SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 63312 / November 12, 2010

Admin. Proc. File No. 3-13750

FINRA Case # E0720050172 01

In the Matter of the Application of

JOHN B. BUSACCA, III CRD# 2302780
2500 Treymore Drive
Orlando, FL 32825

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDING

Failure to Supervise

Failure to Comply with Membership and Registration Requirements

Conduct Inconsistent with Just and Equitable Principles of Trade

Former president of member firm of registered securities association failed to establish and maintain a supervisory system reasonably designed to achieve compliance with applicable securities laws, regulations, and association rules and failed to comply with membership and registration requirements. *Held*, association's findings of violations and sanctions imposed *sustained*.

APPEARANCES:

John B. Busacca, pro se.

Marc Menchel, *Alan Lawhead*, *Carla Carloni*, and *Andrew J. Love*, for Financial Industry Regulatory Authority, Inc.

Appeal filed: January 15, 2010
Last brief received: April 1, 2010

I.

John B. Busacca, III, former president and registered principal of North American Clearing, Inc. ("North American" or the "Firm"), formerly a FINRA member firm,[1] appeals from FINRA disciplinary action. FINRA found that Busacca violated NASD Conduct Rules 3010 and 2110 by failing to exercise reasonable supervision over North American's back-office operations from March 2004, when he became Firm president, through early 2005. FINRA further found that Busacca violated NASD Membership and Registration Rule 1022(a) and Rule 2110 by permitting the Firm to employ an unregistered chief compliance officer.[2] FINRA suspended Busacca for six months from serving as a principal, fined him a total of $30,000, and assessed $2,078.60 in costs. We base our findings on an independent review of the record.

II.

This case primarily involves Busacca's discharge of his supervisory responsibilities as North American's president following the Firm's adoption, in February 2004, of a new computer software system to maintain its back-office operations. It is undisputed that the Firm's software conversion caused widespread operational breakdowns throughout 2004 and early 2005, resulting in an influx of customer complaints. Its is also undisputed that a March 2005 FINRA examination further identified, during this time period, numerous instances of noncompliance with various customer protection, recordkeeping, reporting, and credit extension requirements.

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[1] On July 26, 2007, the Commission approved a proposed rule change NASD filed to amend its Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of its member firm regulatory functions with NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because this disciplinary action was instituted after consolidation, references to FINRA herein include references to NASD.

[2] Following the consolidation of NASD and NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* Exchange Act Rel. No. 58643 (Sept. 25, 2008), 73 Fed. Reg. 57,174 (Oct. 1, 2008). Because the conduct at issue took place before the consolidated rules took effect, NASD conduct rules apply.

NASD Conduct Rule 3010 requires members to "establish and maintain" a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable NASD Rules." NASD Membership and Registration Rule 1022(a) requires members to register their chief compliance officers after they have passed the appropriate qualification examination. NASD Conduct Rule 2110 requires members to "observe high standards of commercial honor and just and equitable principles of trade."

Although Busacca did not become president until shortly after the software conversion, he was involved in the selection of the software, knew, at the time he became president, of the resulting operational problems and customer complaints, and understood his duties as president included supervision of the Firm's operations. Busacca's testimony, however, showed that, during the period at issue, he admittedly focused his efforts on marketing the Firm's services to new clients rather than on the Firm's operational deficiencies. Evidence further indicated that Busacca's selling efforts, in fact, compounded operational problems by adding more client accounts to an already overwhelmed system.

* * * *

North American was a Florida-based clearing broker[3] that, in addition to clearing and executing trades, conducted back-office functions on behalf of introducing broker-dealers.[4] Until late 2003, the Firm, then known as Advantage Trading Group, Inc. ("Advantage"), was a wholly owned subsidiary of Empire Financial Holding Company ("Empire"). In May 2003, a dispute arose between Empire's co-owners, Richard Goble and Kevin Gagne, that resulted in Empire's removal of Goble as an officer and employee of Empire and its affiliates. While Goble retained his ownership interest, he sued to dissolve Empire.[5] In November 2003, Goble and Gagne settled their dispute by, among other things, spinning off Advantage to form an independent clearing firm (later renamed North American).[6] Goble became the Firm's sole owner and initially served as its president.

A. Busacca's Role at the Firm

Busacca entered the securities industry in 1992 and has served in various compliance and operations capacities for several FINRA member firms. He joined North American's predecessor

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[3] "The services provided by clearing firms often include maintaining books and records; receipt, custody and delivery of customer securities and funds; extending credit to finance customer transactions in margin accounts; and in many cases, executing transactions on exchanges or on over-the-counter markets." *Richard Harriton*, Exchange Act Rel. No. 42707 (Apr. 20, 2000), 72 SEC Docket 626, 631 (settled order).

[4] "An introducing or correspondent broker deals directly with the public and originates customer accounts." *Del Mar Fin. Serv., Inc.*, 56 S.E.C. 1332, 1336 n.5 (2003) (citing *Katz v. Fin. Clearing & Serv. Corp.*, 794 F. Supp. 88, 90 (S.D.N.Y. 1992)).

[5] Pursuant to Commission Rule of Practice 323, 17 C.F.R. § 201.323, we take official notice of Empire's filings with the Commission, which are publicly available on the Commission's Web site. Empire is now known as Jesup & Lamont, Inc.

[6] The Firm changed its name on July 8, 2004. Unless indicated otherwise, noted references to North American and the Firm include references to Advantage.

firm in January 2003 as a salesperson, selling clearing services to introducing broker-dealers, and remained with the Firm after the spin-off as its primary salesperson. Busacca described the Firm's transition from its previous ownership as "very acrimonious."[7] According to Busacca, Empire left the Firm with insufficient operating capital and transferred its nearly 20,000 customer accounts with the Firm to another clearing broker.[8]

Busacca's role at the Firm expanded after the spin-off. Although he formally remained a salesperson during the first few months, Busacca had increasing involvement in the Firm's clearing operations beginning at the "end of [20]03," according to the Firm's Sandra Farr, who held the title "operations manager." Farr testified, for example, that, "if a correspondent [broker-dealer] would call up and say that they had a problem with something, that I would deny a transaction or something . . . [t]hey would talk to [Busacca], and if . . . he deemed it should be cleared to go, we would actually send it." Busacca explained that because of his operations experience, if operations staff asked him "for decisions . . . [he]'d give them all [his] expert advice."

Moreover, although the Firm did not formally designate Busacca as its president until March 2004, evidence indicated that he had agreed to assume that role as soon as the Firm's agreement with Empire received regulatory approval. As Goble testified, "it was agreed when I would take over 100%" ownership of North American "that [Busacca] would become president." While Busacca became increasingly involved in supervisory activities, his role as the Firm's primary or only salesperson nonetheless remained paramount, particularly in light of the Firm's early financial struggles following its spin-off. Busacca described himself as the Firm's "breadwinner [with] every client that was brought in [being] mine."

B. Computer Software Problems

North American used a back-office computer software program to assist in its preparation of required books and records and compliance with regulatory requirements. In December 2003, primarily as a cost-cutting measure, Goble decided against renewing the Firm's licensing agreement with its existing back-office software provider, ADP/SIS. While the ADP/SIS software was the most commonly used system in the brokerage industry and had worked well for the Firm when it was part of Empire, it cost the Firm approximately $50,000 per month to maintain.

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[7] As recounted in Busacca's answer, Empire "was still in the building. Doors were locked, power was turned off and lines were cut on almost a daily basis. The Sheriff[']s department made no less than half a dozen visits to the building over the next several months."

[8] Busacca stated that Empire, pursuant to the settlement agreement with Goble, "was supposed to leave [North American] with net capital of 1 million dollars to operate with; instead . . . they left approximately [$]300,000 in net capital."

