BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the Continued Association of Laurence Allen as a General Securities Representative and General Securities Principal with NYPPEX, LLC.	Notice Pursuant to Section 19(d) Securities Exchange Act of 1934 SD-2265 September 23, 2022

I. Introduction

On February 14, 2020, NYPPEX, LLC ("NYPPEX" or the "Firm") filed with FINRA a Membership Continuance Application, which it amended on March 24, 2021 (the "Application"). The Application requests that FINRA permit Laurence Allen, a person subject to statutory disqualification, to continue to associate with the Firm as a general securities representative and a general securities principal. On April 25, 2022, a subcommittee ("Hearing Panel") of FINRA's Statutory Disqualification Committee held a hearing on the matter.[1] Allen appeared and testified at the hearing, accompanied by counsel, Jonathan E. Neuman, Esq. and John K. Wells, Esq. Allen's proposed primary supervisor, Michael Schunk ("Schunk"), and the Firm's general counsel, Jeremy Kim, Esq. ("Kim"), also appeared and testified at the hearing. Jennifer Crawford, Esq., Loyd Gattis, Esq., Michael P. Manning, Esq., and Yael Epstein, Esq. appeared on behalf of FINRA's Department of Member Supervision ("Member Supervision").

[1] The Hearing Panel conducted the hearing via video conference. *See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Temporarily Amend FINRA Rules 1015, 9261, 9524 and 9830 To Permit Hearings Under Those Rules To Be Conducted by Video Conference*, 85 Fed. Reg. 55712 (Sept. 9, 2020) (permitting statutory disqualification hearings to be conducted via video conference because of the COVID-19 pandemic). The effective period of the temporary rule change was extended multiple times, including through and beyond the hearing date. *See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Expiration Date of the Temporary Amendments Set Forth in SR-FINRA-2020-015 and SR-FINRA-2020-027*, 87 Fed. Reg. 16262 (Mar. 22, 2022) (extending the temporary rules permitting statutory disqualification hearings to be held by video conference through July 31, 2022).

After careful consideration of the entire record in this matter, we deny the Application. We find that the Firm has not shown that Allen's continued association with it as a statutorily disqualified individual is in the public interest. Allen's recent, securities-related disqualifying injunction involved serious misconduct, including misappropriation of millions of dollars of investor funds and fraud. Moreover, the Firm has not demonstrated that it can stringently supervise Allen as a disqualified individual. We have serious concerns about whether Allen's proposed supervisor can stringently supervise Allen, which are amplified by Allen's roles as majority owner of the Firm, the Firm's largest producer, and a large lender to the Firm's parent company. The Firm has also failed to propose an adequate heightened supervisory plan. All these factors warrant denial of the Application.[2]

II. The Statutorily Disqualifying Injunctions

A. The Temporary Injunction and Subsequent Complaint Against Allen

Allen first became statutorily disqualified pursuant to a December 28, 2018 Ex Parte Order issued by a New York state court (the "December 2018 Order") at the request of the Office of the New York Attorney General (the "NYAG"). The NYAG argued that a temporary injunction against Allen and his affiliated entities was necessary "because alleged fraudulent practices of Respondents threaten continued and immediate injury to the public." The December 2018 Order preliminarily enjoined and restrained Allen and his affiliated entities from, among other things: (1) engaging in securities fraud; (2) violating New York's securities laws (specifically, New York General Business Law Article 23-A (the "Martin Act"), which among other things prohibits fraudulent practices relating to investment advice or the purchase, exchange, or sale of securities); (3) facilitating, allowing, or participating in the purchase, sale, or transfer of limited partnership interests in a private equity fund created by Allen, ACP X, LP (the "Limited Partnership"); and (4) converting or otherwise disposing of or transferring funds from the Limited Partnership.[3] The December 2018 Order also required that the defendants produce documents to the NYAG and testify under oath.

In December 2019, while the temporary injunction against Allen and the other defendants remained in place, the NYAG filed a complaint against Allen and his affiliated entities (including the Firm as a relief defendant). The complaint alleged that Allen and the other

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[2] Pursuant to FINRA Rule 9524(a)(10), the Hearing Panel submitted its written recommendation to the Statutory Disqualification Committee. In turn, the Statutory Disqualification Committee considered the Hearing Panel's recommendation and presented a written recommendation to the National Adjudicatory Council ("NAC").

[3] Article III, Section 4 of FINRA's By-Laws incorporates by reference the definition of "statutory disqualification" set forth in Section 3(a)(39) of the Securities Exchange Act of 1934 ("Exchange Act"). In turn, Exchange Act Section 3(a)(39)(F), which incorporates by reference Exchange Act Section 15(b)(4)(C), provides that a person is subject to statutory disqualification if he is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, broker, or dealer, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security. *See* 15 U.S.C. § 78c(a)(39)(F), 15 U.S.C. § 78o(b)(4)(C).

defendants engaged in a decade-long scheme to enrich themselves at the expense of investors in the Limited Partnership. The complaint alleged that Allen and the other defendants engaged in fraud, breach of fiduciary duty, and violations of the Martin Act and other New York laws. The complaint alleged that Allen misrepresented to investors that the Limited Partnership would invest in discounted private equity interests on the secondary market, but instead he diverted investors' funds to the Firm's parent company, NYPPEX Holdings, LLC ("Parent"). The complaint further alleged that Allen concealed his fraud by providing investors with inflated valuations of their investments and deprived investors of their rightful profits by distributing millions of dollars of investor funds to himself and his entities. The NYAG sought an order requiring that the defendants disgorge profits from their fraudulent practices, and sought a preliminary injunction to enjoin Allen and the other defendants from, among other things, accessing the remaining assets of the Limited Partnership. Further, the NYAG sought the appointment of a temporary receiver.

B. The Preliminary Injunction

Beginning in late January 2020, a New York state court conducted a five-day evidentiary hearing on the NYAG's request for a preliminary injunction. In February 2020, the court issued a preliminary injunction against, among others, Allen, Parent, and the Firm as a relief defendant. The court enjoined Allen and the other defendants from, among other things: directly or indirectly taking any actions to make distributions from the Limited Partnership (unless made to its limited partners with prior court approval); making any investments, extending loans or lines of credit, or entering into any agreements on behalf of the Limited Partnership to or with Allen, Parent, or any other entity that Allen directly or indirectly owns or controls; facilitating, allowing, or participating in the purchase, sale, or transfer of limited partnership interests in the Limited Partnership; transferring, selling, or otherwise disposing of funds or assets of the Limited Partnership, its general partner, and ACP Investment Group, LLC (an investment adviser affiliated with the Firm and controlled by Allen) (the "Investment Adviser"); and violating the Martin Act. The court denied the NYAG's request for a temporary receiver, without prejudice to renew such request at trial.

In issuing the preliminary injunction against Allen and the other defendants, the court found that "[t]he evidence adduced at the preliminary injunction hearing revealed a shocking level of self-dealing, breaches of fiduciary duty, misappropriation of enormous sums of [the Limited Partnership's] capital, and outright fraud." The court found Allen's explanations for the "suspicious circumstances" surrounding this matter to be "fanciful," and held that the Limited Partnership was "essentially utilized as a piggy bank to fund a failing broker-dealer, its failing parent, and Mr. Allen." In granting the NYAG's request for a preliminary injunction, the court found that it "cannot allow Mr. Allen or any of the companies he controls to make any decisions with respect to the remaining and very modest assets of [the Limited Partnership.]"

C. The Permanent Injunction

The court held a four-day evidentiary hearing on the NYAG's request for a permanent injunction and its related complaint in January 2021.[4] In February 2021, the court issued a permanent injunction, in the same form as the preliminary injunction, against Allen, Parent, and other affiliated entities (including the Firm as a relief defendant). The court also ordered that Allen and the other defendants disgorge approximately $7.872 million. Further, the court appointed a provisional receiver to liquidate the remaining assets of the Limited Partnership.

