore it was not engaged in bona-fide market making activity. To be clear, we do not hold that quotes may never be more than 10% away from the inside to be indicia of bona-fide market making activity. Rather, we hold that on the facts and circumstances of this case—including that Wilson-Davis's quotations were so frequently more than 10% away from the inside and often far exceeded 10% away from the inside—Wilson-Davis's quotations do not establish it was engaged in bona-fide market making activity.

Wilson-Davis contends further that FINRA ignored the conclusion by the firm's expert witness that its quotes were "'at least as competitive as the average market maker'" in the four stocks. The expert reached this conclusion by analyzing, for each stock during the period in which the firm traded it, the spread between the bid and ask quotes of all market makers and comparing the firm's average spread to that of the average market maker. But whether the firm was acting as a bona-fide market maker depends not on the average spread, but rather whether the firm posted "[c]ontinuous quotations that are at or near the market on both sides."[36] And the expert testified that he did not consider whether the firm posted such continuous two-sided quotes, including whether it was continuously at or near the best bid when it was selling.

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32 *Wilson-Davis & Co., Inc.*, 2019 WL 7483496, at *11.

33 *See supra* note 13 and accompanying text.

34 *Wilson-Davis & Co., Inc.*, 2019 WL 7483496, at *11.

35 *Id.*

36 *Amendments to Regulation SHO*, 73 Fed. Reg. at 61,699; *see also supra* notes 13 and 16 and accompanying text.

Wilson-Davis also contends that FINRA ignored the offers it made for CNCT and LOTE on the electronic communication network ARCA, and that such evidence was relevant to whether the firm's quotes were away from the inside quotes because the firm's "ARCA offers were regularly executed, making it clear that the market was aware of those offers."[37] But, as Wilson-Davis acknowledges, its offers on ARCA were anonymous, and Kerrigone made the offers on ARCA at the same time that the firm already had posted quotes. A firm does not hold itself out as being "willing to buy and sell such security for [its] own account" when it posts anonymous offers.[38] Indeed, even Wilson-Davis's own expert did not consider the ARCA offers.

Finally, Wilson-Davis contends that FINRA ignored that the inside quotes for the four stocks "were incredibly active," and that a "human trader" cannot operate "on the inside" of every trade, particularly when a stock is subject to very frequent fluctuations. But the standard is not for a market maker to always be "on the inside"; rather, it must continuously post quotes at or near the market on both sides. And Kerrigone demonstrated that he was able to continuously stay near the inside quote on the side that he wanted to trade.

3. The provisions FINRA found that Wilson-Davis violated are, and were applied in a manner, consistent with the purposes of the Exchange Act.

We find that Rule 203 of Reg SHO and FINRA Rule 2010 are, and were applied in a manner, consistent with the purposes of the Exchange Act. We make this finding as to Rule 203 because its locate requirement was "designed to address the problem of 'naked' short selling,"[39] and Wilson-Davis failed to satisfy the locate requirement for short sales in four penny stocks. We make this finding as to FINRA Rule 2010 because it reflects the mandate of Exchange Act Section 15A(b)(6) that FINRA's rules "promote just and equitable principles of trade,"[40] and Wilson-Davis' misconduct was inconsistent with those principles.

B. Applicants engaged in four supervisory violations of NASD Rule 3010 and FINRA Rule 2010.

NASD Rule 3010(a) requires firms to "establish and maintain a system to supervise the activities of each registered representative . . . that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD rules." NASD Rule 3010(b) requires firms to "establish, maintain, and enforce written procedures to supervise the types of business in which [they] engage[] and to supervise the activities of registered

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[37] Kerrigone made no offers on ARCA for PVTA and PMEA.

[38] Exchange Act Section 3(a)(38), 15 U.S.C. § 78c(a)(38); 17 C.F.R. § 242.203(c)(1); *see also Amendments to Regulation SHO*, 73 Fed. Reg. at 61,699 (stating that quotes must be communicated and represented in a way that makes them widely accessible to investors).

[39] *Short Sales*, Exchange Act Release No. 48709, 2003 WL 22461522, at *1 (Oct. 28, 2003).

[40] 15 U.S.C. § 78*o*-3(b)(6); *see also Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 WL 1272876, at *10 (Apr. 1, 2016) (finding FINRA Rule 2010 consistent with the purposes of the Exchange Act); *supra note* 17 (stating that a violation of another rule violates Rule 2010).

representatives . . . that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable" NASD rules. A firm's WSPs "must establish mechanisms for ensuring compliance and detecting violations" and not merely list what conduct is prohibited.[41] And the "duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation."[42] A violation of NASD Rule 3010 also violates FINRA Rule 2010.[43]

NASD Rule 3010(a)(5) requires firms to assign "each registered person to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities." "Final responsibility for proper supervision shall rest with the" firm,[44] and a supervisor's violation of a "duty to supervise may be imputed to the firm."[45]

Further, a firm's president "is ultimately responsible for supervision, unless he or she has delegated that responsibility to someone else at the firm and does not know or have reason to know that the responsibility is not being properly exercised."[46] It is not sufficient "for the person with overarching supervisory responsibilities to delegate supervisory responsibility to a subordinate, even a capable one, and then simply wash his hands of the matter until a problem is brought to his attention. . . . . Implicit is the additional duty to follow-up and review that delegated authority to ensure that it is being properly exercised."[47]

1. Wilson-Davis, Snow, and Barkley failed to reasonably supervise Kerrigone's short sales to ensure compliance with Reg SHO.

a. Applicants engaged in the conduct FINRA found.

Snow served as the firm's President, Chief Compliance Officer, and AML Compliance Officer. As discussed above, Barkley was a Vice President and Head of Trading. Paul Davis, the founder and Chairman of the Board, and his brother Lyle were also principals at the firm.

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41 *John A. Chepak*, Exchange Act Release No. 42356, 2000 WL 49226, at *2 (Jan. 24, 2000).

42 *Michael T. Studer*, Exchange Act Release No. 50543A, 2004 WL 2735433, at *6 (Nov. 30, 2004), *pet. denied*, 260 F. App'x 342 (2d Cir. 2008).

43 *See supra* note 17.

44 NASD Rule 3010(a).

45 *World Trade Fin. Corp.*, Exchange Act Release No. 66114, 2012 WL 32121, at *12 n.61 (Jan. 6, 2012) (imputing to a firm the supervisory violation of NASD Rule 3010 by its president and trade desk supervisor), *pet. denied*, 739 F.3d 1243 (9th Cir. 2014).