According to Busacca, Goble claimed at the time that "[t]here was no way [the Firm] could survive" if it continued to use ADP/SIS. Goble directed that, unless North American found an alternative (*i.e.*, less costly) system by the end of its contract with ADP/SIS on January 28, 2004, the Firm would "go manual" -- that is, the Firm would manually input its trading data by "put[ting] them [in]to an Excel spreadsheet." Busacca stated that Goble's proposal upset Firm personnel, some of whom "walked out the door and said we can't do it, we can't go manual and we're not going to do it."[9]

Busacca worked with Goble to find a new software provider, but Goble rejected the first several providers that Busacca suggested as "too expensive." Eventually, Busacca found Brokerage Computer Systems, Inc. ("BCS"), a small software company that promised a complete back-office and financial software system for one-tenth the cost of ADP/SIS. Busacca acknowledged that, although he only conducted "some" due diligence into BCS, he knew it would appeal to Goble because it was "pretty cheap." Despite finding the BCS software to be "untested [and] relatively unknown" and "wasn't the best system," he nonetheless referred it to Goble because it "beat going manual." On January 29, 2004 -- *i.e.*, one day after its ADP/SIS contract expired -- the Firm reached a licensing agreement with BCS to use their software.[10]

On February 9, 2004, the Firm converted its back-office operations program completely over to the BCS software system. While the conversion represented a major change in operations, the Firm did little in preparation. For instance, the Firm conducted no advance testing of the new software to determine its compatibility with the Firm's other systems. Nor, as was common for a back-office software conversion, did the Firm arrange for at least the temporary operation of a parallel system, such as the continuation of the existing ADP/SIS system to be run as a backup, during the software transition. The Firm also failed to notify FINRA of its software conversion, so FINRA could monitor the situation.[11] Busacca admitted before FINRA's Hearing Panel that the conversion was "hastily" done and that it "probably should have been tested."

Almost immediately following the conversion, North American began experiencing a wide range of systemic breakdowns in its operations, caused primarily by the system's inability to receive and process information from other internal and external software programs. The system's problems required Firm operations personnel -- who were accustomed to an automated

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[9] FINRA's Hearing Panel declined to credit Goble's testimony -- contradicted by Busacca -- that the switch to BCS was not motivated entirely by cost but also by his dissatisfaction with certain operating features of ADP/SIS.

[10] Although Goble executed the agreement on behalf of the Firm as then-president, Busacca testified that "[he] and Gob[le] made the decision to switch" to the BCS system.

[11] NASD Conduct Rule 1017(a)(5), while not charged here, requires firms to notify FINRA of "a material change in business operations."

system under the ADP/SIS system -- to input manually large amounts of data to make up for the malfunctioning system, which led to further processing errors. The BCS system, for example, proved incompatible with the Firm's trading software program, "Xavier," with the result that Firm personnel were required to enter manually into Xavier "in excess of 1000 trades per day." As a result of the system's problems, North American and its correspondent brokers received an influx of customer complaints about missing and inaccurate information in customer accounts, as discussed more fully below.

C. Busacca is Officially Designated Firm President

On March 17, 2004, the Firm filed an amendment to its Form BD, officially designating Busacca as its president, replacing Goble.[12] Although Busucca did not officially become president until this time, because he was closely involved in the acquisition of the BCS software, he knew about the resulting operational problems. Busacca admitted that, when he became president, the Firm was "a mess," and "complaints were flying off the shelf." On the day he was designated president, Busacca wrote to a complaining customer that errors reflected in her account were a result of the software conversion, not fraud as the customer had feared:

> [Y]our concern about your account is due to our software conversion, not from any of your Broker's actions . . . . We had hoped for a smoother [software] transition but unfortunately there were many technical glitches that our computer programmers did not anticipate . . . . I apologize for the confusion and we will do all we can to correct the entry in your account.

The record, including Busacca's testimony, demonstrates that Busacca's duties as president included supervision over the Firm's operations.[13] Busacca testified that he did not personally delegate his supervisory responsibility over operations to anyone else until late 2005 or early 2006, when the Firm hired a chief operating officer. While Farr served directly under Busacca as the Firm's "operations manager," she was unable to supervise the Firm's operations

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[12] Busacca served as Firm president until June 2007, when he became a director. He left the Firm voluntarily in August 2007.

[13] The record included the Firm's 2003 written supervisory procedures ("WSP") that were in effect when Busacca became president. The WSP stated that a listing of "assignment of responsibilities" for each principal was attached, but the listing was not part of the record. Although generally a brokerage firm's Financial and Operational Principal ("FINOP") oversees operations, ample testimony, including Busacca's, confirmed that he had supervisory responsibility for North American's operations.

under NASD rules because she was unlicensed.[14] Farr testified, without dispute, that Busacca began overseeing "day-to-day operations" by February or March 2004.

Busacca testified that, when he became president, he agreed to "stop being Mr. Salesman . . . and clean up the mess" in operations. However, during his first year as president, he did not concentrate on the Firm's operational deficiencies. Busacca admitted that, after his promotion to president, his "primary function at North America[n] was sales" of the Firm's clearing services to introducing brokers and that such sales activities consumed much of his time. In addition, while Busacca had extensive operations and compliance experience, his compensation arrangement with the Firm was based primarily on his results as a salesperson, including a $2,500 bonus for each new contract he acquired.[15]

Busacca also admitted that his sales efforts caused him to be away from the Firm's offices for extended periods, limiting his oversight of operations. Busacca testified that, only when he "wasn't . . . on the road," selling the Firm's services, "would [he] come back to the office" and "tackle the problems" faced by the Firm's operations department. Busacca also testified that he performed occasional spot "checks" on operations personnel, requiring employees to review and sign the Firm's written procedures. He testified additionally that he held weekly meetings to discuss operations matters, but Farr testified that these meetings did not take place until 2005. Busacca did not dispute her testimony.

D. Operational Problems Persist

After Busacca became president, the Firm continued to receive numerous operational complaints from introducing firms (on behalf of their customers) and from customers directly. Customers complained variously that they were denied access to their accounts, their accounts reflected inaccurate trade information, and the Firm had failed to timely deliver funds.[16] For several months following conversion, the Firm also failed to provide account statements to

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[14] *See* NASD Rule 1022(b) (requiring a person with "overall supervision of and responsibility for the individuals who are involved in the administration and maintenance of the member's back office operations" to register as a "Limited Principal–Financial and Operations").

[15] Busacca earned a monthly salary equal to the greater of $4,000 or fifteen percent of the Firm's net income. In addition, according to Goble, if the Firm was sold during Busacca's tenure, Busacca by contract would receive "fifteen percent of whatever growth occurred during the time he was there."

[16] For example, the day after its software conversion, a correspondent broker notified the Firm of at least six accounts reflecting erroneous securities positions on the Xavier trading system.

numerous customers, preventing the customers from reconciling charges they saw in their bank statements and causing them to worry that possible misconduct was occurring in their accounts.[17]

Introducing firms and their customers became increasingly dissatisfied with the Firm's delays in addressing problems they identified and the manner in which the Firm was communicating information regarding its operational breakdowns. For example:

- On March 25, 2004, an introducing firm e-mailed Busacca directly, stating "our office has made numerous attempts to resolve this issue which came about based on your firm[']s trade error. You continue to take the same position that you have with all of your other mistakes which is to blame someone else for them."

- In a letter to North American on April 15, 2004, a second introducing firm complaining about a trading error in a customer account stated that it "cannot operate under the circumstances that [North American] has created. While [we] understand that problems will arise[,] . . . operational problems experienced over the past weeks are unacceptable."[18]

- On May 5, 2004, a third introducing firm e-mailed Busacca attempting to locate its client's funds: "Can someone please find this, it's now been missing for almost 2 months and [the] client is getting very, very upset. I really don't want her to write a complaint. Please, please someone find it and put it into her account."

- On July 13, 2004, an "unsatisfied customer" wrote directly to North American's customer service: "Hello! Anybody home? Are you still there? . . . You are ignoring all my communications regarding my request. It looks like you care not about your customers. . . . [P]lease, PLEASE send the total amount of $852.71 to the address below immediately . . . . I need it very badly."

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[17] For example, a concerned customer wrote to the Firm after it eventually provided an explanation of the missing account statements: "I had no way of knowing what the disputed charge referred to, as I did not receive a statement during the period January – July 2004 and did not have access to the web account, and had no way of knowing what transactions were taking place on my account."

