BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

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| In the Matter of<br><br>Department of Enforcement,<br><br>Complainant,<br>vs.<br><br>Wilson-Davis & Co., Inc., James C. Snow, and Byron B. Barkley<br>Salt Lake City, UT,<br><br>Respondents. | DECISION<br><br>Complaint No. 2012032731802r<br><br>Dated: July 10, 2025 |

**On remand from the Securities and Exchange Commission for redetermination of sanctions. Held, sanctions modified.**

**Appearances**

For the Complainant: Jennifer Crawford, Esq., Loyd Gattis, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Richard Ensor, Esq., Evan Strassberg, Esq.

**Decision**

I. Background

This matter is before the National Adjudicatory Council ("NAC") on remand from the Securities and Exchange Commission for redetermination of sanctions. The NAC previously found, and the Commission affirmed, that from July 9, 2012, to April 29, 2013 (the "relevant short-selling period"), Wilson-Davis & Co., Inc. ("Wilson-Davis") engaged in short-selling in violation of Rule 203(b)(1) of Regulation SHO of the Securities Exchange Act of 1934 ("Reg SHO") and FINRA Rule 2010 because the firm failed to find locates for 122 short sale transactions effected in four low-priced stocks. The Commission also upheld the NAC's findings that Wilson-Davis, James C. Snow, and Byron B. Barkley (together, "Respondents") failed to reasonably supervise the short sales during the relevant short-selling period to ensure compliance with Reg SHO, in violation of NASD Rule 3010 and FINRA Rule 2010.

In addition, the Commission affirmed the NAC's findings that from January 1, 2011, through April 30, 2014 (the "relevant period") Wilson-Davis and Snow failed generally to supervise registered representatives and principals, failed to supervise whether registered

representatives should be subject to heightened supervision, and failed to supervise instant message ("IM") communications, in violation of NASD Rule 3010 and FINRA Rule 2010. Finally, the Commission affirmed the NAC's findings that Wilson-Davis and Snow failed to establish and implement anti-money laundering ("AML") policies and procedures and conduct adequate AML training, in violation of FINRA Rules 3310(a), (e) and 2010.

While the Commission affirmed the NAC's findings of violations, it has remanded for a redetermination of the sanctions imposed. On remand, the NAC considered the entire record, the parties' briefs, and the Commission's opinion. Based on that review, we have modified the sanctions, as discussed below.

## II. Facts

Although as stated above, the Commission wholly affirmed the NAC's findings of liability and those findings are not at issue in this appeal, the following facts are relevant to the Commission's affirmance and are instructive for our reconsideration of the appropriate sanctions.

### A. Respondents

Wilson-Davis has been a FINRA registered broker-dealer since December 1968. During the relevant period, most of the firm's business consisted of buying and selling penny stocks in its own proprietary accounts. The firm earned its revenue largely from retail sales commissions and profits earned by its traders through their proprietary trading accounts.

During the relevant period, three principals generally managed Wilson-Davis: Snow, Barkley, and Lyle Davis. Paul Davis served as the firm's chairman of the board. His involvement in the firm's daily operations was extremely limited due to his age. Snow also served as the firm's president, chief compliance officer ("CCO"), and anti-money laundering compliance officer ("AMLCO") and was responsible for the firm's written supervisory procedures ("WSPs"). Barkley is a part owner of Wilson-Davis and served as the firm's vice president and the head of its trading.

### B. Wilson-Davis's Short-Selling Activity Violated Section 203(b) of Regulation SHO

The Commission affirmed the NAC's findings that Wilson-Davis engaged in short-selling in violation of Reg SHO and FINRA Rule 2010. The firm's Reg SHO violations 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 the relevant short-selling period, Kerrigone was the firm's biggest producer. Barkley supervised Kerrigone's trading.[1]

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[1] In addition to the stocks at issue here, during the relevant short-selling period there were other stocks that Kerrigone was trading, in violation of Reg SHO. The SEC brought an action against the firm regarding those short sales. Wilson-Davis settled with the SEC for a fine of $75,000 and agreed to pay $208,645.71 in disgorgement plus pre-judgment interest. *See Wilson-*

Kerrigone's trading activity was a significant component of Wilson-Davis's business and a substantial driver of revenue for the firm. Kerrigone's general trading strategy was to identify trading opportunities presented by penny stock companies that traded in high volume following promotional campaigns orchestrated by third parties, some of which, as acknowledged by Barkley, 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 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.

As the principal responsible for supervising Kerrigone, Barkley was charged with ensuring that Kerrigone's trading was consistent with the bona-fide market maker exception of Reg SHO. However, he did little to supervise Kerrigone. Barkley never reviewed any quotes or exception reports to determine whether Kerrigone was actually participating in bona-fide market making. After approving Kerrigone's market maker application prior to entering the market for a particular stock, Barkley failed to engage in any meaningful evaluation of Kerrigone's short-selling. Although Barkley monitored Kerrigone's stock trading in real time, he did not regularly monitor the market maker quotes Kerrigone was displaying to the market at the time of his trading. Consequently, Barkley failed to detect quotations in the relevant securities that were vastly different from competitive levels on either the buy or sell side.

During the relevant short-selling period, Wilson-Davis, acting through Kerrigone, did not find locates for 122 short positions in four low-priced stocks—Preventia, Inc. ("PVTA"), PM&E, Inc. ("PMEA"), China Teletech Holding ("CNCT"), and Lot78, Inc. ("LOTE") (collectively, the "Stocks"). There was little to no trading activity in the Stocks until shortly before Kerrigone began trading in them, when the Stocks were the subjects of promotional campaigns, including press releases and internet promotions. 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." Kerrigone then ceased trading in each of the Stocks within a few days and did not trade in them again.

