

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C.**

In the Matter of the Application of  
Wilson-Davis & Co., Inc. and Byron B. Barkley  
For Review of Disciplinary Action Taken by  
FINRA  
Administrative Proceeding No. 3-22506

**BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN  
OPPOSITION TO THE APPLICATION FOR REVIEW**

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December 24, 2025

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**BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN  
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**I. INTRODUCTION<sup>1</sup>**

FINRA’s National Adjudicatory Council (“NAC”) fully complied with the Securities and Exchange Commission’s remand directives concerning sanctions included in its December 28, 2023 opinion (the “Commission Opinion”) that affirmed all findings of violation against applicants Wilson-Davis & Co., Inc. (“Wilson-Davis” or the “firm”) and Byron B. Barkley (together, the “Applicants”). In its July 10, 2025 decision (the “NAC Decision”), the NAC provided detailed reasoning grounded in FINRA’s Sanction Guidelines (“Guidelines”), evaluated aggravating and mitigating factors, and imposed reasonable, remedial sanctions designed to

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<sup>1</sup> FINRA files this brief today, December 24, 2025, pursuant to the Commission’s October 1, 2025 order staying pending administrative proceedings while the Commission was subject to a lapse in appropriations and its November 13, 2025 order lifting the stay and further extending all deadlines by an additional period of 10 days. *See In re: Pending Admin. Proc.*, Exchange Act Release No. 104162, 2025 SEC LEXIS 2846 (Oct. 1, 2025); *In re: Pending Admin. Proc.*, Exchange Act Release No. 104177, 2025 SEC LEXIS 2867 (Nov. 13, 2025).

protect investors and ensure future compliance—not to punish past misconduct. The Commission should affirm the NAC’s sanctions on remand, which are appropriately remedial and neither excessive nor oppressive.

Wilson-Davis, through its registered representative, violated Rule 203(b)(1) of Regulation SHO of the Securities Exchange Act of 1934 (“Reg SHO”) and FINRA Rule 2010 by failing to find locates for 122 short sale transactions effected in four low-priced stocks. Wilson-Davis improperly used a speculative short selling strategy, executing trades away from the firm’s published quotes, to capture market gains without making any attempt to borrow the shorted stock and without acting as a bona-fide market maker. This improper short selling occurred because the firm and Barkley failed to reasonably supervise the trading activity.

Wilson-Davis’s failure to detect and prevent this illegal short selling was just one example of the firm’s defective supervisory system. From January 1, 2011, through April 30, 2014, Wilson-Davis, James C. Snow, the firm’s president, chief compliance officer (“CCO”), and anti-money laundering compliance officer (“AMLCO”), and Barkley, the firm’s head of trading and vice-president, blatantly disregarded numerous supervisory obligations. These failures resulted in the firm violating not only FINRA rules, but also federal securities regulations. First, Wilson-Davis and Snow failed to reasonably supervise an equity trader at the firm. Wilson-Davis permitted this trader to work at the firm without a heightened supervision plan, notwithstanding a FINRA Hearing Panel order and the firm’s written supervisory procedures (“WSPs”) requiring one. When the firm belatedly prepared a supervisory plan, it was wholly inadequate. In addition, Wilson-Davis and Snow failed to implement a reasonable supervisory system to supervise the firm’s registered personnel and failed to reasonably supervise instant message communications for its registered representatives.

Finally, the firm's and Snow's supervisory failings extended to the firm's anti-money laundering ("AML") program. Wilson-Davis failed to establish and implement AML policies and procedures reasonably designed to cause the detection and reporting of suspicious transactions and failed to conduct adequate AML training. As the Commission found, Applicants' supervisory deficiencies violated federal securities laws and thereby compromised market integrity. Applicants' other supervisory and AML violations are equally problematic. With that misconduct, the numerous aggravating factors, and the Commission's remand instructions in mind, the NAC fashioned sanctions that are appropriately remedial and protect the investing public. For its unlawful short sales, the NAC fined Wilson-Davis \$180,000, and for its failures to supervise and implement adequate AML procedures, the NAC fined Wilson-Davis an additional \$310,000. For his failure to supervise the short-selling, the NAC fined Barkley \$25,000 and suspended him 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.

Rather than address, or even acknowledge, their serious misconduct that the Commission affirmed, the Applicants seek to overturn FINRA's carefully considered sanctions by mischaracterizing the NAC's reasoned decision as "punitive" and ignoring the substance of the Commission's findings against them. Applicants' violations demonstrate a pervasive culture of regulatory indifference that justifies the meaningful remedial sanctions that FINRA ordered.

In sum, the NAC fully complied with the Commission's Opinion—providing detailed reasoning grounded in the Guidelines, evaluating all relevant aggravating and mitigating factors, and imposing remedial sanctions designed to protect investors and ensure future compliance. Accordingly, the Commission should affirm the NAC's decision in all respects.

## II. FACTUAL BACKGROUND AND AFFIRMED VIOLATIONS

The sole issue on appeal is whether the sanctions imposed by the NAC on remand are appropriately remedial, align with the gravity of Applicants' misconduct, protect investors and market integrity, and are not excessive or oppressive. Applicants' brief minimizes the severity of their misconduct—misconduct that the Commission wholly affirmed. To demonstrate the sound connection between the factual findings and violations that the Commission affirmed and the sanctions the NAC imposed on remand, we summarize Applicants' misconduct below.

### A. Wilson-Davis, Barkley, and Other Relevant Individuals

Wilson-Davis has been a FINRA registered broker-dealer since December 1968. Its business consists primarily of trading penny stocks for its customers and its own account. (RP 81.)<sup>2</sup> Such sales constitute an important source of revenue to the firm. (RP 1572.) The firm earned its revenue largely from retail sales commissions and profits earned by its traders through their proprietary trading accounts. (RP 82.)

During the relevant period, Wilson-Davis was largely managed by three principals: Snow, Barkley, and Lyle Davis, all of whom worked out of the firm's Salt Lake City office.<sup>3</sup> Although Snow is now retired, during the relevant period he served as the firm's president, CCO, AMLCO, and he was also responsible for the firm's written supervisory procedures ("WSPs"). (RP 4166.) Barkley is registered as a general securities representative, general securities

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<sup>2</sup> "RP" refers to the page numbers in the certified record of this case filed with the Commission on January 13, 2020 and updated on August 20, 2025. CX," "RX," and "JX" refer to exhibits admitted at the FINRA hearing and are part of the certified record.

<sup>3</sup> Paul Davis, at that time over 80 years old, served as the firm's chairman of the board. (RP 3910.) His involvement in the firm's daily operations during this time was very limited. (RP 1666-67.)

principal, and an equity trader limited representative. He is a part owner of Wilson-Davis and served as the firm's vice president and the head of its trading department during the relevant period. (JX-21.) Lyle Davis was Wilson-Davis's financial operations principal, secretary, treasurer, and a vice-president. (RP 3910.)

**B. The Commission Found that 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. *Wilson-Davis & Co.*, Exchange Act Release No. 99245, 2023 SEC LEXIS 3658 (Dec. 28, 2025), at \*11-12. The firm's Reg SHO violations concern trading by Anthony Kerrigone, the firm's biggest producer at the time, who traded in one of the firm's proprietary accounts as a market maker. *Id.* at \*7. Kerrigone received a 60% commission on his trading profits for Wilson-Davis. Barkley supervised Kerrigone's trading. *Id.*

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, Barkley testified, were pump-and-dump schemes." *Id.* Barkley also testified that most stocks identified by Kerrigone as a trading opportunity had "no value" and "were generally worthless." *Id.* at \*7. As a matter of course, once Kerrigone identified a penny that he was interested in trading, he would present a market maker application to Barkley. Barkley was aware that once 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. *Id.* at \*8. 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.

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 Teletch Holding ("CNCT"), and Lot78, Inc. ("LOTE") (together, 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 and then ceased trading in each of the Stocks within a few days and did not trade in them again. *Id.* at \*8-9.

With respect to PVTA, PMEA, and CNCT, within a day after promotional materials emerged touting the stocks, 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. *Id.* at \*9.

Kerrigone then changed course and bought shares for a few days to entirely cover his short positions and end flat once the promotional campaigns faded and stock prices declined. During these periods, Kerrigone's ask quotes were far enough away from the inside ask quotes that buyers were deterred from hitting his quotes. Kerrigone's strategy for PVTA, PMEA, and CNCT was successful as it generated trading profits of \$129,059. *Id.* at \*10-11.

Kerrigone’s directional bet failed for LOTE because the stock price continued to rise during the period in which Kerrigone needed to close out his short position. 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. Kerrigone’s trading in LOTE resulted in a loss to Wilson-Davis of more than \$4.2 million. *Id.* at \*11.

