

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

ACAP Financial, Inc.
Salt Lake City, UT,

and

Gary Hume
Salt Lake City, UT,

Respondents.

DECISION

Complaint No. 2007008239001

Dated: September 26, 2012

Respondent ACAP Financial, Inc. sold unregistered securities in contravention of the Securities Act of 1933. Respondents ACAP and Gary Hume failed to reasonably supervise a registered representative in connection with the sales of unregistered securities and to establish, maintain, and enforce written procedures reasonably designed to achieve and monitor compliance with the relevant laws, rules, and regulations. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Jonathan I. Golomb, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: James R. Kruse, Esq., and Paula W. Faerber, Esq.

Decision

The review subcommittee of the National Adjudicatory Council ("Review Subcommittee") called this matter for review to examine the sanctions imposed by the Hearing Panel. After a thorough review of the record, we affirm the Hearing Panel's findings that ACAP Financial, Inc. ("ACAP" or the "Firm") violated NASD Rule 2110 when it sold shares of an unregistered penny stock in contravention of Section 5 of the Securities Act of 1933 ("Securities

Act”) and that ACAP and Gary Hume (“Hume”), the firm’s compliance officer and head trader during the relevant period, engaged in related supervisory violations contrary to NASD Rules 3010 and 2110.¹ We, however, have determined to modify the sanctions imposed by the Hearing Panel. We fine ACAP \$50,000 for its sales of unregistered securities, fine ACAP an additional \$50,000 for its supervisory violations, and require the Firm to revise its procedures and retain an independent consultant within 90 days of the date of this decision to review and approve the procedures. We also suspend ACAP from receiving and liquidating unregistered penny stocks until its procedures are approved by the consultant and implemented. We fine Hume \$25,000, suspend him in all capacities for six months, and require that he requalify before acting in any capacity requiring qualification.

I. Background

ACAP is a registered broker-dealer headquartered in Salt Lake City, Utah.² The Firm became a FINRA member in 1978. The majority of the Firm’s business consists of trading lower-priced Bulletin Board and OTC Pink securities.

Hume entered the securities industry in 1988 when he registered as a financial and operations principal. Hume is currently associated with ACAP as a general securities representative and principal, financial and operations principal, equity trader limited representative, investment banking limited representative, and operations professional. At all times relevant, Hume served as ACAP’s compliance officer and head trader.

II. Procedural History

The Department of Enforcement (“Enforcement”) filed the complaint in this matter in June 2010. Cause one of the complaint alleged that between May 9 and June 30, 2005, ACAP, in contravention of Securities Act Section 5, sold shares of Greyfield Capital (“Greyfield”), a thinly traded unregistered penny stock, in violation of NASD Rule 2110. Cause two alleged that ACAP and Hume failed to reasonably supervise registered representative Vincent McGuire (“McGuire”) in connection with the sales of the Greyfield stock and failed to establish, maintain and enforce written supervisory procedures, in violation of NASD Rules 3010 and 2110.³

The parties stipulated to certain facts in the complaint and to the liability of ACAP and Hume. The parties waived a hearing below and the Hearing Panel decided the case based on the written record. In its written decision, the Hearing Panel found ACAP and Hume liable for the

¹ The conduct rules that apply are those that existed at the time of the conduct at issue.

² Prior to 1991, the Firm was known as Alliance Capital Corporation.

³ McGuire agreed to a settlement with Enforcement for his role in selling the unregistered Greyfield securities in violation of NASD Rule 2110.

misconduct as alleged in the complaint. For selling unregistered securities, the Hearing Panel fined ACAP \$25,000. For the supervisory violations, the Hearing Panel fined ACAP \$50,000 and required that it revise its procedures and retain an independent consultant to review and approve the procedures. The Hearing Panel also suspended ACAP from receiving and liquidating unregistered penny stocks until its procedures were approved by the consultant and implemented. The Hearing Panel fined Hume \$10,000, suspended him as a principal for one year, and required that he requalify as a principal before again acting in that capacity. After the Review Subcommittee called this matter for review, neither the respondents nor Enforcement requested oral argument. The case therefore has been decided based upon the written record.