[18] This letter, while addressed to the compliance department, referenced previous discussions with Busacca. A follow-up letter from the introducing firm noted: "At this point [the customer] is extremely irritated at the 'incompetence' of [North American] in fixing his [trading error] but we have been able to keep him from making any formal complaint at this time."

Compounding the operational dysfunction caused by the software conversion were deficiencies in the quantity and quality of the Firm's operations personnel administering back-office functions. Two experienced computer programmers resigned just prior to the software conversion. The Firm had only ten employees in March 2004 to administer 5,000 accounts.

According to Busacca, he convinced Goble, who made the ultimate hiring decisions, to hire additional personnel, including several information technology specialists to address computer problems and others to input data manually.[19] Nonetheless, Goble's business decisions appeared to interfere with Busacca's efforts to address personnel deficiencies. Busacca stated that the operations department was in "constant turmoil" and that "it was hard to keep employees." Busacca testified that often, while he was away from the office, Goble would replace experienced personnel that Busacca had brought in with young, inexperienced, and inexpensive personnel "right out of [college] or high school." Other experienced Firm personnel, according to Busacca, resigned due to personality conflicts with Goble. Busacca stated that such personnel issues caused "a lot of blow-ups" between him and Goble, and that they "didn't have the best relationship."[20]

On-the-record testimony from the Firm's then-chief compliance officer, Daniel McAuliffe, confirmed the Firm's operational dysfunction during these months.[21] McAuliffe testified that he informed Busacca and Goble that he was receiving numerous customer complaints, "so they were aware of it," but McAuliffe stated that they expressed "no unusual concern" about the problems. In McAuliffe's view, the Firm's operational problems were a result of a combination of the limitations of the software system and unqualified personnel staffed to the back-office. McAuliffe, moreover, acknowledged that the Firm took "longer than [he] wanted" in addressing the problems that arose, noting it "sometimes took weeks. And [on] one occasion [it took] months to resolve."

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[19] For example, Busacca explained that "a lot of the systems . . . were manual. So we had to hire a person [and] all [he] did all day long was dividends, or one person all [he] did was mutual fund dividends, and [he would] have to capture them from the fund family and manually enter them into the computer system."

[20] Busacca acknowledged, in response to questioning at the hearing, that he considered leaving the Firm, but a three-year non-compete clause in his Executive Employment Agreement prevented him from quitting.

[21] As chief compliance officer, McAuliffe had no direct operational responsibility. Although McAuliffe died before the hearing in this case, FINRA staff sought to introduce portions of his on-the-record testimony and, in response, Busacca, without objection, moved for inclusion of the full transcript of the testimony, which became part of the record.

E. FINRA's Investigation

By June 2004, several customers had filed formal complaints with FINRA regarding possible misconduct with respect to their accounts, prompting FINRA to open an investigation into "various operations allegations." On August 26, 2004, FINRA staff requested information from the Firm concerning thirty-one customer complaints dating from January 16, 2004, through July 16, 2004.[22] In response, Busacca provided signed statements for each customer account in question, generally attributing the account errors to the software conversion and manual data entry mistakes committed by operations personnel.

In February 2005, FINRA requested additional information from the Firm. Busacca again provided the Firm's response to this inquiry. By this time, the Firm's customer base had substantially expanded due to Busacca's aggressive sales efforts of Firm clearing services, acquiring by the end of 2004 the accounts of two large introducing firms.[23] Although the record indicated that Firm personnel had also expanded to about forty-five employees by 2005, operational breakdowns continued.[24] According to Farr, operations personnel tried to make up for deficiencies in the software "on a manual basis for a little while. But as our business grew, it wasn't able to handle our business. And the lack of automation is what really took a lot of our time, and . . . left room for a lot of error."

In March 2005, FINRA staff conducted an on-site examination of North American's operations indicating that the Firm's problems extended beyond those identified earlier. The staff detected widespread compliance deficiencies throughout 2004 and early 2005. The examination found the following deficiencies, which occurred during Busacca's first year as Firm president and which he does not dispute:

1. Inaccurate Box Count

Under Exchange Act Rule 17a-13(b), a broker-dealer must conduct a quarterly "box count" of all securities held by it, compare the results against the firm's records, and record any

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[22] FINRA addressed its initial inquiry to McAuliffe, as chief compliance officer.

[23] For example, by Busacca's account, in late 2004 the Firm received 8,000 customer accounts from a single introducing firm, more than doubling the accounts the Firm had when Busacca became president.

[24] For example, an introducing firm noted in a December 2004 letter to FINRA: "[T]his is just one example of clients having difficulty . . . access[ing] their funds and securities."

unresolved differences.[25] During the March 2005 examination, FINRA staff found nineteen discrepancies between the Firm's box count on February 28, 2005, and the staff's count of the Firm's securities.[26] A FINRA examiner testified that, in his experience, erroneous box-counts were unusual and ascribed the Firm's errors to a lack of automation in its operations system, which in turn required Firm personnel to input data manually resulting in the errors.

2. Inaccurate Customer Securities Records

Exchange Act Rule 17a-3(a)(5) requires broker-dealers "to make and keep current a securities record or ledger" of its customers' securities positions.[27] During its March 2005 examination, the staff found seventeen inaccuracies (of twenty-five accounts sampled) in the Firm's records pertaining to customer mutual fund positions dated March 9, 2005. FINRA staff ascribed the errors to the Firm's manual entry of records, noting, in contrast, that automated systems generally "interact directly with mutual fund companies" to update securities positions.

3. Failure to Follow FINRA Transfer Procedures

NASD Rule 11870(b) requires member firms that have received broker-to-broker transfer instruction forms ("TIFs") to, within three business days following receipt of the TIF, either validate the transfer instructions or take exception to them.[28] FINRA staff found that, from November 2004 through January 2005, the Firm failed to comply with Rule 11870(b)'s transfer procedures more than twenty percent of the time. Farr testified that the BCS system could not interface with the Automated Customer Account Transfer Service ("ACATS"), requiring operations personnel "to manually input all the transfers on to [the Firm's] system," a time-

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[25] 17 C.F.R. § 240.17a-13(b); *see also Quarterly Securities Counts by Certain Exchange Members, Brokers and Dealers*, Exchange Act. Rel. No. 9376 (Oct. 29, 1971) (establishing Exchange Act Rule 17a-13 as "a minimum standard of control over securities for all subject members, brokers, and dealers").

[26] "Implicit in the recordkeeping rules is the precondition that information contained in these records be accurate." *Ko Sec., Inc.*, 56 S.E.C. 1126, 1133 (2003) (citation omitted), *petition denied sub nom., Yoshikawa v. SEC*, 122 F. App'x. 364 (9th Cir. 2005).

[27] 17 C.F.R. § 240.17a-3(a)(5); *see also* NASD Rule 3110(a) (requiring FINRA members to comply with Commission recordkeeping rules).

[28] FINRA has since amended Rule 11870 reducing the deadline from three days to one. *Order Granting Approval of a Proposed Rule Change Relating to NASD Rule 11870*, Exchange Act Rel. No. 56677 (Oct. 19, 2007), 91 SEC Docket 2814.

consuming task.[29] Busacca acknowledged the Firm's transfer failures in a February 2005 letter to FINRA, explaining the Firm had "an inordinate amount of ACATS requests" during this time "due to a conversion and several correspondents leaving simultaneously."

4. Failure to Initiate Timely Buy-In Procedures

Exchange Act Rule 15c3-3(d)(2) and corresponding NASD Rule 11870(f) require broker-dealers to initiate, within a specified time period, buy-in procedures or to take other "steps to obtain physical possession or control of securities" that a firm fails to receive in connection with an account transfer.[30] FINRA staff found that, from June 2004 to January 2005, the Firm failed on six occasions to initiate timely buy-in procedures or otherwise obtain control or possession of securities in connection with account transfers. Three of the six failures involved ACATS.