After considering these facts, the Commission agreed with the NAC’s determination that Wilson-Davis violated Rule 203 of Reg SHO and FINRA Rule 2010 because Rule 203’s locate requirement was “designed to address the problem of ‘naked’ short selling,” and Wilson-Davis failed to satisfy the locate requirement for short sales in four penny stocks. *Id.* at \*20. Indeed, the Commission explicitly concluded that the firm “engaged in a speculative selling strategy—a clear example of not engaging in bona-fide market making activity. *Id.* at \*16. In addition, Wilson-Davis violated Rule 2010 both because this misconduct was inconsistent with the principles of just and equitable principles of trade and a violation of Rule 203 of Reg SHO itself violates Rule 2010. *Id.* at \*20-21.

**C. Wilson-Davis and Barkley Failed to Supervise the Short Sales 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. *Id.* at \*24.<sup>4</sup>

Wilson-Davis, through Snow, was responsible for the firm's WSPs. *Id.* at \*23. 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." *Id.* The WSPs, however, lacked 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 Commission further affirmed the findings that Wilson-Davis and Barkley violated NASD Rule 3010 and FINRA Rule 2010. Barkley was responsible for supervising traders who functioned as market makers, including whether they met the bona-fide market maker exemption of Reg SHO. *Id.* at \*24. 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. *Id.* at \*23. Although Barkley monitored Kerrigone's trading in real time and communicated frequently with Kerrigone, Barkley did not regularly monitor the market maker quotes Kerrigone was displaying

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<sup>4</sup> The NAC's Decision fined Snow \$50,000 and suspended him 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 for his failures to supervise and implement adequate AML procedures. Snow did not appeal the NAC's sanctions on remand to the Commission. Even though he is not a part of this appeal, Snow's supervisory liability is imputed to Wilson-Davis. See *World Trade Fin. Corp.*, Exchange Act Release No. 66114, 2012 SEC LEXIS 56, at \*28 n.61 (Jan. 6, 2012) (imputing to a firm the supervisory violation of NASD Rule 3010 by its president and trade desk supervisor), *aff'd*, 739 F.3d 1243 (9th Cir. 2014).

to the market at the time of his trading. Consequently, Barkley failed to detect quotations in the Stocks that were far away from competitive levels on either the buy or sell side. These failures are evidenced by the narrowness of Barkley's and the firm's concerns surrounding Kerrigone's trading in LOTE. Barkley was not concerned with whether Kerrigone's quotations were consistent with genuine market making, but rather with the exposure and potential loss that Kerrigone's trading in LOTE created for the firm. (RP 1147-51.) As a result of these failures, Barkley did not detect or deter Kerrigone's posting of quotations that were non-competitive. *Id.* at \*24. As the principal responsible for supervising Kerrigone, Barkley was responsible with ensuring that Kerrigone's trading was consistent with the bona-fide market maker exception of Reg SHO. *Id.*

#### **D. Wilson Davis's Other Supervisory Failures**

In addition to the firm's failure to supervise for compliance with Reg SHO, the Commission affirmed the NAC's findings that Wilson-Davis violated its supervisory obligations in several other ways. Specifically, the Commission affirmed the NAC's findings that Wilson-Davis failed to devise a reasonable system to supervise the firm's registered personnel, failed to follow the firm's supervisory procedures for considering whether registered representatives should be subject to heightened supervision, and failed to supervise instant message communications, in violation of NASD Rule 3010 and FINRA Rule 2010.

##### **1. 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.'" *Id.* at \*24. Snow and Lyle Davis testified that the head count lists contained errors. The firm and its principals were

inconsistent in their attempts to identify which principals were responsible for supervising, leading to a lack of meaningful supervision. In addition, in the instances where Paul Davis was designated as the individual responsible for supervising registered representatives, his very limited time in the office meant that he was unable to effect reasonable supervision, and 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 full of errors. As a result, the firm had no reasonable supervisory system to supervise its registered persons.

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

Wilson-Davis's WSPs required, based on specified criteria, that Snow identify candidates for heightened supervision and determine the scope of such supervision. One of the criteria was the filing of a complaint by a regulator. In such an event, the WSPs required the representative's supervisor to consider whether to establish a plan of heightened supervision and for compliance to prepare a written memorandum outlining the action taken or not taken. *Id.* at \*26-27.

On December 27, 2010, FINRA's Department of Enforcement filed a complaint against the firm, Randy Carlson, who was an equity trader at Wilson-Davis, and Paul Davis. *Id.* at \*27. 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 Paul Davis failed to reasonably supervise Carlson. The firm and Paul Davis settled the charges against them, and on

October 4, 2011, Enforcement filed an amended complaint against Carlson. Following a hearing, the hearing panel issued a decision on June 8, 2012, finding that Carlson violated Section 5. Among other sanctions, the panel ordered that Carlson could be employed by a member firm only if he were subject to heightened supervision for one year. *Id.* at \*28.

Wilson-Davis failed to create or implement a heightened supervision plan for Carlson until August 6, 2012. *Id.* This was one-and-a-half years after FINRA filed the complaint, one year after the firm and Paul Davis settled the action in October 2011, and two months after a hearing panel found Carlson liable in June 2012. *Id.* at \*27-28.

The plan the firm finally put in place did little more than require Carlson to follow procedures already required under firm policy. The plan incorporated the WSPs for stock liquidation that the firm applied to all employees and required that Carlson submit proposed customer liquidations over \$75,000 to outside counsel's review and have quarterly lunch meetings with outside counsel to discuss any Section 5 "issues." *Id.* The plan did not, contrary to the requirements of the firm's WSPs, identify a supervisor or provide for certification by that supervisor. Paul Davis, who was found to have failed to supervise Carlson with regard to the Section 5 violation, was, by default, the supervisor assigned to oversee the heightened supervision. But Davis, who was then in his eighties, was only in the office a few hours a day and was himself unsure he was responsible for the supervision. No supervisor ever certified the firm's and Carlson's compliance with the plan. *Id.*

Based on the foregoing, the Commission affirmed the NAC's finding that Wilson-Davis 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 Paul Davis received the heightened supervision memorandum, and failed to confirm from certifications that Paul Davis conducted the heightened supervision.

3. **Wilson-Davis and Snow Failed to Supervise the Review of Instant Messaging**

The Commission also affirmed the NAC's finding that Wilson-Davis failed to supervise the review of instant messages ("IMs") in violation of NASD Rule 3010 and FINRA Rule 2010. Pursuant to the WSPs, the firm and Snow were required to review IMs, which were subject to the firm's review and record retention policies. *Id.* at \*31. Snow delegated his responsibility to review instant messages to the firm's information technology specialist, an unregistered individual. *Id.* at \*31-32. Snow admitted that he did not know what parameters the specialist used for his review, which Snow testified he "did in . . . error." *Id.*

**E. 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, through 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. *Id.* at \*34. Snow was responsible for ensuring that the firm's AML program was adequately tailored to the risks posed by the firm's business and for establishing an AML program to mitigate those risks. The firm's AML procedures identified penny stock liquidation—the firm's primary business—as a red flag of potential money laundering. Yet the

procedures failed to provide adequate guidance on how to detect potentially manipulative or suspicious penny stock trading.

The WSPs stated it is a red flag if the “customer engages in suspicious activity involving the practice of depositing penny stocks, liquidates them, and wires proceeds” or 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.” *Id.* at \*35. 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 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. *Id.*

Wilson-Davis and Snow also failed to adequately train firm employees to ensure they were able to identify suspicious activity. In particular, the AML training failed to address red flags related to the firm’s penny stock liquidation business, let alone more specific indicators of suspicious and manipulative trading. *Id.*

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. During the period Wilson-Davis customers traded the stock, its price rose approximately 2,000 percent to \$4.95. *Id.* at \*35-36.

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. *Id.* at \*36-37.

The Commission affirmed the NAC's finding that Wilson-Davis and Snow violated FINRA Rules 3310 and 2010 because the firm, through 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. Wilson-Davis failed to establish and implement reasonable AML policies and procedures to detect, investigate and report, where appropriate, suspicious trading. Snow was responsible for ensuring that the firm's AML program was adequately tailored to the risks posed by the firm's business activities and establishing an AML program to mitigate those risks. Specifically, Wilson-Davis and Snow failed to establish or maintain AML policies and procedures tailored to the risks posed by its penny stock business. 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 with respect to the trading in VHMC stock. *Id.* at \*37-38. Accordingly, the firm's AML compliance program was not reasonably designed to detect, prevent, and report suspicious transactions.