The court found that the evidentiary hearing confirmed all facts established at the January 2020 preliminary injunction hearing, and found that Allen's testimony was "unworthy of belief." The court held that:

> [T]he testimonial and documentary evidence adduced during nine days of testimony in this case established that, through a maze of entities owned and/or controlled by defendant Allen, a significant portion of the capital contributed to the [Limited Partnership] was substantially diverted by a hopelessly conflicted Allen toward funding NYPPEX — the broker-dealer entity controlled by Allen. NYPPEX, in turn, utilized these funds to pay Allen exorbitant NYPPEX annual salaries totaling approximately $6 million, as well as to pay the salaries of his staff. [The Limited Partnership's] capital was also used to pay NYPPEX operating expenses. . . . [The Limited Partnership's] investment in NYPPEX is in no way consistent with the investment thesis contained in the [Limited Partnership] Private Placement Memorandum and in the [ ] Limited Partnership Agreement.

The court found that Allen and the other defendants:

- Made frequent, material misrepresentations and misleading omissions to investors in the Limited Partnership;
- Fraudulently caused the Limited Partnership to make "oversized" investments in Parent;
- Gave false and misleading investment advice to purchase Parent's stock to investors in the Limited Partnership;
- Made false and misleading reports on the value of the Limited Partnership's interest in Parent to investors and caused the Limited Partnership to purchase Parent's stock at "wildly inflated" prices;
- Made false and misleading statements concerning the wind-down of the Limited Partnership;

[4] The court explained that the delay between the February 2020 preliminary injunction and a hearing on the permanent injunction was largely due to several withdrawals by counsel for the defendants.

- Concealed the merger of Parent and the Investment Adviser (which served as the investment adviser to investors in the Limited Partnership);

- Fraudulently took carried interest to which Allen and the other defendants were not entitled, pursuant to amendments to the limited partnership agreement that were procured by means of material misrepresentations; and

- Fraudulently caused the Limited Partnership to cover significant operating expenses of Parent, without fairly disclosing any of these wrongdoings to the Limited Partnership's investors.

D. Allen Unsuccessfully Appeals the Permanent Injunction

Allen and the other defendants appealed the permanent injunction. In October 2021, a New York appellate court affirmed the trial court's decision and rejected defendants' legal challenges to the permanent injunction and other relief granted by the court. Thereafter, the appellate court denied Allen and the other defendants' motion to reargue the matter and for leave to appeal to New York's highest court.

In December 2021, Allen and the other defendants petitioned New York's highest court for leave to pursue an appeal. They also argued that they can appeal the lower court's decision as of right. In late April 2022, the New York Court of Appeals dismissed applicants' petition for leave to appeal. *See People v. Allen*, 188 N.E.3d 129, 38 N.Y.3d 996 (N.Y. 2022).

E. Allen and the Firm's Arguments Concerning His Disqualified Status Are Meritless

At the hearing and in the Application, Allen and the Firm disputed the findings of the New York court. Allen testified that the NYAG and the New York courts did not understand the facts and contractual obligations surrounding the Limited Partnership and misapplied the law to find that Allen and his affiliated defendants engaged in misconduct. They also argued that the NYAG's action against Allen and his affiliated defendants was a case of first impression and it would be unfair to deny the Application based upon such a case. Allen and the Firm's arguments are without merit. It is well established that a disqualified individual may not collaterally attack the event giving rise to the statutory disqualification in a FINRA eligibility proceeding. *See Robert J. Escobio*, Exchange Act Release No. 83501, 2018 SEC LEXIS 1512, at *30 (June 22, 2018) (rejecting applicant's arguments that a court erred in enjoining him from engaging in various activities under the Commodities Exchange Act and finding that the NAC "correctly adhered to [FINRA's] long-standing policy of prohibiting collateral attacks on underlying disqualifying events"). That an underlying disqualifying event may be a matter of first impression is not germane to our consideration of whether Allen's continued association with the Firm presents an unreasonable risk of harm to the markets or investors.

Further, Allen and the Firm argue that Allen is not statutorily disqualified because the New York court did not enjoin Allen from acting as an investment adviser or broker-dealer or engaging in any activities with such entities in connection with the purchase or sale of securities. We reject this argument. The New York court expressly enjoined Allen from, among other

things: (1) facilitating, allowing, or participating in the purchase, sale, or transfer of limited partnership interests in the Limited Partnership;[5] (2) transferring, selling, or otherwise disposing of funds or assets of the Limited Partnership, its general partner, and the Investment Adviser; and (3) violating the Martin Act and its prohibition on fraudulent practices relating to the purchase, exchange, investment advice, or sale of securities. *See* 15 U.S.C. § 78c(a)(39)(F); 15 U.S.C. § 78o(b)(4)(C); *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *35 (Apr. 18, 2013) (holding that applicant was statutorily disqualified because the judgment at issue enjoined him from engaging in fraudulent activity in connection with the purchase or sale of securities), *aff'd*, 575 F. App'x 1 (D.C. Cir. 2014). We also reject Allen and the Firm's argument that this proceeding is premature or otherwise improper because Allen petitioned for leave to appeal the injunctive relief and his request was still pending with New York's highest court. As described above, since the hearing on the Application, New York's highest court denied Allen's petition for leave to appeal. And, in any event, an appeal of a disqualifying injunction does not alter its status as a disqualifying event. *See Escobio*, 2018 SEC LEXIS 1512, at *14-15 (holding that "an injunction is the action of a court of competent jurisdiction, and the fact that an appeal is taken does not affect the injunction's status as a statutory disqualification").

III. Factual Background

A. Allen

1. Registrations and Outside Business Activities

Allen first registered as a general securities representative in September 1982 and as a general securities principal in September 1999. He also passed the national commodities futures examination and interest rate options examination in September 1982, the uniform securities agent state law examination in March 1983, and the uniform investment adviser law examination in August 2000.

Allen has been associated with the Firm, which he founded, since May 1999. He currently works remotely from his residence in Greenwich, Connecticut. Allen was previously associated with three member firms.[6] CRD lists the following outside business activities for Allen, the first five of which involve entities named as defendants or relief defendants in the NYAG's complaint: (1) managing member of Parent (which CRD states is a "technology based financial services holding company"), for which Allen spends approximately 80 hours per month on senior executive related duties; (2) the Investment Adviser, for which Allen spends approximately 40 hours per month on senior executive related duties; (3) managing member of Institutional Internet Ventures, LLC, a private equity investment partnership through which Allen holds his majority ownership interest in Parent, for which Allen spends approximately one

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[5] There is no dispute that interests in the Limited Partnership are securities. Further, there is no dispute that the New York court that entered the injunctions against Allen is a court of competent jurisdiction as defined in the Exchange Act.

[6] FINRA's Central Registration Depository ("CRD"®) also shows that Allen was associated with the Investment Adviser from January 2000 until December 2014, although CRD further shows that Allen currently serves as the managing member of the Investment Adviser.

hour per month on senior executive related duties; (4) Institutional Technology Ventures, a private equity investment partnership, for which Allen spends approximately one hour per month on senior executive related duties; (5) managing member of LGA Consultants, LLC, for which Allen spends approximately 30 hours per month on senior executive related duties; (6) managing member of Allen Property Management, LLC, an entity that provides real estate investment and management services; (7) Allen Family Endowment, a charitable trust for which Allen spends approximately one hour per month; (8) the chairman of Allen Research Endowment, a non-profit entity for which Allen spends approximately two hours per month; (9) Allen Museum of Art, for which Allen spends one hour per month; (10) 43 Maple Family LP, 431 Maple Family LP, 432 Maple Family LP, 434 Maple Family LP, and 43 Maple Ave. Greenwich Management, for which Allen spends less than one hour per month; and (11) manager of Greentree Estates Property Management, for which Allen spends approximately one hour per month.