5. Failure to Comply with Cash and Margin Requirements

Section 220.8(b) of Regulation T requires broker-dealers to "cancel or otherwise liquidate a transaction or any part of a transaction for which the customer has not made full cash payment within the required time."[31] Under certain circumstances, when securities are transferred out of a cash account without the customer having paid for them, Section 220.8(c) requires firms to freeze the account for ninety days.[32] FINRA staff reviewed 511 trades in North American customer accounts from January 1, 2004, through February 28, 2005, finding at least fifty-four occasions in which the Firm failed to cancel or liquidate purchases in accordance with Regulation T. FINRA staff further found that the Firm allowed eleven customers to trade in frozen accounts.

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[29] ACATS "is a system administered by the National Securities Clearing Corporation that automates and standardizes procedures for the transfer of assets in a customer account from one firm to another." NASD Notice to Members 04-58 (Aug. 2004).

[30] 17 C.F.R. § 240.15c3-3(d)(2); NASD Rule 11870(f).

[31] 12 C.F.R. § 220.8(b); *see generally Howard Brett Berger*, Exchange Act Release No. 58950 (Nov. 14, 2008), 94 SEC Docket 11615, 11626 ("Exchange Act Section 7 incorporates rules (specifically, Regulation T) of the Board of Governors of the Federal Reserve governing margin requirements and prescribes lending limits for the initial extension of credit on securities for the purpose of preventing the excessive use of credit for the purchase or carrying of securities." (internal punctuation and citation omitted)), *petition denied*, 347 F. App'x 692 (2d Cir. 2009).

[32] 12 C.F.R. § 220.8(c).

NASD Rule 2520(c), as a supplement to Regulation T, requires member firms to ensure that customers maintain minimum levels of margin (also known as "maintenance margin") in their margin accounts with the firms.[33] FINRA staff found ten instances, between October 2004 and January 2005, when the Firm [redacted] timely accounts that had dropped below FINRA's specified maintenance margin requirements.[34] FINRA staff testified that the Firm's cash and margin failures were again due to a lack of automation in the Firm's operations systems. FINRA staff further blamed a lack of "trained personnel to conduct the daily review of this area." McAuliffe's on-the record testimony concurred with this view, noting that the margin department, which reported directly to Busacca, was run by an individual who had no margin experience.

6. Failure to Report Surveillance Data

NASD Conduct Rule 3150 requires member firms to report certain market information to FINRA, including data required under FINRA's Integrated National Surveillance and Information Technology Enhancements ("INSITE") program.[35] FINRA found that for the three-month period following the Firm's software conversion (February 2004 to May 2004) North American did not report any INSITE data to FINRA. Busacca admitted during his testimony that the BCS system for several months had "a different [Market Participant] ID than the [Firm's] actual [Market Participant] ID," resulting in the Firm's failure to report required data to FINRA.

F. Employment of an Unregistered Chief Compliance Officer

The Firm employed McAuliffe as its chief compliance officer from July 2004 to February 2005, despite his being unregistered as a principal during this time. McAuliffe had previously served as a registered principal and chief compliance officer with other FINRA member firms, but his last registration terminated in March 2001. Because more than two years had elapsed since his last registration, FINRA's registration provisions required McAuliffe to requalify as a principal or obtain a waiver from FINRA before serving as the Firm's chief

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[33] *See also* NASD Rule 2520(a)(7) (defining "margin" as "the amount of equity to be maintained on a security position held or carried in an account").

[34] *See* NASD Rule 2520(f)(6) (requiring "margin . . . be obtained promptly as possible and in any event within fifteen business days from the date such deficiency occurred").

[35] NASD Notice to Members 01-84 (Dec. 2001) (explaining that the data collected by the INSITE program helps FINRA "detect emerging risk patterns at member firms").

compliance officer.[36] McAuliffe did neither but was listed on the Firm's Form BD as the chief compliance officer.

According to the Central Registration Depository ("CRD"), Busacca executed the Firm's Amended Form BD on July 8, 2004, that listed McAuliffe as the Firm's chief compliance officer. Although the Firm's supervisory manual at the time identified "[t]he President" as having "ultimate responsibility for the assessment of a candidate's qualifications," Busacca acknowledged that he conducted no inquiry into whether McAuliffe was properly qualified to serve as the Firm's chief compliance officer, trusting McAuliffe had reinstated his licenses with FINRA.

In his on-the-record testimony, McAuliffe explained that, because he had passed numerous NASD licensing examinations before, he assumed that he would be granted a waiver of the examination requirement.[37] McAuliffe testified that, when FINRA notified him that it had denied his waiver request several months after he began serving as chief compliance officer, he told Busacca, who was "disappoint[ed]." According to McAuliffe, he also told Busacca and Goble that without a proper license he could not remain the Firm's chief compliance officer and "asked them if they wanted me to make changes [on CRD]," to which they responded: "No. Just leave it. And we'll get it fixed as soon as possible." McAuliffe continued serving as chief compliance officer until resigning in February 2005.[38]

G. FINRA's Proceeding

On August 13, 2007, FINRA's Department of Enforcement filed a disciplinary action against North American and Busacca, charging the Firm with various primary violations of the net capital, customer protection, recordkeeping and reporting, and credit extension requirements. FINRA additionally charged the Firm and Busacca with failing to reasonably supervise the Firm's

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[36] *See* NASD Rule 1021(c) (requiring persons "whose most recent registrations as a principal has been terminated for a period of two or more years . . . to pass" an appropriate qualification examination); NASD Rule 1022(a) (requiring chief compliance officers to register with FINRA after passing the appropriate qualification examination).

[37] McAuliffe testified that Busacca recruited him, finding his résumé on an employment Web site and referring him to Goble, who ultimately hired him.

[38] McAuliffe stated that he left the Firm because of a disagreement with Busacca and Goble over a February 2005 written response McAuliffe prepared to a FINRA inquiry. According to McAuliffe, Busacca had edited the response to replace a reference to Goble as supervisor of the Firm's bond traders with a name of a Firm official who was not a principal and not involved with bond trading. McAuliffe testified that he told them: "I can't sign this. It's . . . false. It's not correct."

back-office operations and permitting McAuliffe to serve as chief compliance officer without a proper registration. North American settled FINRA's charges prior to hearing.[39]

FINRA's Hearing Panel found that Busacca, as Firm president, "failed to exercise reasonable supervision" over "North American's operations systems and personnel" in violation of NASD Rules 3010 and 2110, and that he violated NASD Rules 1022(a) and 2110 by allowing the Firm to employ an unregistered chief compliance officer. The Hearing Panel suspended Busacca in all principal capacities for six months, fined him $25,000 for failing to supervise and $5,000 for employing an unregistered chief compliance officer, and assessed costs.

The National Adjudicatory Council ("NAC") affirmed. The NAC found that "Busacca did not act promptly and with the 'utmost vigilance' to resolve North American's widespread operational problems." The NAC rejected Busacca's principal argument that the "Hearing Panel held him liable for the [Firm's] software conversion itself, which occurred more than one month before" Busacca was officially designated Firm president. The NAC stated that the Firm's operational "problems persisted until well after Bussaca was listed as the Firm's president on its Form BD, and [that] Busacca failed to diligently address the problems beginning in March 2004."

III.

Busacca does not deny that numerous operational breakdowns took place at North American following its software conversion, nor that the Firm employed an unregistered chief compliance officer. Rather, he asserts that he had no responsibility for these matters. Based on our *de novo* review of the record, we find that a preponderance of evidence supports FINRA's findings of violations.