### **III. PROCEDURAL BACKGROUND**

On December 19, 2019, the NAC issued its original decision, affirming the Hearing Panel's finding that Wilson-Davis willfully violated Rule 203(b)(1) of Reg SHO and FINRA Rule 2010 by short selling without first borrowing the securities. The NAC also affirmed the findings that Applicants and Snow failed to supervise Kerrigone's short selling, in violation of NASD Rule 3010 and FINRA Rule 2010, and that the firm and Snow failed to adequately supervise other activities at Wilson-Davis in violation of NASD Rule 3010 and FINRA Rule 2010 and failed to establish and implement adequate AML procedures tailored to the firm's business, in violation of FINRA Rules 3310 and 2010. (RP 8497-8525.) For its Reg SHO violations, the NAC fined Wilson-Davis \$350,000 and ordered disgorgement of \$51,624. For its failures to supervise and establish and implement adequate AML procedures in violation of NASD Rule 3010 and FINRA Rules 3310 and 2010, the NAC fined Wilson-Davis \$750,000 and directed the Firm to retain an independent consultant. (*Id.*) For his failures to supervise and implement adequate AML procedures in violation of NASD Rule 3010 and FINRA Rules 3310 and 2010, the NAC fined Snow \$77,000, suspended him in all capacities for three months and in his principal and supervisory capacities for one year, to be served concurrently, and ordered him to requalify as a principal by examination before acting in that capacity again. For his failure to supervise the short sales in violation of NASD Rule 3010 and FINRA Rule 2010, the NAC fined Barkley \$52,000, suspended him in all capacities for three months and in his principal and supervisory capacities for one year, to be served concurrently, and ordered him to requalify as a

principal by examination before acting in that capacity again. Applicants and Snow appealed the decision to the Commission. (RP 8529.)

On December 28, 2023, the Commission issued an opinion affirming all of the NAC's liability findings. It also affirmed FINRA's imposition of \$51,624 in disgorgement on Wilson-Davis as to the Reg SHO violation and FINRA's order requiring Wilson-Davis to retain an independent consultant as to the supervisory and AML violations. However, the Commission set aside the sanctions imposed for Wilson-Davis's Reg SHO violations for a narrow reason related to the NAC's finding of recklessness. It noted that:

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, 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.

*Wilson-Davis*, 2023 SEC LEXIS 3658, at \*44.

The Commission also set aside the sanctions imposed on the firm for its supervisory and AML violations. The Commission noted that when imposing a fine for those violations, FINRA had found that aggravating factors predominated, including ones related to Wilson-Davis's failure to reasonably supervise Kerrigone's short sales to ensure compliance with Reg SHO. The Commission concluded that "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." *Id.* at \*46.

Finally, the Commission set aside the sanctions imposed on Barkley and Snow, noting that "[a]lthough we agree with FINRA that sanctions are appropriate, FINRA did not explain

why [the fines, suspensions, and requalification requirements considered together] are necessary to protect the public. 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.” *Id.* at \*47.<sup>5</sup>

With these directives in mind, on remand the NAC substantially reduced the sanctions imposed on the Applicants for all violations. For its unlawful short sales, the NAC fined Wilson-Davis \$180,000. For its failures to supervise and establish and implement adequate AML procedures in violation of NASD Rule 3010 and FINRA Rules 3310 and 2010, the NAC fined Wilson-Davis \$310,000. For his failure to supervise Kerrigone’s short-selling, Barkley was 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, the NAC fined Snow \$50,000 and suspended him 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.

Wilson-Davis and Barkley initiated the instant appeal.

#### **IV. DISCUSSION**

Under Exchange Act Section 19(e)(2), the Commission will sustain the sanctions FINRA imposes “unless [it] find[s], having due regard to the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or

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<sup>5</sup> With respect to each of the remand instructions, the Commission expressly stated that “we express no view on any aggravating or mitigation factors that might affect” the sanctions imposed. *See e.g., id.* at \*46.

inappropriate burden on competition.” *William Joseph Kielczewski*, Exchange Act Release No. 104352, 2025 SEC LEXIS 3108, at \*34 (Dec. 9, 2025); 15 U.S.C. § 78s(e)(2). In evaluating the sanctions imposed, the Commission considers any aggravating or mitigating factors, and whether the sanctions are remedial and not punitive. *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Secs., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007). The Commission considers FINRA’s Guidelines as a benchmark in conducting its review. *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at \*34 n.85 (Nov. 9, 2012).

Applicants misconstrue the Commission’s remand directives and create a standard for sanctions analysis that is unsupported by the Exchange Act. On the other hand, the sanctions FINRA imposed on Wilson-Davis and Barkley for their violations are consistent with the Commission’s directives, supported by the Guidelines, and meet the standards of Exchange Act Section 19(e)(2).

**A. The Fine Imposed for Wilson-Davis’s Reg SHO Violations is Supported by the Record and is Not Punitive**

The \$180,000 fine imposed for Wilson-Davis’s Reg SHO violations is appropriate, reasoned, and grounded in the Guidelines, which explicitly recommend, in cases like this one, enhanced fines for reckless failures to comply with 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.<sup>6</sup> FINRA Sanction Guidelines,

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<sup>6</sup> We note that the original Hearing Panel decision in this matter considered Wilson-Davis’s short-selling violations so egregious that it imposed a \$10,000 fine for each of the 122 trades, resulting in a fine in excess of \$1million.

65 (2019).<sup>7</sup> The Guidelines also explicitly permit an adjudicator to consider a fine beyond those ranges or “consider deviating from the fine structure recommended in this guideline” if the violation is egregious, involves a pattern of misconduct, occurs over an extended period of time, or is intentional or reckless. *Id.* at 65 n.1; *id.* at 3-4, 7-8 (General Principle 3 and Principal Considerations 8, 9 & 13).<sup>8</sup> Wilson-Davis’s challenge to the \$180,000 fine imposed for its 122 violations of Reg SHO’s locate requirement fundamentally mischaracterizes both the nature of the firm’s misconduct and the remedial function of the financial sanctions imposed.

The NAC fully articulated how the fine imposed serves to protect the investing public and market integrity, and to deter recurrence within the firm—not to punish the firm’s past conduct. *See PAZ Sec. II*, 566 F.3d 1172, 1176 (D.C. Cir. 2009). The NAC Decision explained that the presence of aggravating factors, including that the firm acted recklessly, and the dearth of mitigating factors warranted a proportionate fine. Over a nine-month period, Wilson-Davis exploited the bona-fide market maker exemption to Reg SHO’s core protective locate

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<sup>7</sup> [https://www.finra.org/sites/default/files/2020-10/2019\\_Sanctions\\_Guidelines.pdf](https://www.finra.org/sites/default/files/2020-10/2019_Sanctions_Guidelines.pdf) [hereinafter Guidelines].

<sup>8</sup> Applicants also argue that the NAC should have considered batching the sanctions for the firm’s Reg SHO violation, which, according to Applicants, would result in a far lower sanction. Br. at 9 n.7 (citing the Guidelines’ General Principle 4). Wilson-Davis argued that batching was warranted because the violations were unintentional, caused no injury to the public, resulted in restitution (through Kerrigone’s partial reimbursement), and stemmed from a single systemic cause that was corrected. However, none of these conditions is meaningfully satisfied here and the NAC reasonably rejected Applicants’ characterization. First, the violations were not unintentional—they resulted from Wilson-Davis’s reckless short-selling. Second, the record clearly demonstrates the potential risk of injury, including among other things, that Kerrigone’s short-selling created a settlement risk to counterparties. Third, Kerrigone’s partial reimbursement to the firm does not constitute restitution to public investors. Finally, the violations did not stem from a single discrete cause but rather from pervasive speculative short-selling campaigns spanning multiple stocks over an extended period, rendering Applicants’ position on batching inappropriate and justifying the NAC’s treatment of the violations.

requirement—knowingly executing short sales in penny stocks without ever attempting to borrow or locate the securities sold short. Because Wilson-Davis acted recklessly, engaged in prolonged and deliberate circumvention of Reg SHO’s requirements, created genuine risk to market participants, and failed to implement available compliance measures despite clear knowledge of regulatory standards, the \$180,000 fine—a reduction from the NAC’s original sanction of \$350,000—remains appropriately calibrated to deter similar misconduct and protect the integrity of securities markets, and is consistent with the Guidelines’ direction regarding when to consider imposing a fine above the recommended ranges.<sup>9</sup>

1. The NAC Appropriately Considered Multiple Aggravating Factors

In light of the presence of multiple aggravating factors, Wilson-Davis’s misconduct was appropriately considered egregious, warranting a significant fine. The NAC specifically identified several relevant aggravating factors. Wilson-Davis looked the other way while its