2. Pending Disciplinary and Regulatory Matters[7]

In March 2022, and in connection with the findings of the New York court and its issuance of a permanent injunction against Allen and the Firm, the SEC instituted against Allen and the Firm an administrative proceeding pursuant to Exchange Act Section 15(b) and Section 203(f) of the Investment Advisers Act of 1940. This matter is pending.

In February 2020, Connecticut's Banking Commissioner issued a notice of intent to revoke the Firm's registration as a broker-dealer and revoke Allen's registration as a broker-dealer agent. Connecticut based its revocation action on the February 2020 injunction issued by the New York court. CRD shows that this matter is pending.

3. Final Disciplinary and Regulatory Matters

In August 2022, a FINRA Hearing Panel found that: (1) Allen improperly associated with the Firm for more than a year while statutorily disqualified after the New York court entered the December 2018 Order and the Firm and Schunk permitted Allen to improperly associate with the Firm, in violation of FINRA Rules 8311 and 2010 and Article III, Section 3(b) of FINRA's By-Laws; (2) Allen and the Firm made misrepresentations and omissions of material facts to investors, in violation of FINRA Rule 2010 and Sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933, in connection with the sale of securities in Parent after the New York court entered the December 2018 Order; (3) Allen and the Firm violated FINRA's advertising rules in communications to prospective investors and in material posted on the Firm's website, in violation of FINRA Rules 2210 and 2010; (4) Allen and the Firm made false or misleading statements on the Firm's website, in violation of FINRA Rule 2010; (5) Allen made false or misleading statements to a court and to FINRA, in violation of FINRA Rule 2010; (6) Schunk and the Firm failed to reasonably supervise Allen, in violation of FINRA Rules 3110 and 2010; (7) Allen, Schunk, and the Firm made false or misleading statements in response to FINRA requests for information, in violation of FINRA Rules 8210 and 2010; and (8) Allen and the Firm failed to timely and completely respond to FINRA requests for information, in violation of

[7] We discuss herein pending disciplinary and regulatory matters against Allen and the Firm. While we are troubled by the pending regulatory and disciplinary actions, we find it unnecessary to consider them in denying the Application.

FINRA Rules 8210 and 2010. For this misconduct, the Hearing Panel expelled the Firm, barred Allen, suspended Schunk in all capacities for two years, barred Schunk from acting in a principal or supervisory capacity, and fined Schunk a total of $120,000.

Allen, the Firm, and Schunk have appealed the Hearing Panel decision. This appeal is pending.[8]

B. The Firm

1. Background

The Firm has been a FINRA member since November 1999, and Allen testified that the Firm is currently based in Lansing, Michigan, where it has office space.[9] Schunk testified that as of April 2022, the Firm employs: three registered individuals (Allen, Schunk, and Robert Calamunci ("Calamunci"), the Firm's financial and operations principal ("FINOP")); an operations professional; and the general counsel, Kim. The Firm's business primarily focuses on providing "secondary private equity market liquidity to sophisticated investors, including institutions and qualified purchasers" that seek to purchase and sell interests in private equity partnerships. The Firm does not currently employ any other individuals subject to statutory disqualification, although the Firm itself is subject to statutory disqualification because of the injunctions entered against it and a state regulatory order, as described below.

The Firm is wholly owned by Parent (which is also the 100% owner of the Investment Adviser).[10] Allen and his family affiliates own 54% of Parent, and Allen serves as Parent's managing member. Allen also serves as the managing member of the Firm's Office of the Chief Executive Officer (which consists of Allen, Schunk and Kim) and as the Chairperson of the Firm's Executive Committee. He also served as the Firm's chief executive officer until approximately 2020. Allen testified that he approved Schunk's hiring, that his approval was necessary to effectuate Schunk's hire, and that he would "probably" be involved in any decision to terminate Schunk and would be involved with setting Schunk's compensation.

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[8] The appeal of the Hearing Panel decision stayed the sanctions imposed against Allen, the Firm, and Schunk. *See* FINRA Rule 9311(b) (providing that an appeal of a Hearing Panel decision shall operate as a stay of that decision and the sanctions imposed, except the imposition of a permanent cease and desist order). In assessing the Application, we find that ample bases exist to deny the Application without considering this recent FINRA Hearing Panel decision.

[9] In the Application, the Firm stated that although Allen is currently working remotely, he would work from an office in Bethesda, Maryland. Allen testified that after Maryland took regulatory action against the Firm (discussed below), the Firm changed plans and secured office space in Lansing, Michigan. It appears that neither Allen nor Schunk have a residence in Michigan, and Allen testified that the Firm's personnel would be operating remotely for the foreseeable future, although the Firm would periodically reexamine this arrangement going forward.

[10] The NYAG alleged that Parent does not generate any revenue, is effectively the same company as the Firm, and that the Firm transfers its revenue to Parent.

In addition to Allen's majority ownership interest in the Firm, Allen is the Firm's largest producer and has been for many years. Indeed, in 2020, Allen's business activities generated approximately 45% of the Firm's revenues. Further, Allen, through entities that he and his family control, have loaned Parent approximately $1.164 million. These loans remain outstanding.

2. Pending Disciplinary and Regulatory Matters

As set forth above, the Firm is subject to a pending SEC administrative proceeding and a revocation action by the State of Connecticut.

3. Final Disciplinary and Regulatory Matters

As set forth above, the Firm is subject to the August 2022 Hearing Panel decision that expelled it (although this matter is currently on appeal) and the permanent injunction issued by a New York court.

In June 2021, the Maryland Securities Commissioner revoked the Firm's broker-dealer registration. Maryland based its revocation on the permanent injunction entered against the Firm by the New York court. Maryland vacated its revocation in December 2021 pursuant to a consent order after the Firm paid a $5,000 fine and agreed to withdraw its registration and to not reapply until the later of five years or resolution of all pending regulatory matters. The Firm is statutorily disqualified because of this consent order. *See* 15 U.S.C. § 78o(b)(4)(H)(i) (providing that a firm is disqualified if it is subject to any final order of a state securities commission or state authority that supervises or examines banks that, among other things, "bars such person . . . from engaging in the business of securities").

In March 2013, FINRA accepted from the Firm a Letter of Acceptance, Waiver and Consent ("AWC") for violations of FINRA Rule 2010 and NASD Rule 3010. Without admitting or denying the allegations, the Firm consented to findings that it failed to establish and maintain a supervisory system and written supervisory procedures ("WSPs") reasonably designed to ensure that it conducted adequate due diligence for private offerings and the secondary sale of limited partnership interests. FINRA censured the Firm, fined it $10,000, and ordered that it review and revise its WSPs.[11]

[11] Allen testified that the FINRA examiner who identified the misconduct underlying the 2013 AWC informed the Firm that the AWC's findings and fine were "the cost of the exam" and that the examiner was "acknowledging that there really wasn't much of a violation, if any, but they [sic] felt under pressure, if you will, to find a sum amount as the cost of doing the exam." We reject Allen's unsubstantiated allegations. Further, we note that the express language of the AWC provides that the Firm may not make any public statement, including in regulatory filings or otherwise, denying any finding in the AWC or creating the impression that it lacks a factual basis.