46 *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 WL 4258143, at *9 (Aug. 12, 2016), *pet. denied*, 719 F. App'x 724 (9th Cir. 2018).

47 *Harry Gliksman*, Exchange Act Release No. 42255, 1999 WL 1211765, at *6 (Dec. 20, 1999) (internal quotations and citation omitted), *aff'd*, 24 F. App'x 702 (9th Cir. 2001).

The firm's WSPs stated, and Snow testified, that Snow was responsible for the firm's WSPs. According to the firm's WSPs, the traders at the firm were obligated to "locate" securities before effecting short sales except when the firm was engaged in "bona-fide market making transactions . . . where the firm publishes a two-sided quotation in an independent quotation medium." The WSPs provided no procedures for a supervisor to examine whether short sales were made in connection with bona-fide market making activity.

The WSPs also stated, and Barkley testified, that Barkley was responsible for supervising the registered representatives' trading. But Barkley testified that, after he approved a market maker application, he assumed all short sales in that stock were exempt from the locate requirement and took no steps to determine whether activity in the stock was bona-fide market making. Barkley also testified that, although he would watch in real time the purchases and sales by the representatives he supervised, he did not consistently monitor all the bid and ask quotes they posted for the firm, and he did not document any review as to whether any particular short was made in connection with bona-fide market making activities. As a result of these failures, Barkley did not detect or deter Kerrigone's posting of quotations that were non-competitive.

b. Applicants' conduct violated NASD Rule 3010 and FINRA Rule 2010.

Wilson-Davis and Snow violated NASD Rule 3010 and FINRA Rule 2010 because Snow was responsible for the firm's WSPs, which did not prescribe how a supervisor should monitor a trader's activity in order to detect whether a trader was acting as a bona-fide market maker.[48]

Wilson-Davis and Barkley violated NASD Rule 3010 and FINRA Rule 2010 because Barkley was responsible for supervising traders who acted as market makers, including whether they met the bona-fide market maker exemption of Reg SHO, yet Barkley assumed without examination that the traders were acting as bona-fide market makers.[49]

2. Wilson-Davis and Snow failed to devise a reasonable system to supervise the firm's registered personnel.

a. Wilson-Davis and Snow engaged in the conduct FINRA found.

The WSPs incorporated a "head count list" for the purpose of identifying the supervisors for registered personnel at the firm. The record contains two head count lists, one dated September 1, 2013 and the other dated "[p]rior to 2014." Snow testified that the lists were never

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48 *See supra* note 41 and accompanying text.

49 *See, e.g., Robert E. Strong*, Exchange Act Release No. 57426, 2008 WL 582537, at *6 (Mar. 4, 2008) (finding violation of NASD Rule 3010 where supervisor responsible for reviewing personal trading of analyst did nothing for at least six months after assuming that responsibility and then, when he began his review, "failed to utilize . . . readily available reports" that "would have given an almost immediate view of [analyst's] unapproved trading activities"); *World Trade Fin. Corp.*, 2012 WL 32121, at *14 (finding that the supervisors' "erroneous assumption that the Firm had no duty to investigate stock it sold for customers contributed substantially to the Firm's deficient supervisory system").

"circulated" within the firm but that they were in fact the documents referenced in the WSPs. Lyle Davis, who authored the lists, testified that they were unfinished drafts that were not "intended to be cut in stone" and that "never came off [his] computer to anyone."

Snow and Lyle Davis testified that the head count lists contained errors. The lists identified Snow and Paul Davis as reporting to each other, but Snow testified that Paul Davis did not report to him. The lists also identified Snow as supervising registered representatives with retail accounts, but both Snow and Lyle Davis testified that Paul Davis had that responsibility.

The WSPs and the head count lists also identified Paul Davis as responsible for supervising the firm's registered principals. From 2012 through 2014, however, Paul Davis had reduced his work schedule from full-time to less than three hours per day in order to act as a caregiver for an ill family member. Snow testified that this situation required the other principals to "tak[e] up the slack" in managing the firm, and that in Paul Davis's absence, the retail sales group reported to Lyle Davis who in turn reported to Snow. But the firm had no written procedures that made clear the reporting responsibilities in Paul Davis's absence.

b. Wilson-Davis's and Snow's conduct violated NASD Rule 3010 and FINRA Rule 2010.

Wilson-Davis and Snow violated NASD Rule 3010 and FINRA Rule 2010 because they failed to assign each registered person to an appropriately registered representative or principal responsible for supervising that person's activities. The WSPs purported to make those assignments through head count lists, but the head count lists were not circulated or finalized and were replete with erroneous lines of authority. As a result, the firm had no reasonable supervisory system to supervise its registered persons.[50] Applicants contend that "everyone knew exactly whom to report notwithstanding the erroneous headcount list." But even if true, the firm was required to document its supervisory procedures.[51]

3. Wilson-Davis and Snow failed to follow the firm's procedures for considering whether employees should be subject to heightened supervision.

a. Wilson-Davis and Snow engaged in the conduct FINRA found.

The WSPs required Snow to (i) identify employees for potential heightened supervision; (ii) prepare a memorandum outlining either "why existing supervision is adequate" or the scope of heightened "supervision to be conducted"; and (iii) collect periodic certifications from the assigned supervisor "that the heightened supervision has been conducted." In any memorandum

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[50] *See Richard F. Kresge*, Exchange Act Release No. 55988, 2007 WL 1892137, at *10 (June 29, 2007) (finding that WSPs did not satisfy NASD Rule 3010(a) and (b) because they did not "set forth a supervisory chain of command").

[51] *See George Lockwood Freeland*, Exchange Act Release No. 32192, 1993 WL 128746, at *2-4 (Apr. 22, 1993) (finding that firm's WSPs failed to "assign each registered representative to a specific supervisor" in violation of predecessor to NASD Rule 3010, and rejecting argument that WSPs "were unnecessary because the [f]irm was small and the employees knew [who] had supervisory responsibility").

outlining the scope of heightened supervision, the WSPs required Snow to explain (i) the "type, frequency, time period of heightened supervision, and how supervision should be documented"; and (ii) the "form and frequency of certification" by the assigned supervisor. Snow was also required to collect a signed copy of the memorandum from that supervisor. The WSPs provided further that a complaint "by a regulator" required that Snow review whether an employee "should be subject to heightened supervision," and that "[p]ending as well as resolved matters will be considered."