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<sup>9</sup> Applicants complain that the NAC never explains how or why \$50,000 was the appropriate amount to reduce the Reg SHO fine. Br. at 8. This contention mischaracterizes both the NAC’s methodology and the applicable legal standard. The NAC explicitly grounded the \$50,000 reduction in General Principle No. 7 of the Sanctions Guidelines, which directs adjudicators to “consider sanctions previously imposed by other regulators ... based on the same conduct.” The NAC (as it did in its original decision) identified a directly analogous Commission action in which the firm violated Reg SHO through an identical short-selling strategy for five different securities during the overlapping time period and settled for a \$75,000 fine plus disgorgement. The NAC then applied straightforward arithmetic: rather than impose sanctions that would wholly duplicate the Commission’s prior enforcement action, it reduced its own fine by \$50,000 to account for a portion of the Commission penalty already paid, while preserving a higher total sanction because part of the Commission fine addressed other settled misconduct unrelated to the Reg SHO violations. This methodological explanation directly responds to the Commission’s remand instruction to justify deviations from the Guidelines and demonstrates that the \$50,000 figure was not arbitrary but rather a calibrated adjustment reflecting established principles against duplicative sanctions. Wilson-Davis’s argument that this requires additional quantitative justification elevates form over substance and ignores that regulatory practice permits such proportional adjustments when prior enforcement actions have addressed substantially similar conduct.

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.<sup>10</sup> Wilson-Davis also engaged in a clear pattern of misconduct taking place over an extended period of time— involving multiple violations, spanning at least 122 trades, with Kerrigone’s illicit trading strategy going unchecked for nearly a year.<sup>11</sup> And as further explained below, Wilson-Davis acted in reckless disregard of its obligations associated with legitimate market-making activity as it enriched itself through its misconduct.<sup>12</sup> The presence of these factors aggravated Wilson-Davis’s misconduct.

2. The NAC Appropriately Concluded that Wilson-Davis Acted Recklessly

In addition, the NAC’s finding that Wilson-Davis acted recklessly is supported by the record and provides further support for the fine imposed.<sup>13</sup> Contrary to the Applicants’ argument that the NAC made only conclusory statements about recklessness (Br. at 10), the NAC Decision included an extensive and thorough discussion of the basis for its finding that Wilson-Davis’s conduct was reckless. Br. at 10.

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<sup>10</sup> *Guidelines*, at 7-8 (Principal Considerations Nos. 11 & 16).

<sup>11</sup> *Id.* (Principal Considerations Nos. 8, 9, & 17).

<sup>12</sup> *Id.* at 8 (Principal Considerations No. 13). Wilson-Davis’s enrichment resulted in the disgorgement affirmed by the Commission.

<sup>13</sup> As noted above, the Guideline for Reg SHO violations explicitly directs that in cases in which the respondent acted intentionally or recklessly, adjudicators “may impose a monetary sanction in excess of the recommended range.” *Guidelines*, at 65, n. 1. This is further bolstered by the General Principles of the Guidelines which state that “[]when the violations at issue in a particular case . . . result from reckless or intentional actions, Adjudicators should assess sanctions that exceed the recommended range of the guidelines.” *Guidelines*, at 2 (General Principle 1 Applicable to All Sanctions Determinations).

As noted in the NAC Decision, recklessness is “an extreme departure from the standards of ordinary care which presents a danger that is either known to the actor or is so obvious that the actor must have been aware of it.” *Meyers Assocs., L.P.*, Exchange Act Release No. 86497, 2019 SEC LEXIS 1869, at \*19 (Jul. 26, 2019) (applying a similar definition in the context of evaluating FINRA’s sanctions).

The NAC’s recklessness finding is grounded in a specific, demonstrable behavior that reveals the firm’s fundamental disregard for its regulatory obligations. In this case, recklessness was evidenced by Kerrigone’s planned trading strategy, which consistently circumvented Reg SHO’s locate requirements. As the NAC Decision lays out, key indicators of Wilson-Davis’s recklessness include: (1) deliberately posting non-competitive quotes designed to avoid actual market-making obligations; (2) repeatedly entering markets following promotional campaigns with the explicit intent to accumulate and then cover short positions; (3) knowingly trading in securities with little to no intrinsic value; and (4) maintaining a trading approach that prioritized speculative profits over regulatory compliance. Kerrigone’s conduct was “an extreme departure from the standards of ordinary care, and which present[ed] a danger of misleading buyers or sellers that [was] either known to [Wilson-Davis] or is so obvious that the [firm] must have been aware of it.” *See Frank Burger*, Exchange Act Release No. 40125, 1998 SEC LEXIS 1274, at \*9 (June 25, 1998). In addition, as the Commission noted, “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 the firm “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 factual findings upheld by the Commission satisfy that Wilson-Davis acted recklessly. The facts show that Wilson-Davis engaged in a deliberate, calculated strategy—replicated identically across four penny stocks over a nine-month period—that exploited the market-maker exemption without meeting its requirements. Wilson-Davis, through Kerrigone, intentionally entered artificially inflated markets following promotional campaigns, accumulated substantial short positions without locating shares, and posted deliberately non-competitive quotes designed to avoid genuine market-making obligations (with quotes sometimes 250% away from inside market prices). Wilson-Davis’s systematic circumvention of Reg SHO’s core protections were motivated by financial gains and demonstrates reckless disregard for regulatory obligations, despite the firm’s own written supervisory procedures explicitly requiring locate compliance.

Applicants argue that the NAC Decision glosses over the firm’s millions in losses suffered at the hands of Kerrigone and his trading strategy. Br. at 10. They further counter that they firm did not act recklessly because:

(i) the short selling episodes were short-lived, taking place in only 13 trading days across four securities; (ii) totaled 122 trades, (iii) the only trader who used the strategy left in 2013; (iv) the firm has not engaged in short selling in over a decade; and (v) the Firm’s over \$4.2 million loss in LOTE, one of the stocks the trader sold short, created a powerful deterrent against repetition. Br. at 11.

However, the losses sustained occurred on the last of the stocks that Kerrigone traded (LOTE), and it does not strain credulity to conclude that Kerrigone’s illegal activity would have continued unabated had it not been for that loss—the fact that Kerrigone subsequently left and the lack of evidence of recurrence are irrelevant to the recklessness that existed when engaging in the misconduct at issue in this appeal. Moreover, the fact that Wilson-Davis lost money as a result of its illegal short-selling is not mitigating. Generally, collateral consequences arising from a

respondent's misconduct generally are not mitigating. *See, e.g., Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at \*35 (Feb. 20, 2014) (“But any collateral consequence that Houston may have suffered as a result of his misconduct or from the disciplinary proceeding that followed, such as the impact on his reputation, career, or finances, is not a mitigating factor.”). Indeed, that the firm lost money on the LOTE short sales shows only the serious consequence the firm experienced as a result of its reckless and illegal trading strategy, not that the misconduct was not reckless in the first place.

Applicants also maintain that its Reg SHO activity was “based on a good-faith belief that the trading fit within the bona fide market making exemption.” Br. at 10. This argument collapses under the weight of the record. A genuine good faith belief is incompatible with recklessness; one cannot simultaneously hold a reasonable conviction about compliance while departing so extremely from ordinary care standards that one must be aware of the resulting danger. The record demonstrates that Wilson-Davis's purported belief was not in fact held in good faith: Barkley explicitly testified that Kerrigone's strategy was a “directional bet” and speculative trading for profit, not market making; Barkley knew that as a general practice Kerrigone would not find locates; the firm observed that Kerrigone's quotes were vastly non-competitive, posted away from the market more than percent of the time, which directly contradicts the requirement that market makers continuously post competitive two-sided quotes; and despite this observable evidence, the firm took zero steps to verify the exemption's applicability. Moreover, the guidance and precedent on Reg SHO were clear at the time. Reg SHO had been in effect for seven years before Wilson-Davis's violations, the SEC had published extensive guidance on market maker requirements, and FINRA's decision in *e Dep't of Enf't v. Legacy Trading Co.*, Complaint No. 2005000879302, 2010 FINRA Discip. LEXIS 20 (FINRA

NAC Oct. 8, 2010) explicitly addressed the bona fide market maker exemption, all providing fair notice that posting non-competitive quotes and failing to locate shares violated the rule. Wilson-Davis's assertion of good faith belief amounts to claiming ignorance despite available information and deliberate failure to investigate—precisely the hallmarks of recklessness rather than good faith compliance.