4. FINRA Examinations

In August 2021, FINRA issued the Firm a Cautionary Action in connection with the Firm's 2020 examination (and referred a number of matters to Enforcement). FINRA cited the Firm for: (1) failing to comply with FINRA's rules concerning pre-dispute arbitration agreements; (2) failing to apply the accrual method of accounting when preparing its financial books and records; (3) failing to comply with FINRA's rules concerning expense sharing agreements; (4) failing to enforce its procedures relating to the documentation required for investors in the secondary trading of limited partnerships; (5) failing to conduct an annual independent test of its Anti-Money Laundering ("AML") Compliance Program; (6) failing to comply with FINRA's advertising rules with regard to the Firm's website; and (7) failing to establish WSPs that adequately describe the Firm's process for trading limited partnership interests in the secondary market. The Firm responded in writing to the deficiencies noted.

In April 2019, FINRA issued the Firm a Cautionary Action in connection with the Firm's 2018 examination. FINRA cited the Firm for: (1) failing to conduct an independent AML test; (2) failing to maintain an adequate AML Compliance Program; (3) failing to maintain adequate documentation to demonstrate that it was entitled to receive payment for carried interest and failing to prepare its books and records on an accrual basis (which resulted in an inaccurate general ledger and net capital computations); (4) maintaining a deficient affiliate service agreement; (5) selling shares through an initial public offering to accounts in which Allen, who was a restricted person, had a beneficial interest; (6) failing to enforce its WSPs by permitting Allen, a restricted person, to purchase shares in an initial public offering, and not reviewing the Firm's affiliate service agreement; (7) failing to comply with the rules of the Municipal Securities Rulemaking Board concerning annual affirmations; (8) failing to maintain WSPs for its municipal securities business; and (9) failing to provide staff with supporting documents to evidence that the Firm's municipal securities principal (Schunk) completed his continuing education requirements. The Firm responded in writing to the deficiencies noted.

In June 2017, FINRA issued the Firm a Cautionary Action in connection with the Firm's 2016 examination. FINRA cited the Firm for: (1) failing to maintain accurate information on due diligence suitability forms and failing to evidence that it conducted searches of independent sources for issuer due diligence; (2) failing to review requests from the Financial Crimes Enforcement Network and conducting inadequate annual AML tests; (3) failing to maintain adequate WSPs concerning, among other things, the Firm's responsibilities as a selling group participant in private placements, onsite inspections of non-branch offices, and how Allen is supervised; (4) failing to establish a periodic schedule for inspecting an unregistered branch office; (5) failing to timely submit Uniform Termination Notices for Securities Industry Registration; (6) failing to disclose on Uniform Applications for Securities Industry Registration or Transfer that registered representatives were dually employed by the Firm and the Parent; and (7) failing to enforce its WSPs in connection with an internal inspection of an unregistered office. The Firm responded in writing to the deficiencies noted.

IV. Allen's Proposed Activities and the Firm's Proposal for His Heightened Supervision

A. Allen's Proposed Continued Association with the Firm

The Firm currently proposes that Allen will work and be supervised remotely. It states that Allen will continue to serve as the Firm's managing member and as an investment banker.

Allen will be compensated by salary and bonuses based upon fees from private equity transactions.

B. Allen's Proposed Primary Supervisor Schunk

1. Schunk's Registrations, Duties at the Firm, and Outside Business Activities

The Firm proposes that Schunk will serve as Allen's primary supervisor from a remote location. Schunk joined the Firm in February 2004 and has served as the Firm's chief compliance officer since 2012. Since approximately 2020, Schunk has also served as the Firm's chief executive officer, and he is also the Co-Chair of the Firm's Legal and Compliance Committee.[12] Further, Schunk serves as the chief compliance officer for Parent and the Investment Adviser. Although the Application states that he supervises seven registered representatives and operations professionals, he testified that two registered individuals have subsequently left the Firm. Allen is Schunk's supervisor.

Schunk first registered as a general securities representative in June 1981, as a general securities principal in January 1989, as a FINOP in October 1992, and as a municipal securities principal in September 1999. He also passed the uniform securities agent state law examination in February 1983. Prior to associating with the Firm, Schunk was associated with 15 other firms.

CRD lists the following outside business activities for Schunk: (1) Principal Consulting, LLC, an entity that provides investment related consulting; (2) chief compliance officer for Parent, for which Schunk spends approximately 50 hours per month; and (3) chief compliance officer for the Investment Adviser.

2. Final Disciplinary and Regulatory Matters

As discussed above, in August 2022 a FINRA Hearing Panel found that Schunk: (1) failed to reasonably supervise Allen, in violation of FINRA Rules 3110 and 2010; (2) permitted Allen to associate with the Firm while statutorily disqualified, in violation of FINRA Rules 8311 and 2010 and Article III, Section 3(b) of FINRA's By-Laws; and (3) made false or misleading statements in response to FINRA requests for information, in violation of FINRA Rule 8210 and 2010. The Hearing Panel suspended Schunk in all capacities for two years, barred him from acting in a principal or supervisory capacity, and fined him a total of $120,000. This matter is currently on appeal.

[12] Allen testified that in addition to Schunk and himself, Kim is part of the Legal and Compliance Committee and that outside counsel or consultants will occasionally advise the committee and other Firm committees.

In January 2019, FINRA issued Schunk a Cautionary Action. FINRA cited Schunk for failing to update timely his Form U4 to reflect certain financial events. At the hearing, Schunk did not recall what this Cautionary Action related to.[13]

In February 2012, FINRA accepted from Schunk an AWC for violations of FINRA Rules 3310 and 2010 and NASD Rules 3010, 3011, 3012, and 2110. Without admitting or denying the allegations, Schunk consented to findings that he: (1) failed to ensure that a firm established and maintained a supervisory system, and established, maintained and enforced WSPs reasonably designed to achieve compliance with branch office supervision and email retention requirements; and (2) failed to ensure that the firm established, maintained and enforced supervisory control procedures, failed to create a report detailing the results of a test of the firm's supervisory controls system, and failed to develop and implement a reasonably-designed, written AML compliance program for the firm. The AWC found that, among other things, the WSPs drafted by Schunk were not reasonably designed to achieve compliance with rules relating to branch office supervision, email retention, principal approval of trades and new accounts, and the supervision of representatives subject to regulatory orders, and that Schunk failed to supervise reasonably the activities of a branch office and two individuals with disciplinary histories. FINRA suspended Schunk in any principal capacity for 30 days, fined him $20,000, and ordered that he complete at least 16 hours of training concerning AML, supervision, WSP drafting, and supervisory controls.

C. Allen's Proposed Alternate Supervisor

The proposed heightened supervisory plan submitted by the Firm states that if Schunk is absent, "an assignee from the NYPPEX Legal and Compliance Committee or an advisor from outside legal counsel or regulatory consultants shall" supervise Allen. The Firm also stated that the Firm's general counsel, Kim, would assist Schunk in supervising Allen. Kim, however, is not registered in any capacity with the Firm.

Kim testified that he was not being designated as a direct or alternate supervisor for Allen. At the hearing, the Firm represented that Calamunci would serve as a second supervisor of Allen, which we interpret to mean that Calamunci will serve as Allen's alternate supervisor if Schunk is unavailable. Calamunci has been registered with the Firm since July 2021. He is currently associated with five other member firms.[14] In total, Calamunci has been previously associated with approximately 35 firms.

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[13] CRD shows that Schunk has been subject to 12 tax liens and judgments, totaling approximately $166,000, filed by the IRS, New York State, and the New York State Higher Education Services Corp. CRD indicates that these liens were released or are otherwise no longer outstanding.

[14] In June 2021, the NAC approved the continued association of another statutorily disqualified individual, David Elgart, with member firm Sequoia Investments, Inc. (one of the five firms that Calamunci is currently associated with in addition to the Firm). In connection with that Membership Continuance Application, Calamunci was approved as Elgart's primary supervisor.