1. PVTA

There was limited or no trading in the market for PVTA's stock until promotional activity began in July 2012. On July 9, 2012, the website "hotstocked.com" published a promotional article touting the company and claiming that it was extremely undervalued. That day, price and volume in the stock spiked, and Kerrigone decided to make a market in the stock by submitting a

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*Davis & Co.*, Exchange Act Release No. 80533, 2017 SEC LEXIS 1242 (Apr. 26, 2017). We consider the SEC's regulatory action in our re-determination of sanctions. *See infra* note 16.

"market maker application" to Wilson-Davis. Kerrigone's market maker application explained that he decided to make a market in the stock because of a "trading opportunity."[2]

Kerrigone then entered the PVTA market and shorted the stock exclusively during his first day of trading, accumulating a net short position of approximately 32,400 shares. Shortly after the market opened on the second day, the price of the stock started to decline and Kerrigone started purchasing shares to close out his short position. Once he shifted direction, Kerrigone was exclusively a buyer, and by the close he had bought enough PVTA to nearly fully cover his short position. The firm never borrowed or made arrangements to borrow the shares Kerrigone sold short.[3] During this period, he posted offer quotes for Wilson-Davis that were significantly away from the inside offer approximately 94 percent of the time, making it unlikely that he would sell additional stock. Because the stock price declined substantially between Kerrigone's shorts and his subsequent covering purchases, he generated trading profits of $4,032.

2. PMEA

Until "hotstocked.com" published a promotional article touting the company on November 12, 2012, there was negligible trading in PMEA. As a result of the promotional material, the price and volume in the stock spiked, and Kerrigone decided to enter the market.

Kerrigone began shorting the PMEA market on November 21, 2012. Kerrigone executed his initial short sale at a price more than 28 percent away from Kerrigone's own quote. During this first day of trading, all but one transaction by Kerrigone were short sales, and he accumulated a net short position of approximately 35,000 shares. In the afternoon of the second day, the price of the stock started to decline and Kerrigone started purchasing shares to close out his short position. By the close of the second day, Kerrigone had bought enough PMEA to cover his shorts and ended in a net flat position. Because the stock price declined substantially between Kerrigone's shorts and his subsequent covering purchases, he generated trading profits of $8,495.59.

While Kerrigone was shorting PMEA, Wilson-Davis posted competitive bid and ask quotes less than five percent of the time. Moreover, its posted bid quotes were never at the inside, and usually more than 10 percent lower than the inside quote, making it unlikely that its posted bids would result in any actual purchase transactions. When Kerrigone later covered his short position, Wilson-Davis posted competitive bid and ask quotes only seven percent of the time. Its posted offer quotes were almost never at the inside, and usually were more than 10 percent higher than the inside quote, making it unlikely that the firm's posted offers would result in any sales.

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[2] Kerrigone provided the same "trading opportunity" justification on each market maker application for the Stocks.

[3] Wilson-Davis never borrowed or made arrangements to borrow the shares Kerrigone sold short for any of the Stocks.

3. CNCT

Like the other companies, there was limited or no trading in CNCT until an article touting the stock appeared on "hotstocked.com" in February 2013. Kerrigone submitted a market maker application and began selling CNCT short on February 21, 2013. He accumulated a net short position of approximately 2.8 million shares by his third day of trading. Throughout the morning of that third trading day, Kerrigone continued shorting the stock with dozens more short sales and several buy transactions, accumulating a net short position of more than 5 million shares. Then, early in the afternoon as the price of the stock started to decline, Kerrigone started purchasing shares in significant quantities. By the end of the day on February 25, 2013, he had significantly reduced his net short position.

Kerrigone continued trading in the stock for two more days. Although he executed some short sales during this time, he was a significant buyer of the stock. By the end of the fifth trading day, February 27, 2013, Kerrigone was net flat in his trading position, having purchased enough stock to cover his entire 5 million share short position. Because the stock price declined substantially between the time of the promotional activity when Kerrigone started shorting the stock and his subsequent covering purchases, he generated trading profits of $116,532 over the five days of trading. During this period, approximately 90 percent of the firm's posted bid quotes were at least 10 percent lower than the inside quote, making it unlikely that the posted bids would result in any actual purchases.

4. LOTE

While Kerrigone's trading in CNCT, PMEA, and PVTA was profitable, and earned a total net profit of approximately $130,000, his trading in LOTE was extraordinarily unsuccessful and cost the firm millions. Kerrigone began trading LOTE on April 24, 2013, and rapidly built up a large short position. He entered 25 different short sales over the course of five hours. At one point, he had a short position of more than a million shares, which constituted around 2 percent of the total issued and outstanding shares of LOTE.

Unlike the three previous stocks, the market for LOTE did not drop as Kerrigone expected. The price vacillated up and down throughout the day. Later that afternoon, both Kerrigone and the firm realized they had a problem—the firm ended the day short just under a million shares. At no time during the day did anyone at the firm attempt to locate shares of LOTE, not even after the firm's principals (including Barkley and Snow) became aware of the size of the position being carried overnight.

The price of LOTE began to significantly rise the next day. For example, Kerrigone's last purchase on April 24 was at $2.453571 per share, but his first purchase the following morning was at $3.342916 per share. Despite his attempt to cover his large short position, Kerrigone entered 15 short sales on April 25 and only six purchases. Once again, the firm did nothing to attempt to locate shares.

LOTE's price continued to climb over the next three trading days. Wilson-Davis covered a sizable portion of the short position soon after trading opened on April 26, 2013, buying

166,132 shares at $4.815921 per share for a total of $959,011.48. Despite continuing to attempt to cover his short position, Kerrigone entered additional short sales that same day, with the firm again failing to attempt to locate shares. Wilson-Davis finally covered the full short position after trading opened on April 29, 2013. The firm purchased 545,388 shares at $7.891965 per share for a total cost of more than $4.3 million. Kerrigone entered additional short sales on April 29 after the original short position had been covered and ended the day flat. Wilson-Davis's net loss as a result of Kerrigone's LOTE trading was more than $4.2 million. The firm did not have sufficient working capital to cover the losses and had to borrow the funds.