These circumstances—prolonged violations, awareness of the regulatory requirements, and inaction in the face of obvious risk—demonstrate precisely the type of conscious disregard that constitutes recklessness under Commission precedent. The NAC's determination that Wilson-Davis acted recklessly rests on substantial factual evidence found by the Commission and should be affirmed.

3. The NAC Properly Considered and Rejected Wilson-Davis's Purported Mitigation Arguments

The NAC also properly considered and rejected Applicants' purported mitigating factors. The Applicants' argument that the NAC failed to follow the Commission's mandate by not addressing purported mitigating facts fundamentally misrepresents both the scope of the Commission Opinion, the proper analytical framework for evaluating regulatory sanctions in the context of documented, serious Reg SHO violations, and how the NAC did, in fact, consider, but reject, the purported mitigating factors. The Commission did not direct FINRA to disregard the severity of the violations or to treat post-misconduct developments as retroactive justifications for their violations. Rather, the Commission required FINRA to provide transparent analysis of how recklessness and other aggravating factors or mitigating factors influenced the fine amount—a requirement entirely distinct from the Applicants' demand that the NAC minimize documented violations based on the purported brevity of trading activity or the absence of subsequent recurrence. The remand mandate focused on ensuring that sanctions are remedial

and not punitive or otherwise excessive or oppressive, not on permitting Wilson-Davis to escape meaningful consequences through invocation of factors that, upon analysis, do not mitigate culpability for the violations.

The Applicants contend that the NAC ignored the firm's "post-misconduct improvements," the absence of customer harm, and the passage of time since the misconduct. Br. at 10-12. But these arguments mischaracterize both the remand directive and the NAC's careful reasoning. The Commission has long held that it will sustain FINRA sanctions when the adjudicator expressly considers mitigation but accords it limited weight considering the seriousness of the violations. *See, e.g., Saad v. SEC*, 873 F.3d 297, 302-03 (D.C. Cir. 2017); *Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at \*32 (Sept. 3, 2015). Nor was FINRA required to reduce the fine because the firm employed corrective measures. "[A]ny mitigative value of [Wilson-Davis's] subsequent corrective measures is outweighed by the serious, prolonged, and reckless nature of its misconduct." *Lek Securities Corp.*, Exchange Act Release No. 82981, 2018 SEC LEXIS 830, at \* 41 (Apr. 2, 2018). The NAC Decision expressly discussed the factors that Wilson-Davis argued in favor of mitigation but found those measures insufficient to outweigh the firm's extended pattern of un-located short sales. For example, Applicants argued 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 argued 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." Br. at 14. The NAC properly found these bases not mitigating, noting that purported corrective actions are not mitigating when taken after the

identification of misconduct. *See Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at \*55 (Aug. 12, 2016) (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”). Far from ignoring mitigation, the NAC properly determined that the aggravating factors predominated, a conclusion that is fully consistent with the record, Commission precedent, and the remedial goals of the Exchange Act.

Compliance with Reg SHO is crucial because it prevents abusive short-selling practices, specifically naked short selling, and promotes market integrity and timely settlement of trades. Its rules are designed to protect investors and ensure the stability and fairness of the market. The Commission should therefore affirm the \$180,000 fine as proportionate to the egregiousness of the firm’s Reg SHO violations and appropriate to protect investors and market integrity.

4. The Commission Should Reject Applicants’ Other Arguments for Reduced Reg SHO Sanctions

Applicants’ brief makes a host of arguments for reduced sanctions that go well beyond the scope of the remand instructions in the Commission Opinion. As such, the Commission should reject those arguments and affirm the fine imposed by the NAC.

a. FINRA Need Not Demonstrate Appropriate Sanctions to a Mathematical Certainty

The Applicants read into the Commission Opinion a standard for applying sanctions that is not articulated in the Opinion’s text or in line with existing case law and the Guidelines themselves.<sup>14</sup> Contrary to the Applicants’ assertions, the NAC was not required to adopt a

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<sup>14</sup> We note in its original 2019 decision, the NAC did not engage in a “tiered” analysis when imposing a fine on Wilson-Davis (stating that “while we decline to calculate the fine on a “per trade” basis as the Hearing Panel did, we do agree that a significant fine is warranted in

[Footnote continued on next page]

formulaic approach when considering the appropriate sanctions to impose for the firm's Reg SHO violations. Br. at 7-9. As noted above, the Guidelines for Reg SHO violations specifically contemplate scenarios where "[a]djudicators may consider deviating from the fine structure recommended in this guideline for first, second, or subsequent actions." *Guidelines*, at 65, n.1. Moreover, as a general principle it is well-established that securities regulators do not impose sanctions mechanically. See *Kornman v. SEC*, 592 F.3d 173, 186 (D.C. Cir. 2010) (ruling that "the Commission is not required to follow any mechanistic formula in determining an appropriate sanction"); *PAZ Sec II*, 566 F.3d at 1175-76 (confirming that qualitative reasoning satisfies the Exchange Act's reasoned explanation and reiterating that the Commission's "broad discretion in fashioning sanctions in the public interest cannot be strictly cabined according to some mechanical formula").<sup>15</sup> While the number of instances of Wilson-Davis's misconduct is

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excess of the recommended ranges"), and the Applicants did not argue in their appeal brief in the prior appeal to the Commission that the NAC erred by failing to explain whether it was treating their Reg SHO violations as a first, second, or subsequent action, thus waiving the argument in the instant appeal. Additionally, Applicants' brief to the NAC on remand focused their arguments on batching of violations not on the tiered aspects of the Guideline. Because this issue was not before the Commission during the initial appeal, nor was it part of the remand directives in its opinion, the Applicants cannot rely on it now to attempt to nullify the sanctions.

<sup>15</sup> The Applicants misconstrue the Commission's remand directives to create a standard for the NAC's sanctions analysis that is unsupported. For example, contrary to Applicants' assertion, nothing in the Commission Opinion directed the NAC, when assessing sanctions on remand for the firm's Reg SHO violations, to "(i) identify the relevant Sanctions Guidelines tier applicable to this case (i.e., first, second, or subsequent action); (ii) state a baseline within the specified sanctions range; (iii) analyze aggravating and mitigating factors to quantify or otherwise explain the impact of recklessness (if any) on the sanction; and (iv) show why the specific number selected is remedial and tailored to reduce the risk of future violations." Br. at 6. This is made plain by the fact that, unlike this brief which quotes the Commission's directives verbatim, the Applicants interpret the Commission's directives in a manner that exceeds a plain reading of the order.

relevant—and here it was 122 Reg SHO violations—that is only one of more than a dozen factors that the Guidelines direct adjudicators to consider. As noted above, the NAC relied not only on the specific guideline for Reg SHO violations but also on the Guidelines’ multiple Principal Considerations in Determining Sanctions, which should be considered by the adjudicator in for any relevant misconduct.

The Guidelines are not formulaic or mathematically precise because they are designed to serve as principles, not rigid rules. The Guidelines expressly emphasize flexibility: adjudicators must consider the unique facts and circumstances of each case, weigh the presence and severity of aggravating and mitigating factors, and tailor sanctions to achieve FINRA’s remedial goals of investor protection and market integrity. They provide recommended ranges to promote consistency, but they do not mandate specific outcomes or prescribe a mechanical calculation. Instead, they require an individualized, fact-sensitive analysis that allows FINRA to impose sanctions proportionate to the respondent’s misconduct. As discussed above, the NAC analyzed the relevant factors and the facts and circumstances of this case to impose a well-reasoned and well-articulated remedial sanction for Applicants’ reckless misconduct that was consistent with the Guidelines’ direction on when to consider imposing a fine above the recommended ranges.

b. Applicants’ Attempts to Compare their Misconduct with Other Firms’ Misconduct is Unpersuasive

Wilson-Davis also contends that the NAC’s fine is punitive considering its decision in *Legacy Trading Co.* “[T]he appropriateness[, however,] of a sanction depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action taken in other proceedings.” *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at \*72 (July 2, 2013). Nonetheless, according to the Applicants, the NAC in *Legacy*, “found 2,192 short selling trades violated Reg SHO (coupled with aggravators such as

willfulness and false statements) yet imposed a much lower fine of \$10,000 plus disgorgement.” Br. at 13. The Applicants’ analysis of the NAC’s decision in *Legacy* is misleading.<sup>16</sup> Most importantly, the NAC in that case noted that, in addition to the fine and disgorgement imposed, it would have also imposed an “expulsion and bar” for the short-selling violations, had the firm had not already been expelled and the trader not already been barred for other misconduct. *Legacy Trading Co.*, 2010 FINRA Discip. LEXIS 20 *Id.* at \*49, n.41. Therefore, the appropriate sanction in *Legacy* was not lower, but in fact was substantially higher, and nothing about the NAC’s sanctions in *Legacy* suggest that the NAC’s \$180,000 fine against Wilson-Davis is excessive, oppressive, or punitive.