A. Busacca's Supervisory Failure

NASD Rule 3010 requires members to "establish and maintain" a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and

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[39] During the pendency of FINRA's action, a trustee was appointed in separate federal court proceeding to liquidate the Firm pursuant to the Securities Investor Protection Act of 1970. *See Sec. Investor Protection Corp. v. North Am. Clearing, Inc.*, Adv. No. 6:08-ap-00145-KSJ (M.D. Fla. filed July 28, 2008). Before the commencement of FINRA's hearing, the Firm, represented by the SIPC trustee, consented to findings that it violated various net capital, customer protection, recordkeeping, reporting, and credit extension requirements and failed to provide reasonable supervision over its operations. As part of the settlement, the Firm was expelled from FINRA membership.

regulations and with applicable NASD Rules."[40] We further have held that "red flags and suggestions of irregularities demand inquiry as well as adequate follow-up and review. When indications of impropriety reach the attention of those in authority, they must act decisively to detect and prevent violations of the securities laws."[41]

The Firm lacked an adequate supervisory system to prevent the widespread operational failures that took place from February 2004 through early 2005 following its conversion to an untested back-office software program. Due to systemic breakdowns resulting from the conversion, the Firm was unable to carry out rudimentary clearing firm functions, such as executing customer trades, maintaining accurate customer records and handling back-office matters, as evidenced by an influx of complaints. The Firm -- fully automated under its previous software system -- became heavily reliant on inexperienced operations personnel to input manually large amounts of data into the Firm's systems because of the software's limitations. The resulting patchwork system of semi-automation and manual data-entry proved inadequate in meeting customer needs and regulatory requirements. FINRA's March 2005 examination further revealed the extent of the Firm's operational failings -- showing pervasive non-compliance with regulatory requirements.

We have frequently emphasized that "the president of a brokerage firm is responsible for the firm's compliance with all applicable requirements unless and until he or she reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his or her duties."[42] Busacca admittedly assumed overall responsibility for the Firm's operations upon becoming North American's president in March 2004 and did not delegate this responsibility to another registered principal until late 2005, well after the events at issue.

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[40] *Ronald Pellegrino*, Exchange Act Rel. No. 59125 (Dec. 19, 2008), 94 SEC Docket 12628, 12641 (internal punctuation omitted); *see also Robert E. Strong*, Exchange Act Rel. No. 57426 (Mar. 4, 2008), 92 SEC Docket 2875, 2887 (finding firm official's "unreasonable inaction effectively nullified the supervisory system . . . that he himself had designed and was responsible for enforcing").

[41] *Edwin Kantor*, 51 S.E.C. 440, 447 (1993); *cf. Consol. Inv. Servs., Inc.*, 52 S.E.C. 582, 588 (stating under the Exchange Act that "any indication of irregularity brought to a supervisor's attention must be treated with the utmost vigilance"). We have also stated that "[t]he standard of reasonable supervision is determined based on the particular circumstances of each case." *John A. Chepak*, 54 S.E.C. 502, 513 n.27 (2000).

[42] *Richard F. Kresge*, Exchange Act Rel. No. 55988 (June 29, 2007), 90 SEC Docket 3072, 3084 (citing *Rita H. Malm*, 52 S.E.C. 64, 69 (1994)); *see also Donald T. Sheldon*, 51 S.E.C. 59, 79 (1992), *aff'd*, 45 F.3d 1515, 1517 (11th Cir. 1995).

Busacca's supervision of North American's operations was deficient. Having worked with Goble in selecting a new software system, Busacca knew from the beginning of his presidency of the software's limitations and the systemwide breakdowns that followed. He acknowledged that, when he became president, the Firm was a "mess," "complaints were flying off the shelf," and back-office personnel were ill-equipped to handle the increased workload created by the new system. Despite the presence of numerous red flags, Busacca failed to direct his prompt and full attention to remedying the Firm's operational breakdowns that arose and to preventing the occurrence of future problems.[43] Instead, he admits that he acted as the Firm's sole "breadwinner," focusing on generating more clearing business. This focus caused Busacca to "travel extensively" and to address operational problems only when he returned to the office. Under Busacca's supervision, the Firm's operational breakdowns persisted throughout 2004 and early 2005. Moreover, Busacca's ability to secure new business as salesman exacerbated, rather than alleviated, existing problems by adding more accounts to an already overwhelmed system.[44]

On appeal, Busacca urges us to "vacate or at the very least modify" FINRA's decision because, he claims, he should not be held "responsible for the software problems caused by [the computer software] conversion" that occurred prior to his designation as Firm president. Busacca, however, misstates the nature of FINRA's supervisory charges here, which concern his failure once he became president to address operational problems caused by the adoption of the software. Although Busacca repeatedly blames the "faulty software" for the Firm's problems, we have previously held that, "if a broker-dealer or its agent develops a computer-communications system to facilitate regulatory compliance, failure of that system does not excuse the broker-dealer from its obligation to comply with each of its regulatory responsibilities."[45]

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[43] *Cf. George J. Kolar*, 55 S.E.C. 1009, 1016 (2002) (stating under the Exchange Act that "[d]ecisive action is necessary whenever supervisors are made aware of suspicious circumstances, particularly those that have an obvious potential for violations"); *Quest Capital Strategies, Inc.*, 55 S.E.C. 362, 371 (2002) ("[S]upervisors must act decisively to detect and prevent violations of the securities laws when an indication of irregularity is brought to their attention.").

[44] *See Pellegrino*, 94 SEC Docket at 12643 (finding securities principal's "sales efforts exacerbated, rather than alleviated, the risk of" additional noncompliance). As noted above, the Firm's customer base increased substantially by 2005.

[45] *Lowell H. Listrom*, 50 S.E.C. 883, 887 n.7 (1992) (noting further that "[w]e expect that a broker-dealer will appropriately design, test, and maintain those systems so that such systems will assist it in fulfilling its regulatory responsibilities"), *aff'd*, 975 F.2d 866 (8th Cir. 1992) (Table); *see also Use of Electronic Media*, 65 Fed. Reg. 25,843-01 (May 4, 2000) (noting that, "[a]s broker-dealers increasingly rely on electronic facilities . . . , they must have the facilities to handle the expected user volume").

Moreover, evidence that he helped acquire the software and acted in a managerial capacity before serving as president remains relevant. His previous involvement underscores the unreasonableness of his supervision. He understood the severity of the operational problems when he became president, yet he failed to act promptly.[46]

Busacca contends that, after becoming president, he acted reasonably, doing everything he could to "clean up the problems." For example, although not cited directly in his brief, Busacca's hearing testimony identified corrective measures he took to address the Firm's operational problems. These measures included the holding of weekly meetings with staff to discuss compliance and operations issues, periodically "check[ing]" on operations staff and requiring them to review the Firm's procedures, and increasing operations and information technology staff to address deficiencies in the software system.[47]

Busacca's testimony and other evidence contradict his claims of reasonable supervision. He admitted that he addressed operational problems only between sales trips, rather than giving them the priority they needed. Customer complaints, as well as McAuliffe's sworn testimony, further demonstrated that the Firm, under Busacca's supervision, often failed to resolve operational issues for weeks or, in some instances, months after they were identified. McAulliffe also observed that Busacca had "no unusual concern" when McAuliffe brought customer complaints to his attention. Farr's unrebutted testimony clarified that operational meetings did not occur until 2005, well after FINRA had opened its investigation. Reasonable supervision, however, required Busacca as the Firm principal responsible for supervising operations to address known deficiencies promptly -- on his own initiative -- not only after regulatory action had commenced.[48] Busacca's awareness of numerous red flags, including customer complaints, should have caused him to address the Firm's problems much earlier.

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[46] *Sec. Planners Assoc., Inc.*, 44 S.E.C. 738, 742 (1971) (finding firm president -- who was "generally aware" of firm's problems before accepting promotion to president -- failed to "exercise reasonable supervision to prevent" firm's back-office violations that continued to occur after he became president); *see also Pellegrino*, 94 SEC Docket at 12649 (recognizing that the firm "had a deficient supervisory system before [respondent] joined the firm, but reasonable supervision required that [he] correct the deficiencies promptly").

[47] Busacca identified additional steps he took to address the Firm's failings including the hiring of personnel to audit the Firm's systems, hiring a chief operations officer, and forcing Farr to qualify as a principal, but these steps occurred after the period at issue.

[48] *Pellegrino*, 94 SEC Docket at 12649 (applicant's "failure to take such steps until after NASD's investigation began demonstrates unreasonable supervision"); *Kresge*, 90 SEC Docket at 3087 (finding deficient supervision where supervisor's actions occurred only "after NASD had begun its investigation").

