SECURITIES AND EXCHANGE COMMISSION

Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 69177 / March 19, 2013

Admin. Proc. File No. 3-14844

In the Matter of the Application of

ERIC J. WEISS
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New York, New York 10010

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DENIAL OF MEMBERSHIP CONTINUANCE APPLICATION

Registered securities association denied member firm's application to retain its membership if it employed an individual who was statutorily disqualified because of his consent to an order barring him by a state banking authority. *Held*, the review proceeding is *dismissed*.

APPEARANCES:

Wesley J. Paul, of the Paul Law Group, LLP, for *Eric J. Weiss*.

Alan Lawhead and *Andrew J. Love*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: April 11, 2012
Last brief received: August 31, 2012

I.

Eric J. Weiss was a general securities representative and general securities principal associated with American Capital Partners, LLC ("ACP"), a FINRA member firm. While associated with ACP, Weiss consented to a seven-year bar by the Connecticut Department of Banking from transacting business in or from Connecticut as a broker-dealer, agent, investment adviser, investment adviser agent, or agent of issuer.[1] As a result of that consent order, Weiss became statutorily disqualified,[2] losing his ability to associate with ACP, or any other FINRA member firm, without FINRA's consent.[3]

On July 28, 2009, ACP sought such consent, filing an MC-400 Membership Continuance Application with FINRA's Department of Registration and Disclosure in which it asked that Weiss be permitted to continue his employment with the firm as a general securities representative.[4] After holding a hearing, FINRA denied ACP's application, finding that allowing Weiss to continue to associate with the firm was "not in the public interest, and would create an unreasonable risk of harm to the market or investors."[5] This appeal by Weiss followed.[6]

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[1] *Eric John Weiss*, No. CO-09-7664-S, 2009 CT Banking Comr. LEXIS 131 (Conn. Dep't of Banking June 9, 2009).

[2] Exchange Act § 3(a)(39)(F) provides that "[a] person is subject to a 'statutory disqualification' with respect to membership or participation in, or association with a member of, a self-regulatory organization if such person . . . has committed . . . any act, or is subject to an order or finding, enumerated in subparagraph (D), (E), (H) or (G) of paragraph (4) of section 15(b) of this title . . . ." 15 U.S.C. § 78c(a)(39)(F). Section 15(b)(4)(H), in turn, involves persons who are "subject to any final order of a State securities commission (or any agency or officer performing like functions) [or] State Authority that supervises or examines banks . . . that—(i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or (ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct." 15 U.S.C. § 78o(b)(4)(H).

[3] FINRA's By-Laws state that no person shall be associated with a member, continue to be associated with a member, or transfer association to another member if such person is or becomes subject to disqualification. FINRA By-Laws, Art. III, § 3.

[4] FINRA's By-Laws allow a member firm to request relief from ineligibility to associate with a disqualified person on behalf of the prospective associated person. *See* FINRA By-Laws, Art. III, § 3(d).

[5] NAC Decision, dated Mar. 16, 2012, at 12.

[6] Under the Exchange Act, "any person aggrieved" by FINRA's denial of a membership application may file an application for Commission review. *See* 15 U.S.C. § 78s(d); *see also* 17 C.F.R. § 201.420 (providing that any person aggrieved by a FINRA denial of membership may file an application for review); *cf., e.g.*, *Leslie A. Arouh*, Securities Exchange Act Release No. 62898, 2010 SEC LEXIS 2977, at *1 (Sept. 13, 2010) (considering appeal by an associated person of FINRA's denial of a firm's membership continuation application).

II.

A. Weiss became statutorily disqualified after consenting to a seven-year bar issued by a state banking authority.

Weiss entered the securities industry in 1992 and was associated with nine other firms as a registered representative before joining ACP in May 2005. Sometime after joining ACP, Weiss opened an account for Rita Tuohy, whose brother (an existing client of Weiss's) had referred her to Weiss. In opening Tuohy's account, Weiss used the New Jersey business address of Tuohy's brother. Weiss testified, however, that approximately three months after Tuohy opened her account, he learned that she lived in Connecticut, not New Jersey. Connecticut law generally prohibits individuals from transacting certain securities-related business in the state unless registered as an agent.[7] Weiss, however, did not register in Connecticut until after learning that Tuohy lived there.[8]

Approximately fifteen months after opening Tuohy's account, Weiss discussed a prospective investment with her involving a company called InPhonic, Inc. Weiss testified that, at the time of his discussion with Tuohy, he did not know if she had any other assets or accounts and did not know the amount or components of Tuohy's liquid net worth. Weiss knew, however, that Tuohy "didn't have a lot" and was "not rich."[9] Despite this, he advised Tuohy that she should invest the entire amount in her account (approximately $9,000) in InPhonic's stock. Weiss testified that he based his recommendation on research reports that the company was about to receive a "significant cash injection at the time from Goldman Sachs."[10]

In his reply brief, Weiss contends, for the first time, that he based his recommendation to invest in InPhonic on a research report produced by ACP.[11] Weiss contends that he did not testify about the ACP research report during the hearing, below, because ACP's president, Edward Cahill, "demanded that I not say where I got the recommendation."[12] He alleges that Cahill "personally threatened me with my job by stating that ACP would withdraw their [*sic*] MC-400 application and I 'would be out of the industry' if I told the NAC committee that I received the recommendation from an ACP report."[13] The record is not clear, however, about why ACP would want Weiss not to discuss the ACP report, nor does Weiss provide any evidence for his allegations other than his own declaration. Whatever the basis for Weiss's recommendation, Tuohy agreed to invest the entire amount in her account in InPhonic's stock, which Weiss acknowledges represented an "increased risk" to Tuohy compared to her previous

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7 *See* CONN. GEN. STAT. § 36b-6(a) (prohibiting an individual from transacting certain business in the state as an agent of a broker-dealer unless the individual is registered in Connecticut).