FINRA filed a complaint against the firm, Paul Davis, and registered representative Randy Carlson on December 27, 2010. The complaint alleged that the firm and Carlson violated Section 5 of the Securities Act of 1933 by engaging in unregistered sales of a penny stock, and that the firm and Davis failed to reasonably supervise Carlson. At the time, however, Snow did not consider whether Carlson should be subject to heightened supervision.

Rather, Snow waited until August 2012 to consider the need to place Carlson under heightened supervision. This was one-and-a-half years after FINRA filed the complaint, one year after the firm and Davis settled the action in October 2011, and two months after a hearing panel found Carlson liable in June 2012. Moreover, the hearing panel decision, which noted that Carlson had engaged in "serious" misconduct, ordered that he could be employed by a firm only if it agreed in writing to subject him to heightened supervision for one year.

In August 2012, Snow prepared a memorandum outlining the plan for Carlson's heightened supervision. The plan had three components: (1) it incorporated the WSPs for stock liquidation that the firm applied to all employees; (2) it required that Carlson submit proposed customer liquidations over $75,000 to outside counsel's review; and (3) it required that Carlson have quarterly lunch meetings with outside counsel "to discuss recent concerns and issues with Section 5." The memorandum did not explain the form and frequency of certification by an assigned supervisor, as required by the WSPs. And Snow never received a signed copy of the memorandum from an assigned supervisor or certifications that the heightened supervision had been conducted, also as required by the WSPs.

Indeed, Snow failed to assign a supervisor in the memorandum and so the responsibility for supervising Carlson remained with Paul Davis. Yet the need for Carlson's heightened supervision stemmed from a complaint FINRA filed in which it alleged that Carlson committed misconduct and Davis failed to supervise Carlson. Davis had also reduced his work schedule to less than three hours per day by the time the firm put Carlson on heightened supervision in 2012.

b. Wilson-Davis's and Snow's conduct violated NASD Rule 3010 and FINRA Rule 2010.

Wilson-Davis and Snow violated NASD Rule 3010 and FINRA Rule 2010 because Snow did not implement a timely or reasonable plan of heightened supervision. By not acting when FINRA filed the complaint against Carlson, Snow not only disregarded a triggering event in the

WSPs but also a red flag of serious misconduct.[52] Then, after a more than year-and-a-half delay, Snow implemented a plan that did not assign a new supervisor and left Davis as the supervisor, failed to confirm that Davis received the heightened supervision memorandum, and failed to confirm from certifications that Davis conducted the heightened supervision.[53]

Applicants contend that the heightened supervision plan was not untimely because the June 8, 2012 hearing panel decision did not become FINRA's final decision until Carlson's appeal period expired on July 26, 2012, and because Snow implemented the heightened supervision plan "six trading days after the date the [decision] became final." But, per the WSPs themselves, the filing of the complaint triggered the need for Snow to consider heightened supervision; the WSPs did not allow Snow to wait until regulatory action became final.

Applicants also contend that their actions were not untimely because, "after the Section 5 issues came to the firm's attention" but before FINRA filed the complaint, the firm "completely rewrote its stock vetting and deposit procedures." According to Applicants, this was in effect a heightened supervision plan, and FINRA penalized them for applying it to all employees rather than just Carlson. We reject this contention because the WSPs had specific procedures for heightened supervision, which Applicants did not satisfy by revising other procedures.

Applicants contend further that "unrebutted testimony" by a Wilson-Davis account executive who assisted Carlson demonstrated that the heightened supervision plan "was strictly enforced" and that "the actual supervision was even more robust than the plan specified." According to Applicants, "[n]o evidence exists that problems occurred due to alleged inadequate supervision of Mr. Carlson, or that any Section 5 issues have occurred since Wilson-Davis re-wrote its Section 5 procedures in 2010." But Wilson-Davis and Snow failed to implement a timely and reasonable plan of heightened supervision regardless of whether Carlson did not commit further violations.[54] The fact that Wilson-Davis may have enforced the plan that Snow developed does not mean that Snow's plan was reasonable, nor does it excuse the untimeliness of

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52 *See Frank J. Custable, Jr.*, Exchange Act Release No. 33324, 1993 WL 522322, at *4-5 (Dec. 10, 1993) (finding failure to supervise where customer complaints and NASD investigation "should have alerted the firm and [supervisor] that [registered representative] required heightened supervision"); *Robert J. Prager*, Exchange Act Release No. 51974, 2005 WL 1584983, at *11 (July 6, 2005) (emphasizing "the need for heightened supervision when a firm chooses to have associated with it a person who has known regulatory problems").

53 *See Meyers Assocs., L.P.*, Exchange Act Release No. 86193, 2019 WL 2593825, at *10 (Jun. 24, 2019) (finding that firm violated NASD Rule 3010 because, despite the need for heightened supervision over registered representative engaged in a high risk enterprise, firm "did not train [assigned supervisor] regarding his supervisory responsibilities or review [his] performance to ensure that he was discharging those responsibilities").

54 *See Prager*, 2005 WL 1584983, at *12, (stating that a respondent may violate NASD's supervisory rule without a finding of a violation by someone subject to the respondent's supervision).

the plan or the failure of the firm to ensure appropriate oversight by Snow and Davis through the mechanisms that the WSPs required for individuals subject to heightened supervision.[55]

4. Wilson-Davis and Snow failed to supervise the review of instant messages.

a. Wilson-Davis and Snow engaged in the conduct FINRA found.

From 2011 to 2014, the firm's WSPs stated that Snow was the designated supervisor responsible for reviewing the instant messages of the firm's trading departments. Snow delegated his responsibility to review instant messages to the firm's information technology specialist, an unregistered individual, which Snow testified he "did in . . . error." Snow testified that he did not know what parameters the specialist used for the review, but that the specialist knew to bring to Snow's attention "[a]nything he thought was out of the ordinary."

b. The conduct of Wilson-Davis and Snow violated NASD Rule 3010 and FINRA Rule 2010.