Shortly thereafter, Wilson-Davis required Kerrigone to reimburse the firm for its LOTE losses and asked him to resign from the firm.

Based upon the foregoing, the Commission affirmed the NAC's finding that Wilson-Davis violated Reg SHO and FINRA Rule 2010 and was not exempt from Reg SHO's locate requirement because it was not engaged in bona-fide market-making activities with respect to the Stocks.

C. Respondents Failed to Supervise in Violation of NASD Rule 3010 and FINRA Rule 2010

The Commission also affirmed the NAC's findings that Wilson-Davis, Snow, and Barkley failed to reasonably supervise the short sales during the relevant short-selling period to ensure compliance with Reg SHO, in violation of NASD Rule 3010 and FINRA Rule 2010. In addition, the Commission affirmed the NAC's findings that Wilson-Davis and Snow failed generally to supervise registered representatives and principals, failed to supervise whether registered representatives should be subject to heightened supervision, and failed to supervise IM communications, in violation of NASD Rule 3010 and FINRA Rule 2010.

1. Wilson-Davis, Snow, and Barkley Failed to Reasonably Supervise Kerrigone's Short Sales to Ensure Compliance with Reg SHO

Snow served as the firm's president, CCO, and AMLCO and Barkley was the vice president and head of trading.[4] 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

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[4] 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." *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *34 (Aug. 12, 2016), *aff'd*, 719 F. App'x 724 (9th Cir. 2018). 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." *Harry Gliksman*, 54 S.E.C. 471, 484-85 (1999) (internal citation omitted), *aff'd*, 24 F. App'x 702 (9th Cir. 2001).

"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, and the firm had no processes or procedures for locating or borrowing securities for its short sales.

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.[5]

The Commission affirmed the NAC's findings that 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 to detect whether a trader was acting as a bona-fide market maker.

The Commission further affirmed the findings that Wilson-Davis and Barkley violated NASD Rule 3010 and FINRA Rule 2010 because Barkley was responsible for supervising traders who functioned as market makers, including whether they met the bona-fide market maker exemption of Reg SHO, yet Barkley assumed, incorrectly and without review or examination, that Kerrigone was acting as a bona-fide market maker.

In addition to these supervisory violations and as described below, the Commission affirmed the findings that Wilson-Davis and Snow violated their supervisory obligations in other ways.

2. Wilson-Davis and Snow Failed to Devise a Reasonable System to Supervise the Firm's Registered Personnel

The firm's 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 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

[5] We note that the SEC similarly concluded that Barkley failed to supervise the firm's trading for Reg SHO compliance. In *Byron B. Barkley*, Exchange Act Release No. 79578, 2016 SEC LEXIS 4658 (Dec. 16, 2016), which involved an identical short-selling strategy for five different securities that occurred during the relevant short-selling period at issue here, the SEC, among other things, imposed on Barkley a civil penalty of $50,000 (for failures to supervise the improper short-selling activity and the firm's unrelated violations of the market access rule).

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. 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 or supervisory responsibilities in Paul Davis's absence.

The Commission affirmed the NAC's findings that 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.

3. Wilson-Davis and Snow Failed to Follow the Firm's Procedures for Heightened Supervision

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 outlining the scope of heightened supervision, the WSPs required Snow to explain (a) the "type, frequency, time period of heightened supervision, and how supervision should be documented"; and (b) 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."

On December 27, 2010, FINRA filed a complaint against the firm, Paul Davis, and registered representative Randy Carlson. 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—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 a firm could employ him 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 that exceeded $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. Moreover, 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 Paul Davis failed to supervise Carlson. Paul Davis had also reduced his work schedule by the time the firm put Carlson on heightened supervision in 2012.

Based on the foregoing, the Commission affirmed the NAC's finding that 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. Finally, after a more than year-and-a-half delay, Snow implemented a plan that did not assign a new supervisor (leaving Paul Davis to supervise), failed to confirm that Davis received the heightened supervision memorandum, and failed to confirm from certifications that Davis conducted the heightened supervision.

#### 4. Wilson-Davis and Snow Failed to Supervise the Review of Instant Messages

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." Based on the foregoing, the Commission affirmed the NAC's finding that Wilson-Davis failed to supervise the review of instant messages.

### D. 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

Finally, the Commission affirmed the NAC's findings that Wilson-Davis and Snow failed to establish and implement AML policies and procedures and conduct adequate AML training, in violation of FINRA Rules 3310(a), (e) and 2010. From 2011 through 2014, the firm's WSPs designated Snow as the AMLCO 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 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 trading constituting a significant 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, or other specific indicators of suspicious and manipulative trading.

Illustrative of the firm's AML issues was its failure to detect suspicious activity in the trading of Valley High Mining Company ("VHMC") from April through November 2012. VHMC 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 VHMC's CEO requested that the firm do so. The trading volume and price of VHMC's stock then increased immediately and significantly. In the 21 months prior to April 10, 2012, VHMC'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 VHMC 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 VHMC stock from April to November 2012—108,576 of 148,805 shares.

The only document in the record indicating that Wilson-Davis performed any AML review of the trading in VHMC 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 shares. Davis testified that he did not recall VHMC or anyone at the firm discussing it with him, and Snow testified that no one at the firm raised any AML issues about it.

The Commission affirmed the NAC's finding that 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 of market manipulation. In addition, the Commission affirmed the NAC's finding that Wilson-Davis and Snow 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 VHMC stock. Even though the trading in VHMC 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 firm's AML compliance program was not reasonably designed to detect, prevent, and report suspicious transactions.

## III. Sanctions

### A. Wilson-Davis's Reg SHO Violations

For Wilson-Davis's violations of Reg SHO, the NAC originally fined it $350,000 and ordered it to disgorge $51,624 (plus prejudgment interest). On remand, the Commission has directed the NAC to explain and/or analyze our conclusion that Wilson-Davis acted recklessly or how that conclusion factors into FINRA's imposition of a fine for Wilson-Davis's violating Reg SHO.[6] As explained below, we find that Wilson-Davis acted recklessly, and that Wilson-Davis's recklessness serves to aggravate its misconduct.