8 Transcript of NAC Hearing ("Tr.") at 26.

9 *Id.* at 29, 34.

10 *Id.* at 24.

11 As explained in notes 75–76, *infra*, and accompanying text, that report does not establish that his recommendation to Tuohy was suitable.

12 Eric J. Weiss Decl., dated Aug. 21, 2012, ¶ 11.

13 *Id.*

investments.[14] InPhonic soon filed for bankruptcy, which caused Tuohy to lose almost all of her investment.

On June 9, 2009, Weiss entered into a consent order with the Connecticut Department of Banking. In that order, Connecticut alleged that Weiss had (i) conducted business in an unregistered capacity; (ii) engaged in a dishonest or unethical practice by falsely reporting on firm records that the securities transactions he effected for a Connecticut customer, while he was unregistered, were associated with a New Jersey address; and (iii) made unsuitable recommendations to a Connecticut customer. While neither admitting nor denying Connecticut's allegations, Weiss consented to Connecticut's revoking his registration as an agent in the state and barring him for seven years from transacting business in or from Connecticut as a broker-dealer, agent, investment adviser, investment adviser agent, or agent of issuer. Weiss further consented, among other things, to being precluded from supervising any broker-dealer agents with respect to securities business transacted in or from Connecticut. The consent order provided that Weiss could reapply for registration after five years.

B. ACP filed a membership continuation application.

On July 28, 2009, ACP filed an MC-400 Membership Continuance Application with FINRA's Department of Registration and Disclosure in which the firm asked that it be allowed to continue as a FINRA member if Weiss remained associated with it as a general securities representative. In its application, the firm stated that it "does not deem it necessary to place Mr. Weiss under heightened supervision. The State of Connecticut disclosure is the only item on Mr. Weiss's CRD within the past 4 years."[15] ACP's general counsel explained at the hearing that Weiss's statutory disqualification had not triggered heightened supervision under the firm's protocols because ACP's procedures triggered such supervision only under "certain thresholds, none of which were met."[16] ACP's president added that "we looked at the allegations," but the "conclusion of the compliance staff was that [heightened supervision] wasn't necessary at that time."[17] Approximately two years after filing the application, however, ACP placed Weiss under heightened supervision after FINRA's Department of Member Regulation told it such supervision was "critical."[18]

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[14] Appellant's Br. in Sup. of Pet. for Review at 2.

[15] Certified Record ("R.") at 140.

[16] Tr. at 18. The example ACP's counsel gave of what would trigger heightened scrutiny was when a representative had acquired three or more written complaints.

[17] *Id.* at 19.

[18] *Id.* at 50.

C. FINRA denied ACP's membership continuance application.

On October 6, 2011, a two-person subcommittee of FINRA's Statutory Disqualification Committee held a hearing to consider ACP's application.[19] At the panel's request, the firm submitted a revised plan of heightened supervision for Weiss after the hearing. In it, the firm appointed Guy Gorham, an operations manager, as Weiss's primary on-site supervisor, and Eric Drewes as Weiss's backup supervisor. According to the plan, Gorham's supervisory duties required him to "review and initial all of Mr. Weiss' trade and check blotters weekly" and to review "[e]very document associated with Mr. Weiss' transactions" no later than the next business day.[20] Though Gorham would be compensated for his additional responsibilities, such compensation would not be based on Weiss's production. The plan also stipulated that Weiss would not act in a supervisory capacity, would allow his Series 24 supervisory registration to lapse,[21] and would not maintain any discretionary accounts.[22]

On March 16, 2012, the NAC denied ACP's membership continuance application. The NAC found that allowing Weiss to continue to associate with ACP was "not in the public interest, and would create an unreasonable risk of harm to the market or investors."[23] In particular, it expressed concern that the Connecticut order was recent and serious; and ACP's supervision, both generally and in terms of the proposed plan of heightened supervision, was "troubling."[24] The NAC also found that Weiss had eleven customer complaints filed against him before becoming associated with ACP:

- May 2005—a customer alleged that Weiss used his margin account without authorization. This customer claimed $7,035 in damages.[25]

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19 *See* FINRA Rule 9524(a)(1) (stating that, when an applicant requests a hearing, "the National Adjudicatory Council or the Review Subcommittee shall appoint a Hearing Panel composed of two or more members, who . . . shall conduct a hearing and recommend a decision on the request for relief").