We sustain, and Applicants do not challenge, the finding that Wilson-Davis and Snow violated NASD Rule 3010(a) and FINRA Rule 2010 by failing to reasonably supervise the review of instant messages. Having delegated that review to a subordinate, Snow had to ensure that the authority was exercised properly.[56] Snow did not take reasonable steps to do so, as he failed to set or understand the parameters for the review that his subordinate conducted.[57]

5. FINRA's rules are, and were applied in this case in a manner, consistent with the purposes of the Exchange Act.

We find that NASD Rule 3010 is consistent with the Exchange Act's purpose of protecting investors because "the responsibility of broker-dealers to supervise their employees is a critical component of the federal regulatory scheme."[58] Applying Rule 3010 here was consistent with that purpose given the unreasonableness of the firm's supervisory failures.[59]

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[55] *See Custable*, 1993 WL 522322, at *5 (rejecting contention of firm and firm principal that broker "was subject to 'reasonable, timely and increasingly close and heightened' supervision" because firm and principal "failed to apply . . . their standard supervisory procedures" such as "maintaining a customer contact log, maintaining a new account verification log, reviewing [broker's] customer book, and randomly contacting [broker's] customers").

[56] *See supra* note 47 and accompanying text.

[57] *See, e.g., Kresge*, 2007 WL 1892137, at *9 (finding that president of firm violated NASD Rule 3010 where he delegated to subordinate responsibility for supervising branch office without providing training and without reviewing subordinate's performance of supervisory duties).

[58] *Wedbush Sec., Inc.*, 2016 WL 4258143, at *10 (internal quotations and citations omitted).

[59] *See Thaddeus J. North*, Exchange Act Release No. 84500, 2018 WL 5433114, at *7 (Oct. 29, 2018) (finding FINRA's application of Rule 3010 "was appropriate in this case given the unreasonableness of the written supervisory procedures"), *pet. denied*, 828 F. App'x 729 (D.C. Cir. 2020); *see also supra* notes 17 & 40 and accompanying text.

C. Wilson-Davis and Snow violated FINRA Rules 3310 and 2010 by failing to establish and implement AML policies and procedures and conduct adequate AML training.

FINRA Rule 3310 requires member firms to develop and implement a written AML program.[60] Under Rule 3310(a), a firm must "[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."[61] The regulation implementing 31 U.S.C. § 5318(g) requires broker-dealers to file with the Financial Crimes Enforcement Network ("FinCEN") a Suspicious Activity Report ("SAR") of "any suspicious transaction relevant to a possible violation of law or regulation" conducted or attempted by, at, or through their firms.[62] A transaction must be reported if it "involves or aggregates funds or other assets of at least $5,000, and the broker-dealer knows, suspects, or has reason to suspect that the transaction . . . [h]as no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the broker-dealer knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction."[63] FinCEN's Form SAR-SF for broker-dealers included the following types of suspicious activity to report: "securities fraud," "market manipulation," "prearranged or other non-competitive trading," and "wash or other fictitious trading."[64] A firm must also "[p]rovide ongoing training for appropriate personnel."[65]

1. Wilson-Davis and Snow engaged in the conduct FINRA found.

From 2011 through 2014, the firm's WSPs designated Snow as the AML Compliance Officer and set forth the procedures for the firm's AML program. The AML procedures stated that Snow was responsible for the AML program, including (i) developing policies and procedures; (ii) training employees; (iii) "[m]onitor[ing] (or designate monitoring) the activity of" the firm and its customers "to reasonably detect and prevent" financial crimes; and (iv) reporting suspicious activities on Form SAR-SF. Snow testified that he did not monitor trading for suspicious activity; instead, Lyle Davis and Barkley did so and reported to Snow.

The AML procedures also required firm employees to report suspicious activities to Snow and set forth a list of "red flags" for them to "be aware of" for that purpose. Snow testified

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60 FINRA Rule 3310.

61 FINRA Rule 3310(a).

62 31 C.F.R. § 1023.320(a)-(b), *previously numbered* 31 C.F.R. § 103.19(a)-(b) (2010).

63 31 C.F.R. § 1023.320(a)(2).

64 *See Lek Sec. Corp.*, Exchange Act Release No. 82981, 2018 WL 1602630, at *4 (Apr. 2, 2018) (discussing Form SAR-SF). FinCEN's current SAR form for broker-dealers, Form 111, includes the following types of suspicious activity to report: "[s]ecurities fraud," "[m]arket manipulation," and "[w]ash trading." *FinCEN SAR Electronic Filing Requirements*, at p.88-92, *available at* https://bsaefiling.fincen.treas.gov/docs/XMLUserGuide_FinCENSAR.pdf.

65 FINRA Rule 3310(e); *see also* 31 U.S.C. § 5318(h)(1) (requiring broker-dealers to establish AML programs that include "an ongoing employee training program").

that the firm purchased the AML procedures from a vendor and did not alter the generic list of red flags that came with it; as a result, the list was not tailored to the firm's primary business of penny stock trading and penny stock liquidation.

The vast majority of red flags on the list concerned traditional indicators of money laundering (*e.g.*, "the customer refuses to identify or fails to indicate any legitimate source for his or her funds and other assets"). Only two red flags concerned securities trading: (i) the "customer engages in suspicious activity involving the practice of depositing penny stocks, liquidates them, and wires proceeds"; and (ii) the "customer, for no apparent reason or in conjunction with other 'red flags,' engages in transactions involving . . . penny stocks, . . . which although legitimate, have been used in connection with fraudulent schemes and money laundering activity." The list did not include suspicious activity associated with manipulative penny stock trading, such as cross trades, matched orders, pre-arranged trading, promotional activity, sudden stock price increases without an apparent reason, or customer activity constituting a large percentage of the market. Similarly, the firm's annual AML compliance training materials from 2011 to 2014 covered red flags, but they did not mention penny stocks, let alone more specific indicators of suspicious and manipulative trading.

The AML program Snow implemented failed to detect suspicious activity in the trading of Valley High Mining Company from April to November 2012. Valley High was a penny stock and a shell company, and its stock traded very infrequently prior to April 2012. But that month Wilson-Davis became a market-maker in the stock after Valley High's CEO requested that the firm do so. The trading volume and price of Valley High's stock then increased immediately and significantly. In the 21 months prior to April 10, 2012, Valley High's stock price held at about $0.25 per share. But on April 10, 2012, one minute before the close of trading, a firm customer bought 2,500 shares of Valley High from another firm customer at $0.40 per share. From there the price continued to rise, reaching a high of $4.95 per share on October 15, 2012. Nine Wilson-Davis customers dominated trading by constituting 73 percent of the total trading volume in Valley High stock from April to November 2012—108,576 of 148,805 shares.[66]

The only document in the record indicating that Wilson-Davis performed any AML review of the trading in Valley High stock is a report of customer trades on April 10, 2012. On that report, Lyle Davis hand-wrote "ok" next to a line showing the cross trade of 2,500 Valley High shares. Davis testified that he did not recall Valley High or anyone at the firm discussing it with him, and Snow testified that no one at the firm raised any AML issues about Valley High.