FINRA's Sanction Guidelines ("Guidelines") address violations of Reg SHO.[7] The Guidelines recommend a fine of $5,000 to $16,000 for a first action, a $10,000 to $77,000 fine for a second action, and $10,000 to $155,000 for subsequent actions.[8] The Guidelines also direct an adjudicator to consider fines in greater amounts when the violations are egregious, involve a pattern or patterns of misconduct, took place over an extended period of time, or can be quantified by a number or percentage.[9] Similarly, the Guidelines state that "[in] all egregious cases, whether a first, second or subsequent action, consider a fine greater than or equal to the high end of the range for a first, second or subsequent action."[10] Finally, the Guidelines direct us to consider the Principal Considerations in Determining Sanctions and the General Principles

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6 The Commission sustained FINRA's order that Wilson-Davis disgorge $51,624 plus prejudgment interest for violating Reg SHO.

7 *See FINRA Sanction Guidelines* 65 (2019). https://www.finra.org/sites/default/files/2020-10/2019_Sanctions_Guidelines.pdf (hereinafter, *Guidelines*). We apply the Guidelines in effect at the time of the NAC's original decision.

8 *Id.*

9 *Id.*

10 *Id.* at 65.

that apply to all sanction determinations in our assessment of the severity of respondents' violations.[11]

1. <u>Wilson-Davis's Conduct was Reckless</u>

We find that the record amply supports a finding that Wilson-Davis's conduct in violation of Reg SHO was reckless. "Recklessness is highly unreasonable conduct that represents an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it." *Meyers Associates, L.P.*, Exchange Act Release No. 86497, 2019 SEC LEXIS 1869, at *19 (Jul. 26, 2019). The Commission noted "that 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" and that "it engaged in a speculative selling strategy—a 'clear example' of not engaging in bona-fide market making activity." *See Wilson Davis*, 2023 SEC LEXIS 3658, at *16, 17. The firm, through Kerrigone, relied on the bona-fide market maker exemption, yet it took no steps to determine whether it was applicable. Instead, it simply assumed that Kerrigone's trading satisfied the exemption. The firm maintained that position despite knowing, as Barkley admitted at the hearing, that Kerrigone's short sales were a component of a speculative trading strategy. The firm also treated Kerrigone's trading as subject to the market maker exception even though many of Kerrigone's quotes were uncompetitive. The firm's complete failure to monitor Kerrigone's trading posed an obvious risk that his short sales were in violation of Reg SHO—which they were.

Further, Wilson-Davis repeatedly failed to satisfy the locate requirement, despite having actual knowledge that Kerrigone was carrying a large short position. For example, the firm knew that Kerrigone's short position after his first day of trading LOTE was "just under a million shares"—which was nearly 2% of the total shares outstanding—yet no one located the shares or even attempted to locate them, at that time or on the following trading days. The firm did not satisfy the locate requirement even as Kerrigone added to his short position more than 15 times. Nor did the firm take any steps to evaluate whether any exemption from the locate requirement was applicable. The firm's complete lack of effort was an extreme departure from the ordinary standards of care and therefore reckless. *See Meyers*, 2019 SEC LEXIS at *19.

Wilson-Davis suggests that it did not act recklessly because Kerrigone's activity was not unusual, citing guidance from the SEC[12] and testimony at the hearing. But that guidance addressed activity of "a market maker engaged in bona-fide market making." In addition, the testimony at the hearing responded to questions about activity of a "market maker." Kerrigone was not making a market—to the contrary, he was engaging in proprietary trading as part of a

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[11] *Id.* at 1.

[12] Respondents rely on the Commission's *Key Points about Regulation SHO*, https://www.sec.gov/investor/pubs/regsho.htm. However, the Commission's discussion of instances when naked short-selling is appropriate presupposes that the firm engaged in the short-selling is a market maker, which the Commission has concluded Wilson-Davis was not.

speculative trading strategy. Wilson-Davis knew that he was seeking trading opportunities, not holding himself out as a market maker.

Wilson-Davis's misconduct also was egregious, and aggravating factors predominate. It looked the other way while its registered representative abused its access to markets to engage in speculative trading in an effort to profit from market manipulation, at the expense of market investors.[13] There was a clear pattern of misconduct taking place over an extended period of time—involving multiple violations, spanning at least 122 trades over more than a year.[14] Wilson-Davis acted in reckless disregard for its obligations associated with legitimate market-making activity as it enriched itself through its misconduct.[15] Wilson-Davis's trading had the potential to create unfair and volatile market conditions, harming investors and the companies they traded in. Based on the above, we have determined that a fine of $180,000[16] is appropriate in this matter.

2. Respondents' Arguments for Reduced Sanctions Fail

Respondents make several arguments as to why the sanctions for the firm's Reg SHO violations should be reduced. While we have determined to reduce the fine on remand, we note that their arguments lack merit. First, Respondents contend that the firm did not act recklessly because Reg SHO was "relatively new" and there was "little definitive guidance." However, the locate requirement took effect in 2004 and the deadline for compliance was January 2005—more than seven years before the misconduct at issue. *See Short Sales*, 69 Fed. Reg. 48008, 48031 (Aug. 6, 2004) (stating that the "effective date" of Reg SHO was Aug. 6, 2004, and the "compliance date" was January 3, 2005). Indeed, one of the decisions that Respondents cite in their brief, *Legacy Trading*, involved the bona-fide market maker exemption, and the NAC

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13 *Guidelines*, at 7-8 (Principal Considerations Nos. 11 & 16).

14 *Id.* (Principal Considerations Nos. 8, 9, & 17). Respondents argue that the short-selling violations really only occurred over the course of 13 days. While it is true that there were only a certain number of days that Kerrigone traded, his illicit trading strategy went unchecked for more than a year.