20 R. at 490.

21 A Series 24 supervisory license authorizes a general securities principal to "supervise all areas of the member's investment banking and securities business, such as underwriting, trading and market making, advertising, or overall compliance with financial responsibilities." *Qualifications FAQ - Examinations, FINRA-Compliance-Registration*, *available at* http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/RegisteredReps/Qualifications/p011087 (last visited Mar. 14, 2013).

22 NAC Decision at 1 n.1. Neither the panel's nor the full Statutory Disqualification Committee's recommendations is part of the record. *See* FINRA Manual, *available at* http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4598 (last visited Mar. 14, 2013) (By-Laws of FINRA Regulation, Inc., Art. V, § 5.1 (Authority)); FINRA website, *available at* http://www.finra.org/Industry/Enforcement/SanctionGuidelines/p016371 (last visited Mar. 14, 2013) (March 2006 Revisions to the NASD Sanction Guidelines—FAQ).

23 NAC Decision at 12.

24 *Id.* The NAC's decision notes, for example, that ACP's proposed back-up supervisor (Eric Drewes) had been the subject of five customer complaints and a state regulatory action, including allegations of failures to supervise, between 1994 and 2008. Weiss does not dispute this.

25 According to the CRD, this matter was still pending as of March 14, 2013. Report, Eric John Weiss, CRD No. 224852, at *22–23 (generated Mar. 14, 2013), *available at* http:// www.finra.org/brokercheck.

- June 2004—a customer alleged a breach of contract and trust claim, asserting $49,294 in damages. Weiss's firm at the time settled the claim for $12,500, to which Weiss personally contributed $7,800.

- December 1999—a customer alleged that Weiss recommended unsuitable securities, claiming $250,000 in damages. Weiss personally paid the customer $5,000 to settle the matter.

- September 1999—a customer alleged that Weiss breached his fiduciary duties, breached a contract, made misrepresentations, and failed to disclose material facts. The customer claimed $214,610 in damages. Weiss personally paid the customer $2,500 to settle the matter.

- March 1998—two customers alleged that Weiss recommended unsuitable securities, made misrepresentations, and churned their account, claiming $96,000 in damages. Weiss personally paid the customers $7,000 to settle the matter.

- October 1997—two customers alleged that Weiss made misrepresentations, claiming $79,000 in damages. They withdrew their complaint in December 1997.

- August 1997—a customer alleged that Weiss recommended unsuitable securities, breached his fiduciary duties, engaged in fraud, and made misrepresentations, claiming $45,000 in damages. Weiss personally paid the customer $1,000 to settle the matter.

- July 1997—a customer alleged that Weiss failed to supervise, recommended unsuitable securities, and breached his fiduciary duties, claiming $96,000 in damages. Weiss personally paid the customer $6,666 to settle the matter.

- July 1997—a customer alleged that Weiss failed to supervise and recommended unsuitable investments, claiming $40,000 in damages. The customer withdrew the complaint in March 1998, after which Weiss personally paid $1,500 to the customer's attorney to cover the fees.

- April 1997—a customer alleged that Weiss made misrepresentations and omissions, engaged in unauthorized trading, and churned the customer's account, claiming $160,000 in damages. Weiss personally paid the customer $9,000 to settle the matter.

- March 1996—a customer alleged that Weiss made misrepresentations, recommended unsuitable securities, failed to execute a trade, and failed to supervise, claiming $5,740 in damages. Weiss's firm at the time paid $2,000 to settle the matter. Weiss did not personally contribute to the settlement.

The NAC found that these complaints "raise serious concerns regarding Weiss' dealings with customers and compliance with securities laws and regulations."[26]

The NAC observed that, "[w]ere we otherwise inclined to approve this Application, which we are not, we would have given the Firm an opportunity to submit a . . . revised plan that cures [the deficiencies in ACP's proposed supervisory plan]."[27] The NAC concluded here, however, that Weiss's disqualifying misconduct and the numerous customer complaints "alone warrant denial of this Application."[28] This appeal by Weiss followed.

III.

Section 19(f) of the Exchange Act sets forth the criteria that govern our review of FINRA's denial of ACP's application.[29] We must dismiss Weiss's appeal if we find that (i) the specific grounds on which FINRA based its action exist in fact, (ii) the denial was in accordance with FINRA rules, and (iii) those rules were applied in a manner consistent with the purposes of the Exchange Act.[30] For the reasons below, we find that FINRA's denial met this criteria, and we accordingly dismiss Weiss's appeal.[31]

A. The grounds for FINRA's decision exist in fact.

We first find, and Weiss does not dispute, that the grounds on which FINRA based its decision exist in fact. The record establishes that Weiss consented to a seven-year bar by the Connecticut Department of Banking and that the Connecticut order is a statutorily disqualifying event. Although Weiss claims, for the first time on appeal, that he was "manipulated and coerced by ACP, into accepting the Connecticut Order,"[32] we have long "held that principles of collateral estoppel dictate that a respondent must not be permitted to retry the merits of a proceeding that results in conviction or an injunction."[33] Moreover, Weiss admits to the relevant events that led

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26 NAC Decision at 11.

27 *Id.*

28 *Id.* at 12.

29 15 U.S.C. § 78s(f).