III. Facts

A. Greyfield

Greyfield began trading in the over-the-counter market on May 24, 2002, at a price of \$1.40 per share. Between May 24, 2002, and May 2005, there were four trades in Greyfield's stock, equaling 1,330 total shares traded. With the exception of the first trade, the price per share was \$.01.

Greyfield had no business operations as of April 2005. That month, MF, a Canadian resident, and his two colleagues took control of Greyfield by providing false documents to the transfer agent. MF perpetrated this fraud by using a signature stamp that he obtained from Greyfield's former president. MF thereafter appointed his two colleagues as Greyfield's controlling officers and directors and issued the unregistered shares that are at the center of this case.

Beginning in April 2005, MF arranged for the distribution of 600 million shares of unregistered Greyfield stock to himself, nominees, and others, including stock promoters. Greyfield issued 477 million of these shares to Gold Technologies, LLC ("Gold Technologies"), a company that MF owned. In April and May 2005, MF caused the transfer agent to distribute 65 million Greyfield shares to MF's business associate, BC; 90 million shares to BC's wife; 92 million shares to Gold Technologies; and the remaining shares to other entities and individuals.⁴

In 2005, during the time when MF was facilitating the Greyfield stock distribution, Greyfield was promoting its stock by issuing press releases touting its business prospects. From May 6 through July 26, 2005, Greyfield's average daily trading volume was approximately 1,580,000 shares. Its price per share rose to \$.05 over the first two weeks of trading, but fell to less than \$.01 by the first week of June 2005.⁵

⁴ McGuire opened accounts at ACAP for MF, Gold Technologies, and BC in 2003.

⁵ On July 29, 2005, the SEC suspended trading in Greyfield stock for 10 days. The SEC determined that questions related to Greyfield's corporate domicile, the identity of the

B. ACAP's Sales of Unregistered Greyfield Securities

Between May and July 2005, Gold Technologies and BC deposited a total of 55 million unregistered Greyfield shares into their accounts at ACAP.⁶ Specifically, Gold Technologies deposited a certificate for 25 million Greyfield shares on May 3, 2005, and a 10 million share certificate on July 6, 2005. BC deposited 20 million shares by certificate on May 3, 2005. None of the shares bore a restrictive legend.

ACAP, through McGuire, sold more than 27 million unregistered Greyfield shares from the Gold Technologies and BC accounts to the public. Proceeds to the seller customers totaled more than \$46,000 between May and July 2005.⁷ Specifically, Gold Technologies sold 423,684 Greyfield shares through ACAP in May 2005 and an additional 7.3 million shares in July 2005. Gold Technologies received \$34,606.86 from these sales. When BC sold his 20 million shares through ACAP in June 2005, he received \$11,435 in sales proceeds.

C. Supervision

Hume was ACAP's compliance officer and McGuire's supervisor. Neither ACAP nor Hume took adequate measures to prevent McGuire from selling the Greyfield shares to the public. Rather, ACAP and Hume relied on the lack of a restrictive legend on the Greyfield stock certificates and the clearance of the stock through the transfer agent in making the determination that the shares were freely tradable.

Hume also was responsible for creating and updating ACAP's written supervisory procedures. The Firm had no written or formal procedures regarding restricted stock transactions or the receipt of stock certificates. In addition, the Firm's procedures provided no guidance on determining whether stock was freely tradable.

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company's officers and directors, the validity of its newly issued shares, and the accuracy of the information contained in the company's press releases warranted the trading suspension.

In November 2006, the SEC and British Columbia Securities Commission announced settlements with MF and one of his colleagues for market manipulation and the sale of unregistered Greyfield securities.

⁶ This represented approximately 11% of the issued and outstanding Greyfield shares.

⁷ McGuire accepted the orders, completed the order tickets, and obtained market maker quotes for all of these Greyfield sales.

IV. Discussion

We have reviewed the record thoroughly and affirm the Hearing Panel's findings of violation.

A. Selling Unregistered Securities

ACAP was prohibited under Securities Act Section 5 from selling Greyfield shares in interstate commerce unless a registration statement was in effect as to the offer and sale of that security or an exemption from the registration requirements applied. *See Midas Sec., LLC*, Exchange Act Rel. No. 66200, 2012 SEC LEXIS 199, at *25-28 (Jan. 20, 2012). "A *prima facie* case for violation of Securities Act Section 5 is established upon a showing that: (1) no registration statement was in effect or filed as to the securities; (2) a person, directly or indirectly, sold or offered to sell the securities; and (3) the sale or offer to sell was made through the use of interstate facilities or mails." *World Trade Fin. Corp.*, Exchange Act Rel. No. 66114, 2012 SEC LEXIS 56, at *23-24 (Jan. 6, 2012). ACAP stipulates that there was no registration statement in effect for the Greyfield shares when the securities were issued or at any time during the period when ACAP sold shares on behalf of Gold Technologies and BC. ACAP also does not dispute that it sold the unregistered Greyfield shares into the over-the-counter market using interstate means. ACAP moreover does not argue that the Greyfield sales were made in compliance with any applicable exemption from registration under the Securities Act. *See, e.g., id.* at *24-25 ("Exemptions from the registration requirements are affirmative defenses that must be established by the person claiming the exemption.").

Selling unregistered shares in violation of Securities Act Section 5 also violates NASD Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. *Midas*, 2012 SEC LEXIS 199, at *46 n.63. Moreover, it is a "long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation . . . constitutes a violation of Conduct Rule 2110." *Stephen I. Gluckman*, 54 S.E.C. 175, 185 (1999).

Accordingly, we conclude that ACAP violated NASD Rule 2110 when it sold unregistered shares of Greyfield in contravention of Section 5 of the Securities Act.

B. Supervisory Violations

NASD Rule 3010(a) requires FINRA members to establish and maintain a supervisory system that is reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA rules. Pursuant to this rule, ACAP was required to set forth the applicable rules and policies to which its representatives must adhere and describe specific practices that are prohibited. ACAP was required to tailor the supervisory system specifically to its business and to address the activities of all of its registered representatives and other associated persons. *See Dep't of Enforcement v. Midas Sec., LLC*, Complaint No. 2005000075703, 2011 FINRA Discip. LEXIS 62, at *20 (FINRA NAC Mar. 3, 2011), *aff'd*,

2012 SEC LEXIS 199. Despite indications that the Greyfield stock sales may have been part of an illegal distribution, ACAP and Hume failed to take steps to ensure that McGuire ascertained the information necessary to determine whether the unregistered Greyfield shares could be sold in compliance with Securities Act Section 5.

NASD Rule 3010(b) requires each member to establish, maintain, and enforce written supervisory procedures that are reasonably designed to ensure compliance with the applicable securities laws and regulations and FINRA rules.⁸ Hume was responsible for creating and maintaining ACAP's written supervisory procedures. ACAP, however, had no written procedures regarding restricted stock transactions or the receipt of stock certificates.

ACAP and Hume stipulated to the alleged supervisory violations, and the record supports the Hearing Panel's findings. Accordingly, we affirm the Hearing Panel's findings that ACAP and Hume violated NASD Rules 3010 and 2110.⁹

V. Sanctions

A. Selling Unregistered Securities

For its sales of unregistered securities, the Hearing Panel fined ACAP \$25,000. We determine that the severity of the violation warrants an increased fine.

The FINRA Sanction Guidelines ("Guidelines") for the sale of unregistered securities recommend a fine of \$2,500 to \$50,000.¹⁰ The Guidelines further provide that, in egregious cases, an adjudicator may consider a higher fine and suspending the firm with respect to any or all activities or functions for up to 30 business days or until procedural deficiencies are remedied.¹¹ We determine that four guideline-specific considerations are relevant to ACAP's misconduct and weigh in favor of an increased fine: (1) whether ACAP attempted to comply with an exemption from registration; (2) the share volume and dollar amount of transactions involved; (3) whether ACAP implemented reasonable procedures to ensure that it did not

⁸ The particular facts and circumstances of the case at issue govern whether the written supervisory procedures are reasonable. *See Midas*, 2011 FINRA Discip. LEXIS 62, at *22.

⁹ A violation of NASD Rule 3010 is also a violation of NASD Rule 2110. *See Midas*, 2012 SEC LEXIS 199, at *60.

¹⁰ *FINRA Sanction Guidelines* 24 (2011), <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf> [hereinafter *Guidelines*].

¹¹ *Id.*

participate in an unregistered distribution; and (4) whether ACAP disregarded “red flags” suggesting the presence of an unregistered distribution.¹²

ACAP made no attempt to determine whether the Greyfield stock was registered and freely tradable, and it instead exclusively relied upon the lack of a restrictive legend and clearance of the stock by the clearing firm. ACAP argues that such reliance was consistent with industry practice at the time and therefore acceptable and serves to mitigate sanctions. We disagree. The law is well-settled that ACAP was not relieved of its obligations to inquire because the transfer agent cleared the stock or the shares did not contain restrictive legends. *See Quinn & Co. v. SEC*, 452 F.2d 943, 947 (10th Cir. 1971); *Stead v. SEC*, 444 F.2d 713, 716 (10th Cir. 1971); *see also Robert G. Leigh*, 50 S.E.C. 189, 194 (1990) (explaining that a “transfer agent’s willingness to reissue the certificates without restrictive legends did not relieve [broker] of his obligation to investigate”); *L.A. Frances, Ltd.*, 44 S.E.C. 588, 593 (1971) (rejecting argument that respondents were misled by sellers and acted with due diligence to satisfy themselves that the transactions were legal); *cf. Everest Sec., Inc. v. SEC*, 116 F.3d 1235, 1239 (8th Cir. 1997) (determining reliance on others does not excuse brokers’ own lack of investigation). Rather, it was incumbent upon ACAP to make an independent investigation to determine the registration status of the Greyfield securities. *See Charles F. Kirby*, 56 S.E.C. 44, 66 & n.58 (2003) (“Nor is it a defense, if true, that others in the industry rely on transfer agents to determine whether stock is restricted.”); *Jacob Wonsover*, 54 S.E.C. 1, 14-15 (1999), *aff’d*, 205 F.3d 408 (D.C. Cir. 2000). The Commission has “stressed the responsibility of broker-dealers to prevent their firms from being used as conduits for illegal distributions.” *Apex Fin. Corp.*, 47 S.E.C. 265, 269 (1980).

To that end, the Commission has issued repeated pronouncements dating back decades about a firm’s duty to conduct a searching inquiry before participating in the liquidation of potentially unregistered stock.¹³ *See In re Transactions in the Securities of Laser Arms Corp. by*

¹² *See id.* Because there was no registration statement in effect for the Greyfield shares, we do not consider the guideline-specific consideration regarding whether ACAP sold the shares before the effective date. *See id.*

¹³ ACAP argues that FINRA imposed new requirements on firms related to the resale of restricted securities in 2009 as announced in FINRA Regulatory Notice 09-05. *See* 2009 FINRA LEXIS 7 (Jan. 2009). ACAP misconstrues the content of the notice. FINRA stated that the notice served to “remind[] firms of their responsibilities to ensure that they comply with the federal securities laws and FINRA rules when participating in unregistered resales of restricted securities.” *Id.* at *1. The notice did not impose any new requirements upon firms. *See id.* at *1-22. ACAP’s failure to recognize its obligations does not mitigate its violations here. *See, e.g., Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971, at *19 n.22 (May 9, 2007) (rejecting any finding of mitigation and stating that respondents may not blame FINRA for their own failings to comply with relevant rules); *cf. East/West Sec. Co.*, 54 S.E.C. 947, 951

Certain Broker-Dealers, 50 S.E.C. 489, 503-04 (1991); *Sales of Unregistered Securities by Broker-Dealers*, Exchange Act Rel. No. 9239, 1971 SEC LEXIS 19, at *7-8 (July 7, 1971); *Distribution by Broker-Dealers of Unregistered Securities*, Exchange Act Rel. No. 6721, 1962 SEC LEXIS 74, at *4-5 (Feb. 2, 1962); cf. Securities Act Rule 144(g)(3) (requiring reasonable inquiry by a broker before securities sales). ACAP's failure to conduct any inquiry here warrants significant sanctions.

Most important, in our view, is the severe danger to investors from the 27 million unregistered shares that ACAP sold into the public marketplace.¹⁴ We also find aggravating for purposes of sanctions that ACAP had no written supervisory procedures in place to prevent the participation in an unregistered distribution or to provide guidance to its representatives when presented with stock certificates without restrictive legends and to determine whether a security was exempt from registration.¹⁵ This fact is particularly troubling given ACAP's business model.

ACAP argues that its misconduct was negligent. We find that the facts here amply illustrate that ACAP intentionally ignored the legality of the Greyfield trades, which supports that this was an egregious violation.¹⁶ Specifically, ACAP ignored several red flags related to the Greyfield trading.¹⁷ Greyfield was an unknown, development-stage company that had recently undergone a change in control. *See, e.g., Kirby*, 56 S.E.C. at 55-56 (finding the fact that unknown company had limited assets and limited trading history were red flags warranting broker's due diligence prior to sales). MF and his associates deposited more than 10 percent of the outstanding Greyfield stock into ACAP accounts within weeks of the Greyfield shares being issued. *See, e.g., Steven Eugene Scott*, Exchange Act Rel. No. 43656, 2000 SEC LEXIS 2635, at *10-11 (Dec. 1, 2000) (opening of nominee accounts and delivery of millions of shares of thinly

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& n.13 (2000) (rejecting as a defense to a rule violation the assertion that FINRA provided inadequate guidance).

¹⁴ *See Guidelines*, at 24. The dollar amount of these sales also was not insignificant. ACAP argues that any fine imposed should be proportionate to the dollar amount of the sales and commissions earned. In a written submission made below, ACAP represented that the Firm earned \$5,290 in gross commissions on these sales. We determine that the dollar amount of the sales and the commissions that ACAP earned on these sales in no way mitigates sanctions here. *See id.* at 7, 24.

¹⁵ *See id.* at 24.

¹⁶ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

¹⁷ *See id.* at 24.

traded security into those accounts was a red flag requiring a searching inquiry into the status of the shares). MF and his associates began liquidating these shares soon after depositing them in their ACAP accounts, which they did contemporaneous with Greyfield issuing press releases promoting its business prospects.

Despite these facts, ACAP turned a blind eye and conducted no inquiry into the circumstances surrounding the Greyfield activity. Indeed, Hume testified in a 2008 on-the-record interview with Enforcement that ACAP took no action to investigate whether a stock was freely tradable when a customer deposited a stock certificate that bore no restrictive legend. As the Commission has made clear, “when a dealer is offered a substantial block of a little-known security, either by persons who appear reluctant to disclose exactly where the securities came from, or where the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then searching inquiry is called for.” See *Distribution by Broker-Dealers of Unregistered Securities*, 1962 SEC LEXIS 74, at *4-5.

Under these circumstances, we conclude that ACAP’s actions show a deliberate disregard of its gate-keeping responsibilities pursuant to Securities Act Section 5 and fine ACAP \$50,000.

B. Supervisory Violations

For its supervisory violations, the Hearing Panel fined ACAP \$50,000, ordered the Firm to revise its procedures, required the Firm to retain an independent consultant to review and approve the procedures, and suspended a Firm business line. We affirm these sanctions. The Hearing Panel also fined Hume \$10,000, suspended him as a principal for one year, and ordered that he requalify as a principal. We determine that the seriousness of Hume’s misconduct requires a modification of sanctions.

For the failure to discharge supervisory obligations, the Guidelines recommend a fine of \$5,000 to \$50,000 and a suspension of the responsible individual in all supervisory capacities for up to 30 business days or, in egregious cases, all capacities for up to two years or a bar.¹⁸ Adjudicators should also consider in egregious cases suspending the firm with respect to any or all activities or functions for up to 30 business days.¹⁹ In determining the proper remedial sanction, the Guidelines for supervisory violations recommend that adjudicators consider whether: (1) the responsible individual ignored “red flag” warnings that should have resulted in additional supervisory scrutiny; (2) the nature, extent, and character of the underlying

¹⁸ *Guidelines*, at 103.

¹⁹ *Id.*

misconduct; and (3) the quality and degree of the supervisor's implementation of the firm's supervisory procedures and controls.²⁰

The Guidelines for deficient written supervisory procedures provide for fines ranging from \$1,000 to \$25,000.²¹ In egregious cases, the Guidelines recommend suspending the firm with respect to any or all relevant activities for up to 30 business days and thereafter until the supervisory procedures are amended to conform to rule requirements.²² The Guidelines for deficient supervisory procedures provide two considerations to determine the appropriate sanctions: (1) whether the deficiencies allowed violative conduct to occur or to escape detection; and (2) whether the deficiencies made it difficult to determine the individual or individuals responsible for specific areas of supervision or compliance.²³

The Hearing Panel determined that ACAP's and Hume's supervisory failures were egregious. We agree and find that several factors serve to aggravate respondents' misconduct. ACAP and Hume ignored several red flags as set forth above that should have resulted in an inquiry into whether the Greyfield shares were part of an unlawful distribution. Respondents, however, engaged in no due diligence and abdicated all responsibly to the Firm's clearing firm. Respondents' supervisory failures allowed the Securities Act Section 5 violations to occur here. The Firm's and Hume's failure to employ any supervisory procedures is particularly egregious considering that the Firm's business principally involved brokering transactions in lower-priced Bulletin Board and OTC Pink securities. We also find that the volume of Greyfield shares sold to the public is aggravating.

ACAP argues in favor of mitigation that the Firm revised its procedures related to the resale of restricted stock after the misconduct at issue here occurred. A firm's employment of "subsequent corrective measures" to revise procedures to avoid the recurrence of misconduct can be mitigating, but only where the firm does so "prior to detection or intervention . . . by a regulator."²⁴ See, e.g., *Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655, 2008 SEC LEXIS 819, at *68 (Apr. 11, 2008) ("Remedial action taken after the initiation of an examination has little mitigative value."). In this case, the record contains trace evidence of remedial measures. Hume testified in his 2008 on-the-record interview with Enforcement that ACAP, a few weeks earlier, had begun using a questionnaire in connection with the deposit of large blocks

²⁰ *Id.*

²¹ *Id.* at 104.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 3).

of stock to determine whether the shares were eligible for resale. Hume testified that, at that time, ACAP representatives were not mandated to use this questionnaire. Most importantly, ACAP took no remedial measures before Enforcement commenced its investigation of the Firm; thus, we find that the Firm is not entitled to any mitigation of sanctions.

Based on the facts of this case, we fine ACAP \$50,000 for the supervisory violations and require that the Firm revise its procedures to ensure that they are reasonably designed to comply with the requirements of Securities Act Section 5.²⁵ To make certain that the Firm comprehends the critical importance of compliance with NASD Rule 3010 and Securities Act Section 5, we also order ACAP to retain within 90 days of the date of this decision an independent consultant, acceptable to Enforcement, with experience in designing and evaluating broker-dealer procedures to review and approve the Firm's revised procedures. We suspend the Firm from receiving unregistered penny stocks and liquidating those positions until it has implemented the revised and approved procedures.

With respect to Hume, we determine that his supervisory failings demonstrated his lack of knowledge or familiarity with the rules and laws governing the securities industry and were sufficiently serious to warrant a modification of the Hearing Panel's sanctions. Hume not only failed to supervise McGuire's handling of the Greyfield trades, he was the supervisor at the Firm charged with ensuring that ACAP adopted and implemented procedures to comply with Securities Act Section 5. Instead, he admittedly did nothing but rely upon others, such as the transfer agent and clearing firm, to fulfill his responsibilities. For Hume's misconduct, we fine him \$25,000 and suspend him in all capacities for six months. We also order that Hume requalify by examination before he again serves in any capacity requiring qualification. We determine to suspend Hume in all capacities, versus the Hearing Panel's suspension of Hume as a principal, and order requalification in all capacities requiring qualification because we find that Hume's failures impeded the gatekeeping function designed to prevent the sale of unregistered securities, which is an important component of maintaining the integrity of the securities registration process. Hume was centrally responsible for the rule violations at issue here, he abdicated his responsibility to others, and he displayed a disturbing lack of understanding and ignorance of FINRA rules. *See, e.g., Dennis S. Kaminski*, Exchange Act Rel. No. 65347, 2011 SEC LEXIS 3225, at *42, 45 (Sept. 16, 2011) (affirming suspension and requalification requirement in all capacities of supervisor who disregarded his supervisory responsibilities and led to a breakdown in firm's compliance system).

²⁵ ACAP requests that the NAC aggregate the sale of unregistered securities and supervisory violations for the purposes of determining an appropriate unitary fine. We decline to aggregate the violations here based on the circumstances of this case and instead impose a fine for each violation. *See Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 4).

C. ACAP's Financial Condition

ACAP asserted throughout these proceedings that it is a small firm whose financial condition warrants reduced sanctions.²⁶ ACAP submitted below its annual audited financial reports for the period ending December 31, 2009. At the end of 2009, the Firm's stockholders' equity was \$159,452, its revenues totaled \$1,501,875, and its net loss for the year was \$143,133. ACAP, at the end of 2009, had approximately \$90,000 in excess net capital.²⁷ We determine that the evidence submitted by the Firm illustrates that no reduction in the fine amounts is required, and the Firm is capable of paying the fines that we order here.²⁸

VI. Conclusion

We affirm the Hearing Panel's findings that ACAP sold unregistered securities in violation of NASD Rule 2110. For this violation, we impose a \$50,000 fine. We also affirm the findings that ACAP and Hume failed to supervise McGuire and to establish adequate policies and procedures reasonably designed to achieve and monitor compliance with applicable laws, rules, and regulations in violation of NASD Rules 3010 and 2110. For the supervisory violations, we fine ACAP an additional \$50,000 and require the Firm to revise its procedures. The Firm shall retain, within 90 days of the date of this decision, an independent consultant acceptable to Enforcement to review and approve the procedures. We also suspend ACAP from receiving and liquidating unregistered penny stocks until the procedures are approved by the

²⁶ ACAP's appellate brief purports to raise this issue on Hume's behalf as well. Hume, however, made no argument below regarding his financial condition and has not sought to introduce any evidence to support that claim. *See, e.g., Guang Lu*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *33 (Jan. 14, 2005) (explaining that the party claiming an inability to pay has the burden of demonstrating that ability). We therefore limit our consideration of this issue to the Firm.

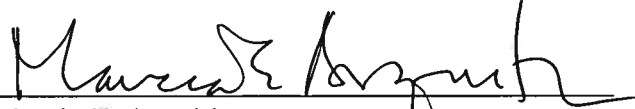
²⁷ ACAP represents in its appellate brief that at the conclusion of 2010, the Firm's stockholders' equity was \$156,644, its revenues exceeded \$1.3 million, and its net loss was \$2,808. The Firm did not provide any documentary evidence to support its representations.

²⁸ We therefore decline to analyze whether the egregious nature of the Firm's violations weighs against the consideration of the Firm's size in connection with sanctions. *See Guidelines*, at 2 n.2.

Respondents have requested that they be allowed to pay any fines over time pursuant to an installment payment plan. On a case by case basis, FINRA has allowed for such plans, which are generally limited to two years and require execution of a promissory note to track the installment payment plan. *See id.* at 11.

consultant and implemented. We fine Hume \$25,000, suspend him in all capacities for six months, and require him to requalify before acting in any capacity requiring qualification.²⁹

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

²⁹ We also have considered and reject without discussion all other arguments of the parties.

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