15 *Id*. at 8 (Principal Considerations No. 13).

16 We would have imposed a fine of $230,000 but have reduced the fine by $50,000. We find mitigating as to Wilson-Davis the sanction imposed against it in a related Commission action. *See Wilson-Davis & Co*., 2017 SEC LEXIS 1242, at *13-14. In that action, the Commission found, among other violations, that the firm violated Reg SHO when it engaged in an identical short-selling strategy (as the one at issue here) for five different securities. Wilson-Davis settled with the SEC and agreed to pay a fine of $75,000 and disgorgement. As we did previously, we reduce the fine we impose on Wilson-Davis for its Reg SHO violations by $50,000—taking into account a portion of the fine previously imposed by SEC. *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations No. 7). We do not reduce by the entire amount of the Commission's fine because part of that fine is apportioned to other settled misconduct unrelated to the Reg SHO violations.

issued that decision in 2010, nearly two years before Wilson-Davis's violations of Reg SHO began. *See Dep't of Enf't v. Legacy Trading Co*., Complaint No. 2005000879302, 2010 FINRA Discip. LEXIS 20, at *21, 29 (FINRA NAC Oct. 8, 2010) (respondent was not engaged in bona-fide market making when it "almost never posted the inside bid or ask in connection with the short sales"). The Commission's published guidance and FINRA's decision in *Legacy Trading* put Respondents on notice of the contours of Reg SHO. *See Notice of Filing of a Proposed Rule Change Relating to FINRA Rule 8313* (Release of Disciplinary Complaints, Decisions and Other Information), Exchange Act Release No. 69178, 78 Fed. Reg. 17975, 17976-77 (Mar. 25, 2013) (SR-FINRA-2013-018) (explaining that "information regarding [FINRA's] disciplinary actions provides valuable guidance and information to members, associated persons, other regulators, and investors"). Reg SHO was neither new nor unfamiliar when Wilson-Davis engaged in its misconduct, and there was ample guidance on the topic.

Wilson-Davis also contends that it believed that it was complying with Reg SHO. The record, however, reflects that Wilson-Davis made *no* effort to satisfy the locate requirement or even to determine whether it applied. The firm merely assumed that it did not need to comply with the locate requirement. Given Wilson-Davis's complete lack of diligence, the firm had no reasonable basis for believing that it was complying with Reg SHO. And as explained extensively above, its conduct in violation of Reg SHO was reckless.

Respondents also argue that the fine should be reduced because it has been 11 years since the short-selling misconduct "and there has been no suggestion that Wilson-Davis ever engaged in similar trading activity." They also note that the firm is under new ownership and new leadership, and they have partnered with independent consultants "who successfully performed AML and supervision undertakings resulting from other regulatory settlements from the same general time period as this matter." This assertion is irrelevant. Purported corrective actions are not mitigating when taken after the identification of misconduct. *See Wedbush Sec.*, 2016 SEC LEXIS 2794, at *55 (stating that "the Firm's purported corrective actions" did not mitigate sanctions "because some were taken only after regulators notified them of the reporting failures"). In any event, notwithstanding these updates, we are tasked with sanctioning the firm's serious misconduct as discussed in the original NAC decision and affirmed by the Commission. Moreover, the seriousness of that misconduct is not diluted over time and the firm cannot claim that their subsequent clean record is mitigating. *Cf. Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *32 (Sept. 3, 2015) (rejecting argument that lack of disciplinary history is mitigating "because an associated person should not be rewarded for acting in accordance with her duties as a securities professional").

Finally, Respondents maintain that a fine above $16,000 would be punitive and not remedial. They argue that the aggravating factors are "absent or overstated." We disagree for the reasons stated above. They also assert that the significant losses suffered by the firm due to Kerrigone's trading function as a deterrent. However, any deterrence created by the firm's financial losses stemming from its misconduct is separate from the deterrence component of a FINRA sanction. A fine of $180,000 incentivizes the firm to comply with Reg SHO in the future and additionally will deter others from engaging in such misconduct.

B. Supervisory and AML Violations

1. Wilson-Davis

For Wilson-Davis's supervisory and AML violations, the NAC originally fined the firm $750,000 and ordered that it retain an independent consultant. The Commission agreed that it was appropriate for the NAC to apply the Sanction Guidelines for "Systemic Supervisory Failures" to Respondents' supervisory and AML violations.[17] The Commission further noted that "[t]he 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." *Wilson-Davis*, 2023 SEC LEXIS 3658, at *45. However, because the aggravating factors relied on by the NAC are related to those that the NAC considered in imposing the Reg SHO-related fine that the Commission set aside and remanded, the Commission also set aside and remanded the fine imposed for Wilson-Davis's supervisory and AML failures.[18]

For systemic supervisory failures, the Guidelines recommend a fine of $10,000 to $310,000 or, if "aggravating factors predominate," a higher fine and a suspension with respect to any relevant activities or functions for up to two years, or expulsion.[19] Eight principal considerations specifically govern those sanctions: (1) whether the supervisory failure allowed misconduct to occur or escape detection; (2) whether the firm or individual failed to timely correct or address deficiencies once identified, failed to respond reasonably to prior warnings from FINRA or another regulator, or failed to respond reasonably to other "red flag" warnings; (3) whether the firm appropriately allocated its resources to prevent or detect the supervisory failure; (4) the number and type of persons who were affected by the deficiencies; (5) the number and dollar value of the transactions that were not adequately supervised; (6) the nature, extent, size, character, and complexity of the activities or functions not adequately supervised as a result of the deficiencies; (7) the extent to which the deficiencies affected market integrity, market transparency, the accuracy of regulatory reports, or the dissemination of trade or other regulatory information; and (8) the quality of controls or procedures available to the supervisors and the degree to which the supervisors implemented them.[20] The NAC's findings, as sustained by the Commission, show that aggravating factors predominate.