30 *Id.*; *accord Arouh*, 2010 SEC LEXIS 2977, at *25 (stating standard of review under Exchange Act § 19(f)); *Wm. J. Haberman*, Exchange Act Release No. 40673, 53 SEC 1024, 1998 SEC LEXIS 2466, at *6 (Nov. 12, 1998) (same), *aff'd per curiam*, 205 F.3d 1345 (8th Cir. 2000) (table).

31 Exchange Act § 19(f) also requires us to set aside FINRA's action if we find that the action imposed an undue burden on competition. 15 U.S.C. § 78s(f). Weiss does not claim, and the record does not support a finding, that FINRA's actions imposed such a burden.

32 Appellant's Reply Brief at 4.

33 *BFG Sec., Inc.*, Exchange Act Release No. 44627, 55 SEC 276, 2001 SEC LEXIS 1521, at *5 n.5 (July 31, 2001) (dismissing petition for review of denial of membership application by FINRA's predecessor, NASD); *see also Gershon Tannenbaum*, Exchange Act Release No. 31080, 50 SEC 1138, 1992 SEC LEXIS 1998, at *6 (Aug. 24, 1992) (stating that "[i]t is always true in a case of this sort that a respondent cannot mount a collateral attack on findings that have previously been made against him"); *Boleslaw Wolny*, Exchange Act Release No. 40013, 53 SEC

(continued…)

to that order. For instance, Weiss testified that he recommended that Tuohy invest her entire account in a single company's stock, while admitting that he knew she did not have many assets. Weiss also concedes that he transacted business in an unregistered capacity and incorrectly reported that transactions he effected were associated with a non-Connecticut address (although Weiss claims that, once he learned that the customer resided in Connecticut, he immediately registered in the state).

The record also establishes that, from May 1992 through May 2005, eleven customer complaints were filed against Weiss, many of which involved the same allegation of making unsuitable recommendations as Connecticut alleged in the consent order.[34] We also find that, as ACP's general counsel conceded at the hearing, the firm did not implement a heightened supervisory plan for Weiss until approximately two years after his disqualifying event, and even then only after FINRA staff told ACP that implementing such a plan was critical. We further find that, among other deficiencies, ACP's supervisory plan proposed a backup supervisor who had been subject to various customer complaints alleging failures to supervise, the most recent of which was in 2008.

B. FINRA's denial of ACP's membership continuation application was in accordance with FINRA's rules.

We next turn to whether FINRA denied ACP's membership application in accordance with FINRA's rules. We find that it did so by, among other things, convening a hearing panel,[35] conducting an eligibility hearing at which FINRA afforded Weiss an opportunity to be heard and to submit evidence, and allowing ACP to submit a revised supervisory plan after the hearing.[36]

Weiss does not dispute that FINRA conducted the application process in accordance with its rules. Weiss instead claims that FINRA's determination was prejudiced by his sponsoring firm, ACP, which Weiss contends was subject to "ongoing FINRA reviews and possible sanctions and could arguably [have] been motivated to lay blame on Mr. Weiss in an attempt to deflect additional potential[] liability."[37] Weiss claims that, because of ACP's supposed motivation to blame him, the firm did not advise him about submitting evidence at the NAC

(…continued)
590, 1998 SEC LEXIS 996, at *5 (May 20, 1998) (holding that FINRA correctly adhered to its long-standing policy of prohibiting collateral attacks on underlying disqualifying events); *Jan Biesiadecki*, Exchange Act Release No. 39113, 53 SEC 182, 1997 SEC LEXIS 1975, at *8 (Sept. 22, 1997) (same).

[34] *See infra* notes 63–68 and accompanying text (discussing relevance and admissibility of Weiss's past customer complaints).

[35] *See supra* note 19 and accompanying text (citing FINRA rule regarding appointment of hearing panel).

[36] *See* FINRA By-Laws, Art. III, § 3(d) (stating that FINRA "may conduct such inquiry or investigation into the relevant facts and circumstances as it, in its discretion, considers necessary to its determination" of whether to approve a member's application for relief from ineligibility from membership); *see also generally* FINRA Rules 9520 to 9525 (setting forth parameters of eligibility proceedings).

[37] Appellant's Br. in Sup. of Pet. for Review at 14.

hearing "that would have mitigated the charges against him."[38] This, Weiss claims, ultimately "stripped [him] of his due process rights."[39]

We find no evidence that ACP prevented Weiss from submitting evidence or otherwise deprived him of a fair hearing.[40] ACP initiated the MC-400 application process and supported its application throughout the subsequent FINRA proceedings by, among other things, submitting multiple plans of heightened supervision and having three ACP personnel appear and testify at the hearing, including the firm's president. Although ACP's supervisory plan had deficiencies (not the least of which was the firm's failure to implement such a plan for two years after learning of Weiss's statutory disqualification), we find no evidence supporting Weiss's vague and speculative allegations that ACP somehow prevented Weiss from presenting evidence on his own behalf.

Furthermore, if ACP had actually wanted to distance itself from Weiss, or otherwise deflect blame, it presumably could have avoided the unnecessary time, expense, and attention of the application process by simply withdrawing its application. And as Weiss himself concedes, he "is not proposing that he had ineffective counsel or that he be provided with the right to separate counsel in connection with an MC-400 application."[41] Weiss's dissatisfaction with his sponsoring firm is not germane to the relevant inquiry for our review: whether *FINRA* reviewed and denied ACP's continuation application fairly and in accordance with its rules, which we find it did.