Busacca's purported corrective measures, in addition to being untimely, were not reasonably designed to address the extensive operational dysfunction that arose.[49] For example, Busacca's "spot checks" of operations staff were cursory, at best -- describing them in his testimony as occasionally requiring staff to review Firm policies and procedures -- and "did not remedy the obvious potential" for continued operational problems.[50] Moreover, we have long held that "the presence of procedures alone is not enough" because "[w]ithout sufficient implementation, guidelines and strictures do not assure compliance."[51]

Busacca's efforts to address personnel issues also were ineffectual. Despite a larger staff, the Firm's operational problems continued to occur due, in large part, to processing errors committed by personnel that Busacca admitted were inexperienced and often overwhelmed. We have often stressed the "obvious need to keep [a] new office with . . . untried personnel under close surveillance."[52] Busacca's awareness of the Firm's personnel deficiencies, in addition to the computer malfunctions, demanded his utmost attention and follow up.[53]

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[49] *See, e.g.*, *Pellegrino*, 94 SEC Docket at 12648 (stating the relevant inquiry is "whether [applicant's] supervision 'was reasonably designed to prevent the violations at issue, not weigh [his] supervisory performance in other areas against his deficiencies in the area under review'" (quoting *Quest*, 55 S.E.C. at 374)); *cf. Albert Vincent O'Neal*, 51 S.E.C. 1128, 1135 (1994) (stating that "the test" under the Exchange Act "is whether [the] supervision was reasonably designed to prevent the violations at issue").

[50] *Pellegrino*, 94 SEC Docket at 12648; *see also Blinder, Robinson & Co.*, 47 S.E.C. 812, 814 (1982) (finding applicants' "cursory examination" to be "clearly inadequate" because a failure of supervision "connotes 'a failure to learn of improprieties when diligent application of supervisory procedures would have uncovered them'") (quoting *Jerome F. Tegeler*, 45 S.E.C. 512, 515 n.8 (1974), and *Anthony J. Amato*, 45 S.E.C. 282, 286 (1973)).

[51] *Kresge*, 90 SEC Docket at 3089 n.37 (quoting *Rita H. Malm*, 52 S.E.C. 64, 69 & n.17 (1994)); *see also George J. Kolar*, 55 S.E.C. 1009, 1020 (2002) (rejecting supervisor's claim that he enacted reasonable supervisory procedures because the "routine surveillance measures cited by [respondent] were clearly inapplicable to the situation that he confronted"); *Thomson & McKinnon*, 43 S.E.C. 785, 788 (1968) ("Although it was registrant's stated policy . . . it failed to establish an adequate system of internal control to insure compliance with such policy.").

[52] *LaJolla Capital Corp.*, 54 S.E.C. 275, 282 & n.18 (1999) (internal punctuation omitted) (collecting cases).

[53] *See, e.g., Reynolds & Co.*, 39 S.E.C. 902, 917 (1960) ("The duty of supervision cannot be avoided by pointing to the difficulties involved where facilities are expanding or by placing the blame upon inexperienced personnel or by citing the pressures inherent in competition for new business. These factors only increase the necessity for vigorous effort.").

Busacca's testimony suggested that Goble may have interfered with Busacca's effective supervision by making personnel decisions while Busacca was away on sales trips. Under the circumstances, however, given the Firm's ongoing operational failings and that it was ultimately his responsibility to oversee operations, Busacca should have ensured that the Firm dedicated sufficient resources and attention to resolving the Firm's operational problems. If Goble continued to undermine his efforts, Busacca was "required to insist on [Goble's] cooperation and compliance with applicable requirements or to resign."[54] There is no indication that Busacca made any such demands of Goble until 2007, long after the events at issue occurred.[55]

In light of the foregoing, we sustain FINRA's findings that Busacca, as North American's president, failed to supervise reasonably the Firm's operations in violation of NASD Conduct Rules 3010 and 2110.[56]

B. Unregistered Chief Compliance Officer

NASD Membership and Registration Rule 1022(a) requires each person designated as a chief compliance officer on Schedule A of a member firm's Form BD to be registered as a general securities principal. McAuliffe served as the Firm's chief compliance officer for eight months, from July 2004 to February 2005, without a proper registration in effect. Because more than two years had elapsed since his last registration terminated, McAuliffe was required to re-qualify with FINRA by passing the appropriate qualification examination or obtaining a waiver of the requirements -- neither of which occurred.[57] As reflected in the Firm's supervisory manual,

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[54] *George Lockwood Freeland*, 51 S.E.C. 389, 392 (1993); *see also James J. Pasztor*, 54 S.E.C. 398, 409 n.28 (1999) (supervisor not relieved of responsibility because he had to report to firm president who repeatedly overruled his decisions); *Steven P. Sanders*, 53 S.E.C. 889, 904 (1998) ("even where supervisory responsibility is shared between firm executives, each can be held liable for supervisory failure") (collecting cases).

[55] We do not find, as Busacca contends, that the existence of a three-year non-compete clause in Busacca's employment contract was a valid reason for failing to confront Goble earlier. *Cf. Pellegrino*, 94 SEC Docket at 12655 n.67 (holding, in context of sanction determination, that applicant's concern that he would be unable to find employment if he resigned did not mitigate his supervisory failures).

[56] A violation of any NASD rule or regulation also constitutes a violation of Conduct Rule 2110. *Siegel v. SEC*, 592 F.3d 147, 153 (D.C. Cir. 2010).

[57] *See* NASD Rules 1021(c) and 1070(d).

Busacca was responsible for ensuring that McAuliffe was properly registered, but he failed to do so.[58]

Busacca asserts he was "duped into trusting" McAuliffe, "an experienced industry veteran," to properly register himself. He asserts further that, in any event, "FINRA [*i.e.*, the NAC] acknowledges that [McAuliffe] did a good job but" that McAuliffe simply "did not have his licenses up with the firm." Busacca, however, cannot shift blame to others for his failure as president to determine McAuliffe's registration status.[59] Moreover, Busacca's attempt to downplay McAuliffe's lack of registration as simply an oversight, on McAuliffe's part, is inconsistent with the record. Busacca conducted no inquiry into McAuliffe's registration status before identifying McAuliffe as chief compliance officer on the Firm's Form BD. Even when informed by McAuliffe that he had failed to requalify for registration (and for that reason could not continue to serve in that capacity), Busacca was indifferent, according to McAuliffe, allowing him to continue in office.

We accordingly sustain FINRA's finding that Busacca violated NASD Membership and Registration Rule 1022(a) and 2110 by permitting McAuliffe to act as chief compliance officer without being so registered.

IV.

A. Allegations of FINRA Staff Misconduct

Busacca claims that FINRA's action is a form of retaliation "due to his voice of dissent" in opposing the "merger of NASD and NYSE regulation" and "for daring to take on [an] abusive staff at NASD and FINRA." According to Busacca, he is being "unfairly punished due to his stance as a Small Firm Leader." Busacca asserts he has "endured constant harassment," alleging that, during a previous proceeding against North American, FINRA staff "threatened [him] in the presence of" Firm personnel, "that if he didn't 'watch it,' he would find himself named to this complaint as well."

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[58] *See Kresge*, 90 SEC Docket at 3093 (holding firm president liable for violating FINRA registration rules by permitting unregistered person to act in a principal capacity); *Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655 (Apr. 11, 2008), 93 SEC Docket 5089, 5114 (holding firm's chief executive officer and president liable for violating FINRA registration rules by permitting unregistered individual to function in a principal capacity).

[59] *See, e.g.*, *Justine Susan Fischer*, 53 S.E.C. 734, 741 n.4 (1998) (holding that "[a] broker has responsibility for his or her own actions and cannot blame others for [his or] her own failings") (citing *Dan A. Druz*, 52 S.E.C. 130, 135 n.18 (1995)). Although Busacca indicated he did not have access to CRD, relying instead on others for information, he appeared as signatory on numerous Firm filings, including several identifying McAuliffe as chief compliance officer.

To establish a claim for selective prosecution, Busacca must demonstrate that "he was unfairly singled out and that his prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right."[60] Busacca has not made such a showing.