2. Wilson Davis's and Snow's conduct violated FINRA Rules 3310 and 2010.

Wilson-Davis and Snow violated FINRA Rules 3310 and 2010 because Snow failed to establish AML policies, procedures, and training that were tailored to the AML risks presented by the firm's penny stock liquidation and trading business. Those risks included market manipulation, but the firm's AML policies and procedures and training did not address red flags

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[66] Cross trades "occur[] when a security of one client is bought by another client." *Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *14 n.149 (May 16, 2014), *pet. denied in relevant part*, 793 F.3d 147 (D.C. Cir. 2015).

of market manipulation. As a result, the firm's AML compliance program could not be reasonably expected to detect and cause the reporting of suspicious transactions.[67] Wilson-Davis and Snow also violated FINRA Rules 3310 and 2010 because the firm failed to implement the AML policies and procedures that it did have with respect to the trading in Valley High stock. Despite the fact that the trading in Valley High stock involved cross trades, customer market dominance, and a sharp increase in the price and trading volume of a shell company's penny stock, neither Snow nor anyone else at the firm raised any concerns or took any action. Accordingly, the implementation of the firm's AML policies and procedures could not have been reasonably expected to detect and cause the reporting of suspicious transactions.[68]

Applicants contend that "a broker-dealer's knowledge of its customers can mitigate potential red flags," that "the persons trading in [Valley High] were long-time Wilson-Davis customers with no history of issues," and that one of those customers had previously worked "for the Commission and as an Assistant United States Attorney." Yet Applicants do not explain how their knowledge of their customers mitigated the red flags at issue here given that the record suggests that several of the customers at issue had connections to Valley High. In any event, we agree that a firm's knowledge of its customers is an important aspect of an AML program, but it is not the only aspect, and it does not allow a firm to fail to monitor for or to ignore red flags.[69]

Applicants contend further, based on the testimony of two witnesses, that the firm did not ignore cross trades but rather vetted them "in real time." According to Applicants, because the hearing panel did not find that this testimony lacked credibility, and because there was no contradictory testimony, "the NAC had to conclude that Wilson-Davis did exactly what the witnesses said it did, which undercuts the factual basis for finding sweeping AML failures with respect to [Valley High]." We disagree with Applicants' assessment of the testimony because

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67 *See, e.g., Lek Sec. Corp.*, 2018 WL 1602630, at *5 (finding that firm violated FINRA Rule 3310 where its AML Manual "placed almost no weight on suspicious securities transactions" and the one red flag of market manipulation it contained "lacked enough specificity to indicate to employees . . . what types of transactions should be escalated"); *Merrimac Corp. Sec., Inc.*, Exchange Act Release No. 86404, 2019 WL 3216542, at *13-14 (July 17, 2019) (finding that firm violated FINRA Rule 3310 because it "did not adopt an AML Manual that was appropriate in light of the AML risks related to the firm's penny stock business").

68 *See, e.g., Meyers Assocs., L.P.,* Exchange Act Release No. 86497, 2019 WL 3387091, *15 (July 26, 2019) (finding that firm violated FINRA Rule 3310 where its AML Compliance Person "testified that he could not detect manipulative trading through his own monitoring . . . , that he did not know if anyone at the Firm reviewed the AML exception reports, and that no one at the Firm signed off as having reviewed them"); *Lek Sec. Corp.*, 2018 WL 1602630, at *6 (finding that firm violated FINRA Rule 3310 because in manually monitoring order flow neither the compliance officer nor anyone else was "monitoring trading activity for AML purposes").

69 *See, e.g., FinCEN Customer Due Diligence Requirements for Financial Institutions*, 81 Fed. Reg. 29,397, 29,398 (May 11, 2016) (stating that because the requirement that financial institutions "conduct monitoring to identify and report suspicious transactions" includes "transactions that are not of the sort the customer would be normally expected to engage, the customer risk profile information is used (among other sources) to identify such transactions").

neither witness was testifying about the implementation of AML policies and procedures, and as a result, this evidence does not show that the firm established or implemented policies and procedures that could be reasonably expected to detect and cause the reporting of suspicious transactions. The first witness, a Wilson-Davis account executive, testified that the trading desk would catch cross trades and have them approved and that it did so once for a Valley High cross trade. The second witness, Lyle Davis, testified that every morning he reviewed a report of the previous day's trades to identify "cross trades, wash sales, [and] any trades that might be out of the ordinary"; and that the "ok" he wrote next to the April 10, 2012 cross trade in Valley High stock indicates that he followed up with the trading department "to see if this had been approved prior to" execution. But the witnesses did not testify that the reviews by the trading desk or Davis were part of the application of AML procedures, such as the identification of cross trades for possible reporting by the AML compliance officer to FinCEN. Indeed, the witnesses did not even mention AML in providing the above testimony. Moreover, even if Davis was testifying about AML procedures, his review of the previous day's trades would not have caught the problematic trading in Valley High because, as he acknowledged, it was limited to daily activity rather than long-term trends of which cross-trading could be a part.[70]

Applicants also contend that a section of the WSPs concerning "prohibited transactions and practices" discussed "market manipulation, prearranged trades, and wash transactions." But this section of the WSPs was outside of the AML policies and procedures. As a result, it "did not alert employees that the firm should be monitoring for, detecting, escalating, and potentially *reporting* suspicious transactions" and did not "reasonably inform[] employees that the prohibited transactions identified . . . presented an AML risk and had to be escalated for the potential filing of a SAR."[71] Similarly, Applicants note that the AML policies and procedures stated (i) that the AML Compliance Officer has as a resource "reports regarding potential matched or crossed trades"; and (ii) that suspicious activities for the AML Compliance Officer to consider in filing SARs "include trading that constitutes a substantial portion of all trading for the day in a particular security . . . late day trading . . . [and] heavy trading in low priced securities." But these statements were in sections specific to Snow; the policies and procedures did not identify these activities as red flags for employees to consider. Thus, these statements could not be reasonably expected to cause employees to detect or report such activities.[72]

No more persuasive is Applicants' contention that "Wilson-Davis demonstrated that it has completed a thorough and independent annual review of its AML program." FINRA Rule

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70 *See* 31 C.F.R. § 103.19(a)(2) (requiring broker-dealers to report any "pattern of transactions of which the [suspicious] transaction is a part"); *FinCEN; Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions*, 67 Fed. Reg. 44,048, 44,051 (July 1, 2002) (stating that "if a broker-dealer determines that a series of transactions that would not independently trigger the suspicion of the broker-dealer, but that taken together, form a suspicious pattern of activity, the broker-dealer must file" an SAR).