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[38] *Id.* at 6.

[39] *Id.* at 7.

[40] Furthermore, SROs such as FINRA are not state actors and thus not subject to the Constitution's due process requirements. *See, e.g.*, *Timothy P. Pedregon*, Exchange Act Release No. 61791, 2010 SEC LEXIS 1164, at *19 n.19 (Mar. 26, 2010) ("It is well established that the requirements of constitutional due process do not apply to FINRA because FINRA is not a state actor."); *see also D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (stating that it is a well-settled principle that FINRA's predecessor, NASD, is not a governmental actor); *Mark H. Love*, Exchange Act Release No. 49248, 57 SEC 315, 2004 SEC LEXIS 318, at *12 n.13 (Feb. 13, 2004) ("We have held that NASD proceedings are not state actions and thus not subject to constitutional requirements."); *William J. Gallagher*, Exchange Act Release No. 47501, 56 SEC 163, 2003 SEC LEXIS 599, at *9 n.10 (Mar. 14, 2003) ("[W]e note that many courts and this Commission have determined that self-regulatory organizations . . . are not subject to . . . constitutional limitations applicable to government agencies."); *but see* 15 U.S.C. § 78o-3(b)(8) (stating that SROs are required to "provide a fair procedure for . . . the denial of membership to any person seeking membership").

[41] Reply Brief at 8; *see also Citadel Sec. Corp.*, Exchange Act Release No. 49666, 57 SEC 502, 2004 SEC LEXIS 949, at *11 (May 7, 2004) (stating that "[t]here is no constitutional or statutory right to representation of counsel in administrative proceedings" (quoting *Love*, 2004 SEC LEXIS 318, at *18)).

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

We last turn to whether FINRA applied its rules in a manner consistent with the Exchange Act when it denied ACP's application. Under the Exchange Act, FINRA may deny a firm's application for association with a statutorily disqualified person if FINRA determines that such association would be inconsistent with the public interest and the protection of investors.[42] To be consistent with the Exchange Act, "FINRA must 'independently [evaluate the] application, based upon the totality of the circumstances, and . . . explain the bases for its conclusion.'"[43] In doing so, FINRA "may demand a high level of integrity from securities professionals" in order to protect investors.[44] We have also recognized that FINRA has discretion in determining whether persons subject to statutory disqualification should be permitted to associate with a member firm.[45] Moreover, in a FINRA proceeding such as this, "the burden rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested employment."[46] Here, we find that FINRA acted in a manner consistent with the Exchange Act by weighing the facts and circumstances surrounding the Connecticut order, Weiss's history of customer complaints, and ACP's proposed supervisory plan to conclude that ACP had not met its burden of showing that it would be in the public interest for Weiss to continue associating with the firm.

FINRA was properly concerned, for example, with the suitability violation that led to the Connecticut order. Registered representatives are obligated to make "a customer-specific determination of suitability and to tailor [their] recommendations to the customer's financial profile and investment objectives."[47] Weiss exhibited a remarkable lack of care about this obligation by recommending that Tuohy invest the entire amount in her account in a single

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[42] 15 U.S.C. § 78o-3(g)(2) (providing that FINRA "may . . . deny membership to any registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification"); *see also Frank Kufrovich,* Exchange Act Release No. 45437, 76 SEC 2180, 2002 SEC LEXIS 357, at *11–12 (Feb. 13, 2002) (describing the steps that NASD must take when denying an application to be consistent with the purposes of the Exchange Act).

[43] *Arouh*, 2010 SEC LEXIS 2977, at *46 (quoting *Pedregon*, 2010 SEC LEXIS 1164, at *20).

[44] *Kufrovich*, 2002 SEC LEXIS 357, at *17.

[45] *See, e.g.*, *Arouh*, 2010 SEC LEXIS 2977, at *48–49 (stating that the Commission has "afforded FINRA discretion in determining whether persons subject to statutory disqualification should be permitted to associate with a member firm"); *Am. Inv. Servs., Inc*., Exchange Act Release No. 43991, 54 SEC 1265, 2001 SEC LEXIS 306, at *12 (Feb. 21, 2001) ("NASD is afforded discretion in considering the circumstances under which a person subject to a statutory disqualification may associate with a member."); *Halpert & Co., Inc.*, Exchange Act Release No. 28615, 50 SEC 420, 1990 SEC LEXIS 3564, at *6 (Nov. 14, 1990) ("Particularly in matters involving a firm's employment of persons subject to a statutory disqualification, it is appropriate to recognize the NASD's evaluation of appropriate business standards for its members."); *see also* FINRA By-Laws Art. III, § 3(d) ("The Board may, in its discretion, approve the continuance in membership, and may also approve the association or continuance of association of any person, if the Board determines that such approval is consistent with the public interest and the protection of investors.").

[46] *Timothy H. Emerson Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *11 (July 17, 2009) (quoting *Tannenbaum*, 1992 SEC LEXIS 1998, at *4–5).