Calamunci first registered as a general securities representative in November 1994, a general securities sales supervisor in January 1998, a general securities principal in May 2001, an options principal in January 2003, a financial and operations principal in February 2003, a proprietary trader in September 2011, a municipal securities principal in October 2011, and a compliance officer in October 2011.

CRD lists two outside business activities for Calamunci: (1) 100% owner of RJC Accountants, LLC, which provides tax preparation, bookkeeping, and accounting services; and (2) a certified public accountant for RRBB Accountants and Advisors, where he performs various accounting functions as well as outsourced functions for broker-dealers.

CRD also lists several matters against Calamunci. It shows five outstanding judgments and liens against Calamunci totaling approximately $150,000, and bankruptcy filings in 1996 and 2007, pursuant to which Calamunci received a discharge of debts.

In addition, in January 2007, FINRA accepted from Calamunci an AWC. Without admitting or denying the allegations, Calamunci consented to findings that he violated NASD Rules 3110 and 2110 by failing to: adequately ensure that his firm's ledgers and other records accurately reflected the firm's assets and liabilities; give timely notice of material inadequacies in the firm's accounting system and net capital deficiencies; and file accurate FOCUS reports. FINRA censured Calamunci and fined him $7,500.[15] Also, in February 2004, FINRA accepted from Calamunci an AWC. Without admitting or denying the allegations, Calamunci consented to findings that he violated NASD Rules 2310 and 2110 by making unsuitable recommendations to customers. FINRA suspended Calamunci for 10 business-days and fined him $13,460 (which represented his total commissions on the recommendations).[16]

D. The Firm's Proposed Heightened Supervisory Plan

The Firm submitted a proposed heightened supervisory plan for Allen when it filed the original Membership Continuance Application in February 2020. It subsequently submitted a revised heightened supervisory plan in March 2021, although at the hearing Allen testified that the Firm was working with a consultant to draft another heightened supervisory plan and would welcome any input or suggestions from FINRA in drafting a plan.

The Firm's March 2021 supervisory plan provides as follows:

> 1. Recitals. Although we believe that NYPPEX, the Investment Adviser, and its managing member, Allen, are not statutorily disqualified, this revised Plan of

[15] Further, CRD shows that in 2006 this firm discharged Calamunci for alleged failures to supervise the firm's accounting department and correct books and records deficiencies. Calamunci disputes this claim.

[16] In November 2007, FINRA revoked Calamunci's registration for failing to pay this monetary sanction in full. FINRA rescinded the revocation several weeks later.

Heightened Supervision of Allen is hereby provided in good faith and will retroactively revise NYPPEX's WSPs.

2. Daily Supervision. When Allen is in the office, he will be supervised by Schunk. During the current pandemic, personnel including Allen will operate remotely. Schunk will oversee Allen's activities remotely as well via daily compliance meetings by phone or Zoom type meeting, as well as the Firm's Citrix system and Global Relay system.

3. Securities Accounts. Schunk will review and pre-approve each securities account of Allen. Account documentation will be approved, initialed and saved to NYPPEX's main server.

4. Written Correspondence. Schunk will review Allen's incoming written correspondence, including email, and will review outgoing correspondence.

5. Order Tickets. Schunk will review and approve Allen's order tickets before they are executed. Schunk will evidence his review by initialing the order tickets.

6. Outside Securities Sales Activity. Allen shall disclose to Schunk related [sic] to his outside securities sales activity, if any.

7. Customer Complaints. All complaints pertaining to Allen will be immediately referred to Schunk as Compliance Officer for review. Schunk will prepare a memo to the file detailing measure[s] taken to investigate the merits of such complaints.

8. Quarterly Certifications. Schunk will certify quarterly that Schunk and Allen are in compliance with the conditions of heightened supervision to be applied to Allen according to this plan.

9. Supervision & Contingency Plan. Schunk, Chief Compliance Officer, or in Schunk's absence, an assignee from the NYPPEX Legal and Compliance Committee or an advisor from outside legal counsel or regulatory consultants[,] shall be the supervisor responsible for Allen.

V. Member Supervision's Recommendation

Member Supervision recommends that the application be denied because, in its view: (1) the disqualifying event was recent and involved egregious, securities-related misconduct; (2) the Firm's proposed heightened supervisory plan is inadequate; and (3) the Firm failed to propose suitable supervisors for Allen.

VI. Discussion

A. The Legal Standard

In evaluating an application like this, we assess whether the sponsoring firm has demonstrated that the proposed association of the statutorily disqualified individual is in the

public interest and does not create an unreasonable risk of harm to the markets or investors. *See In the Matter of the Ass'n of X*, Redacted Decision No. SD06002, slip op. at 5 (NASD NAC 2006), http://www.finra.org/sites/default/files/NACDecision/p036476_0.pdf; *see also Frank Kufrovich*, 55 S.E.C. 616, 624 (2002) (holding that FINRA "may deny an application by a firm for association with a statutorily-disqualified individual if it determines that employment under the proposed plan would not be consistent with the public interest and the protection of investors"); FINRA By-Laws, Art. III, Sec. 3(d) (providing that FINRA may approve association of statutorily disqualified person if such approval is consistent with the public interest and the protection of investors).

Factors that bear upon our assessment include the nature and gravity of the statutorily disqualifying misconduct, the time elapsed since its occurrence, the restrictions imposed, the totality of regulatory history, and the potential for future regulatory problems. We also consider whether the sponsoring firm has demonstrated that it understands the need for, and has the capability to provide, adequate supervision over the statutorily disqualified person. The sponsoring firm has the burden of demonstrating that the proposed association is in the public interest despite the disqualification. *See Timothy P. Pedregon, Jr.*, Exchange Act Release No. 61791, 2010 SEC LEXIS 1164, at *16 & n.17 (Mar. 26, 2010).

B. The Firm Has Not Met Its Burden

After carefully reviewing the entire record in this matter, we find that the Firm has failed to demonstrate that Allen's continued association with it is in the public interest and that Allen's association with the Firm would present an unreasonable risk of harm to the markets and investors. We base our denial upon several factors. First, we conclude that Allen's recent and securities-related disqualifying event involved serious and extensive misconduct, including misappropriation of investor funds and fraud, and weighs heavily against the Application. Second, as an independent basis for our denial, we find that the Firm has not demonstrated that it can stringently supervise Allen. Specifically, the Firm has not demonstrated that Schunk can stringently supervise Allen, who is the owner of the Firm, its largest producer, a large lender to Parent, and Schunk's supervisor. The Firm has also failed to propose an adequate heightened supervisory plan. Indeed, the supervisory plan proposed by the Firm is skeletal, not tailored to Allen and his disqualifying misconduct, and lacks sufficient detail. Consequently, we deny the Application for Allen to continue to associate with the Firm.

1. Allen's Serious and Recent Disqualifying Event

We find that the seriousness of Allen's misconduct underlying the disqualifying injunction supports denying the Application. *See Commonwealth Cap. Sec. Corp.*, Exchange Act Release No. 89260, 2020 SEC LEXIS 2612, at *8 (July 8, 2020) (affirming denial of statutory disqualification application and agreeing with the NAC that individual's recent disqualifying misconduct—misappropriation of investor funds—was serious and warranted denial); *Escobio*, 2018 SEC LEXIS 1512, at *16 (agreeing with the NAC that the seriousness of the misconduct underlying the disqualifying injunction supported denying the statutory disqualification application); *Meyers Assocs., LLP*, Exchange Act Release No. 81778, 2017 SEC LEXIS 3096, at *29 (Sept. 29, 2017) (affirming FINRA's denial of statutory disqualification application based in part upon the seriousness and recency of the underlying disqualifying event); *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 2270, at *34 (June 26, 2014) (holding that FINRA properly considered that the consent order forming the

basis of an individual's statutory disqualification stemmed from allegations of serious misconduct). The New York court found that Allen engaged in a lengthy and extensive scheme that involved "a shocking level of self-dealing, breaches of fiduciary duty, misappropriation of enormous sums of [the Limited Partnership's] capital, and outright fraud." The court found that Allen was "hopelessly conflicted" and diverted investor funds to Parent and the Firm, while paying himself and other Firm employees "exorbitant" annual salaries totaling approximately $6 million.