71 *Lek. Sec. Corp.*, 2018 WL 1602630, at *5 (emphasis in original).

72 *See supra* note 71 and accompanying text.

3310 requires that firms "[p]rovide for annual . . . independent testing for compliance."[73] But it also includes the requirements discussed above, and the fact that Wilson-Davis may have satisfied one of its requirements under FINRA Rule 3310 does not mean it satisfied the others.[74]

Finally, Applicants contend that FINRA did not "allege, let alone prove, that any manipulative matched or wash trades or other manipulative activities *were actually taking place*, either in regard to [Valley High] or any other trading" (emphasis in original). But, as Applicants also acknowledge, violations of FINRA Rule 3310 "do not require an underlying violation."[75]

3. FINRA's rules are, and were applied in this case in a manner, consistent with the purposes of the Exchange Act.

FINRA Rule 3310 is consistent with the purpose of the Exchange Act 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."[76] FINRA's application of Rule 3310 to Wilson-Davis's and Snow's conduct was consistent with that purpose given the unreasonableness of the firm's AML program.[77]

II. Sanctions

Under Exchange Act Section 19(e)(2), we 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 or impose an unnecessary or inappropriate burden on competition.[78] We consider any aggravating or mitigating factors,[79] and whether the sanctions imposed are remedial

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[73] FINRA Rule 3310(c).

[74] *See supra* notes 61 & 65 and accompanying text.

[75] *See Merrimac Corp. Sec., Inc.*, 2019 WL 3216542, at *14 (finding that "FINRA need not establish an underlying securities law violation to show that [a firm's] AML compliance program violated" FINRA Rule 3310); *Lek Sec. Corp.*, 2018 WL 1602630, at *9 & n.23 (finding that an underlying violation need not be established to find that a firm violated FINRA Rule 3310).

[76] *Lek Sec. Corp.*, 2018 WL 1602630, at *10 (citing 15 U.S.C. § 78*o*-3(b)(6)).

[77] *See id.* (finding FINRA's application of Rule 3310 was appropriate given the "failure to establish and implement reasonable AML policies and procedures").

[78] 15 U.S.C. § 78s(e)(2). The record does not show, nor do Applicants claim, that FINRA's sanctions impose an unnecessary or inappropriate burden on competition.

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

or impermissibly punitive.[80] In imposing sanctions, FINRA relied on FINRA's Sanction Guidelines.[81] Although not binding on us, we use the Guidelines as a benchmark.[82]

A. We remand for FINRA to reconsider the two fines it imposed on Wilson-Davis, but we sustain the disgorgement it imposed on Wilson-Davis as to the Reg SHO violation and its order requiring Wilson-Davis to retain an independent consultant as to the supervisory and AML violations.

1. The disgorgement FINRA imposed on Wilson-Davis for its violations of Reg SHO is not excessive or oppressive.

We sustain FINRA's order that Wilson-Davis disgorge $51,624 plus prejudgment interest for violating Reg SHO. The Guidelines authorize disgorgement of ill-gotten gains,[83] and we have held that "FINRA's disgorgement orders pursuant to which a violator must give up the ill-gotten gains causally connected to the violations are appropriately remedial."[84] The amount ordered to be disgorged "must be a reasonable approximation of the profits causally connected to the violation."[85] Because the firm earned approximately $51,624 from Kerrigone's trading in CNCT, PMEA, and PVTA, we find that this amount of disgorgement was appropriate.[86]

2. We remand for FINRA to reconsider the fine it imposed on Wilson-Davis for violating Reg SHO.

The Guidelines recommend a fine of $5,000 to $16,000 for a first action concerning short sale violations, $10,000 to $77,000 for a second action, and $10,000 to $155,000 for subsequent actions;[87] they authorize a fine beyond those ranges if the violation is egregious, involves a pattern of misconduct, occurs over an extended period of time, or is intentional or reckless.[88] FINRA found it appropriate to exceed the Guidelines ranges and impose a $350,000 fine

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

[81] FINRA's Sanction Guidelines (2019 ed.) ("Guidelines").

[82] *See, e.g.*, *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 & n.68 (June 14, 2013) (citing cases).

[83] Guidelines at 5 (General Principle 6).

[84] *William H. Murphy & Co., Inc.*, Exchange Act Release No. 90759, 2020 WL 7496228, at *18 (Dec. 21, 2020) (internal quotation marks and citation omitted).

[85] *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 WL 605918, at *16 (Feb. 7, 2020) (internal quotation marks and citation omitted), *pet. dismissed in part and denied in part*, 989 F.3d 4 (D.C. Cir. 2021).

[86] *See William H. Murphy & Co., Inc.*, 2020 WL 7496228, at *18 (sustaining FINRA's order that firm disgorge commissions it received, plus prejudgment interest, from unregistered sales).

[87] Guidelines at 65.

[88] *Id.* at 65 n.1; *id.* at 4, 7-8 (General Principle 3 and Principal Considerations 8, 9 & 13).

because, as it stated, "there are several aggravating factors reflected in Wilson-Davis's misconduct that render the violations egregious."[89]

In determining that the amount of the fine should exceed the Guidelines ranges, FINRA relied in part on its conclusion that Wilson-Davis had "acted recklessly." But FINRA provided no explanation or analysis for how it reached this conclusion. Scienter is a potentially important factor in evaluating whether sanctions are appropriate,[90] but without more than a conclusory statement, we cannot evaluate FINRA's basis for concluding how Wilson-Davis acted recklessly or how that conclusion factors into FINRA's imposition of a fine for Wilson-Davis's violating Reg SHO. We therefore set aside the fine imposed and remand this proceeding for FINRA to provide such analysis in the first instance.[91] In doing so, we express no view on Wilson-Davis's scienter or any other aggravating or mitigation factors that might affect the amount of the fine.

3. We remand for FINRA to reconsider the fine it imposed on Wilson-Davis for its supervisory and AML violations, but we sustain the requirement that it retain an independent consultant.