[47] *F.J. Kaufman & Co. of Va.*, Exchange Act Release No. 27535, 50 SEC 164, 1989 SEC LEXIS 2376, at *9 (Dec. 13, 1989) (finding that a broker had made unsuitable recommendations).

company's stock despite knowing little about her net assets other than that she "didn't have a lot."[48] Such admissions plainly supported FINRA's conclusion that Weiss "fails to appreciate the suitability issues presented by [the Tuohy] transaction and is a risk to the investing public."[49]

FINRA also expressed a reasonable concern with Weiss's failure to register as an agent in Connecticut and report his transactions on firm records accurately. Registration requirements, we have noted, provide "an important safeguard in protecting public investors and, consequently, strict adherence . . . is essential."[50] Similarly, reporting requirements allow SROs and state regulatory agencies "to monitor and determine the fitness of securities professionals."[51] By failing to properly register in Connecticut and report the transactions he effected for Tuohy on firm records accurately, Weiss undermined these important investor protection provisions.

FINRA also properly considered the time between Weiss's disqualifying event and ACP's application. Weiss entered into the consent order approximately three-and-one-half years ago. FINRA reasonably concluded that was too recent for him to have demonstrated a sufficiently long-term change in behavior to show he would comply with the securities regulations going forward.[52] For these reasons, we agree with FINRA that the conduct underlying Weiss's

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48 Tr. at 29. *Cf. Luis Miguel Cespedes*, Exchange Act Release No. 59404, 2009 SEC LEXIS 368, at *22 (Feb. 13, 2009) (noting that modest investments, which represented "all or substantially all" of a customer's liquid net worth, left "little margin for error or loss"), *petition for review denied*, 462 F. App'x 2012 (D.C. Cir. 2012); *James B. Chase*, Exchange Act Release No. 47476, 56 SEC 149, 2003 SEC LEXIS 566, at *16 (Mar. 10, 2003) (finding broker's recommendation to be unsuitable where broker recommended that the customer invest entire account in a single security even though customer was "young with a lifetime of earning potential"); *Stephen Thorlief Rangen*, Exchange Act Release No. 38486, 52 SEC 1304, 1997 SEC LEXIS 762, at *10 (Apr. 8, 1997) (finding recommendations to be unsuitable, in part, because, "by concentrating so much of [the customers'] equity in particular securities, [the broker] increased the risk of loss for these individuals beyond what is consistent with the objective of safe, non-speculative investing").

49 NAC Decision at 11; *see also id*. at 10 (citing *Dep't of Mkt. Reg. v. Kresge*, Complaint No. CMS030182, 2008 FINRA Discip. LEXIS 46, at *15 n.12 (NAC Oct. 9, 2008) (stating that "it is axiomatic that fraud and unsuitable recommendations rank among the most serious kinds of securities law violations")).

50 *Kevin D. Kunz*, Exchange Act Release No. 45290, 55 SEC 551, 2002 SEC LEXIS 104, at *36 (Jan. 16, 2002); *accord Michael F. Flannigan*, Exchange Act Release No. 47142, 56 SEC 817, 2003 SEC LEXIS 40, at *13–14 (Jan. 8, 2003) (observing that registration requirements provide "an important safeguard in protecting public investors and strict adherence to that requirement is essential").

51 *Rosario R. Ruggiero*, Exchange Act Release No. 37070, 52 SEC 725, 1996 SEC LEXIS 990, at *8–9 (Apr. 5, 1996) (stating that reporting requirements are "used by all the self-regulatory organizations, including the NASD, state regulators, and broker-dealers to monitor and determine the fitness of securities professionals"); *see also Stephen J. Horning*, Exchange Act Release No. 56886, 2007 SEC LEXIS 2796, at *52 (Dec. 3, 2007) (noting that "[t]he books and records that broker-dealers are required to maintain are 'a keystone of the surveillance of brokers and dealers by [Commission] staff and by the securities industry's self-regulatory bodies'" (quoting *Edward Mawod & Co*., Exchange Act Release No. 13512, 46 SEC 865, 1977 SEC LEXIS 1811, at *16 n.39 (May 6, 1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979))), *aff'd*, 570 F.3d 337 (D.C. Cir. 2009).

52 *See, e.g.*, *Haberman*, 1998 SEC LEXIS 2466, at *14 (finding representative's association with member firm to be "not in the public interest" where representative's felony conviction was "only six years ago"); *Louis A. Frangos*, Exchange Act Release No. 26009, 49 SEC 865, 1988 SEC LEXIS 1687, at *6 (Aug. 18, 1988) (describing an approximately five-year-old felony conviction as "recent").

disqualifying event, and his admissions about that conduct, weighed against allowing Weiss to associate with a member firm.[53]

Weiss does not dispute the events underlying his disqualification. To the contrary, he acknowledges that his "statutorily disqualifying event was serious and was securities related."[54] Instead, Weiss contends that these events "were mostly based on justifiable human error and not malicious intent."[55] He argues that, in comparison to his disqualifying event, the disqualifying events in other FINRA denials of continuing membership involved "felonies, fraud or some other type of heinous act."[56] The type of disqualifying event, however, is not the determining factor. Congress, not FINRA or the Commission, decided that certain orders by state securities commissions trigger statutory disqualification.[57] The relevant inquiry is instead whether, under "the totality of the circumstances," a person's continued association with a member firm is inconsistent with the public interest and the protection of investors.[58] FINRA performed this analysis by not only examining the circumstances underlying Weiss's disqualification, but also examining Weiss's professional history and ACP's application.[59]