The court further found that Allen and his affiliated defendants made frequent, material misrepresentations and misleading omissions in communications to investors of the Limited Partnership, and fraudulently caused the Limited Partnership to make oversized investments in Parent. The court also found that Allen gave false and misleading investment advice to the Limited Partnership to purchase Parent's stock, made false and misleading reports on the value of the Limited Partnership's interest in Parent to the limited partners, and caused the Limited Partnership to purchase Parent's stock at wildly inflated prices. Further, the court found that Allen made false and misleading statements concerning the wind-down of the Limited Partnership, concealed the merger of Parent and the Investment Adviser, fraudulently took carried interest to which the defendants were not entitled (pursuant to amendments to the limited partnership agreement that were procured by means of material misrepresentations), and fraudulently caused the Limited Partnership to cover significant operating expenses of Parent without fairly disclosing any of these wrongdoings to the Limited Partnership's investors. The court held that it needed to enjoin Allen and his affiliated defendants to prevent further harm to investors. Moreover, the Court ordered Allen and his affiliated defendants to disgorge approximately $7.872 million.

In the Application and at the hearing, Allen and the Firm downplayed the events underlying the disqualifying injunction and the court's myriad findings of misconduct, claiming that the events underlying the disqualifying injunctions were merely a contractual dispute with a disgruntled limited partner. Indeed, Allen claimed that he acted in the best interests of the limited partners because he purportedly rejected an improper effort by a limited partner to liquidate his interests (which, even if true, ignores the rest of the extensive findings of wrongdoing by the New York court). As set forth above, we reject Allen and the Firm's attempt to collaterally attack the findings of the New York court (which were affirmed on appeal).[17] *See Escobio*, 2018 SEC LEXIS 1512, at *30. We also find problematic Allen's attempts to minimize his misconduct, including his testimony that it was "shocking" and "outrageous" that the Firm had to spend the time filing and pursuing approval of the Application. *See Am. Inv. Servs., Inc.*, 54 S.E.C. 1265, 1273 (2001) (denying a firm's application to associate with statutorily disqualified persons who "demonstrate[d] a troubling lack of understanding . . . of their own role in the events that were at issue in the [statutorily disqualifying event]").

Moreover, insufficient time has passed since the New York court entered the permanent injunction against Allen in February 2021 for Allen and the Firm to demonstrate that Allen is currently able to comply with securities laws and regulations and to refrain from engaging in

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[17] For the same reason, we give limited weight to the affidavits of certain investors in the Limited Partnership submitted by the Firm that support Allen's actions in connection with the Limited Partnership.

misconduct.[18] *See Escobio*, 2018 SEC LEXIS 1512, at *17 (holding that FINRA properly determined that the date a court entered a disqualifying injunction finding that an individual engaged in a fraudulent scheme was recent when it was entered less than two years ago); *Eric J. Weiss*, Exchange Act Release No. 69177, 2013 SEC LEXIS 837, at *29 (Mar. 19, 2013) (finding that FINRA properly concluded that a disqualifying order was recent because it was entered 3.5 years prior to the filing of the MC-400 application and that insufficient time had passed for the disqualified individual "to have demonstrated a sufficiently long-term change in behavior to show he would comply with the securities regulations going forward"); *see also William J. Haberman*, 53 S.E.C. 1024, 1030 (1998) (affirming denial of statutory disqualification application where felony conviction occurred "only six years ago"), *aff'd*, 2000 U.S. App. LEXIS 645 (8th Cir. Jan. 19. 2000); *JJFN Servs., Inc.*, 53 S.E.C. 335, 339 n.6 (1997) (rejecting argument that disqualifying event that occurred more than five years prior was "remote in time" and finding that the conviction was "relatively recent"). Under the circumstances, we find that Allen's disqualifying event was too recent for him to show that any changes in his behavior are long-lasting and that he can act in a compliant manner while working in the securities industry.

Allen and the Firm argue that we should approve the Application because other than the misconduct underlying the disqualifying event, Allen has not had any regulatory issues or customer complaints during his long career. We disagree. Setting aside the August 2022 Hearing Panel decision finding that Allen engaged in myriad serious misconduct, which is on appeal, we find that this factor does not outweigh our numerous concerns about Allen's continued association with the Firm, including Allen's highly serious and recent misconduct underlying his disqualification. *See Bruce Zipper*, Exchange Act Release No. 84334, 2018 SEC LEXIS 2709, at *40-41 (Oct. 1, 2018) (rejecting argument that disqualified individual's lack of customer complaints supported approval of application); *Kufrovich*, 55 S.E.C. at 627 (holding that "[a] propensity for dishonest behavior is of particular concern in the securities industry, an industry that presents numerous opportunities for abuses of trust").

We also reject Allen and the Firm's argument that Allen's existing customers and the markets will be harmed if the Application is denied because the Firm is unlikely to exist without Allen, which they assert will impact customers and the private equity markets and therefore weighs in favor of approving the Application. *Cf. Dawson James Sec., Inc.*, Exchange Act Release No. 76440, 2015 SEC LEXIS 4712, at *12 (Nov. 13, 2015) (Order Denying Stay) (considering argument that customers would be harmed by depriving them of broker's financial advice and finding that any such harm "is outweighed by FINRA's concerns about [broker's] ability to comply with the securities laws and the threat he poses to investors"); *The Dratel Group, Inc.*, Exchange Act Release No. 72293, 2014 SEC LEXIS 5094, at *18 (June 2, 2014) (Order Denying Stay) (stating that "the record before us suggests that applicants' customers may be better served if applicants are not participating in the securities industry pending their appeal"). The inconvenience to Allen's existing customers, whom Allen described as sophisticated and consisting mostly of institutional customers, of finding another broker to assist them and unsubstantiated and generalized claims of harm to the markets simply do not outweigh the unreasonable risk of harm to the markets and investors presented by Allen's continued

[18] This is true whether we look to the December 2018 Order that temporarily enjoined Allen as Allen's initial disqualifying event, the preliminary injunction entered against Allen in February 2020, or the permanent injunction entered in February 2021.

association with the Firm. This is especially true of the investors in the Limited Partnership—the New York court enjoined Allen from taking numerous actions in connection with the Limited Partnership to *protect* them from further harm at Allen's hands. *Cf. Commonwealth Cap. Sec. Corp.*, 2020 SEC LEXIS 2612, at *21 (holding that the NAC "reasonably concluded that the risks posed by Springsteen-Abbott's continued association with the firm as a result of the seriousness of the underlying misconduct, recency of the bar, and inadequacy of CCS's proposed supervisory plan outweigh any potential increased expense to the Funds' investors"). The New York court's order that Allen and the other defendants disgorge $7.872 million is a powerful measure of the risk of harm to investors that would exist if we were to approve of this Application.