First, the supervisory failures allowed other misconduct to occur and escape detection. The firm's failure to supervise Kerrigone's short sales allowed 122 violations of Reg SHO to

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17 The Commission affirmed, and therefore did not remand, the NAC's requirement that the firm retain an independent consultant and engage in certain undertakings.

18 We necessarily rely on many of the same facts we considered for the Reg SHO violation, because Respondents' supervisory failures created the permissive environment in which the Reg SHO misconduct occurred.

19 *Guidelines*, at 105-06.

20 *Id*.

occur, and the firm's failure to enforce its AML procedures allowed suspicious trading of VHMC's stock to escape detection.

Second, Wilson-Davis failed to respond to red flags. The firm maintained its assumption that Kerrigone was a bona-fide market maker despite knowing that his goal was trading profit, and despite observing bids that were far from competitive. The firm did not investigate the rise in the price of VHMC's stock, despite the lack of an explanation for the increase and evidence that it was fueled by cross-trading among the firm's customers. And the firm ignored FINRA's disciplinary complaint against Randy Carlson, a red flag that heightened supervision was necessary.

Third, Wilson-Davis failed to appropriately allocate its resources. Proprietary trading was the firm's primary business during the relevant period, generating a sizable portion of the firm's gross revenue. Within that business, Kerrigone was the firm's biggest producer, and he—as the firm knew—generated profits using a strategy that involved short-selling. Those profits were substantial, yet despite the importance of short sales to the firm's business, Wilson-Davis did not devote meaningful resources to ensuring that Kerrigone was complying with Reg SHO.

Fourth, Wilson-Davis's supervisory failures affected other persons. The firm's failure to supervise Kerrigone's short sales created risk for his counterparties that the transactions would not settle, and the firm's failure to supervise trading in VHMC created risk for other market participants that the stock's price was being manipulated.

Fifth, Wilson-Davis's supervisory failures impacted a considerable number and dollar value of transactions. The firm's failure to supervise Kerrigone's short sales impacted 122 transactions, while the firm's failure to detect its customers' suspicious activity in VHMC's stock that at times constituted nearly 100% of market activity.

Furthermore, the number and type of customers, investors or market participants affected by the deficiencies, the number and dollar value of the transactions not adequately supervised as a result of the deficiencies, and the nature, extent, size, character, and complexity of the activities or functions not adequately supervised is also aggravating. For example, 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. In addition, Wilson-Davis customers dominated VHMC trading by constituting 73 percent of the total trading volume in VHMC stock from April to November 2012. Clearly, Wilson-Davis's supervisory and AML deficiencies affected market integrity and market transparency. Finally, the lack of robust supervisory procedures in addition to the firm and its supervisors' lax approach to supervising is also aggravating.

Wilson-Davis's supervisory violations were egregious. The firm relied on the bona-fide market maker exemption yet did not have any written supervisory procedures explaining how supervisors should determine whether the exemption applied. The firm also relied on that

exemption without meaningfully supervising Kerrigone's trading; Barkley did not take even rudimentary steps such as reviewing his quotes to determine whether he was actively buying and selling the subject security along with placing continuous quotations that were at or near the market on both sides as required. In addition, the firm shirked its supervisory responsibility despite knowing that Kerrigone was engaged in speculative trading, because his short-selling activity was a clear example of what would not be considered bona-fide market making. The firm's approach to supervising Kerrigone posed an obvious risk that it would allow violative short sales.

Wilson-Davis's failure to establish and enforce reasonable AML procedures was also egregious. Trading penny stocks poses distinct AML-related risks. *See Dep't of Enf't v. C.L. King & Assoc., Inc.*, Complaint No. 2014040476901, 2019 FINRA Discip. LEXIS 43, at *79 (FINRA NAC Oct. 2, 2019) (noting that FINRA has emphasized the susceptibility of penny stocks to fraud and manipulation). The firm did not identify those risks in its AML procedures or training. This created an obvious danger that the firm's personnel would not know how to identify those risks or respond to them—which is what happened when the firm's customers began trading VHMC and the price soared without explanation—yet no one at the firm did anything to investigate the numerous warning signs of suspicious activity.

Wilson-Davis's failure to timely develop a plan of heightened supervision for Carlson was similarly alarming. By waiting months after FINRA filed its complaint to begin considering whether heightened supervision was necessary, the firm created an obvious risk that further misconduct by Carlson would go undetected. Allowing Davis to supervise Carlson in the interim, even though FINRA's complaint charged Davis with failing to supervise Carlson, created another obvious risk that Carlson would continue to engage in misconduct.

We note the considerable scope of the supervisory deficiencies at Wilson-Davis. The shortcomings touched multiple aspects of its business. It relied on the market maker exemption as a cornerstone of its market-making business but made no effort to design procedures adequate to ensure that it was acting in compliance with the exemption. It took no meaningful steps to apply adequate supervision to one of its brokers subject to an action by its regulator for selling unregistered securities, allowing that broker to proceed with business as usual. It knew that its penny stock business was a high-risk area subject to trading abuses but took inadequate steps to ensure that the firm met its responsibilities to address those risks by identifying red flags it encountered. It even failed to clearly articulate to its personnel who their supervisors were, much less apply adequate supervision.

Finally, we are also troubled by Wilson-Davis's extensive disciplinary history.[21] In the years preceding the NAC's original decision, the firm entered into multiple settlements with

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[21] "Sanctions imposed on recidivists should be more severe because a recidivist, by definition, already has demonstrated a failure to comply with FINRA's rules or the securities laws." *Guidelines*, at 2 (General Principles No. 2).

FINRA for misconduct specifically involving deficient supervisory processes and procedures.[22] The frequency of Wilson-Davis's supervisory issues evinces a firm culture that did not take its supervisory obligations seriously. We therefore conclude that a fine of $310,000 is appropriately remedial given the breadth of the firm's supervisory and AML misconduct. We believe that a sanction at the maximum of the guideline range reflects our concerns with the troubling nature of the firm's supervisory failures.