For example, FINRA expressed "serious concern" with the eleven customer complaints filed against Weiss, many of which FINRA correctly noted "involved serious allegations such as unauthorized trading, misrepresentations, failures to disclose material facts, and churning customer accounts."[60] Although Weiss argues that the majority of the customer complaints related to one of his previous firms shutting down (while he was listed as an officer on that firm's Form BD),[61] four of the most recent complaints had nothing to do with that previous firm. And, as FINRA noted, "several of the complaints alleged that Weiss made unsuitable

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[53] *Cf., e.g.*, *Citadel Sec. Corp.*, 2004 SEC LEXIS 949, at *12–15 (finding that NASD properly considered the seriousness and recency of the disqualifying permanent injunction, which involved a failure to supervise, when denying a firm's membership continuation application).

[54] Appellant's Br. in Sup. of Pet. for Review at 9.

[55] *Id.* at 10.

[56] *Id.* at 9 (citing *Pedregon*, 2010 SEC LEXIS 1164, at *1 (sustaining denial of application where disqualifying event was felony conviction for online solicitation of a minor); *Emerson*, 2009 SEC LEXIS 2417, at *2 (sustaining denial of application where disqualifying event was a felony DUI conviction); *Jan Biesiadecki*, Exchange Act Release No. 39113, 53 SEC 1102, 1997 SEC LEXIS 1975, at *1 (Sept. 22, 1997) (sustaining denial of application where disqualifying event was felony conviction for mail fraud, wire fraud, racketeering, and conspiracy to commit racketeering)).

[57] *See supra* note 2.

[58] *Pedregon*, 2010 SEC LEXIS 1164, at *20 (quoting *Kufrovich*, 2002 SEC LEXIS 357, at *16).

[59] *See, e.g.*, *Emerson*, 2009 SEC LEXIS 2417, at *14 (finding FINRA's denial of application consistent with Exchange Act where it "appropriately weigh[ed] all the facts and circumstances surrounding [the statutorily disqualifying event] and [the] proposed supervisory plan"). We are also concerned by Weiss's continued insistence that he "did absolutely nothing wrong." Appellant's Br. in Sup. of Pet. for Review at 4. Such a refusal to recognize the wrongfulness of his conduct provides little assurance that Weiss will not repeat his misconduct in the future.

[60] NAC Decision at 11.

[61] Form BD is the application form entities use to apply to the Commission for registration as a broker-dealer.

recommendations similar to the Connecticut Order."[62] While some of these complaints may not be recent, such history still "reflects poorly on [an applicant's] judgment and trustworthiness."[63] And taken together, Weiss's history of complaints suggests a continuous and troubling pattern of poor behavior towards customers.[64]

Weiss argues that it was improper and prejudicial for FINRA to cite the more than $40,000 he paid to settle some of the customer complaints. In doing so, he relies on the prohibitions in Federal Rule of Evidence 408 (related to settling claims). Those rules, however, are inapplicable here because, as we have noted, SRO proceedings "are informal and are not bound by the rules of evidence used in courts of law."[65] Moreover, courts have consistently allowed agencies to consider settled actions for purposes such as showing that a respondent was aware of a regulatory requirement.[66] Here, Weiss paid to settle multiple customer complaints that alleged he had made unsuitable recommendations. Those settlements, at the very least, should have alerted Weiss about the risks of making unsuitable recommendations. Weiss, however, admits that he nevertheless recommended that a customer invest the entire amount in her account in a single company's stock despite knowing little about her net assets other than that she "didn't have a lot."[67] Such conduct, as FINRA reasonably concluded, raises "serious concerns regarding Weiss's dealings with customers and compliance with securities laws and regulations."[68]

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[62] NAC Decision at 11.

[63] *Kufrovich*, 2002 SEC LEXIS 357, at *20 (concluding that prior misconduct, even if not recent, still reflects poorly on a statutorily disqualified person).

[64] *See, e.g.*, *Emerson*, 2009 SEC LEXIS 2417, at *17–18 (holding that FINRA reasonably concluded that two customer complaints alleging unsuitable recommendations filed against a disqualified individual and settled by his firm, as well as discharges from prior firms, reflected poorly on his judgment and trustworthiness); *Robert J. Prager*, Exchange Act Release No. 51974, 2005 SEC LEXIS 1558, at *59 n.73 (July 6, 2005) (rejecting respondents' argument that certain settled disciplinary actions were too stale to be considered for sanctions purposes because, as NASD had noted, that history established "a disturbing pattern of disregard for regulatory compliance matters"); *cf. Michael D. Smith*, CFTC Docket No. 93-9, 1997 CFTC LEXIS 48, at *22 (Mar. 11, 1997) (stating that evidence of prior wrongdoing is "relevant in assessing the threat a respondent will pose to market integrity in that it further indicates a pattern of respondent's failure to comply with significant regulatory requirements").