For similar reasons, we reject Allen and the Firm's argument that because the Firm only deals with sophisticated customers, there is no risk of harm to investors if Allen continues to associate with the Firm. *See Lester Kuznetz*, 48 S.E.C. 551, 554 (1986) (rejecting argument that customers' experience negated registered representative's liability for fraud and holding that customers' investment experience did not give him "license to make fraudulent representations"), *petition for review denied*, 828 F.2d 844 (D.C. Cir. 1987); *Gopi Krishna Vungarala*, Exchange Act Release No. 90476, 2020 SEC LEXIS 4938, at *29-30 (Nov. 20, 2020) (stating that "the Commission has 'repeatedly rejected arguments that the antifraud provisions do not apply to customers who were experienced or sophisticated'"). This argument also ignores that the New York court enjoined Allen and his affiliated defendants from engaging in activities related to the Limited Partnership to protect its investors, whom Allen repeatedly described as sophisticated.

Allen and the Firm further argue that Member Supervision permitted Allen to work at the Firm throughout the period of his disqualification, beginning with the December 2018 Order. They assert that this demonstrates that FINRA believed Allen did not present any risks to investors and we therefore should approve the Application. It is our task to assess the Application and to determine whether Allen's employment with the Firm is in the public interest. *See* FINRA Rule 9524(b)(1). What Member Supervision may have previously permitted Allen to do has no bearing on our assessment that considering all the factors discussed herein, his association with the Firm presents an unreasonable risk of harm to the markets and investors. *Cf. Mitchell T. Toland*, Exchange Act Release No. 71875, 2014 SEC LEXIS 4621, at *11 (Apr. 4, 2014) (Order Denying Stay) (rejecting argument that FINRA could not have believed disqualified individual was a risk to the investing public because he worked in the industry during the lengthy period between the filing of the MC-400 and the hearing).

In sum, we find that Allen's recent and highly serious, securities-related misconduct weighs heavily against approving the Application.

2. The Firm Has Not Demonstrated That It Can Stringently Supervise Allen

We further find, as a separate and independent reason to deny the Application, that the Firm has not demonstrated that it can stringently supervise a statutorily disqualified individual such as Allen. *See Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *18-19 (July 17, 2009) (holding that an applicant must establish that it will be able to stringently supervise a statutorily disqualified individual). We base our conclusion on several factors.

First, we have serious doubts that the Firm can stringently supervise Allen given his ownership of the Firm, role as the Firm's largest producer, and lender of large sums to Parent. The SEC has observed that it is "difficult for employees to supervise effectively the activities of the owner of a firm because owners will almost certainly continue to exercise control over the firm's operations, including the ability to fire an employee charged with the responsibility to supervise the firm's owner." *Zipper*, 2018 SEC LEXIS 2709, at *21 (internal quotation marks omitted); *Asensio & Co.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *17 (Dec. 20, 2012) (same); *Citadel Sec. Corp.*, 57 S.E.C. 502, 509-10 (2004) (same). The SEC has also noted that a firm's dependence on a disqualified individual as the source of a large portion of the firm's customers "undermine[s] the independence of a supervisor," which is crucial to ensure that a disqualified individual is stringently supervised. *See Escobio*, 2018 SEC LEXIS 1512, at *22.

These concerns are particularly applicable here. Allen will continue to play a large managerial role at the Firm. He testified that he approved hiring Schunk, and he also testified that he would likely be involved in any decision to terminate Schunk and would be involved with determining Schunk's compensation. Allen also serves as Schunk's supervisor. Moreover, Allen is the Firm's largest producer, accounting for approximately 45% of the Firm's revenue in 2020, and has been the Firm's largest producer for years.[19] He also has loaned Parent, through affiliated entities, approximately $1.164 million (which remains outstanding). *Cf. In the Matter of the Continued Ass'n of Ronald Berman with Axiom Cap. Mgmt., Inc.*, Decision No. SD-1997, slip op. at 17 (finding that outstanding loans from disqualified individual to minority owner of firm "at a minimum present the potential for conflicts"). All these facts underscore the difficulty of supervising Allen given his position of authority at, and control over, the Firm and the Firm's dependence on him for business and funds.

Second, the Firm has not demonstrated that Schunk can stringently supervise Allen as a disqualified individual. In addition to the difficulty supervising Allen as the Firm's owner, large producer, and lender to Parent, Schunk has regulatory and disciplinary history that casts doubt on his ability to stringently supervise Allen.[20] In 2012, FINRA accepted from Schunk an AWC for

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[19] Allen testified that he has been under heightened supervision at the Firm since at least 2013 because of his role as a large producer. We take no comfort from this fact given that the serious misconduct underlying the disqualifying injunction occurred during this period. Indeed, this further highlights the difficulty of supervising Allen. *See Savva*, 2014 SEC LEXIS 2270, at *38 (finding firm's implementation of a heightened supervisory plan in place prior to disqualifying event "troubling" where disqualified individual was the subject of four customer complaints and two regulatory matters during that time); *In the Matter of the Continued Ass'n of Ronald M. Berman with Axiom Cap. Mgmt., Inc.*, Decision No. SD-1997, slip op. at 17 (FINRA NAC Dec. 11, 2014), https://www.finra.org/sites/default/files/Berman%20SD1997%20FINAL%2019%28d%29%20DECISION%2012%2011%2014_0_0_0_0_0_0_0_0.pdf (finding that firm failed to show that it could stringently supervise disqualified individual where, among other things, he was under heightened supervision when misconduct underlying disqualifying order occurred).

[20] This is true even considering that we do not rely on the August 2022 Hearing Panel decision and its findings that, among other things, Schunk failed to supervise Allen.

supervisory violations, including findings that he failed to ensure that his firm established and maintained a supervisory system, and established, maintained, and enforced WSPs reasonably designed to achieve compliance with branch office supervision and email retention requirements and ensure that the firm established, maintained, and enforced supervisory control procedures. The AWC further found that Schunk failed to reasonably supervise the activities of a branch office and two individuals with disciplinary histories. FINRA suspended Schunk in any principal capacity for 30 days, fined him $20,000, and ordered that he complete at least 16 hours of training concerning AML, supervision, WSP drafting, and supervisory controls. *See Meyers Assocs.*, 2017 SEC LEXIS 3096, at *29-30 (affirming denial of statutory disqualification application based upon, among other things, the inadequacy of individual's proposed supervisors where the alternate supervisor had a regulatory history that included supervisory violations). Schunk also received a Cautionary Action from FINRA in 2019 concerning failures to disclose matters on his Form U4.

Moreover, Schunk served as the Firm's chief compliance officer and Allen's supervisor when the extensive misconduct underlying the disqualifying injunction occurred. During Schunk's tenure as the Firm's chief compliance officer, FINRA also issued the Firm the 2013 AWC (which found that the Firm failed to establish and maintain adequate WSPs, for which Schunk was responsible) and three Cautionary Actions in the past five years identifying numerous deficiencies. These deficiencies included, but were not limited to, supervisory failures involving the Firm's repeated failures to conduct independent AML testing, selling shares through an account in which Allen—a restricted person—had a beneficial interest, and failing to maintain adequate WSPs.

Further, Schunk currently serves as the Firm's chief compliance officer, chief executive officer, Parent's chief compliance officer, the Investment Adviser's chief compliance officer, and he supervises several other individuals at the Firm. Given these other obligations, we are not persuaded that Schunk has sufficient time to dedicate to Allen's stringent supervision.[21] *See Toland*, 2014 SEC LEXIS 4724, at *25 (affirming denial of statutory disqualification application based in part upon inadequacy of proposed supervisors where primary supervisor had additional duties as the firm's chief compliance officer and supervised numerous other individuals); *Emerson*, 2009 SEC LEXIS 2417, at *18-19 (affirming denial of statutory disqualification application and finding that FINRA "reasonably questioned" whether the disqualified individual's proposed supervisor had sufficient time to stringently supervise the individual where he supervised nine other individuals).