c. Applicants Purported Current Low Risk Factors Do Not Mitigate its Prior Misconduct

The Applicants assert that the record demonstrates that they are a “minimal present risk” and that a large fine is therefore unnecessary to “protect the public.” Br. at 13-14. The Applicants argue that because the firm voluntarily ceased short-selling activities, has not engaged in similar conduct for twelve years, and experienced massive financial losses, Wilson-Davis poses no meaningful risk of future violations and therefore large sanctions are unwarranted. However, in addition to the fact that sanctions are imposed for the misconduct the firm actually engaged in, Wilson-Davis remains a FINRA member, and ensuring its future compliance serves investor protection and is not punitive. *See e.g., Wedbush Sec.*, 2016 SEC LEXIS 2794, at \*45 (affirming that the fine imposed by FINRA “would also serve the public

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<sup>16</sup> Applicants also fail to highlight that the NAC “fine[d] respondents a total of \$907,035.01, jointly and severally, plus interest, for their short sale violations.” *Id.* at \*49; *accord id.* at \*47. (“affirm[ing] the Hearing Panel’s imposition of a \$907,035.01 fine . . . for the[] short-selling violations”).

interest by encouraging future compliance with regulatory reporting requirements by the Firm and other industry participants.”). Moreover, a member firm “should not be rewarded for acting in accordance with [its] duties” as a member of the securities industry. *Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 SEC LEXIS 819, at \*66 (Apr. 11, 2008). Finally, any potential mitigative effect of the firm’s decision to cease short-selling is outweighed by the firm’s continued failure to take responsibility for its misconduct. The firm’s attempts to reframe its recklessness as simple error, to claim good faith where the record shows none, and to minimize the potential harm from its Reg SHO violations reveal that Wilson-Davis has not internalized the regulatory obligation of Reg SHO compliance. A respondent’s continued failure to accept responsibility and acknowledge wrongdoing can be probative of the likelihood of recurrence, because it suggests that the underlying compliance culture remains unchanged and that the firm views regulatory constraints as obstacles to contest rather than rules to embrace. *See Jason Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at \*22 (Dec. 22, 2008) (finding that applicant’s “failure to take responsibility for his conduct makes recurrence more likely”); *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at \*44 (Nov. 8, 2006) (finding aggravating for purposes of sanctions that applicant repeatedly blamed others for his violative conduct), *aff’d*, 304 F. App’x 883 (D.C. Cir. 2008); *Robert Tretiak*, 56 S.E.C. 209, 234 (2003)(finding that applicant's argument that his misconduct was excusable “indicate[s] to us that he fails to appreciate the seriousness of his misconduct and his own responsibility, as a securities principal and industry participant, for his compliance with essential regulatory requirements that serve to protect public investors.”).

Applicants also contend that the NAC “leans on language stressing the importance of general deterrence” and cannot point to any evidence that the firm re-offended, making the

sanctions punitive. Br. at 14. They rely on *Kokesh v. SEC*, 137 S. Ct. 1635, 1638 (2017), to support their argument that the sanction is strictly punitive. See Br. at 5. However, Applicants’ reliance on *Kokesh* to characterize the NAC’s deterrence rationale as impermissibly punitive is misplaced. As an initial matter, “*Kokesh* has no relevance to this appeal” and “is inapplicable to FINRA’s imposition of sanctions . . . .” See *Dep’t of Enf’t v. Newport Coast Sec., Inc.*, Complaint No. 2012030564701, 2018 FINRA Discip. LEXIS 14, at \*201 n.98 (FINRA NAC May 23, 2018), *aff’d*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911 (Apr. 3, 2020) (holding that *Kokesh* “considered the narrow question of whether the five-year statute of limitations in 28 U.S.C. § 2462 applies to Commission disgorgement actions filed in federal district courts” and “leaves intact Section 15A of the Exchange Act, which mandates FINRA to have rules allowing it to impose bars, suspensions, fines, and other fitting sanctions in its disciplinary proceedings”).

Moreover, the NAC properly considered general deterrence as one component of a remedial sanction.<sup>17</sup> The NAC’s fine serves multiple complementary remedial purposes: it specifically incentivizes Wilson-Davis’s own future compliance with Reg SHO, reduces the present risk that the firm will repeat such conduct by imposing a meaningful cost, and simultaneously deters similarly situated firms from engaging in comparable misconduct—all of which are legitimate regulatory objectives under General Principle No. 1 of the *Guidelines*, which explicitly identifies protecting the public and decreasing recurrence as the disciplinary process’s dual purposes. The fact that a properly remedial sanction also carries a deterrent effect is not a defect making it punitive—it is an ancillary benefit of appropriate enforcement of

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<sup>17</sup> Federal courts of appeals have confirmed that general deterrence “may be considered as part of the overall remedial inquiry.” *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005).

FINRA rules and federal securities laws. The sanction imposed by the NAC is calibrated to this firm's circumstances and directly addresses Wilson-Davis's demonstrated recklessness.

In sum, the Commission should affirm the fine imposed for Wilson-Davis's Reg SHO violations.

**B. The Fine Imposed for Wilson-Davis's Supervisory and AML Violations is Supported by the Record**

Wilson-Davis's systemic supervisory and AML failures represent a comprehensive breakdown in institutional compliance infrastructure that directly endangered market integrity and investor protection. From 2011 through 2014, the firm failed fundamentally to establish, implement, or enforce reasonable supervisory systems and AML procedures. These failures were not isolated lapses but rather reflected a pervasive culture of regulatory indifference spanning multiple critical compliance domains: the firm failed to supervise for compliance with Reg SHO; it maintained no clear supervisory chain of command, leaving registered persons without identifiable supervisors; failed to timely implement heightened supervision despite explicit regulatory triggers; delegated instant messaging review to an unregistered individual without meaningful oversight; and established generic, untailored AML procedures that could not possibly detect the market manipulation and suspicious trading patterns that characterized the firm's penny-stock business.

For systemic supervisory failures by a member firm, the Guidelines recommend a fine of \$10,000 to \$310,000 or, if "aggravating factors predominate," a higher fine and a suspension of the firm with respect to any relevant activities or functions for up to two years or expulsion. *Guidelines*, at 105-06. The NAC's imposition of a \$310,000 fine for these violations on remand, combined with the independent consultant requirement affirmed by the Commission, represent a measured and remedial response calibrated to address the breadth of Wilson-Davis's institutional

failures, protect investors from the ongoing risks posed by a firm demonstrating such pervasive disregard for its core compliance obligations, and deter similar misconduct throughout the industry.

1. The Presence of Aggravating Factors Warrants a Sanction on the Higher End of the Guidelines

Wilson-Davis's systemic supervisory failures present a compelling case of troubling regulatory misconduct characterized by pervasive aggravating factors and a conspicuous absence of meaningful mitigating circumstances. The Commission's findings of violations and the underlying facts supporting those violations demonstrate systemic and widespread supervisory deficiencies that persisted over an extended period, directly satisfying the criteria for enhanced sanctions under the Guidelines for "Systemic Supervisory Failures." *Guidelines*, at 105-06.

Wilson-Davis's supervisory lapses directly allowed the 122 Reg SHO violations to occur and escape detection for over a year—its failure to monitor Kerrigone's quotes and trading patterns meant that non-competitive quotations and massive short positions went unchallenged, and the firm's generic AML procedures allowed suspicious trading in VHMC stock to go uninvestigated. *Guidelines*, at 105 (Principal Consideration No. 1). The firm failed to respond to multiple red flags: it observed Kerrigone's non-competitive quotes yet took no action, it became aware of massive short positions yet never attempted to locate shares, it knew Kerrigone engaged in speculative trading yet continued assuming the bona fide market maker exemption applied, it ignored FINRA's regulatory complaint against Carlson for over a year before implementing an inadequate heightened supervision plan, and it failed to tailor its AML procedures to address the obvious risks inherent in penny stock trading and liquidation. *Id.* (Principal Consideration No. 2). Wilson-Davis failed to appropriately allocate its resources. *Id.* (Principal Consideration No. 3). Proprietary trading generated substantial revenue for the firm

and Kerrigone was the biggest producer, yet despite short-selling being central to profitability, the firm devoted minimal supervisory resources to verifying Reg SHO compliance or monitoring quote competitiveness. The number and dollar value of the transactions not adequately supervised is also aggravating. *Id.* (Principal Consideration No. 5). The 122 Reg SHO transactions involved massive share volumes, and VHMC trading involved approximately 90% of the total shares over an eight-month period. Finally, the quality of the firm’s supervisory controls was fundamentally deficient—written procedures contained no methodology for determining bona fide market maker status, head count lists were erroneous and poorly circulated, heightened supervision procedures were not timely or properly implemented, and AML red flags were not tailored to the firm’s business model—and the supervisors systematically failed to implement even the minimal controls that existed, demonstrating that aggravating factors predominate across every dimension of the Guidelines framework. *Guidelines*, at 106 (Principal Consideration No. 8). Furthermore, Wilson-Davis has an extensive disciplinary history involving prior supervisory failures.<sup>18</sup> From 2010 to 2016, Wilson-Davis settled with FINRA five separate times for deficient supervisory processes and procedures,