In any event, we find no evidence that FINRA unfairly targeted Busacca or was biased against him.[61] The record shows that FINRA's investigation was amply warranted. It was begun after numerous introducing firms and customers filed complaints about the Firm's operations with FINRA. Such complaints -- together with the back-office violations later found by FINRA examining staff -- formed the basis for FINRA's August 2007 complaint against Busacca and North American. In contrast, Busacca presented no evidence during the proceeding below, called no witnesses (including those he claimed had observed FINRA staff misconduct), and declined to cross-examine the several FINRA staff members who gave testimony in FINRA Enforcement's case-in-chief, about their motives in prosecuting him.[62] We, therefore, reject Busacca's claims of selective prosecution.[63]

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[60] *Raghavan Sathianathan*, Exchange Act Rel. No. 54722 (Nov. 8, 2006), 89 SEC Docket 774, 788-89 (citing *United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992)), *petition denied*, 304 F. App'x. 883 (D.C. Cir. 2008); *see also Fog Cutter Capital Group Inc. v. SEC*, 474 F.3d 822, 826 (D.C. Cir. 2007).

[61] *See Stephen Russell Boadt*, 51 S.E.C. 683, 685 (1993) (rejecting contention that "the instant sanction is the result of a vendetta against [applicant] by the Regional Counsel" because "even if we were to find that Regional Counsel were biased, that would not suggest that the fairness of the hearing itself was compromised").

[62] As part of his brief to us, Busacca attached seven previously unadmitted documents purportedly supporting his claims of FINRA staff misconduct. The submitted documents include Busacca's affidavit in a separate civil suit, e-mails he sent to FINRA staff and to the U.S. Department of Justice, and various other materials. Commission Rule of Practice 452, 17 C.F.R. § 201.452, permits the admission of additional evidence where the evidence is material and where there exist reasonable grounds for failing to produce the evidence earlier. Rule 452's requirements have not been met. Busacca gave no explanation for his failure to adduce these materials earlier and failed to respond when FINRA challenged his requested submission. In addition, these documents do not appear to be material in that they neither support his claim of staff misconduct nor otherwise address the allegations in this case.

[63] Busacca asserts further, without citation to any specific authority, that he "should be protected under the Whistle Blower Act." We have repeatedly held, however, that whistle-blower statutes "'do not purport to provide a defense in a disciplinary action or to estop [FINRA] from taking disciplinary action consistent with its rules.'" *Scott Epstein*, Exchange Act Rel. No.

(continued...)

B. Busacca's Production Request

Busacca also argues that the hearing officer's denial of his request to compel the production of documents from North American prevented him from properly defending himself. NASD Rule 9252(b) provides that a request for FINRA to compel the production of documents from a member firm "shall be granted only upon a showing that: the information sought is relevant, material, and non-cumulative," and "the requesting party has previously attempted in good faith to obtain the desired Documents . . . but has been unsuccessful in such efforts." In ruling on such a request, the hearing officer also "shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome."

On April 29, 2008, Busacca submitted his request nine months after commencement of FINRA's action, seeking the Firm's production of (1) "all communications and minutes" from meetings beginning in December 2003; (2) all Forms BD and amendments filed by the Firm from January 2001 to April 2008; and (3) "all Written Supervisory Procedures" used by the Firm from January 2001 to May 2007. The hearing officer denied Busacca's motion, holding that Busacca's request "seeks broad categories of documents, fails to state why they are material and does not describe his prior efforts to obtain them" from the Firm -- which was still a party to FINRA's action.[64] Busacca did not challenge this ruling.

Three months later (after the Firm went into SIPC liquidation), Busacca again raised his need for the documents during a prehearing conference. The hearing officer reiterated his earlier position that Busacca had not satisfied Rule 9252(b)'s requirements, and explained to Busacca that, "if there are things that you need[,] you can still request them . . . [but] you have to ask for them. If [the SIPC trustee presiding over the Firm's liquidation] refuses to provide them *then* you would have a basis" for compelling production (emphasis supplied). Busacca, however, did not notify the hearing officer of having any trouble obtaining the documents from the SIPC trustee until October 27, 2008, less than two weeks before the hearing (and nearly six months after his initial request). On November 3, 2008, the hearing officer denied Busacca's second request to compel document production, ruling that "FINRA lacks jurisdiction over the [SIPC] trustee . . . [to] compel production of the documents" and, in any event, "Busacca has still failed to demonstrate that the documents he is seeking . . . are relevant and material to his defense."[65] The NAC affirmed the hearing officer's denial, stating that Busacca failed to show he made any

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[63] (...continued)
59328 (Jan 30, 2009), 95 SEC Docket 13833, 13856 n.42 (quoting *Sathianathan*, 89 SEC Docket at 788), *appeal filed*, No. 09-1550 (3d Cir. Feb. 24, 2009).

[64] *See supra* note 39 (discussing Firm's subsequent placement in SIPC receivership).

[65] The record indicated that Busacca had access to all discoverable documents in possession of FINRA staff, as required by NASD Rule 9251.

attempts to obtain the documents from the Firm. In any event, the NAC gave Busacca the benefit of the doubt regarding his efforts to address operational issues by "credit[ing] Busacca's unrebutted testimony that he took the [corrective] actions that he described."[66]

Under the circumstances, we find no error in FINRA's handling of Busacca's request to compel document production. The hearing officer gave Busacca ample opportunity to properly obtain the materials he desired from the Firm before it was placed under SIPC trusteeship (and ceased to be a FINRA member) when the hearing officer became unable to compel their production.[67] Busacca, however, delayed action and repeatedly failed (when he did act) to comply with the requirements of Rule 9252(b) by, for example, in the first instance, not seeking the materials directly from the Firm and, then, failing to obtain them from the Firm, documenting that failure, and explaining to the hearing officer his need for the materials.

The materiality of these documents, which covered an eight-year period, is not apparent, particularly since the violative conduct is limited to 2004 and early 2005. Moreover, the record contains other competent evidence -- including Busacca's own testimony -- that described the measures Busacca took to address the Firm's problems.[68] In addition, the record contains, as FINRA exhibits, the relevant written supervisory procedures that Busacca sought in his request, and we have reviewed all relevant Forms BD and their amendments, which are available on CRD. We have considered this evidence as part of our *de novo* review of the proceeding,[69] and accordingly reject Busacca's claims of unfairness during FINRA's proceedings.[70]

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[66] For instance, the NAC accepted Busacca's claims that he held weekly meetings with operations management, as clarified by Farr's unrebutted testimony that they occurred in 2005. *See supra* text following note 15.

[67] FINRA "lacks subpoena power" and has limited authority to compel production of materials from member firms pursuant to NASD Rules 8210 and 9252. *PAZ, Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008) 93 SEC Docket 5122, 5127, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

[68] *Cf. Andrew P. Gonchar*, Exchange Act Rel. No. 60506 (Aug. 14, 2009), 96 SEC Docket 19852, 19871-72 & n.49 (holding that "applicant's inability to subpoena witnesses is not grounds for overturning a disciplinary action unless the applicant can show prejudice") (citing *Crimmins v. Am. Stock Exch., Inc.*, 368 F. Supp. 270, 277 (S.D.N.Y. 1973), *appeal filed*, No. 09-4215 (2d. Cir. Oct. 8, 2009)).

[69] *See Robert Bruce Orkin*, 51 S.E.C. 336, 344 (1993) ("Furthermore, our *de novo* review of this matter cures whatever bias or disregard of precedent or evidence, if any, that may have existed below."), *aff'd*, 31 F.3d 1056 (11th Cir. 1994).

[70] We also reject Busacca's argument that these proceedings violate the Double Jeopardy Clause of the U.S. Constitution because, as he claims, FINRA issued a 2006 letter of

(continued...)

V.

Busacca challenges the sanctions FINRA imposed as excessive. In particular, he argues that the $30,000 in fines that FINRA assessed is "insan[e] given the nature of the claim being technical violations" and, he claims, "no injury nor customers [being] involved." He further contends that the sanction is excessive in light of his "clean[,] reputable and ethical career for over 18 years."[71] According to Busacca, "his punishment reflects a vendetta by FINRA of his telling the truth" about the regulatory consolidation of NASD and NYSE Regulation.