FINRA applied the guideline for "Systemic Supervisory Failures" to Applicants' supervisory and AML violations. We find, and Applicants do not dispute, that applying this guideline to the supervisory and AML violations was appropriate. The guideline states that it should be used "when a supervisory failure is significant and is widespread or occurs over an extended period of time."[92] The supervisory failures were significant and widespread, and they occurred over an extended period of time. And the AML violations, which are not addressed in the Guidelines specifically, are analogous to supervisory failures.[93]

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[89] *Wilson-Davis & Co., Inc.*, 2019 WL 7483496, at *19.

[90] *See* Guidelines at 8 (Principal Consideration No. 13) and 65 n.1 (concerning sanctions for short sale violations); *see also Aaron v. SEC*, 446 U.S. 680, 701 (1980) (stating that the "degree of intentional wrongdoing evident in a defendant's past conduct" is an "important factor" indicating a risk of future harm).

[91] *See Keith Patrick Sequeira*, Exchange Act Release No. 81786, 2017 WL 4335070, at *5 (Sept. 29, 2017) ("Where FINRA does not clearly explain the bases for its conclusions and the sanctions it imposes, we cannot discharge properly our review function and remand is appropriate.") (internal quotation marks and citation omitted); *Richard T. Sullivan*, Exchange Act Release No. 40671, 1998 WL 786943, at *6 (Nov. 12, 1998) ("It is important that a self-regulatory organization clearly explain the basis for its conclusions. If it fails to do so, an applicant is impaired in his or her ability to urge a contrary position to us, and we cannot discharge our review function.").

[92] Guidelines at 105.

[93] *See id.* at 1 ("For violations that are not addressed specifically, [a]djudicators are encouraged to look to the guidelines for analogous violations."); *see also Meyers Assocs., L.P.*, 2019 WL 2593825, at *17 (finding it proper to apply the guideline for "Systemic Supervisory Failures" to AML violations that "can be considered as analogous to supervisory failures").

The guideline for "Systematic Supervisory Failures" recommends "ordering the firm to engage an independent consultant to recommend changes to the firm's supervisory systems and procedures."[94] The guideline also recommends a fine between $10,000 and $310,000 for a firm.[95] Where "aggravating factors predominate," the guideline contemplates a fine for the firm in excess of those ranges as well as suspending "the firm with respect to any or all relevant activities or functions" for up to two years, or expelling the firm.[96] For the four supervisory violations and the AML violations, FINRA ordered that Wilson-Davis pay a fine of $750,000 and retain an independent consultant to recommend changes to its WSPs. We sustain the order that Wilson-Davis retain an independent consultant to recommend changes to its WSPs as that will help ensure that the firm has reasonable supervisory and AML procedures in place to detect misconduct.[97]

In imposing the $750,000 fine, FINRA found that aggravating factors predominated, including aggravating factors related to Wilson-Davis's failure to reasonably supervise Kerrigone's short sales to ensure compliance with Reg SHO. Because these aggravating factors are related to those that FINRA considered in imposing the Reg SHO-related fine that we set aside and remanded above, we also set aside and remand the fine imposed for Wilson-Davis's supervisory and AML failures.

In doing so, we express no view on any aggravating or mitigation factors that might affect the amount of the fine, and we do not address the merits of Wilson-Davis's arguments as to the fine. Wilson-Davis may instead on remand raise arguments, such as the appropriate fine given the firm's size and the aggregate fines imposed, for FINRA to consider in the first instance.

B. We remand for FINRA to reconsider the sanctions it imposed on Barkley and Snow.

FINRA applied the guideline for "Systemic Supervisory Failures" to Snow's and Barkley's violations. That guideline recommends a fine of $10,000 to $77,000 for responsible individuals.[98] Where "aggravating factors predominate," the guideline recommends that the adjudicator consider a fine in excess of that range as well as a suspension between ten business days and two-years.[99] FINRA imposed a $77,000 fine on Snow for his supervisory and AML violations; and it imposed a $52,000 fine on Barkley for his supervisory violation. In addition, for their respective violations, FINRA ordered that Snow and Barkley be suspended in all

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94 *Guidelines* at 106.

95 *Id.*

96 *Id.* at 105-106.

97 *See J.W. Korth & Co., LP*, Exchange Act Release No. 94581, 2022 WL 990183, at *17 (Apr. 1, 2022) (sustaining order that firm retain independent consultant because it would "help ensure that [the firm] remains compliant with . . . FINRA rules").

98 Guidelines at 105.

99 *Id.*

capacities for three months, and that they be suspended in principal and supervisory capacities for one year and requalify as principals before acting in that capacity again.

We set aside and remand the sanctions imposed on Snow and Barkley. Although we agree with FINRA that sanctions are appropriate, FINRA did not explain why all of these sanctions are necessary to protect the public.[100] Without an explanation regarding the need for all of these sanctions, we cannot find all of the sanctions to be appropriately remedial and not punitive or otherwise excessive or oppressive.[101] Because we are remanding, we express no view on any aggravating or mitigation factors that might affect the sanctions for Snow and Barkley.

Although we remand, we note our disagreement with Applicants that both suspending Snow and Barkley in principal and supervisory capacities and ordering that they requalify before acting in a principal capacity again would be "punitive and unnecessary." According to Applicants, if Snow and Barkley are able to requalify, there is no "remedial effect" from suspending them. But these two sanctions are complementary. Suspensions help ensure that violators take their responsibilities more seriously in the future.[102] Requalification helps ensure that they have a full understanding of those responsibilities.[103] With these observations, we leave the appropriate mix of sanctions to FINRA's discretion on remand, subject to the requirement that FINRA adequately explain why the chosen sanctions, considered together, are necessary to protect the public, and are remedial and not punitive or otherwise excessive or oppressive.

III. Applicants' procedural contentions.

Applicants contend that the proceeding before the NAC was unfair because a two-person subcommittee of the NAC presided over oral argument in October 2018, but those individuals

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[100] *See Bruce Zipper*, Exchange Act Release No. 90737, 2020 WL 7496222, at *19-20 (Dec. 21, 2020) (stating that the Commission "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,'" and remanding "for the NAC to more clearly explain the basis for its conclusion that" the violations warranted the sanctions imposed because the Commission could not "tell from the NAC's analysis whether" it imposed the sanctions as "necessary to protect the public, or instead solely because [applicants] had committed" the violations) (citation omitted).