Wilson-Davis makes several arguments to support a reduction in sanctions. While we have determined that it is appropriate to reduce the sanctions imposed on remand, we do not find the firm's arguments for reduction persuasive. Wilson-Davis maintains that the sanctions imposed by the NAC in its original decision are inconsistent with precedent, in both litigated in settled matters. "It is well established, however, that 'the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases.'" *C.L. King & Assoc., Inc.*, 2019 FINRA Discip. LEXIS 43, at *136. Wilson-Davis also contends that the NAC's original fine is too large, given the impact it would have on the firm's net capital and cites to several settlements

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[22] Respondents concede that several of the settlements "address supervisory or deficient WSP issues" but claim that they are irrelevant to the causes of action here. We disagree. For example, in July 2013, Wilson-Davis consented to findings that:

> The firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to certain applicable securities laws and regulations, and/or the Rules of FINRA. At a minimum, adequate written supervisory procedures addressing quality of markets topics should describe the following: (a) Specific identification of the individual(s) responsible for supervision; (b) The supervisory steps and reviews to be taken by the appropriate supervisor; (c) The frequency of such reviews; and (d) How such reviews shall be documented.
>
> The firm's written supervisory procedures failed to provide for one or more of the above-cited minimum requirements for adequate written supervisory procedures in the following subject areas: Order Handling (Disclosure of Order Routing Information; Market Orders; and Disclosure of Order Execution Information) (b); Sale Transactions (Prompt Delivery of Sale Transactions; Refraining from Accepting Short Sale Orders w/o Pre-Borrowing; and Naked Short Selling Antifraud Rule) - (b); Other Rules (Monitoring Electronic Communications) - (c) and (d); and Use of Multiple MPIDs - (a),(b),(c) and (d).

These supervisory violations clearly echo the supervisory breakdowns at issue in this case. Indeed, the fact that the firm had years of settlements involving supervisory issues only bolsters the conclusion that Wilson-Davis's widespread difficulties complying with its supervisory obligations aggravate the misconduct here.

in support of a lower fine.[23] However, as stated above, "comparisons to sanctions in settled cases are inappropriate because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement such as the avoidance of time-and-manpower-consuming adversary proceedings." *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *33 (Feb. 20, 2014). In addition, "though Adjudicators must consider a respondent's bona fide inability to pay when the issue is raised by a respondent, monetary sanctions imposed on member firms need not be related to or limited by the firm's required minimum net capital."[24] Wilson-Davis did not request to adduce additional evidence to support any purported inability to pay, nor does the firm point to any evidence in the record to supports its claims. Moreover, in light of the reduced sanctions, Wilson-Davis's arguments are largely moot.

2. Barkley and Snow

The Guideline for an individual's systemic supervisory failures direct adjudicators to consider a fine of $10,000 to $77,000 and "[w]here aggravating factors predominate, consider suspending the responsible individual(s) in any or all capacities for a period of 10 business days to two years, or consider barring the responsible individual(s).[25] For Snow's failures to supervise and implement adequate AML procedures in violation of NASD Rule 3010 and FINRA Rules 3310 and 2010, the NAC originally fined Snow $77,000, suspended him in all capacities for three months and in his principal and supervisory capacities for one year (to be served concurrently), and ordered that he requalify as a general securities principal by examination before acting in that capacity again. For Barkley's failure to supervise the short sales in violation of NASD Rule 3010 and FINRA Rule 2010, the NAC originally fined Barkley $52,000, suspended him in all capacities for three months and in his principal and supervisory capacities for one year, to be served concurrently, and ordered that he requalify as a principal by examination before acting in that capacity again.

The Commission in its decision in this matter supported the imposition of sanctions against Barkley and Snow. Notably, the Commission endorsed the practice of imposing a suspension in a supervisory or principal capacity as well as a requirement to requalify, finding those two sanctions to be complementary. "Suspensions help ensure that violators take their responsibilities more seriously in the future. Requalification helps ensure that they have a full understanding of those responsibilities." *Wilson-Davis*, 2023 SEC LEXIS 3658, at *48. However, the Commission remanded because the NAC did not explain why all the sanctions imposed are necessary to protect the public. The Commission left 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." *Id.* As explained in detail below, we conclude that fining Barkley $25,000 and Snow $50,000, suspending both of them in

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[23] The Commission permitted Wilson-Davis to "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." Op. at 24.

[24] *Guidelines*, at 6.

[25] *Guidelines*, at 105.

their principal capacities for six months, and requiring that they requalify by examination before acting in those capacities are necessary and appropriate to protect the public, are remedial and not punitive, and neither excessive nor oppressive.

a. Barkley's Failure to Supervise

While we note that Barkley did not act intentionally, we find his supervisory lapses were egregious. Barkley was responsible for ensuring that Kerrigone's trading was consistent with the bona-fide market maker exemption of Regulation SHO. But after approving Kerrigone's market maker application prior to entering the market for a particular stock, Barkley uncritically assumed that all Kerrigone's short-selling in the security was a part of bona fide market making. Neither Barkley nor anyone else at the firm conducted any analysis or implemented any procedures to ensure that Kerrigone's trading was, in fact, genuine market making. Although Barkley monitored Kerrigone's trading in the relevant stocks in real time, he did not regularly monitor the market maker quotes Kerrigone was displaying to the market at the time of his trading. Consequently, Barkley failed to detect quotations in the relevant securities that were so far away from competitive levels on either the buy or sell side that they were effectively one-sided.

Indeed, Barkley was less concerned with whether Kerrigone was offering quotations consistent with bona-fide market making than he was with the prospect that offering a truly competitive bid for the stock might drive the stock price up and affect profitability. This was the case even though Barkley knew that publishing a two-sided quote was an important indicator of whether the firm was engaging in bona-fide market making.