Exchange Act Section 19(e)(2) directs us to reduce or set aside FINRA sanctions if we find, having "due regard for the public interest and the protection of investors," that the sanctions are "excessive or oppressive" or impose an unnecessary or inappropriate burden on competition.[72] As discussed below, we find no merit to Busacca's arguments challenging the sanctions and find they are neither excessive nor oppressive and are appropriately remedial.

We disagree with Busacca's characterization that the violations involved merely "technical" requirements and that customers were uninvolved. We further reject his efforts to blame these proceedings on policy differences Busacca purportedly had with members of FINRA management. The record shows that Busacca presided over a firm that was, for a significant period, effectively unable to carry out fundamental duties of a clearing firm. The operational deficiencies identified had clear implications for the safety of customer accounts and North American's proper functioning in the self-regulatory system.[73] As found above, the Firm's

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[70] (...continued)
caution against the Firm for "fail[ing] to timely validate or take exception to transfer instructions." The U.S. Supreme Court has held that the Double Jeopardy Clause only applies to "the imposition of multiple criminal punishments for the same offense," which Busacca does not claim occurred here. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (collecting cases); *see also Jones v. S.E.C.*, 115 F.3d 1173, 1183 (4th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998) (agreeing with the argument that "the double jeopardy clause is not applicable [to FINRA] because [it] is a private party and not a governmental agent").

[71] Busacca also challenges the authority of FINRA to impose the sanction because, according to Busacca, "the merger of NASD and NYSE was done so under misrepresentation and fraud." Busacca, however, provides no support, nor do we see a basis, for his claim. *See, e.g., Standard Inv. Chartered, Inc. v. NASD*, No. 07 Civ. 2014 (JSR), 2010 WL 749844, at *2 (S.D.N.Y. Mar. 1, 2010) (dismissing private action challenging FINRA consolidation).

[72] 15 U.S.C. § 78s(e)(2). Busacca does not claim, nor does the record show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

[73] We have previously stated that, "[i]n most respects, introducing brokers are dependent on clearing firms to clear and to execute customer trades, to handle customer funds
(continued...)

operational breakdowns resulted in an inability to meet the basic needs of introducing firms' customers by failing, for example, to provide account statements and trade confirmations to customers for several months. The Firm also regularly failed to comply with customer protection safeguards, such as failing to keep accurate securities records, follow transfer procedures, institute buy-in procedures for securities it did not receive, and adhere to cash and margin requirements.

We are troubled by the fact that Busacca was confronted with numerous complaints and other indications of serious problems with the Firm's operations yet, for much of 2004, gave limited emphasis to addressing such problems -- choosing to focus instead on increasing the Firm's business. Busacca may have enhanced North American's profitability (as well as his own remuneration) but at the cost of adding to the stress on an already overwhelmed operations system. We are also troubled by Busacca's inclination to blame others for the Firm's problems, including the Firm's software, Goble, other Firm personnel, and FINRA staff, when he had overall responsibility for supervising the Firm's operations. "'Assuring proper supervision is a critical component of broker-dealer operations,'"[74] and Busacca's failure to promptly address known red flags "'reveal[s] a fundamental misunderstanding of his supervisory duties.'"[75]

While we, like FINRA, consider certain facts in mitigation -- such as his cooperation with FINRA staff in investigating and resolving problems at the Firm and that McAuliffe, the unregistered compliance officer, had previously been registered and was not shown to have contributed to the Firm's compliance problems -- we do not believe they justify a reduction of the sanctions, which are fully consistent with FINRA's Sanction Guidelines.[76] Those guidelines recommend, for a supervisory violation, a fine between $5,000 and $50,000 and, in egregious cases, a suspension of up to two years or a bar in any or all capacities. Among the factors identified in supporting significant sanctions for a supervisory failure are "[w]hether respondent

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[73] (...continued)
and securities, and to handle many back-office functions, including issuing [trade] confirmations . . . and customer account statements." *See Definitions of "Small Business" or "Small Organization" under the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, and the Securities Act of 1933*, Exchange Act Rel. No. 40122 (June 24, 1998), 67 SEC Docket 1113, 1118 n.65.

[74] *Pellegrino*, 94 SEC Docket at 12641 (quoting *Richard F. Kresge*, 90 SEC Docket at 3083).

[75] *Id.* at 12654 (quoting *Stephen J. Horning*, Exchange Act Rel. No 56886 (Dec. 3, 2007), 92 SEC Docket 207, 226, *aff'd*, 570 F.3d 337 (D.C. Cir. 2009)).

[76] We are "not bound by the Guidelines [but] use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2)." *CMG Inst'l Trading, Inc.*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13814 n.38.

ignored 'red flag' warnings that should have resulted in additional supervisory scrutiny" and the "[n]ature, extent, size and character of the underlying misconduct." The multitude of red flags identified above, combined with the protracted duration and scope of the Firm's operational problems, support FINRA's imposition of a $25,000 fine against Busacca and six-month suspension from serving in a principal capacity.[77]

With respect to Busacca's registration violation, the Sanction Guidelines recommend a fine of $2,500 to $50,000 and suspension of up to six months, and in egregious cases, a suspension up to two years. We note that the FINRA's $5,000 fine against Busacca for violating FINRA registration requirements is at the lower end of the sanction range. Although Goble made the ultimate decision to hire McAuliffe, it was Busacca's express responsibility to confirm that he was adequately qualified and Busacca acknowledged not making the proper inquiries. In addition, we do not view, as Busacca suggests, McAuliffe's lack of registration as a technical rules violation. FINRA's "registration requirement provides an important safeguard in protecting public investors, and strict adherence to that requirement is essential because it serves a significant purpose in policing of the securities markets and in the protection of the public interest."[78] Busacca's failure to confirm McAuliffe's registration status and to remove McAuliffe as chief compliance officer after McAuliffe informed him that FINRA had not granted him a waiver undermined FINRA's ability to ensure that a member firm's chief compliance officer had the requisite qualifications to serve in that position.[79]

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[77] Contrary to Busacca's assertions, his "[l]ack of a disciplinary history is not a mitigating factor." *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006); *see also Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 801 (stating that the absence of disciplinary history is not mitigating because member firms and their associated persons "should not be rewarded for acting in accordance with [their] duties").

[78] *Hans N. Beerbaum*, Exchange Act Rel. No. 55731 (May 9, 2007), 90 SEC Docket 1863, 1869 n.17 (internal punctuation omitted) (quoting *Michael F. Flannigan*, 56 S.E.C. 8, 17 (2003)); *see also Requirement of Broker-Dealers to Comply with SRO Qualification Standards*, Exchange Act Rel. No. 32261 (May 4, 1993), 54 SEC Docket 39, 40 (stating, in adopting Exchange Act Rule 15b7-1, that "[self-regulatory organization] qualification of associated persons of broker-dealers is of substantial importance in promoting compliance with the substantive requirements of the federal securities laws").

[79] *See Self-Regulatory Organizations;Order Approving Proposed Rule Change*, Exchange Act Rel. No. 44451 (June 19, 2001), 75 SEC Docket 723, 724 (recognizing that FINRA registration requirement helps ensure that chief compliance officers, who "play a critical role" in operations, have "attained the requisite knowledge of applicable securities laws and regulations").

Under the circumstances, we believe the sanctions imposed are amply warranted. The sanctions will additionally serve to encourage Busacca, as well as other supervisors, to respond vigorously to known operational problems and to ensure that firm officials are properly registered with regulatory authorities.[80]

An appropriate order will issue. [81]

By the Commission (Commissioners CASEY, AGUILAR and PAREDES); Chairman SCHAPIRO and Commissioner WALTER not participating.

Elizabeth M. Murphy
Secretary

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[80] Although "'general deterrence is not, by itself, sufficient justification for expulsion or suspension[,] . . . it may be considered as part of the overall remedial inquiry.'" *PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)).

[81] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.