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<sup>18</sup> Applicants argue that its prior disciplinary history should not be considered aggravating because its prior disciplinary actions are too dissimilar, and the NAC did not engage in a “citation-specific analysis.” Br. at 21. An initial matter, Applicants did not argue in its original appeal to the Commission that its disciplinary history, one that the NAC found aggravating both pre and post remand, was irrelevant. Notwithstanding this, the NAC Decision provides a summary of one of the disciplinary actions, faulting the firm for multiple supervisory breakdowns—similar to the myriad supervisory failures at issue here. Moreover, Applicants implicitly concede that the other settlements were related enough to the violations at issue here because they try to piggyback on corrective measures taken for other violations to mitigate their misconduct here: “[t]he Firm retained two independent consultants who successfully performed AML and supervision undertakings *because of other regulatory settlements from the general time period.*” Br. at 14 (emphasis added).

establishing a pattern of repeated regulatory failures that directly undermine any claim of inadvertent compliance lapses.

The absence of meaningful mitigating factors compounds this analysis. There is no evidence that the firm took proactive steps to remediate its supervisory deficiencies before FINRA's investigation commenced. While the firm argues that subsequent corrective actions demonstrate the firm's compliance remediation (Br. at 20-21), these post-misconduct improvements cannot serve as mitigating factors when the violations themselves stemmed from the firm's systematic disregard for established compliance obligations, and when the firm only implemented changes after regulatory intervention forced the issue.<sup>19</sup> *See Wedbush Sec.*, 2016 SEC LEXIS 2794, at \*47 ("Applicants point to no corrective measures taken before regulators began notifying the Firm of their concerns, so the record does not support consideration of efforts to improve regulatory reporting as a mitigating factor"). Wilson-Davis's supervisory record thus presents an unusually clear case of aggravating factors—systemic, widespread, repeated, and enabling of other violations—standing in stark contrast to any meaningful mitigating circumstances.

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<sup>19</sup> Wilson-Davis continues to hold itself out as being a compliant firm after this disciplinary action. *See e.g.*, Br. at 20-21. This is not the case. If the firm is going to invoke its alleged compliance improvements as mitigating, we respectfully ask the Commission to take official notice of the firm's BrokerCheck report, which reflects additional supervisory-related disciplinary history after the misconduct at issue here, indicating that the firm has not in fact taken its supervisory obligations seriously. *See Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at \*1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records pursuant to Rule of Practice 323, 17 C.F.R. § 201.323).

2. Applicants' Arguments for Additional Reduction in Sanctions Fail

The Applicants argue that the NAC ignored the Commission's directive to consider the "appropriate fine given the firm's size and the aggregate fines imposed." Br. at 15-16. The NAC, however, considered and appropriately rejected Wilson-Davis's arguments regarding firm size and aggregate financial burden. The NAC expressly found that the substantial reduction in the sanctions imposed on remand—by more than half and within the range recommended by the Guidelines—rendered the Applicants' arguments in favor of additional mitigation moot. Moreover, the NAC found that Wilson-Davis did not carry its burden of proof to substantiate mitigation related to financial burden. There is no evidence of the firm's current net capital, as the firm did not seek to supplement the record. In analogous circumstances, the Commission has rejected a firm's attempt to rely on years-old data about its finances rather than seeking to adduce "evidence . . . of [its] current financial circumstances." See *ACAP Fin., Inc.*, Exchange Act Release No. 70046, 2013 SEC LEXIS 2156, at \*43–44 (July 26, 2013) (discussing an argument that the respondent lacked the ability to pay monetary sanctions).

Applicants also attempt to compare the fines here with those imposed on larger financial institutions for AML violations in cases in which sanctions were negotiated via settlements. Br. at 18. It is well-established, however, that comparing litigated decisions like this one with settlements is "inappropriate" and distinguishable. See *Dep't of Enf't v. C.L. King & Assocs.*, Complaint No. 2014040476901, 2019 FINRA Discip. LEXIS 43, at \*136–37 (FINRA NAC Oct. 2, 2019) (citing *Kent Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at \*33 (Feb. 20, 2014)). In addition, the \$310,000 fine imposed on Wilson-Davis for its widespread supervisory failures reflects the firm's five distinct systemic supervisory violations—regarding

Reg SHO, AML, instant messaging, heightened supervision, and assignments of supervisory responsibility—which was not the case in all the settlements upon which Wilson-Davis relies.

Applicants also contend that the NAC was “obligated to explain why, given the structural remedy that the Commission imposed, a maximum supervisory/AML fine remained necessary to protect investors.” Br. at 18. While not entirely clear, we interpret this argument to mean that the Applicants are seeking a lower fine because they feel that the Commission’s requirement that Wilson-Davis retain an independent consultant entitles them to one. First, the NAC, like the Commission, is not obligated to explain why it did not impose the lowest possible sanction, only that it explains why the sanction imposed is appropriate to protect investors, which it has:

We require the Commission to explain its reasoning in order to ensure it reviewed the sanction with “due regard for the public interest and the protection of investors.” 15 U.S.C. § 78s(e)(2). We do not limit the discretion of the Commission to choose an appropriate sanction so long as its choice meets the statutory requirements that a sanction be remedial and not “excessive or oppressive.” *Id.* Accordingly, we will not require the Commission to choose the least onerous of the sanctions meeting those requirements.

*PAZ Sec. II*, 566 F.3d at 1176.

Second, the Applicants’ reliance on the NAC’s decision in *C.L. King* as creating a mandate that Wilson-Davis’s sanction be lowered because the NAC found it appropriate to do so in that instance is mistaken. While *C.L. King* involved the Guidelines for systemic supervisory failures, the NAC applied that guideline only to AML violations, not—as here—to AML violations plus four other distinct supervisory violations, which makes the case against Wilson-Davis far more serious. *See* 2019 FINRA Discip. LEXIS 43, at \*126–27.<sup>20</sup> Also, *C.L. King* involved an older version of the Guidelines, which recommended lower fine ranges than the

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<sup>20</sup> *C.L. King* also involved the firm’s failure to establish and maintain a supervisory system, but that violation was sanctioned separately.

2019 version of the Guidelines applied to Wilson-Davis’s misconduct. *See id.* at \*127 (recommending a maximum fine of \$292,000—the fine ultimately imposed by the NAC). Ironically, the respondents in *C.L. King* complained—just like Wilson-Davis does—that their sanctions were not “in line” with other cases, but the NAC summarily dismissed that argument, noting that “[i]t is well established” that sanctions “depend[] on facts and circumstances,” making precise comparisons among cases unhelpful. *Id.* at \*136.

3. The NAC Did Not Impermissibly Rely on the Same Underlying Facts

Applicants also claim that the NAC “impermissibly relied” on the same facts underlying the Regulation SHO violations to justify the AML and supervisory sanctions is incorrect. Br. at 19. The NAC clearly distinguished the bases for sanctioning the two sets of violations. The NAC’s discussion of the firm’s supervisory and AML failures focused not on the short-sale executions themselves, but on independent structural deficiencies—including the absence of written procedures addressing locate obligations, the firm’s failure to investigate or escalate red-flag trading patterns, and its lack of an effective AML program capable of identifying potentially manipulative activity. These shortcomings persisted regardless of the specific Reg SHO trades and demonstrated a broader failure of oversight that exposed the market to risk. By distinguishing the firm’s control failures from its trading violations, the NAC properly ensured that the supervisory and AML sanctions addressed the firm’s broader compliance weaknesses and were not duplicative of the Reg SHO penalty. *See Newport Coast Sec., Inc.*, 2018 FINRA Discip. LEXIS 14, at \*228 (upholding the sanctions imposed on the firm for excessive trading and churning customer accounts as well as the separate sanction for the firm’s failure to supervise reasonably those registered representatives who excessively traded and churned customer accounts.)