Third, we find that the Firm has proposed an inadequate heightened supervisory plan for Allen. The proposed plan: (1) lacks detail, appears to consist of generalized boilerplate applicable to other registered individuals at the Firm, and omits provisions designed to ensure

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[21] We are also troubled by the Firm's failure to initially name a qualified alternate supervisor. At the hearing, the Firm identified Calamunci as Allen's proposed alternate supervisor. Calamunci, however, is currently employed by five other member firms and serves as the primary supervisor for a disqualified individual at one of those firms. Given these responsibilities, the Firm has not shown that Calamunci currently has the time to serve as Allen's alternate supervisor.

that the Firm will stringently supervise Allen;[22] (2) contains no provisions to ensure that Allen's supervisors possess the necessary independence to stringently supervise Allen as the Firm's owner, largest producer, and lender to Parent; and (3) lacks provisions sufficient to help ensure that misconduct similar to the misconduct underlying Allen's disqualifying injunction does not reoccur.[23] *See, e.g.*, *Escobio*, 2018 SEC LEXIS 1512, at *24 ("We have previously found that supervisory plans that . . . lack[] detail are insufficient."); *Savva*, 2014 SEC LEXIS 5100, at *38 (affirming denial of statutory disqualification application based, in part, upon FINRA's findings that the proposed supervisory plan was "skeletal, lack[ed] specificity, and [was] not specifically tailored to Savva and preventing misconduct similar to" the underlying disqualifying order); *Emerson*, 2009 SEC LEXIS 2417, at *18-19 (affirming denial of statutory disqualification application and agreeing with FINRA that the firm's proposed plan was inadequate); *Asensio &*

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[22] For instance, most of the plan's provisions do not provide for documentation of the Firm's compliance with the plan. The proposed plan also fails to specify when Allen's supervisors will review incoming and outgoing correspondence, and it relies solely upon Allen to disclose his outside business activities. Further, the plan does not contain any specific provisions for meetings between Allen and his supervisors to discuss compliance with the plan and any issues related to his heightened supervision, even though Allen and Schunk testified that they discuss these matters daily and the proposed plan contains a general provision for daily meetings. Further, the proposed plan fails to address Allen's role as a principal at the Firm and does not list Calamunci as the proposed alternate supervisor.

[23] Allen and the Firm argue that provisions designed to prevent reoccurrence of the misconduct underlying Allen's disqualifying injunction are unnecessary because the disqualifying injunction, which they assert Allen and the other defendants have complied with, already prevents him from engaging in certain activities. We disagree. As a general matter, a heightened supervisory plan for a disqualified individual should, at a minimum, contain provisions tailored to prevent the misconduct underlying the disqualification from happening again. *See, e.g.*, *Savva*, 2014 SEC LEXIS 5100, at *37-38 (affirming denial of statutory disqualification application based, in part, upon FINRA's findings that the proposed supervisory plan was not specifically tailored to preventing misconduct similar to that underlying the disqualifying order); *In the Matter of the Continued Ass'n of Kimberly Springsteen-Abbott with Commonwealth Cap. Sec. Corp.*, Decision No. SD-2132, slip op. at 15 (FINRA NAC May 24, 2018), https://www.finra.org/sites/default/files/ NAC_SD-2132_Kimberly-Springsteen-Abbott_052418_0_0.pdf (finding that proposed plan was inadequate because, among other things, it did not reflect the underlying disqualifying misconduct), *aff'd*, 2020 SEC LEXIS 2613; *In re the Continued Ass'n of Guy Wyser-Pratte,* Decision No. SD-2148, slip op. at 12-13 (FINRA NAC Mar. 7, 2019), https://www.finra.org/sites/default/files/NAC_SD-2148_Wyser-Pratte_030719.pdf (rejecting a proposed supervision plan that did "not contain any provisions specifically addressing Wyser-Pratte's misconduct underlying the Disqualifying Order"); *see also FINRA Regulatory Notice 18-15*, 2018 FINRA LEXIS 14, at *7-8 (Apr. 30, 2018) (providing that firms should ensure that heightened supervisory plans "are appropriately tailored for each associated person and take into consideration, among other things, the person's activities and history of industry and regulatory-related incidents"). And with respect to the New York injunction, it prohibits Allen from engaging in activities related to the Limited Partnership and from violating New York's securities laws. It does not contain provisions related to Allen's actions generally and preventing the large-scale fraud that gave rise to the injunction.

Co., 2012 SEC LEXIS 3954, at *17 (finding that proposed plan failed to contain provisions that provided for stringent supervision of disqualified owner); *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 SEC LEXIS 2977, at *38 (Sept. 13, 2010) (finding proposed supervisory plan deficient where "[m]uch of what the plan required is no different from the supervision the Firm afforded to all employees").

Allen and the Firm argue that FINRA did not provide any input on the Firm's proposed supervisory plan and complain that Member Supervision did not issue the Firm its denial recommendation, which raised numerous issues with the proposed plan, until two weeks prior to the hearing. It is well established, however, that the applicant bears the burden to draft and propose a supervisory plan that provides for stringent supervision. *See Pedregon*, 2010 SEC LEXIS 1164, at *28 n.32 (holding that FINRA was fully justified in requiring a firm to provide specifics before approving an application rather than accepting assurances that the firm would later devise an appropriate plan); *Emerson*, 2009 SEC LEXIS 2417, at *20 (holding that drafting a supervisory plan is the firm's responsibility, not FINRA's). Moreover, Member Supervision is not required to provide input on a deficient supervisory plan, and it complied with FINRA's rules when it issued its denial recommendation and served it on the Firm. *See* FINRA Rule 9524(a)(3) (providing that Member Supervision "shall serve its recommendation and its supporting documents on the Office of General Counsel and the disqualified member or sponsoring member, as the case may be, within 10 business days of the hearing").

At the hearing, Allen testified that the Firm had recently engaged a consultant to draft a revised heightened plan of supervision to address the concerns identified in Member Supervision's denial recommendation. We must, however, "consider the proposed supervisory plan before us, not some hypothetical plan." *See In the Matter of the Ass'n of Scott Coy with Invicta Cap. LLC*, SD-2195, slip op. at 14 (FINRA NAC Mar. 15, 2019), https://www.finra.org/sites/default/files/2019-05/NAC_SD-2195_Scott-Coy_031519.pdf; *see also Pedregon*, 2010 SEC LEXIS 1164, at *28; *Emerson*, 2009 SEC LEXIS 2417, at *20. We have stressed the importance of having documented the exact terms and conditions of the Firm's supervisory plan. *See Coy*, Decision No. SD-2195, slip op. at 13 (holding that "the language of the proposed heightened supervisory plan is of the utmost importance because it provides the specific framework and details of Coy's supervision as a disqualified individual"); *cf. In the Matter of the Continued Membership of Windsor St. Cap., L.P.*, Decision No. SD-2172, slip op. at 22 (FINRA NAC May 14, 2018), http://www.finra.org/sites/default/files/NAC_SD-2172_Windsor_051418_0_0.pdf (emphasizing, in the context of a firm's request to continue its FINRA membership notwithstanding its disqualification, that "a written plan serves as a safeguard to help ensure that the disqualified firm does not repeat the misconduct underlying the disqualifying event and generally complies with securities laws and regulations going forward. A written plan also provides FINRA examiners with concrete factors and benchmarks to help measure and assess a firm's compliance with securities laws and regulations if FINRA permits the firm to continue in membership."). The proposed supervisory plan currently before us fails to meet these exacting standards.

For all these reasons, we find that the Firm has failed to demonstrate that it can stringently supervise Allen.

VII. Conclusion

Accordingly, we find that it is not in the public interest and would create an unreasonable risk of harm to the markets and investors, for Allen to continue to associate with the Firm. We therefore deny the Application.

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary