SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 68505 / December 20, 2012

Admin. Proc. File No. 3-14711

In the Matter of the Application of

ASENSIO & COMPANY, INC.

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DENIAL OF MEMBERSHIP APPLICATION

Registered securities association denied application for membership on the ground that firm failed to demonstrate that it meets the standards of membership contained in registered securities association's rules. *Held*, review proceeding is *dismissed*.

APPEARANCES:

Manuel P. Asensio, for Asensio & Company, Inc.
Alan Lawhead and *Michael J. Garawski* for FINRA.

Appeal filed: January 20, 2012
Last brief received: May 18, 2012

I.

Asensio & Company, Inc. (the "Firm"), a Delaware corporation based in New York, New York, appeals from the denial by FINRA of the Firm's application for FINRA membership.[1]

[1] FINRA is a private, not-for-profit, self-regulatory organization ("SRO") registered with, and overseen by, the Securities and Exchange Commission. It was created in July 2007 following the consolidation of the National Association of Securities Dealers, Inc. and the member regulation, enforcement, and arbitration functions of the NYSE Regulation, Inc. [*No Name in Original]*, Exchange Act Release No. 56751, 2007 WL 4302651, at *3 (Nov. 6,
(continued…)

Manuel P. Asensio, the Firm's chairman, chief executive officer, president, chief financial officer, chief compliance officer, executive representative, general securities principal, financial and operations principal ("FINOP"), anti-money laundering officer, and only representative, is subject to a statutory disqualification as a result of a 2006 FINRA decision that barred Asensio from associating with any FINRA member firm in any capacity. FINRA denied the new membership application ("NMA") on the basis that the Firm had failed to demonstrate that: (i) it was capable of complying with the federal securities laws, the rules and regulations thereunder, and FINRA Rules, as required by NASD Rule 1014(a)(3); (ii) it has a supervisory system designed to prevent and detect violations of the federal securities laws, the rules and regulations thereunder, and FINRA Rules, as required by NASD Rule 1014(a)(10); and (iii) it and its associated persons had all required licenses and registrations, as required by NASD Rule 1014(a)(2). We base our findings on an independent review of the record.

II.

A. In 2006, FINRA barred Asensio from associating with any FINRA member.

On July 28, 2006, FINRA barred Asensio from associating with any FINRA member firm. The 2006 FINRA Bar Decision resulted from an investigation of the FINRA member firm with which Asensio was then associated, Asensio Brokerage Services, Inc. ("ABSI"). ABSI, which was founded in 1993, was wholly owned by another firm called Asensio & Company, Inc. ("A&C"), which was not a FINRA member firm.[2] The investigation centered on investment research reports that A&C had issued and whether the reports contained misleading facts and omitted certain information required under FINRA Rules. In connection with the investigation, FINRA requested that Asensio and ABSI provide it with information, including brokerage account statements and copies of some of the research reports at issue. Asensio and ABSI provided some of the information that FINRA requested, but refused to provide other requested information. At a subsequent on-the-record interview ("OTR") with FINRA staff, Asensio answered some of the questions posed, but refused to answer others because he claimed that they did not involve matters "directly related to [his] activities that are regulated [by FINRA]." Given an additional chance to answer FINRA's questions in written form after the OTR, Asensio and ABSI once again answered certain questions, but did not respond to others.

(…continued)
2007); *Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes to Accomm. the Consol. of the Member Firm Regulatory Functions of NASD and NYSE Reg., Inc.*, Exchange Act Release No. 56145, 2007 WL 5185330, at *1 (July 26, 2007). The consolidation of the two self-regulatory organizations eliminated their overlapping jurisdiction and set in motion the writing of a uniform set of rules to be administered by the surviving entityCa process that continues to this day. Though the case at hand was instituted after the consolidation, some of the conduct at issue took place before then. Accordingly, this opinion refers to those conduct rules that were in place at the time.

[2] Asensio was the chairman, chief executive officer, and president of A&C. It is not the same firm that filed the NMA at issue in this proceeding.

FINRA found that Asensio had failed to respond to FINRA's requests for information in violation of NASD Rules 8210 and 2110.[3] On this basis, FINRA barred Asensio from association in any capacity with a FINRA member firm.[4] Pursuant to § 3(a)(39)(A) of the Securities Exchange Act of 1934,[5] the FINRA bar disqualifies Asensio from membership or participation in, or association with a member of, an SRO, such as FINRA.[6] As a statutorily disqualified individual, Asensio became ineligible to associate with a FINRA member firm without FINRA's consent.[7] FINRA's By-Laws allow a member firm to request relief from ineligibility to associate with a statutorily disqualified person on behalf of the prospective associated person.

On August 12, 2008, FINRA denied a Membership Continuance Application Form MC-400 filed by member firm ISI Capital, LLC with FINRA's Department of Member Regulation, requesting permission for Asensio to associate with ISI notwithstanding Asensio's statutory disqualification. ISI's Form MC-400 stated that Asensio would be subject to heightened supervision if he were permitted to associate with ISI. FINRA, however, found that Asensio "did everything within his power to obstruct [NASD]'s attempts to gather information concerning potentially misleading research reports" and "demonstrated a wanton disregard for FINRA's regulatory authority." FINRA also expressed concern that ISI's proposed supervision plan was "fragmented" and "d[id] not place the primary daily responsibility for Asensio squarely in the hands of one capable and available supervisor."

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[3] NASD Rule 8210 requires persons associated (or formerly associated) with a member firm to provide information with respect to any matter related to an investigation, complaint, or proceeding. NASD Rule 2110 requires members and associated persons to observe "high standards of commercial honor and just and equitable principles of trade."

[4] The 2006 FINRA Bar Decision also found that Asensio and ABSI committed other violations related to the research reports that were the initial basis of the investigation. Among other things, the 2006 FINRA Bar Decision found that Asensio and ABSI had violated NASD Rule 2210, which requires that public communications, including research reports, "be based on principles of fair dealing and good faith," "be fair and balanced," and "provide a sound basis" for evaluating a security. Rule 2210 prohibits making "any false, exaggerated, unwarranted, or misleading statement or claim" in a research report or omitting "any material fact or qualification if the omission, in light of the context of the material presented, would cause the communication to be misleading." For these violations, FINRA found that it would have fined ABSI, of which Asensio was the majority shareholder, president, chairman, and chief executive officer, $20,000, and imposed a 60-day suspension, but it found it unnecessary to do so in light of the bar it imposed against Asensio for the violations of Rules 8210 and 2110.

[5] 15 U.S.C. § 78c(a)(39)(A).

[6] Asensio and A&C also have been the subject of three separate Letters of Acceptance, Waiver, and Consent ("AWCs") for violating governing rules. On May 23, 1994, Asensio and A&C were censured and fined $7500, jointly and severally, for failure to obtain a required amendment to the firm's restriction agreement related to A&C's net capital level. On October 13, 1998, Asensio and A&C were censured and fined $2500, jointly and severally, for failing to comply with NASD Rules requiring them to develop and maintain a written training plan and a continuing and current education plan for the firm's registered persons. On November 13, 2000, Asensio and A&C were censured and fined $75,000, jointly and severally, and Asensio was ordered to requalify as a principal, because of several different violations of NASD Rules related to firm advertising, short selling, trade reporting, supervision, recommendations made in firm research reports, and related compliance procedures, among other things.

[7] FINRA By-Laws, Art. III, § 3(d).

By letters dated December 9, 2009, and January 4, 2010, Asensio sought Commission review of the 2006 FINRA Bar Decision and the 2008 FINRA Membership Continuance Denial. On June 17, 2010, we dismissed that appeal on the grounds that it was not timely filed.[8] The 2010 Commission Decision addressed numerous procedural and constitutional arguments by Asensio concerning the fairness of the FINRA disciplinary proceeding against him. We found that Asensio failed to demonstrate any extraordinary circumstances that would justify his failure to file a timely appeal of the FINRA actions.[9] Asensio appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the 2010 Commission Decision.[10]

B. While appealing his bar, Asensio acquired the Firm, which applied to operate as a FINRA-registered broker-dealer with Asensio performing all supervisory functions.

The Firm was formed on July 31, 2009, as Horizon Securities, Inc. and later changed its name to Battersea Park Investments, Inc. On April 9, 2010, Asensio purchased a 100% interest in the Firm from its original founder and changed the Firm's name to Asensio & Company, Inc.

On June 14, 2010, the Firm filed an NMA with FINRA requesting permission to operate as a broker-dealer.[11] In the NMA, the Firm stated that it intended to engage in the business of selling diversified equity mutual funds on a subscription or application basis to Asensio's family, friends, and clients of his investment advisory firm, Mill Rock Investment Advisors.[12] The Firm proposed that Asensio would "devote a minimum of 100 hours per month to the operations of [the Firm]." The Firm proposed that Asensio would serve in all principal executive capacities (i.e., chairman, chief executive officer, president, chief financial officer, chief compliance officer, executive representative, general securities principal, FINOP, and anti-money-laundering officer). The NMA stated that Asensio alone would: (i) supervise the Firm's operations, "including monitoring email, enforcing anti-money laundering rules, etc.," (ii) "perform due

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8 *Manuel P. Asensio*, Exchange Act Release No. 62315, 2010 WL 2468111, at *13 (June 17, 2010), *reconsideration denied*, Exchange Act Release No. 62645, 2010 WL 3043628 (Aug. 4, 2010).

9 *See* Commission Rule of Practice 420(b), 17 C.F.R. § 201.420(b) (stating that the Commission will not extend the thirty-day deadline for filing an application for review of a determination by an SRO "absent a showing of extraordinary circumstances").

10 *Asensio v. SEC*, 447 F. App'x 984 (11th Cir. 2011).

11 In April and May 2010, the Firm applied to register Asensio with FINRA as a general securities principal, FINOP, and general securities representative, and with the State of New York as a securities agent. Asensio's qualifications in those capacities had lapsed because he was last registered in September 2003, and he had not taken the relevant examinations in the previous two years. *See* NASD Rule 1021(c) (setting forth examination requirements for registered principals) and NASD Rule 1031(c) (setting forth examination requirements for registered representatives). The Firm requested an exemption from the qualification examination requirements, which FINRA denied. As of December 2010, the Firm had not received a response to its New York examination waiver request. The record does not indicate that New York ever approved the request.

12 Asensio owns and operates Mill Rock, and the NMA stated that the Firm would share an office suite with Mill Rock. The Firm estimated that it would have "approximately 100 retail customers within the first twelve months of operations."

diligence on prospective mutual funds whose funds [the Firm] might distribute;" and (iii) "ensure accuracy and currency of [the Firm's] books and records and file all regulatory reports in a timely manner."

The NMA attached a seventy-four-page proposed Supervisory System, which included sections pertaining to the Firm's supervision of Asensio, its sole proposed executive officer and registered representative. The Supervisory System included the following statement:

> In general, the Firm does not hire registered representatives with a history of customer complaints, disciplinary actions, or arbitrations, or employ a registered representative who develops such a record during his employment. Should such registered representatives become employed, the Chief Compliance Officer will develop heightened supervisory procedures that will require, at a minimum, the [Chief Compliance Officer] to examine the circumstances of each such case and make a reasonable determination whether the Firm's current supervisory and educational programs are adequate to address the issues. . . .

The Firm did not disclose any procedures to provide heightened supervision of Asensio.[13]

The NMA represented that the Firm had made tentative arrangements for Carrie Wisniewski to take over the supervisory roles of Asensio should he become unable to do so for any reason. Wisniewski was employed at the time of the NMA by B/D Compliance Associates, Inc., a firm based in Norcross, Georgia. An agreement, which was executed by the Firm and B/D Compliance on September 14, 2010, stated that, "in the event either [the Firm] or Manuel Asensio are statutorily disqualified, this agreement is null and void" and that Wisniewski would fulfill Asensio's duties only "on a temporary basis." The NMA does not identify any other personnel who would have supervisory responsibilities besides Asensio as the Firm's sole executive officer.

C. FINRA denied the NMA.

On December 14, 2010, Member Regulation issued a decision denying the NMA on the basis that the Firm had failed to demonstrate that: (i) it was capable of complying with the federal securities laws, the rules and regulations thereunder, and FINRA Rules, as required by NASD Rule 1014(a)(3); (ii) it has a supervisory system designed to prevent and detect violations of the federal securities laws, the rules and regulations thereunder, and FINRA Rules, as required by NASD Rule 1014(a)(10); and (iii) it and its associated persons had all required licenses and

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[13] The only information that the Firm provided regarding supervision of Asensio was in a September 2, 2010, Membership Continuance Application (the "MC-400") requesting permission to associate with Asensio notwithstanding his statutory disqualification. The MC-400 stated that "[Asensio] proposes to employ an individual at the Firm who qualifies as an expert in FINRA compliance, and whose sole job responsibility will be to ensure that the Firm and [Asensio] comply with FINRA Rules." But the MC-400 did not identify any individual who would serve in this capacity.

registrations, as required by NASD Rule 1014(a)(2). Based on these findings, Member Regulation concluded that the Firm did not meet the standards of membership contained in its Rules. The Firm appealed Member Regulation's decision to FINRA's National Adjudicatory Council, which affirmed Member Regulation's decision. This appeal followed.

III.

Exchange Act § 19(f) governs our review of this appeal.[14] In general, § 19(f) requires us to dismiss such an appeal if we find that: (i) the specific grounds on which FINRA based its denial of the Firm's NMA exist in fact; (ii) FINRA's action was in accordance with its rules; and (iii) FINRA's rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[15]

A. The specific grounds on which FINRA based its denial of the Firm's new membership application exist in fact.

Prospective new FINRA member firms are required to meet each of the fourteen standards set forth in NASD Rule 1014(a). In addition, FINRA also considers the public interest and the protection of investors. The applicant firm carries the burden of demonstrating that it meets each of the admission standards. Further, under NASD Rule 1014(b), where a prospective member firm or an associated person is subject to certain events set forth in the Rule,[16] including a statutory disqualification as is the case here, "a presumption exists that the application should be denied." NASD Rule 1014(b) provides that an applicant "may overcome the presumption [of denial] by demonstrating that it can meet each of the standards in [NASD Rule 1014(a)]."

1. The Firm has not met the NASD Rule 1014(a)(3) standard.

Under NASD Rule 1014(a)(3), the Firm had the burden of establishing that it and its associated persons are capable of complying with the federal securities laws, the rules and regulations thereunder, and NASD Rules, including observing high standards of commercial honor and just and equitable principles of trade. In determining whether the standard set forth in Rule 1014(a)(3) is met, FINRA considers, among other things, whether any associated persons of the applicant firm are subject to a statutory disqualification. The FINRA bar against Asensio,

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[14] 15 U.S.C. § 78s(f).

[15] *See, e.g.*, *Frank Kufrovich*, Exchange Act Release No. 45437, 55 SEC 616, 2002 WL 215446, at *4 (Feb. 13, 2002); *William J. Haberman*, Exchange Act Release No. 40673, 53 SEC 1024, 1998 WL 786945, at *2 (Nov. 12, 1998), *aff'd*, 205 F.3d 1345 (8th Cir. 2000) (Table).

[16] The applicable events are listed in NASD Rule 1014(a)(3)(A) and (C)-(E). The relevant provisions applicable to the Firm here are Rule 1014(a)(3)(A) (". . . a self-regulatory organization has taken permanent or temporary adverse action with respect to a registration or licensing determination regarding the Applicant or an Associated Person") and Rule 1014(a)(3)(C) ("an Applicant or Associated Person is the subject of a pending, adjudicated, or settled regulatory action or investigation by . . . a self-regulatory organization").

imposed as a result of his failure to cooperate with a FINRA investigation, makes him subject to a statutory disqualification.

The Firm contends that "Asensio was never the subject of a suspected violation of securities laws or a Commission disciplinary proceeding and, of course, was never the subject of a sanction imposed by the Commission,"[17] but Asensio has a significant disciplinary history. The 2006 FINRA Bar Decision barred Asensio for failure to comply with NASD Rule 8210. We have found that violations of Rule 8210 are serious. Rule 8210, which applies to all FINRA member firms, "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations. The rule is at the heart of the self-regulatory system for the securities industry."[18] We have further found that "[t]he failure to respond to [FINRA] information requests frustrates [FINRA]'s ability to detect misconduct, and such inability in turn threatens investors and markets."[19] We have concluded that individuals who violate Rule 8210 "present too great a risk to the markets and investors to be permitted to remain in the securities industry."[20] Similarly, we have found that "removing those who present such a risk is necessary to further 'the Exchange Act's basic purpose of protecting public investors.'"[21] In light of our consistent position that Rule 8210 serves important regulatory purposes that warrant strong enforcement to ensure compliance with the rule, we agree with FINRA that an individual who is statutorily disqualified as a result of a bar imposed for violations of Rule 8210 must meet a "highly demanding standard" before being permitted to re-enter the industry.[22]

The Firm's claim on appeal that "Asensio has a stellar record of Rule 8210 compliance,"[23] notwithstanding that he has been barred for violating that provision, indicates that the Firm does not appreciate the seriousness and importance of compliance with Rule 8210. This increases the risk of future violations. Moreover, Asensio's permanent bar was imposed relatively recently,

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17 Firm's Br. of Applicant at 35.

18 *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *4 (Nov. 14, 2008), *petition for review denied*, 347 F. App'x 692 (2d Cir. 2009).

19 *PAZ Sec., Inc.,* Exchange Act Release No. 57656, 2008 WL 1697153, at *4 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009).

20 *Id.*

21 *Id.* (citing *Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, 2006 WL 3590274, at *7 (Dec. 11, 2006) (quoting *Gershon Tannenbaum*, Exchange Act Release No. 31080, 50 SEC 1138, 1992 WL 213844, at *3 (Aug. 24, 1992)); *Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 WL 2482466, at *5 (Aug. 25, 2006) ("Rule 8210 is an essential cornerstone of NASD's ability to police the securities markets and should be rigorously enforced.")).

22 *See* FINRA's Br. in Opp'n to Appl. for Review at 14. We also agree with FINRA's previous statement that "a FINRA-barred applicant is required to make an extremely strong showing" to justify a finding "that approval of an application for re-entry would serve the public interest." *See Ass'n of X as a Gen. Sec. Rep.*, Redacted Decision No. SD08004, at 6 (FINRA NAC 2008), available at http://www.finra.org/web/groups/industry/@ip/@enf/@adj/.

23 Firm's Br. of Applicant at 39.

which calls into question whether sufficient time has passed to deter Asensio from committing similar violations again.[24]

In addition to Asensio's Rule 8210 violations, the 2006 FINRA Bar Decision found that Asensio and ABSI had violated FINRA Rules related to public communications such as research reports. Asensio and A&C also agreed to three AWCs for other violations of FINRA Rules.[25] Asensio's disciplinary history indicates a pattern of non-compliance with, and disregard for, regulatory requirements and investor protection that further supports FINRA's finding that the Firm has not met the burden of showing that it is able to comply with applicable regulatory requirements, as set forth in Rule 1014(a)(3).

The Firm argues that it meets the Rule 1014(a)(3) standard because its proposed business plan shows that it will comply with relevant securities laws and FINRA Rules. The Firm described its proposed business as "the simplest possible form of FINRA membership—selling mutual funds on an application basis."[26] The Firm stated that it "would not publicly solicit new customers" and would sell mutual funds only to Mill Rock's existing advisory clients, "who are sophisticated investment professionals, and Asensio's friends and family."[27]

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[24] *See, e.g., Timothy P. Pedregon, Jr.*, Exchange Act Release No. 61791, 2010 WL 1143089, at *8 (Mar. 26, 2010) (denying membership continuance application, among other reasons, because of the recent and serious nature of the disqualifying event).

[25] *See supra* note 6. The Firm suggests that we should not consider the AWCs because they "were not adjudicated and entailed no admission of wrongdoing by Asensio." But both the October 1998 and November 2000 AWCs expressly stated that "this AWC will become part of [Asensio's and A&C's] permanent disciplinary records and may be considered in any future actions brought by the [NASD] against us." *See Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *20 & n.85 (Dec. 19, 2009) (considering settled AWCs, which included no admission of wrongdoing, as part of respondent's disciplinary history) (citing *Consol. Inv. Servs., Inc.*, Exchange Act Release No. 36687, 52 SEC 582, 1996 WL 20829, at *6 (Jan. 5, 1996)). In reviewing disciplinary history, we have considered orders in both settled and litigated proceedings. *Russo Sec., Inc.*, Exchange Act Release No. 44186, 55 SEC 58, 2001 WL 379064, at *10 & n.61 (Apr. 17, 2001); *see also, e.g., Pagel, Inc. v. SEC*, 803 F.2d 942, 948 (8th Cir. 1986) (holding that the Commission did not abuse its discretion in revoking broker-dealer's registration and barring it from association with any broker-dealer where, *inter alia*, broker-dealer previously had been sanctioned for other securities violations pursuant to offer of settlement).

While FINRA also cites a May 1994 AWC entered into by Asensio and A&C, our review of the record indicates that it failed to introduce into evidence the related settlement documents. The only evidence regarding this prior disciplinary settlement is a Central Registration Depository Information Report. We have held that an offer of settlement may not be considered for purposes of disciplinary history where "the plain language of the consent order unequivocally states that it cannot be used in another proceeding." *See R.B. Webster Invs., Inc.*, Exchange Act Release No. 34659, 51 SEC 1269, 1994 WL 512475, at *6 & n.37 (Sept. 13, 1994); *Howard R. Perles*, Exchange Act Release No. 45691, 55 SEC 686, 2002 WL 507029, at *10 & n.41 (Apr. 4, 2002). In the absence of the actual settlement documents for the May 1994 AWC, we are unable to determine whether the terms of the prior disciplinary settlement preclude its use in this proceeding. As a result, we have not considered the May 1994 AWC in evaluating the Firm's compliance with Rule 1014(a)(3).

[26] Firm's Br. of Applicant at 4.

[27] *Id.* at 38.

We find that the Firm's arguments do not overcome the presumption of denial that applies to the Firm's NMA as a result of Asensio's statutory disqualification. The bar that led to Asensio's statutory disqualification was imposed for his failure to cooperate with a FINRA investigation pursuant to Rule 8210. Rule 8210 applies to all FINRA member firms, regardless of their specific business plans or the sophistication of their investors. Thus, the Firm's proposed business plan does not reduce the likelihood of future violations of this critical investor protection provision.

The Firm also claims that the likelihood of Asensio committing future violations of Rule 8210 is "speculative" and "unsubstantiated"[28] because, according to the Firm, the underlying investigation that led to Asensio's bar and statutory disqualification was a "frivolous use of regulatory authority in asking unanswerable questions that served no regulatory purpose."[29] The doctrine of collateral estoppel precludes the Firm from challenging in this proceeding the underlying bar against Asensio as well as factual and procedural issues that were actually litigated in connection with the 2010 Commission Decision, which was affirmed by the Eleventh Circuit.[30] Moreover, associated persons of FINRA member firms cannot unilaterally decide when they will respond to FINRA requests for information depending on their personal view of the merits of the investigation at issue.[31] The Firm's continued attempts to attack the merits of the underlying bar against Asensio on the basis that Asensio believed that FINRA's information requests were improper are evidence of a strong likelihood of future violations of Rule 8210.

The Firm further claims that "Asensio has conducted activities as an investment adviser substantially similar to those of a broker-dealer without any accusation of customer harm or

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[28] *Id.* at 31.

[29] *Id.* at 33.

[30] As the Supreme Court has stated, collateral estoppel "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate" and thereby "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

We have consistently rejected attempts by respondents to avail themselves of an appeal to the Commission in one proceeding to attack collaterally a prior administrative decision by an SRO in another proceeding. *David C. Ho*, Exchange Act Release No. 54481, 2006 WL 2959662, at *7 & n.27 (Sept. 22, 2006) (citing *Clyde J. Bruff*, Exchange Act Release No. 40583, 53 SEC 880, 1998 WL 730586, at *4 & n.23 (Oct. 21, 1998) (refusing to consider respondent's complaint that NASD improperly considered his disciplinary history in assessing sanctions because respondent's arguments were simply "an extensive collateral attack" on a prior NASD order)); *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 58 SEC 1197, 2006 WL 231642, at *6 & n.36 (Jan. 31, 2006) (finding that, where respondents consent to an injunction, they may not dispute the factual allegations of the injunctive complaint in a subsequent administrative proceeding) (citing *Marshall E. Melton*, Investment Advisers Act Release No. 2151, 56 SEC 695, 2003 WL 21729839, at *3 (July 25, 2003), *reconsideration denied*, Exchange Act Release No. 50600, 2004 WL 2413296 (Oct. 28, 2004), *aff'd*, 148 F. App'x 58 (2d Cir. 2005) (unpublished)).

[31] *See Berger*, 2008 WL 4899010, at *4 & n.21 ("The language of Rule 8210 . . . is 'unequivocal' with respect to an associated person's obligation to cooperate with NASD information requests") (citing *Michael Markowski*, Exchange Act Release No. 32562, 51 SEC 553, 1193 WL 243654, at *4 (June 30, 1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994)).

other misconduct" and that this is "germane to an informed determination on whether Asensio would cause investor harm in conducting brokerage activities."[32] Asensio, however, has not been subject to the requirements of Rule 8210 and other FINRA Rules since 2006, as a result of his bar. Therefore, the Firm's claim that Asensio and Mill Rock have maintained a clean disciplinary record during the period following his bar is irrelevant in assessing the likelihood of future violations of those provisions.

2. The Firm has not met the NASD Rule 1014(a)(10) standard.

Under NASD Rule 1014(a)(10), a prospective applicant for FINRA membership must show that it has a supervisory system, including written supervisory procedures, internal operating procedures (including operational and internal controls), and compliance procedures designed to prevent and detect, to the extent practicable, violations of the federal securities laws, the rules and regulations thereunder, and FINRA Rules. When a firm proposes to employ a statutorily disqualified individual, we have held that "stringent supervision" is required.[33] We have stated that, "[i]n determining whether to permit the employment of a statutorily disqualified person, the quality of the supervision to be accorded that person is of utmost importance. We have made it clear that such persons must be subject to stringent oversight by supervisors who are fully qualified to implement the necessary controls."[34]

To enable meaningful evaluation of the adequacy of a proposed supervisory system, it is important that the member firm identify a specific individual responsible for the supervision of a statutorily disqualified person, so that the proposed supervisor's experience and qualifications can be assessed. NASD Rule 1014(a)(10)(A) requires FINRA, in evaluating an NMA, to consider whether the "experience" and "qualifications" of supervisory personnel are adequate in light of the disciplinary history of a statutorily disqualified person at the applicant firm. NASD Rule 1014(a)(10)(B) requires FINRA to consider whether the applicant firm "has identified specific Associated Persons to supervise and discharge each of the functions in the Applicant's business plan." We have sustained an NASD denial of a member firm's request to associate with a statutorily disqualified individual where the proposed supervisor of the individual "not only lacked the necessary supervisory experience, but also the requisite industry experience to supervise a statutorily disqualified person."[35] We have also sustained a FINRA denial of a membership continuance application where the proposed supervisors identified by the member

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[32] Firm's Reply Br. of Applicant at 9.

[33] *See, e.g., Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 WL 3554584, at *10 & n.49 (Sept. 13, 2010) (citing *Haberman*, 1998 WL 786945, at *4 ("We require . . . stringent supervision for a person subject to a statutory disqualification."); *Kufrovich*, 2002 WL 215446, at *6 (rejecting a proposed supervisory plan as lacking "a key component—stringent supervision").

[34] *Citadel Sec. Corp.*, Exchange Act Release No. 49666, 57 SEC 502, 2004 WL 1027581, at *4 & n.20 (May 7, 2004) (quoting *Morton Kantrowitz*, Exchange Act Release No. 44239, 55 SEC 98, 2001 WL 435668, at *2 (May 1, 2001)).

[35] *Kantrowitz*, 2001 WL 435668, at *1.

firm did not possess the licenses and training necessary to operate in the capacities set forth in the proposed supervisory system.[36]

In evaluating the adequacy of a proposed supervisory system for a statutorily disqualified person, we have also found that it is especially "difficult for employees to supervise effectively the activities of the owner of a firm."[37] The owner of the firm 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.[38] This problem is exacerbated if the owner of the firm continues to serve in executive capacities, such as the firm's president, that are responsible for the firm's compliance with regulatory requirements and rules.[39]

The NMA failed to provide for adequate supervision of Asensio. In the NMA, the Firm proposed to employ Asensio, its sole owner, in all of its principal executive capacities, with no specific plan to provide heightened supervision. The Supervisory System included in the NMA stated that the Firm would devise a system of heightened supervision if any employees became subject to a statutory disqualification, but the Firm had no such system in place even though its sole owner and holder of all executive positions was subject to a statutory disqualification. The MC-400 stated an intention to hire personnel who would be responsible for supervising Asensio, but identified no such individual and, therefore, provided no information about any such individual's relevant supervisory experience or qualifications.

The proposed agreement with B/D Compliance for Wisniewski to assume Asensio's responsibilities at the Firm should he become unable to fulfill them also supports FINRA's finding that the NMA did not comply with Rule 1014(a)(10). The agreement was contingent on Asensio *not* being subject to a statutory disqualification, but Asensio *was* statutorily disqualified. In addition, the agreement provided that Wisniewski would only serve as a replacement for Asensio "on a temporary basis" should he become unable to do his jobs at the Firm, not that Wisniewski would supervise Asensio's proposed work at the Firm. This does not constitute the stringent supervision required by FINRA's Rules and our precedent.

The 2006 FINRA Bar Decision also found that Asensio had violated provisions pertaining to member firm communications with the public. Although the NMA stated that the Firm "will not advertise itself" and would sell only to Mill Rock's existing clients, the written supervisory procedures included in the NMA have no such restrictions. And the Firm's proposed

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[36] *Citadel*, 2004 WL 1027581, at *4.

[37] *Id.*

[38] *See, e.g., Kirk A. Knapp*, Exchange Act Release No. 31556, 51 SEC 115, 1992 WL 365568, at *10 (Dec. 3, 1992) (owner of over 90% of firm barred from acting as general securities principal still exercised control and fired new president of firm when president disagreed with owner).

[39] *See Midas Sec., LLC*, Exchange Act Release No. 66200, 2012 WL 169138, at *13 (Jan. 20, 2012) (finding that "the president of a brokerage firm is responsible for the firm's compliance with all applicable requirements," absent a delegation of authority).

supervisory procedures contain provisions covered by Rule 2210, which governs communications with the public, including firm advertising, institutional sales literature, and correspondence. Given Asensio's past violations of these FINRA Rules, the failure of the Firm to establish heightened supervisory procedures to prevent similar violations in the future is further evidence that the Firm has not met its burden under Rule 1014(a)(10). We find that the Firm has not satisfied the Rule 1014(a)(10) standard by showing that it has a supervisory system designed to prevent and detect future violations of applicable regulatory provisions.

3. The Firm has not met the NASD Rule 1014(a)(2) standard.

Under NASD Rule 1014(a)(2), the Firm was required to show that it and its associated persons have all licenses and registrations required by state and federal authorities. Although the Firm admits that Asensio has not taken the qualification examinations necessary for him to be registered as a general securities principal, FINOP, and general securities representative, the Firm contends that Asensio was entitled to ignore this requirement because FINRA's denial of his request for a waiver of the examination requirements has not been reviewed by the Commission. The Firm further asserts that Asensio is "ready, willing and able to take the exams should the Commission deny the waiver or at any time it is necessary."[40] But neither Asensio nor the Firm appealed FINRA's decision to deny the examination waiver to the Commission, and the Firm cannot now collaterally attack FINRA's determination nearly two years after it was made.[41]

The Firm argues that requiring Asensio to take examinations "that might expire before membership is achieved is illogical[] and unnecessary."[42] FINRA's Rules expressly state that FINRA will evaluate whether an applicant firm and its associated persons *have* all licenses and registrations required to perform as the NMA proposed. These Rules permit FINRA to assess whether the associated persons of an applicant firm have the current competence required to operate a FINRA member firm. This goal would be substantially frustrated if prospective associated persons could wait until after a decision was reached on the NMA to take required qualification examinations.

We find that the Firm has not shown, as required by NASD Rule 1014, that: (i) it and its associated persons are capable of complying with all relevant securities laws and regulations and FINRA Rules; (ii) it has implemented a plan of heightened supervision designed to prevent and detect future such violations; and (iii) it and its associated persons have all necessary licenses. The Firm's arguments in opposition to FINRA's findings do not overcome the presumption that its NMA should be denied due to Asensio's statutory disqualification. Therefore, we find that all of the grounds supporting FINRA's decision exist in fact.

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[40] Firm's Br. of Applicant at 45 n.55.

[41] *See, e.g., James Lee Goldberg*, Exchange Act Release No. 66549, 2012 WL 759397, at *9 (Mar. 9, 2012) (reviewing FINRA's denial of member firm's request for waiver of examination requirements with respect to a proposed associated person).

[42] Firm's Br. of Applicant at 45 n.55.

B. The denial of the NMA was in accordance with FINRA's rules.

We also find that FINRA's denial of the NMA was in accordance with FINRA's rules, which include the presumption that a prospective member firm's NMA will be denied where that firm proposes to associate with a statutorily disqualified individual. Upon the filing of the NMA, Member Regulation requested additional information from the Firm and conducted a membership interview. FINRA conducted a new membership hearing in accordance with its rules, during which it afforded the Firm an opportunity to be heard.[43]

As discussed above, FINRA expressly considered each of the factors set forth in NASD Rule 1014, and its opinion set forth the reasons for its determination to deny the NMA. On appeal from the decision of Member Regulation, the NAC followed all of the required procedures for an appeal of this type, as set forth in NASD Rule 1015. The NAC allowed the parties to submit briefs in support of their positions, and it considered numerous motions submitted by the Firm. The NAC's decision included all of the required elements under NASD Rule 1015(j).[44] Accordingly, we find that FINRA's decision to deny the NMA was conducted in accordance with its Rules.

C. FINRA applied its rules in a manner consistent with the Exchange Act.

We also find that FINRA applied its rules in a manner consistent with the purposes of the Exchange Act. § 15A(g)(3)(A) of the Exchange Act authorizes registered securities associations such as FINRA to "examine and verify the qualifications of an applicant to become a member and the natural persons associated with such an applicant."[45] FINRA acts consistently with this statutory provision by conducting a review of the fourteen admission standards contained in Rule 1014. We have previously found that those rules and admission standards are "consistent with the [Exchange] Act."[46] We have further supported, as consistent with the Exchange Act, FINRA's membership application process, stating, "because [FINRA] is a member organization charged with the protection of investors and the public interest, it is fair to require applicants to show why membership should be granted."[47] Here, FINRA conducted its Rule 1014 review of the NMA in accordance with the authority that the Exchange Act grants it.[48]

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[43] *See* NASD Rule 1013(a)(4) & (b) (setting forth the procedures to be followed after the filing of an NMA).

[44] *See* NASD Rule 1015(j) (requiring the NAC's decision to include: (i) a description of the Department's decision, including its rationale; (ii) a description of the principal issues raised in the NAC's review; (iii) a summary of the evidence on each issue; and (iv) a statement whether the Department's decision is affirmed, modified, or reversed, and a rationale therefor that references the applicable standards in Rule 1014).

[45] 15 U.S.C. § 78*o*-3(g)(3)(A).

[46] *See Order Approving Proposed Rule Change*, 62 Fed. Reg. 43,385, 43,398-43,400 (Aug. 13, 1997).

[47] *Order Granting Approval of Proposed Rule Change*, 68 Fed. Reg. 75,681, 75,682 (Dec. 31, 2003).

[48] *See* 15 U.S.C. § 78*o*-3(g)(3)(A) (authorizing FINRA to "deny membership to . . . a registered broker or dealer if (i) . . . such broker or dealer or any natural person associated with such broker or dealer does not meet such standards of training, experience, and competence as are prescribed by the rules of the association or (ii) such broker

(continued…)

We have recognized that, in order to ensure protection of investors, an SRO such as FINRA "may demand a high level of integrity from securities professionals."[49] We have also afforded FINRA discretion in determining whether persons subject to statutory disqualification should be permitted to associate with a member firm.[50] Similar concerns apply in the context of a prospective new FINRA member that proposes to associate with a statutorily disqualified individual. The requirement in NASD Rule 1014(a)(3) that a prospective new member firm show that it is capable of complying with relevant federal securities laws and FINRA Rules ensures that FINRA has oversight of the proposed re-entry of a statutorily disqualified individual into the industry via association with the new member.

The heightened supervision requirements in NASD Rule 1014(a)(10) are also consistent with the purposes of the Exchange Act. In assessing a supervisory plan, "we require . . . stringent supervision for a person subject to a statutory disqualification."[51] Here, the Firm proposed that Asensio would serve in all principal executive capacities, did not propose a specific plan for heightened supervision of Asensio, and did not identify any personnel who would be responsible for supervising him. The lack of attention to Asensio's supervision made it impossible for FINRA to evaluate the Firm's ability to detect and prevent future violations of the relevant securities laws and FINRA Rules. Likewise, the failure to identify specific individuals responsible for Asensio's supervision made it impossible to evaluate whether the supervisory personnel had the necessary qualifications and incentives to conduct effectively their supervisory duties. We have previously found that, where FINRA member firms have failed to establish heightened supervisory plans for statutorily disqualified individuals, those firms and the statutorily disqualified individuals failed to meet their burden "to show that . . . continued employment in the securities industry would be in the public interest."[52]

Rule 1014(a)(2)'s requirement that Asensio obtain the necessary licenses to operate in the capacities proposed in the NMA is also consistent with the purposes of the Exchange Act. Exchange Act § 15(b)(7) authorizes the Commission to regulate persons associated with broker-dealers by establishing qualification standards.[53] Among these standards is Exchange Act Rule 15b7-1, which requires associated persons to "pass[] any required examinations" established by

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or dealer or person associated with such broker or dealer has engaged and there is a reasonable likelihood he will engage again in acts or practices inconsistent with just and equitable principles of trade").

[49] *Kufrovich*, 2002 WL 215446, at *5.

[50] *E.g., Am. Inv. Servs., Inc.*, Exchange Act Release No. 43991, 54 SEC 1265, 2001 WL 167861, at *3 & n.16 (Feb. 21, 2001); *Halpert & Co., Inc.*, Exchange Act Release No. 28615, 50 SEC 420, 1990 WL 322213, at *2 (Nov. 14, 1990).

[51] *Haberman*, 1998 WL 786945, at *4 (finding fault with a supervisory plan where sole compliance officer would have insufficient contact with statutorily disqualified individual).

[52] *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 WL 2138439, at *6 & n.23 (July 17, 2009).

[53] 15 U.S.C. § 78*o*(b)(7).

the rules of SROs.[54] In adopting that rule, we stated that "[SRO] qualification of associated persons of broker-dealers is of substantial importance in promoting compliance with the substantive requirements of the federal securities laws," that we "rely principally on the [SROs] in the formulation and administration of qualification standards, subject to [our] review and oversight," and that requiring compliance with such standards advances "investor protection."[55]

Asensio does not currently possess the licenses that are required by FINRA Rules in order for him to operate as a member firm's general securities principal, FINOP, and general securities representative. Requiring such licenses is consistent with the purposes of the Exchange Act because it helps to ensure that Asensio possesses the minimum standards of competency and awareness of his responsibilities before acting in those capacities for a FINRA member firm.[56]

Based on Asensio's disciplinary history, the Firm's failure to provide for adequate supervision of Asensio if the NMA had been granted, and Asensio's failure to obtain the requisite licenses and take the necessary qualification examinations to serve in the capacities set forth in the NMA, FINRA determined that it was in the public interest and in the interest of protecting investors to deny the NMA. We find that FINRA made this determination in a manner consistent with the purposes of the Exchange Act.

IV.

Under the Exchange Act, FINRA is required to "provide a fair procedure for . . . the denial of membership to any person seeking membership."[57] The Firm makes numerous arguments alleging that FINRA did not satisfy this requirement in denying the NMA. We find the Firm's arguments to be without merit.

A. The Firm is collaterally estopped from challenging Asensio's underlying bar.

The Firm challenges the merits of the underlying bar against Asensio. For example, the Firm requests that we "order that FINRA make available to the Applicant another process to

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[54] 17 C.F.R. § 240.15b7-1.

[55] *Requirement of Broker-Dealers to Comply with SRO Qualification Standards*, Exchange Act Release No. 32261, 1993 WL 141070, at *2 (May 4, 1993).

[56] *See Michael Stegawski*, Exchange Act Release No. 59326, 2009 WL 223618, at *6 (Jan. 30, 2009) (finding that requiring applicant "to retake the qualification examination for the Series 7 license" after over four years away since his last Series 7 terminated "is fully consistent with the Exchange Act's statutory goal of ensuring the requisite levels of knowledge and competency of associated persons"); *see also Report of the Special Study of Securities Markets*, H.R. Doc. No. 95, 88th Cong., 1st Sess. Pt. 1, 54 (1963) ("The way should be left open to newcomers to enter the securities business, as with any other business, but the public interest demands that newcomers meet minimum standards of competency and show an awareness of their responsibilities before being allowed to approach the public as brokers, dealers, or underwriters.").

[57] 15 U.S.C. § 78*o*-3(b)(8).

address the grievances over which the Commission declined to accept jurisdiction."[58] It also claims that it does not seek to re-litigate the sanction imposed, but rather wants to "examine the facts and circumstances surrounding the sanction" to show "that Asensio posed no threat of customer or investor harm, and that the investigation did not serve any significant regulatory purpose."[59]

In the 2010 Commission Decision, we declined jurisdiction over Asensio's appeal of the 2006 FINRA Bar Decision because we found that Asensio had not shown the requisite extraordinary circumstances necessary to justify his failure to file a timely application for review.[60] Collateral estoppel prevents the Firm from re-litigating both the factual findings and legal conclusions of the 2006 FINRA Bar Decision in this appeal.[61]

B. There is no merit to the Firm's fairness arguments related to the MC-400.

The Firm argues that FINRA's consideration of the NMA was unfair because it did not first consider the MC-400, stating that "the MC-400 process could have informed a determination on whether Asensio's association would be appropriate notwithstanding the bar."[62] According to the Firm, this alleged procedural failure "circumvented review of the issue that is most central—whether Asensio's association should be allowed in light of the circumstances surrounding the bar sanction, Asensio's work aiding investor protection . . . , and Asensio having conducted an investment business for many years since the imposition of the sanction without regulatory issues."[63] The Firm takes the position that FINRA was obligated to consider the MC-400 prior to considering the NMA because the MC-400 review process would enable the Firm to make its case that there was no risk of harm to investors if Asensio associated with the Firm. In general, the Firm's chief complaint is that "if an MC-400 is not evaluated during the pendency of an NMA, no 'applicant for membership' [that is sponsoring an MC-400] could have an NMA approved."[64]

None of these contentions has merit. For the reasons discussed above, the MC-400 process, like the NMA review process, does not permit the Firm to collaterally attack Asensio's

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[58] Firm's Br. of Applicant at 4.

[59] *Id.* at 34.

[60] *See Asensio*, 2010 WL 2468111, at *7 & n.26 (citing *Warren B. Minton, Jr.*, Exchange Act Release No. 46709, 55 SEC 1170, 2002 WL 32140276, at *3 & n.12 (Oct. 23, 2002) (quoting *Lance E. Van Alstyne*, Exchange Act Release No. 40738, 53 SEC 1093, 1998 WL 830817, at *4 (Dec. 2, 1998) (holding that adherence by a self-regulatory organization to its procedures rebuts a claim of 'extraordinary circumstances'))).

[61] *See supra* note 30.

[62] Firm's Reply Br. of Applicant at 16.

[63] Firm's Br. of Applicant at 32.

[64] *Id.* at 23.

bar or the facts and legal analysis that led to it.[65] Further, contrary to the Firm's arguments, FINRA considered the relevant portions of the MC-400 in reaching its decision to deny the NMA (i.e., the Firm's insufficient proposed business and supervisory plans, and its management structure). And there was nothing about the NMA review process that prevented the Firm from making additional arguments that might have been germane to both application processes. In any event, the Firm cites nothing in the MC-400 that calls into question the facts on which FINRA based its denial of the NMA (i.e., Asensio's statutory disqualification and disciplinary history, the Firm's failure to implement an adequate heightened supervisory plan, and Asensio's failure to obtain the required licenses to operate in the capacities described in the NMA). This illustrates the deficiency of the NMA, rather than a failure by FINRA to provide a fair procedure.

The Firm raises a number of complaints related to FINRA's handling of the MC-400 application. For example, the Firm repeatedly claims that FINRA did not respond to inquiries regarding the status of the MC-400 application. But on August 5, 2010, prior to the submission of a signed MC-400 by the Firm as required under FINRA Rules,[66] FINRA informed the Firm that it would make a determination on the MC-400 "upon conclusion of the NMA process."[67] The Firm claims further that the "intention of FINRA rules" is that Forms NMA and MC-400 will be considered concurrently.[68] But the only authority the Firm cites in support of its position is FINRA Rule 9522, which allows an applicant for membership to file an MC-400. Although an applicant firm may file an MC-400, there is nothing in FINRA's Rules that requires FINRA to consider an MC-400 prior to or concurrently with a pending NMA. On the contrary, as FINRA notes, the Rules governing NMAs contain specific time deadlines by which a decision must be reached, unlike the Rules governing consideration of membership continuance applications. This indicates that FINRA contemplated that NMA determinations may be made within a shorter period of time than MC-400 determinations would be made.

Furthermore, it seems illogical that FINRA would consider the MC-400, which is a membership *continuance* application, prior to consideration of a new membership application,

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[65] *See supra* note 30.

[66] The record indicates that the Firm and FINRA differed as to the date the Firm filed an MC-400 that was fully compliant with FINRA's Rules. Because the MC-400 is not directly at issue in this proceeding, the specifics of the MC-400 application proceeding are not included in the record of this proceeding. The record, however, appears to contradict the Firm's claim that FINRA "mishandled or destroyed the first filed copy of Applicant's MC-400." Firm's Br. of Applicant at 24. On August 13, 2010, FINRA informed the Firm that it had received the MC-400 by email, but that the MC-400 was deficient due to the lack of a signed copy and the absence of an authorization for FINRA to deduct the $1500 application fee from the Firm's accounts.

[67] This letter undermines the Firm's contention that it was unaware of the status of the MC-400 for over a year after it first submitted the MC-400 and its complaint that the Firm allegedly received the "first formal acknowledgment of receipt of the MC-400" in an August 3, 2011, letter from FINRA staff. Given FINRA's clear statement in August 2010 that it would consider the MC-400 only after it had made its decision with respect to the NMA, even if FINRA had failed to provide regular communication to the Firm during the intervening period about the status of the MC-400, this caused the Firm no harm.

[68] Firm's Br. of Applicant at 22.

where the firm submitting the MC-400 is not yet a FINRA member firm. As FINRA argues, under different circumstances (where, for example, an applicant firm's NMA indicates that it has developed an internal business plan and supervisory system that will adequately address any concerns caused by the firm's association with a statutorily disqualified individual), it is possible that an NMA could be approved prior to approval of that firm's MC-400. Thus, it is not necessary, as the Firm argues, for FINRA to reach a determination on the MC-400 before an NMA for a firm that seeks to associate with a statutorily disqualified person could be approved. Accordingly, we find that it was fair and consistent with the Exchange Act for FINRA to consider the NMA prior to the MC-400.

C. The Firm's allegations that FINRA staff was biased provide no basis for overturning FINRA's decision.

During the pendency of FINRA Member Regulation's NMA decision, Asensio initiated an *ex parte* email dialogue with two attorneys in FINRA's Offices of the General Counsel. The Firm now claims that the emails that the FINRA attorneys sent to Asensio in response to these communications establish that these FINRA officials interfered with the normal NMA review process and caused FINRA to make a "drastic change" to an alleged "agreement" by Member Regulation to consider the NMA and the MC-400 concurrently.[69]

The record contradicts the Firm's claims that the emails in question show that the FINRA attorneys had "influenced the staff" of Member Regulation, including instructing it "to be reticent."[70] One of the attorneys stated in her email that she was not "involved in the [NMA] or MC-400 processes," and there is no evidence to indicate that she had any communications with Member Regulation staff with respect to the Firm's NMA. The other attorney, one of FINRA's General Counsels at the time, provided detailed responses to inquiries made by Asensio regarding the overall NMA and MC-400 review processes. Although the General Counsel copied certain Member Regulation staff on his reply emails to Asensio, the emails do not indicate any bias. The General Counsel reiterated the necessity that FINRA consider the NMA prior to its consideration of the MC-400. He further noted that the process is not inherently biased, and pointed out that FINRA has, in the past, granted member firm requests to associate with statutorily disqualified individuals where the facts and circumstances of the application warranted such a decision. In a September 8, 2010, email, the General Counsel stated that he had "no idea whether or not [the Firm has completed the NMA process], this office will make no inquiry in this regard, and that process is the sole province of Member Regulation." In addition, neither the General Counsel nor the other attorney with whom Asensio communicated played any role in the NAC's de novo review of Member Regulation's decision. Finally, we have conducted an independent review of the record and determined that the Firm has failed to meet

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[69] *Id.* at 18.

[70] *Id.* at 26.

its burden of establishing that it satisfies each of the admission standards of NASD Rule 1014. Our de novo review cures whatever bias, if any, that may have existed.[71]

D. The Firm's futility/ constitutional claims lack merit.

The Firm argues that the "considerable discretion" afforded to FINRA by the Commission—discretion which, the Firm asserts, entails being allowed to operate with "no definitive standards for MC-400s"—renders the appeals process futile.[72] The Firm further claims that the discretion afforded to FINRA allows it to "deny an application on any basis whatsoever."[73] Asensio raised similar claims in the appeal that resulted in the 2010 Commission Decision. As the Eleventh Circuit stated in connection with Asensio's appeal of that decision, "a deferential standard of review does not mean that filing an appeal is futile."[74]

Moreover, we find no merit in the Firm's claim that FINRA may deny an NMA on any basis whatsoever. To the contrary, as discussed above, NASD Rule 1014 sets forth a set of fourteen standards that FINRA evaluates in the NMA decision-making process, and FINRA followed that process here. The Firm's arguments confuse its inability to meet its burden under Rule 1014 with its assertion of an inherently unfair and futile process for reviewing NMAs.

E. FINRA's proposed rulemaking relating to NMAs did not unfairly impact the Firm's NMA.

The Firm claims that a proposed FINRA rulemaking, made while the Firm's NMA was pending before Member Regulation, constitutes a source of impermissible bias in FINRA's evaluation of the NMA. The proposed rulemaking would have required FINRA to "reject an application for FINRA membership . . . in which either the applicant or an associated person . . . is subject to a statutory disqualification."[75] But the proposed rule expressly stated that it did not apply to NMA proceedings pending at the time, such as this one. And the proposed rule never became effective because, after initial approval of the rule by our Division of Trading and Markets,[76] Asensio filed a petition for Commission review of the rulemaking. Pursuant to our Rules of Practice,[77] the effectiveness of the order was stayed, and the rulemaking has not taken

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[71] *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *19 & n.79 (May 27, 2011), *aff'd*, No. 11-2247, 2012 WL 3871561 (1st Cir. Sept. 7, 2012).

[72] Firm's Br. of Applicant at 45.

[73] *Id.* at 47.

[74] *Asensio*, 447 F. App'x at 987.

[75] *See Notice of Filing of Proposed Rule Change*, Exchange Act Release No. 63316, 2010 WL 4622446, at *2 (Nov. 15, 2010).

[76] See *Order Approving a Proposed Rule Change*, Exchange Act Release No. 63933, 2011 WL 635921, at *4 (Feb. 18, 2011).

[77] Rule of Practice 431(e), 17 C.F.R. § 201.431(e).

effect. Moreover, the Firm has pointed to nothing in the record that suggests that Member Regulation was biased by the existence of the rulemaking in making its initial decision to deny the NMA.

The Firm contends that the NAC was also biased because NAC members "are appointed and employed by the same FINRA executives" as the FINRA staff that instituted the rulemaking.[78] The Firm argues that the NAC was biased because it is "guided and influenced [by] [FINRA's Office of General Counsel], the same FINRA office that advise[d] the [FINRA] Board [on the proposed rulemaking]."[79] The NAC's decision, however, does not provide any evidence that it was affected by the rulemaking. For example, the NAC expressly considered many factors, including the Firm's complete failure to provide any form of heightened supervision for Asensio and Asensio's failure to take the required qualification examinations, in making its decision. It did not simply rely on the existence of Asensio's statutory disqualification as the proposed rulemaking would have permitted.

F. The Firm has not shown that Asensio's purported exposure of stock fraud led to bias in FINRA's consideration of the Firm's NMA.

The Firm alleges that FINRA was biased because "FINRA executives' substantial financial interests were and continue to be harmed by Asensio's work to expose stock fraud."[80] The Firm cites Asensio's asserted exposure of stock fraud involving the American Stock Exchange, Inc. ("AMEX"), Citigroup, Inc., and several Chinese companies involved in reverse mergers. The Firm alleges that certain individuals, including current and former FINRA executives, had financial interests that were negatively affected by Asensio's efforts to uncover these frauds.

Specifically, the Firm claims that Asensio's actions biased a former FINRA Vice Chairman, who was also formerly the Chairman and CEO of the AMEX. But this individual has not been employed by FINRA for a number of years and played no part in FINRA's consideration of the NMA.[81] The Firm also claims that Asensio's actions biased FINRA's current Chairman, who was previously employed at Citigroup. These allegations, too, are

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78 Firm's Br. of Applicant at 28.

79 *Id.*

80 *Id.* at 9. Asensio raised similar arguments during the prior Commission proceeding. We found that the arguments did not constitute extraordinary circumstances that warranted permitting Asensio's untimely appeal of the bar against him.

81 This individual, Salvatore F. Sodano, became subject to a Commission administrative proceeding, which found that Sodano had failed to enforce compliance with the Exchange Act, the rules and regulations thereunder, and AMEX's rules. *Salvatore F. Sodano*, Order Making Findings Pursuant to § 19(h) of the Securities Exchange Act of 1934, Exchange Act Release No. 61562, 2010 WL 616371, at *4 (Feb. 22, 2010).

unsubstantiated and, in any event, the record establishes that FINRA's current Chairman played no role at any level in FINRA's consideration of the Firm's NMA.[82]

The Firm also alleges that Asensio's efforts to expose fraudulent conduct involving Chinese reverse mergers created a conflict because FINRA shares financial interests with the NASDAQ Stock Market, on which some companies involved in such mergers are listed. While FINRA provides certain regulatory services to NASDAQ, this does not, on its own, establish the kind of financial connection that would create a conflict of interest in the consideration of FINRA regulatory matters such as an applicant's NMA. We have stated that FINRA's structure "provides for the autonomy and independence of the regulatory staff . . . such that the staff . . . is generally insulated from the commercial interests of its members and the NASDAQ market."[83] There is nothing in the record that would substantiate the Firm's claims that any potential conflict arising from FINRA's relationship with the NASDAQ market affected FINRA's consideration of the NMA here.

The Firm argues that it should be granted the right to discovery in pursuit of evidence that would prove its allegations of bias. The Firm claims that the Eleventh Circuit's decision, which required proof that the allegedly biased individuals influenced or participated in the FINRA action at issue, established a standard that could never be met unless litigants against FINRA are afforded discovery.[84] We have previously rejected similar requests for discovery related to alleged but unsubstantiated claims of bias by FINRA.[85] Given that the Firm has failed to substantiate any of its claims of bias, we deny the Firm's request for discovery.

The Firm further claims that "Asensio's actions to expose stock fraud aided investors and the public."[86] The Firm objects to FINRA's finding, in denying the NMA, that Asensio's work exposing fraud was "hardly altruistic."[87] The Firm argues that "[t]he apparent unannounced rule for FINRA is that securities work benefitting the public is of interest only if one's motives are altruistic."[88] However, even if we accept that Asensio's work "substantially aided investor

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[82] *See Asensio*, 447 F. App'x at 987 (referring to Asensio's alleged claims of the FINRA Chairman's bias in relation to the bar proceeding and stating, "even if such bias existed, Asensio would still have to prove that the CEO influenced or participated in the NASD investigation, which he has not done").

[83] *Order Approving Proposed Rule Change*, 62 Fed. Reg. at 43385-86.

[84] Firm's Br. of Applicant at 48.

[85] *See, e.g., John Montelbano*, Exchange Act Release No. 47227, 56 SEC 76, 2003 WL 147562, at *12 (Jan. 22, 2003) (rejecting discovery request because respondent is "not entitled to go on a fishing expedition in the hope that something might turn up to aid his defense"); *Stratton Oakmont, Inc.*, Exchange Act Release No. 38390, 52 SEC 1170, 1997 WL 112329, at *5 (Mar. 12, 1997) (finding no obligation to compel NASD staff testimony regarding "alleged, but wholly unsubstantiated" contacts between NASD staff and members of the District Committee).

[86] Firm's Br. of Applicant at 14.

[87] NAC Decision at *13.

[88] Firm's Br. of Applicant at 42.

protection and the public interest,"[89] this would not address the risk presented by the NMA as proposed. Efforts to expose stock fraud, regardless of motive, do not indicate a greater likelihood of compliance with Rule 8210, which pertains to an associated person's cooperation with FINRA investigations. Nor would any such benefit from Asensio's work in this area justify the approval of an NMA in which a statutorily disqualified person serves as the sole executive officer of the proposed member firm without any proposed plan of heightened supervision and without obtaining the necessary licenses.

We find that Asensio's claims that his purported exposure of various stock frauds caused FINRA to be biased against him in its NMA decision are unsubstantiated and without merit. The Firm's deficient NMA, which proposed that Asensio alone would be in charge of the Firm, without identifying any personnel or specific plan dedicated to supervising him in a way that would address the concerns raised by his statutory disqualification, as well as Asensio's failure to obtain the necessary licenses to operate in the capacities set forth in the NMA, provided ample justification for FINRA's denial of the Firm's NMA.

G. The Firm's claim that FINRA's decision has hurt Mill Rock's business does not bear on FINRA's rationale for denying the NMA.

The Firm argues that FINRA's denial of the NMA is unfair because it has caused "negative collateral effects [on Asensio] . . . as an advisor and even as a private investor (for instance, in attempting to open brokerage accounts)."[90] The Firm contends that Asensio has suffered such alleged harm "based upon a vague, inferred threat to investors."[91] To the contrary, FINRA's finding that the proposed NMA entailed a significant risk of harm to investors was based on its consideration of each of the relevant factors under NASD Rule 1014. The denial of the NMA protects investors from the potential harm that would be caused were Asensio permitted to associate with the Firm without heightened supervision and without having passed the required qualification examinations.

There is likewise no merit to the Firm's claim that Asensio has been denied due process because he "has been deprived of livelihood and property by a private party, which acted under authority conferred by statute."[92] It is well established that the requirements of constitutional due process do not apply to FINRA because FINRA is not a state actor.[93] In any event, the risks presented by the NMA as proposed clearly outweigh the claims by the Firm that FINRA's denial

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[89] *Id.*

[90] Firm's Reply Br. of Applicant at 8.

[91] *Id.* at 9.

[92] *Id.* at 22.

[93] *See, e.g.*, *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002); *Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *15 (Jan. 30, 2009), *appeal filed*, No. 09-1550 (3d Cir. Feb. 24, 2009); *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *4 (Nov. 8, 2007); *Mark H. Love*, Exchange Act Release No. 49248, 57 SEC 315, 2004 WL 283437, at *3 & n.13 (Feb. 13, 2004).

of the NMA caused harm to Asensio personally and to Asensio's separate investment advisory business.

We have considered all of the Firm's claims related to the fairness of FINRA's procedures in determining to deny the NMA. For the reasons discussed above, we find that FINRA provided the requisite fair procedure under the Exchange Act.

V.

After the completion of briefing in this appeal, both the Firm and FINRA filed Motions for Leave to Adduce Additional Evidence (the "Motions to Adduce"). Pursuant to Commission Rule of Practice 452, we "may allow the submission of additional evidence" upon a motion that "show[s] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously."[94]

The Firm's Motion to Adduce attached five exhibits. The first two exhibits relate to whether the Firm paid the required $1500 application fee for the MC-400. The Firm claims that this evidence rebuts FINRA's assertion that "the Firm cannot be heard to complain about the fact that FINRA did not process its MC-400 considering that [the Firm] never paid the required processing fee."[95] But the Firm's NMA, not the MC-400, is at issue in this appeal. As we found above, FINRA's determination to consider the NMA prior to the MC-400 was in accordance with FINRA's Rules and did not unfairly prejudice the Firm. And FINRA expressly considered the relevant provisions of the MC-400 in making its determination on the NMA. For these reasons, we deny the Firm's Motion to Adduce with respect to the first two exhibits, because the Firm failed to show that the additional evidence is material.[96]

Exhibit Three to the Firm's Motion to Adduce includes a series of correspondence between Asensio and a FINRA staff member. The correspondence covered numerous topics, but the Firm asserts that, "most importantly," it included "information provided by Asensio to [the FINRA staff member] and others at FINRA concerning stock fraud among Chinese reverse mergers and the sudden resignation of a NASDAQ official in China after Asensio discussed evidence of improper conduct by the same official with a NASDAQ regulatory executive."[97] Although the Firm states that "this evidence was adduced in part in the record of the prior Commission appeal proceeding"[98] and all of the email messages included in Exhibit Three are

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[94] 17 C.F.R. § 201.452.

[95] FINRA's Br. in Opp'n to Appl. for Review at 31.

[96] We likewise deny as immaterial FINRA's Motion to Adduce, which sought to introduce a declaration by the FINRA staff member responsible for maintaining records of the Firm's payment of required fees, which stated that the $1500 payment indicated in the Firm's Motion to Adduce covered other fees owed by the Firm, and not the MC-400 processing fee.

[97] Firm's Mot. of Applicant for Leave to Adduce Add'l Evidence at 2.

[98] *Id.* at 3.

dated in July and August 2009, considerably in advance of the Firm's filing of the NMA, the Firm does not explain its failure to adduce this evidence previously.[99] In any event, even if we accept the Firm's contention that it had sought to incorporate the record of the earlier Commission proceeding into the record of this proceeding and that FINRA had improperly failed to include these documents in the record,[100] the evidence contained in Exhibit Three is immaterial. As discussed above, we reject the Firm's argument that Asensio's work attempting to expose fraud related to Chinese reverse merger transactions created a bias against him in FINRA's NMA decision-making process. Proposed Exhibit Three does not contain any evidence of bias on the part of FINRA staff and specifically fails to establish bias by anyone who was directly involved in its review of the Firm's NMA.[101]

Proposed Exhibit Four to the Firm's Motion to Adduce is a document styled as a "Report and Determination" by an attorney who entered an appearance on behalf of the Firm before the NAC. Proposed Exhibit Five is a separate document listing what it describes as fourteen "key extracts" from proposed Exhibit Four. These documents contain numerous legal arguments covering topics such as the merits of the 2006 FINRA Bar Decision, our review process in connection with the 2010 Commission Decision, FINRA's analysis of collateral estoppel in the context of its evaluation of the NMA and related portions of the MC-400, the Firm's argument regarding the futility of FINRA and Commission review proceedings, and several other topics that the Firm addressed in detail in its two briefs on appeal to the Commission and elsewhere in the underlying FINRA proceeding.

Under Rule of Practice 450(a), "[n]o briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Commission."[102] Although the Firm claims that the "Report and Determination" includes the findings of a "securities law expert,"[103] it merely repeats or restates legal arguments that the Firm has already made in its briefs on appeal and at other stages in this proceeding. Therefore, we find that it is an impermissible additional brief. In addition, it contains no new information that was otherwise unavailable prior to the filing of the Motion to Adduce, and the Firm has failed to establish that there were reasonable grounds for its failure to adduce this evidence previously. Therefore, we deny the Motion to Adduce with respect to Exhibits Four and Five. Accordingly, we also deny FINRA's request for

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[99] *See John Edward Mullins*, Exchange Act Release No. 66373, 2012 WL 423413, at *14 & n.60 (Feb. 10, 2012) (rejecting additional evidence where the applicant "has not explained why these documents were not introduced at earlier stages in this proceeding"); *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 WL 5001956, at *8 (Oct. 20, 2011) (declining to accept additional evidence that was dated "well over a year before the Panel Hearing date").

[100] As FINRA notes, FINRA served the Firm with the certified record on February 6, 2012, and the Firm did not raise the absence of this evidence until it filed the Motion to Adduce on May 22, 2012.

[101] Instead of showing bias, it shows that FINRA seriously considered Asensio's claims about Chinese reverse mergers.

[102] 17 C.F.R. § 201.450(a).

[103] Firm's Mot. of Applicant for Leave to Adduce Add'l Evidence at 3.

permission to file an additional brief responding to the arguments raised in Exhibits Four and Five.

In accordance with § 19(f) of the Exchange Act, we find that the specific grounds on which FINRA based its denial of the NMA exist in fact, that FINRA's determination to deny the Firm's NMA is in accordance with FINRA's Rules, and that FINRA's Rules were applied in a manner consistent with the purposes of the Exchange Act. We therefore dismiss this review proceeding.

An appropriate order will issue.[104]

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

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 68505 / December 20, 2012

Admin. Proc. File No. 3-14711

In the Matter of the Application of

ASENSIO & COMPANY, INC.

For Review of Action Taken by

FINRA

ORDER DISMISSING REVIEW PROCEEDING

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by Asensio & Company, Inc. is dismissed.

By the Commission.

Elizabeth M. Murphy
Secretary