**C. The Sanctions Imposed for Byron Barkley’s Systemic Supervisory Violations are Supported by the Record**

The Guidelines for Barkley’s Systemic Supervisory Failures recommend a fine of \$10,000 to \$77,000 for responsible individuals. *Guidelines*, at 105. When aggravating factors predominate, the Guidelines direct the adjudicator to consider a higher fine and a suspension between 10 business days and two years. *Id.* The fine imposed on Barkley on remand—\$25,000—along with a six-month suspension in his principal and supervisory capacities (with the requirement that he requalify after the completion of his suspension) are appropriately remedial given his supervisory failings.

Barkley’s supervisory failures warranted meaningful sanctions that are appropriately calibrated to address his personal responsibility for the documented Reg SHO compliance breakdown and to ensure investor protection. As vice president and head of trading, Barkley bore direct responsibility for supervising Kerrigone’s trading activities and ensuring that market-making activities complied with Regulation SHO’s locate requirements. While Barkley may have not acted intentionally, the findings that the Commission upheld unambiguously establishes that Barkley abdicated his supervisory responsibility through systematic gross negligence. Despite Kerrigone’s obvious trading pattern—accumulating substantial short positions, posting non-competitive quotes designed to deter actual market participation, and then covering positions as prices declined—Barkley failed to scrutinize Kerrigone’s market-maker applications, failed to review quotes or exception reports, and failed to investigate the red flags that should have alerted any diligent supervisor to the likelihood of Reg SHO violations. *Guidelines*, at 105 (Principal Consideration Nos. 1, 2, 8). Barkley’s testimony revealing that he assumed all of Kerrigone’s short selling was exempt from the locate requirement and took no steps to determine whether activity in the stocks was bona-fide market making demonstrates not merely inadvertent

oversight but gross negligence in the exercise of core supervisory responsibilities. *Id.*, at 8 (Principal Consideration No. 13). Barkley’s dereliction in his supervisory responsibility demonstrates indifference to regulatory obligations and creates precisely the type of institutional vulnerability that Reg SHO is designed to prevent.

The NAC’s determination that Barkley’s supervisory lapses were egregious is fully supported by the Commission findings, which reveal a supervisor with real-time monitoring capabilities who deliberately chose not to exercise them, who approved market-maker applications without meaningful evaluation, and who failed to detect or deter obvious patterns of violative conduct.

Contrary to the Applicants’ claims, the NAC in fact did specifically explain “why the chosen sanctions, considered together, are necessary to protect the public, and are remedial and not punitive or otherwise excessive or oppressive.” Br. at 22. Again, the Applicants are improperly attempting to impose on FINRA a requirement that all sanctions imposed be articulated to a quantitative certainty.<sup>21</sup> The six-month principal capacity suspension and requalification requirement ensure that Barkley understands the gravity of supervisory responsibility and cannot resume principal-level supervisory roles without demonstrating comprehension of those obligations through examination. As noted in the Commission Opinion, these sanctions are complementary and remedial: the suspension provides opportunity for reflection and behavioral modification, while requalification ensures that Barkley has

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<sup>21</sup> For example, the Applicants argue that the NAC did not “identify facts that make six months [suspension as a principal], as opposed to a shorter time, necessary to protect investors.” Br. at 23. However, as noted above, FINRA is not required to explain why a shorter sanction was not imposed, only that the one imposed is appropriately remedial, which it did.

systematically reviewed the regulatory framework governing supervisory responsibility and can articulate his understanding of compliance obligations. In addition, the fine aims to protect the public interest by emphasizing to Barkley the importance of compliance.<sup>22</sup> *See Southeast Inv., N.C., Inc.*, Exchange Act Release No. 99118, 2023 SEC LEXIS 3460, at \*36-37 (Dec. 7, 2023) (explaining that the fines imposed “will impress upon Applicants and other firms and their associated persons the importance of complying with these requirements in the future and thereby help to secure that compliance”).

The Applicants also argue that Barkley warrants reduced sanctions based on his “winding down” of his career, current service of a “small number of clients as a registered representative,” and not “acting as a supervisor of market making or AML-implicated activities.” Br. at 24. This argument illustrates a fundamental misunderstanding of both the regulatory framework for individual sanctions and the proper analysis of the present risk Barkley poses. Barkley’s reduced current supervisory responsibilities neither eliminate nor substantially reduce the need for meaningful sanctions addressing his documented supervisory failures. Barkley’s gross negligence directly enabled 122 Reg SHO violations, contributing to a multi-million-dollar loss that Wilson-Davis ultimately absorbed. *Guidelines*, at 105 (Principal Consideration Nos. 1, 5). The Applicants’ argument that a reduced or minimal sanction is appropriate because Barkley is no longer actively supervising market-making activities inverts the proper regulatory analysis—the sanctions are not designed based on current employment status but on the severity of Barkley’s supervisory violations and the need to ensure meaningful sanctions for his supervisory

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<sup>22</sup> Applicants maintain that a \$10,000 fine and suspension as a principal only until he requalifies are more appropriate sanctions for Barkley. Br. at 24. However, Barkley’s gross negligence, coupled with the presence of aggravating factors and the lack of mitigating factors warrant a sanction that is above the minimum recommended by the Guidelines.

failures. As the Guidelines note, “[s]anctions should be more than a cost of doing business. Sanctions should be a meaningful deterrent and *reflect the seriousness of the misconduct at issue.*” *Guidelines*, at 2 (emphasis added). By abdicating his supervisory responsibility, Barkley allowed illegal short-selling to go unchecked. Barkley’s egregious supervisory lapses warrant the suspension and the fine imposed by the NAC.

**D. Wilson-Davis Waived All Constitutional Arguments**

The Applicants’ assumption that they may “reserve” constitutional arguments for some later stage of review is unfounded. The Applicants did not raise any constitutional claims before the NAC and therefore waived them. The Commission has long held that parties must raise constitutional challenges—and all other objections—to FINRA disciplinary actions before the Commission or risk forfeiture. *See Robbi J. Jones and Kipling Jones & Co., Ltd.*, Exchange Release No. 104273, 2025 SEC LEXIS 3023, at \*37 (Nov. 28, 2025) (“As a threshold matter, Applicants forfeited these arguments by failing to raise them before FINRA.”). “Challenges premised on constitutional claims are not exempt from ordinary principles of waiver and forfeiture.” *Kielczewski*, 2025 SEC LEXIS 3108, at \*30; *see, e.g., Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 622 (2d Cir. 2004) (holding that “general administrative exhaustion principles apply to SROs”). The Applicants cannot evade this settled rule by purporting to “reserve” constitutional issues without identifying them with any specificity or presenting any developed argument. *See Baeco Plastics v. Inacomp Fin. Servs.*, No. 94-3391, 1995 U.S. App. LEXIS 6527, at \*2 (7th Cir. Mar. 29, 1995) (“A litigant may not throw down a gauntlet in the opening brief and reserve its argument for the

reply brief.”). For these considerable reasons, the Commission should decline to consider the Applicants’ constitutional arguments, which in any event lack merit.<sup>23</sup>

## V. CONCLUSION

The record before the Commission amply supports the sanctions imposed on the Applicants for their Regulation SHO violations and violations of FINRA’s supervision and AML rules. The NAC correctly considered the Commission’s findings of violations and remand directives, the record before it, the Guidelines, and all aggravating and mitigating factors, and assessed sanctions that are commensurate with the severity of the violations and protect the public interest. Thus, the Commission should sustain FINRA’s sanctions in all respects and dismiss the application for review.

Respectfully submitted,

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December 24, 2025

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<sup>23</sup> Even had the Applicants not forfeited their constitutional arguments, the proposition that FINRA disciplinary actions violate the Seventh Amendment, Br. at 25 (citing *SEC v. Jarkesy*, 603 U.S. 109 (2024)), is of no account. As the Commission recently reaffirmed, “courts have held that the requirements of constitutional . . . jury trial rights do not apply to FINRA . . . , because it is not a state actor.” *Kielczewski*, 2025 SEC LEXIS 3108, at \*34 & n.57 (collecting cases).

**CERTIFICATE OF SERVICE**

I, Colleen Durbin, certify that on this 24th day of December 2025, I caused FINRA's Brief in Opposition to the Application for Review In the Matter of the Application of Wilson-Davis & Co., Inc. and Byron B. Barkley, Administrative Proceeding File No. 3-22506, to be served through the SEC's eFAP system on:

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I further certify that, on this date, I caused a copy of FINRA's Brief in Opposition in the foregoing matter to be served by electronic service on:

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**CERTIFICATE OF COMPLIANCE**

I, Colleen Durbin, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

I, Colleen Durbin, further certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition not to exceed 14,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,312 words.

*/s/Colleen Durbin*

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December 24, 2025