Barkley's blind assumption that Kerrigone was acting as a bona-fide market maker resulted in the failure to scrutinize Kerrigone's market maker applications and his trading activity. This allowed Kerrigone's violative short-selling to escape detection. We find aggravating the substantial volume of the transactions and the "number and dollar value of the transactions not adequately supervised as a result of the deficiencies."[26] While we note that Barkley did not act intentionally, we find his supervisory lapses were at a minimum grossly negligent.[27]

b. Snow's Failures to Supervise and AML Violations

Snow's systemic supervisory failures were also egregious. His failure to establish and enforce written procedures for ensuring compliance with Reg SHO allowed numerous violative short sales to occur over an extended period, yielding the potential for gain (and actual gain from many of the short sales) and posing risk to markets, as discussed above.[28]

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26 *Guidelines*, at 105 (Principal Consideration No. 5).

27 *Id.*

28 *Id.* at 105 (Principal Consideration Nos. 1, 5, 7).

Snow's failure to establish or enforce reasonable AML procedures posed additional risks to the market as illustrated by the trading activity in VHMC. His failure to ensure that Wilson-Davis's registered persons were able to identify and address warning signs of suspicious activity in the firm's penny-stock business resulted in the firm's failure to investigate obvious red flags.[29] Snow was well aware of the risks that the business posed, and he knew that the firm's procedures were not tailored to that business.[30] Similarly, his failure to enforce the firm's procedures governing heightened supervision were alarming, as he did not take any action until after the Hearing Panel's decision, and that failure persisted for an extended period of time.[31] Snow did not voluntarily take responsibility or corrective measures, and there are no mitigating factors. Thus, aggravating factors predominate, warranting meaningful sanctions.

c. Respondents' Arguments in Favor of Reduced Sanctions Fail

Respondents argue there is no evidence that Barkley's and Snow's systemic supervisory failures have persisted and should not be the basis for significant sanctions. However, even if their failures did not persist, and there is no evidence in the record to support that assertion, Snow's and Barkley's misconduct was egregious. Where aggravating factors predominate, we are directed to consider suspending the responsible individuals in any or all capacities for a period of 10 business days to two years.

Respondents also argue that suspending Barkley and Snow would be punitive and that it is unnecessary to protect the public because Snow is "now retired" and Barkley is "winding down his career." However, Barkley and Snow are free to associate with a member firm if they so choose—and having suspension and requalification requirements in place protect the investing public and the industry should they do so. The Commission has rejected analogous arguments, even with respect to more serious sanctions. For example, the Commission ruled that expelling a firm was not punitive even though it was already out of business, finding that the expulsion "protects investors from [the firm] returning to business." *Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *28 (Apr. 3, 2020). Similarly, suspending Barkley and Snow and requiring them to requalify will protect investors if they return to the brokerage industry, whether as a principal or in some other capacity.

Finally, Respondents argue that the suspensions in any principal-capacity should last only until Snow and Barkley requalify. However, we find that due to the egregious nature of Barkley's and Snow's supervisory failures, a more meaningful suspension—prohibiting them from acting in a principal or supervisory capacity to reflect upon their misconduct before allowing them to requalify—is appropriately remedial.

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29 *Id.* (Principal Consideration No. 2).

30 *Id.* at 8 (Principal Consideration No. 13).

31 *Id.* at 7–8 (Principal Considerations Nos. 9 & 13).

With the Commission's opinion in mind, we modify the sanctions imposed against Barkley and Snow. We fine Barkley $25,000, suspend him in his principal capacities for six months, and order him to requalify by examination as a general securities principal, investment banking principal, and compliance officer before acting in those capacities again.[32] We fine Snow $50,000, suspend him in his principal capacities for six months, and order him to requalify by examination as a general securities principal and investment banking principal before acting in those capacities again. We conclude that combining the fine, principal-capacities suspension, and requalification requirement creates a more impactful disciplinary response that is necessary to better protect investors and the markets. The suspension in principal capacities temporarily prohibits Barkley and Snow from associating with a member firm in principal capacities, reducing the risk of harm to investors and the financial markets, and gives them time to reflect on the importance of appropriate supervision and the need to take their supervisory responsibilities more seriously in the future. The requirement to requalify decreases the likelihood of recurrence because Barkley and Snow will have to demonstrate that they are qualified to act in a principal capacity before associating with a member firm in those capacities again. Finally, the fine acts as a financial deterrent, discouraging misconduct and reinforcing the consequences of violating FINRA rules to both Barkley and Snow and other registered representatives. Together, these sanctions protect the investing public and will deter Barkley, Snow, and others from engaging in similar misconduct.[33]

## V. Conclusion

For its unlawful short sales in violation of Rule 203 of Reg SHO, Wilson-Davis is fined $180,000. For its failures to supervise and implement adequate AML procedures in violation of NASD Rule 3010 and FINRA Rules 3310 and 2010, Wilson-Davis is fined an additional $310,000. For his failure to supervise Kerrigone's short-selling, Barkley is fined $25,000 and suspended in all principal capacities for six months, with the requirement that he requalify by examination as a general securities principal, investment banking principal, and compliance officer before acting in those capacities again. For his failures to supervise and implement adequate AML procedures, Snow is fined $50,000 and suspended in all principal capacities for six months, with the requirement that he requalify as a general securities principal and investment banking principal before acting in those capacities again.

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[32] We would have imposed a $50,000 fine on Barkley. However, we do find mitigating as to Barkley the sanction imposed against him in the SEC action for his failure to supervise Regulation SHO violations and reduce the fine we would otherwise impose against him by $25,000. *See Guidelines*, at 5 (General Principal No. 7).

[33] Imposing a suspension and a fine is consistent with the Guidelines. *See Guidelines*, at 10 (Technical Matters) (providing that adjudicators may, in their discretion, impose a suspension and a fine).

We affirm the joint and several imposition of $13,443.39 for hearing costs.[34]

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

[34] Pursuant to FINRA Rule 8320, the membership of any firm that fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.