[101] *Cf. Springsteen-Abbott*, 2020 WL 605918, at *18 (setting aside a fine FINRA imposed on an individual where FINRA had also barred the individual and ordered that she disgorge her ill-gotten gains because "under these particular facts and circumstances . . . imposing all three sanctions would be excessive"); *William H. Murphy & Co.*, 2020 WL 7496228, at *19 (setting aside the fine because "[u]nder the circumstances, fining WHM in addition to ordering disgorgement is excessive"); *North*, 2018 WL 5433114, at *12-13 (upholding fine and suspension in principal and supervisory capacities where FINRA "tailored North's suspension to his misconduct" by imposing a suspension "in principal and supervisory capacities only").

[102] *See Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 WL 3652429, at *8 (Nov. 4, 2009), *pet. denied*, 416 F.App'x 95 (2d Cir. 2011).

[103] *See Gliksman*, 1999 WL 1211765, at *7.

"were not on the NAC at the time the decision was issued" in December 2019. We reject this contention because FINRA's rules do not require that the subcommittee hearing oral argument also make the final decision concerning the appeal or even that individual members of the subcommittee participate in the NAC's final decision.[104] Nor do Applicants offer any authority providing that a change in the composition of an adjudicative body between the oral argument and its ruling violates due process,[105] and we are aware of none.[106]

Next, Applicants contend that certain aspects of FINRA disciplinary proceedings make them "fundamentally unfair." Applicants characterize those aspects as follows:

> (1) Enforcement is given unlimited power to demand the appearance of witnesses at depositions on little to no notice and then recall a witness an unlimited number of times; while counsel can object during the examination, no neutral decision-maker exists to resolve such objections; (2) a respondent, in turn, never gets the chance to take any discovery; (3) Enforcement has the ability to make an unlimited number of demands for documents and the responding party has no ability to object or refuse to comply because failing to produce is an independent basis for punishment; (4) Enforcement has access to an entire body of hearing officer's written decisions in thousands of disciplinary proceedings that no respondent can access, allowing Enforcement to know in advance of any motion how the particular hearing officer has decided similar motions; and (5) Enforcement knows the identity of each person who has served as an Extended Hearing Panel member for every case that has gone to a decision, while respondents are not provided that information, allowing Enforcement to predict how a particular panel member decided other potentially similar cases while a respondent remains in the dark.

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[104] *See* FINRA Rule 9331(a)(1) ("[F]or each disciplinary proceeding appealed or called for review, the [NAC] . . . shall appoint a Subcommittee to participate, subject to Rule 9345, in the appeal or review. A Subcommittee shall be composed of two or more persons who shall be current *or former members* of the [NAC]." (emphasis added)); FINRA Rule 9345 ("A Subcommittee . . . shall present a recommended decision in writing to the [NAC] before the meeting of the [NAC] at which the disciplinary proceeding shall be considered."); FINRA Rule 9349(a) ("[T]he [NAC], after considering all matters presented in the appeal or review and the written recommended decision of the Subcommittee . . . may affirm, dismiss, modify or reverse the decision of the Hearing Panel."); *see also Order Approving Proposed Rule Change*, Exchange Act Release No. 58643, 2008 WL 4468749 (Sept. 25, 2008) (approving these rules).

[105] *Cf. In re Bose Corp.*, 772 F.2d 866, 869 (Fed. Cir. 1985) (finding "no error in substituting a board member without allowing reargument" before the board issued its decision).

[106] *Cf. Arthur Lipper Corp.*, Exchange Act Release No. 11980, 1976 WL 161911, at *1 (Jan. 6, 1976) (finding change in composition of the Commission between the time of the oral argument and the time of the decision not "enough to raise a due process question"), *pet. denied in relevant part*, 547 F.2d 171 (2d Cir. 1976).

We reject these arguments because they are waived as a result of Applicants failing to raise them to the hearing panel or the NAC;[107] and because Applicants have not shown that their case was prejudiced by FINRA's process.[108] In any event, Applicants mischaracterize FINRA's discovery rules, which permit respondents in disciplinary proceedings to inspect and copy documents from FINRA's investigation that led to the proceeding, and to request that FINRA invoke FINRA Rule 8210 to compel the production of documents or testimony at the hearing.[109] Respondents are also permitted to object to the admission of evidence at the hearing, which the hearing officer may excluded if it is irrelevant, immaterial, unduly repetitious, or unduly prejudicial.[110] Moreover, hearing panel decisions are available online, and Applicants did not request information concerning the panelists or hearing officer before the panel issued its decision.

An appropriate order will issue.[111]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

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[107] *See, e.g., Newport Coast Sec., Inc.*, Exchange Act Release No. 88458, 2020 WL 1659292, at *16-17 (Apr. 3, 2020) (rejecting Appointments Clause argument because applicant failed to raise it before FINRA); *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at *22 (Sept. 28, 2017) (finding that applicant who failed to "object to the Panelist's participation on the Hearing Panel" waived his bias challenge).

[108] *See, e.g., Gateway Stock & Bond, Inc.*, Exchange Act Release No. 8003, 1966 WL 84124, at *3 (Dec. 8, 1966) (rejecting argument that "NASD's Code of Procedure and Rules of Fair Practice operated to deny them due process in the conduct of the proceedings" because "[a]pplicants have not shown that they were prejudiced by the manner in which evidence was presented or their lack of subpoena power, or that any material evidence was not produced").

[109] FINRA Rules 9251, 9252.

[110] FINRA Rule 9263.

[111] 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. 99248 / December 28, 2023

Admin. Proc. File No. 3-19666

In the Matter of the Application of

WILSON-DAVIS & CO.,
JAMES C. SNOW, and
BYRON B. BARKLEY

For Review of Disciplinary Action Taken by

FINRA

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

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

ORDERED that FINRA's findings of violations by Wilson-Davis & Co., James C. Snow, and Byron B. Barkley are sustained; and it is further

ORDERED that FINRA's sanctions determinations as to Wilson-Davis & Co. are sustained with the exception that the fines imposed are set aside and the proceeding is remanded to FINRA to reconsider the appropriate fines in light of our opinion; and it is further

ORDERED that FINRA's sanctions determinations as to James C. Snow and Byron B. Barkley are set aside and the proceeding is remanded to FINRA to reconsider the appropriate sanctions in light of our opinion.

By the Commission.

Vanessa A. Countryman
Secretary