[65] *Robert E. Gibbs*, Exchange Act Release No. 32401, 51 SEC 482, 1993 SEC LEXIS 1290, at *6 (June 2, 1993) (rejecting applicant's contention "that he was prejudiced by the admission of 'certain settlements' of customer complaints"), *aff'd*, 25 F.3d 1056 (10th Cir. 1994) (table); *see also* FINRA Rule 9145(a) ("The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.").

[66] *See, e.g.*, *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981) (allowing an earlier consent decree between defendant and the SEC to be introduced to show defendant's awareness of SEC requirements); *cf.* FED. R. CIV. P. 408 (prohibiting admission of compromise offers and negotiations "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction," but expressly allowing the admission of such evidence "for another purpose"); *Tate v. U.S. Postal Service*, No. 2012-3066, 2012 U.S. App. LEXIS 20904, at *8–9 (Fed. Cir. Oct. 9, 2012) (stating that it was proper for the Postal Service to consider Tate's history of settled disciplinary actions for purposes of establishing that Tate had notice of his obligations and the likelihood of discipline for such violations); *Emerson*, 2009 SEC LEXIS 2417, at *17 (denying membership continuation application where disqualified individual's personal history included, in part, two customer complaints alleging unsuitable recommendations).

[67] Tr. at 29.

[68] NAC Decision at 11; *see supra* notes 47–49 and accompanying text (discussing risk to the investing public of making unsuitable recommendations).

Weiss also challenges the relevance of the customer complaints by arguing that, after "[e]xamining the overall context, it becomes clear that [he] has been an extraordinary representative with a high degree of integrity."[69] In support, Weiss attached thirty-seven letters from former and current customers to his opening brief. None of these letters, however, was introduced during the FINRA proceeding, nor is there any evidence that Weiss attempted to do so until now. Weiss instead claims only that his "counsel at the time did not advise [him] in submission of these letters."[70]

Under our Rule of Practice 452, a party who wishes to introduce additional evidence must file a motion for leave to do so.[71] That rule requires that "[s]uch [a] motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failing to adduce such evidence previously."[72] Weiss meets none of these standards. He did not file a motion seeking permission to introduce the new evidence; he has not explained with any particularity why he did not introduce the evidence previously; and none of the thirty-seven customer letters deals with the relevant issues here. All Weiss's letters show is that thirty-seven customers were happy with his services. None of the letters addresses the specific circumstances surrounding the disqualifying event or the eleven customer complaints—circumstances that FINRA reasonably concluded raised serious concerns about Weiss's dealings with customers and compliance with securities laws and regulations.[73] We therefore decline to admit this evidence.[74]

In his reply brief, Weiss attached additional new evidence without seeking permission to do so. This evidence consisted of (i) a research report concerning InPhonic prepared by ACP (which Weiss now claims for the first time on appeal that he relied upon when recommending the stock to Tuohy) and (ii) an alleged e-mail from Tuohy in which she writes, in part, that she holds "no bad feelings" toward Weiss and that her complaint "appears to have been more with ACP" rather than Weiss. Neither of these attachments is relevant to these proceedings.

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[69] Appellant's Br. in Sup. of Pet. for Review at 5.

[70] *Id.* at 6.

[71] 17 C.F.R. § 201.452.

[72] *Id.*; *see also* 17 C.F.R. § 201.460(c) (providing that documents not admitted at hearing "shall not be considered a part of the record before the Commission").

[73] *Cf. Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *27 (Nov. 4, 2009) ("The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate Glodek's misconduct."), *petition for review denied*, 416 F. App'x 95 (2d Cir. 2011).

[74] *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *58 (Nov. 9, 2012) (declining to admit evidence where applicant had not sought permission to do so, where applicant had not explained failure to introduce exhibits earlier, and where attachments did not address issues relevant to the case), *appeal filed*, No. 13-31 (2d Cir. Jan. 8, 2013); *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *56 n.60 (Feb. 10, 2012) (declining to admit exhibits attached to an applicant's brief that were "not material to [the applicant's] case" and that addressed issues not under review); *CMG Inst'l Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *18 & n.20 (Jan. 30, 2009) (determining not to admit into the record documents proffered when applicants did not file a motion under Rule 452).

First, we fail to see how Weiss's supposed reliance on ACP's research report made his recommendation to Tuohy any more suitable. If anything, the ACP report reinforces the unsuitability of recommending that Tuohy invest the amount of her entire account in InPhonic's stock. Although the ACP report labeled the company's stock as a "buy" because of new management and other changes to the company, the report also warned that the company had suffered eight consecutive years of operating losses, was experiencing "plummeting sales," and was in transition and undergoing "deep restructuring."[75] Even more troubling is Weiss's apparent willingness to mislead the FINRA hearing panel about whether ACP was the source of the research report. That ACP allegedly pressured him into misleading the hearing panel does not lessen our concern.[76]

Second, Tuohy's supposed e-mail that she held "no bad feelings" towards Weiss is similarly irrelevant, as FINRA's "power to enforce its rules is independent of a customer's decision not to complain."[77] Weiss also fails to provide a reason for why these documents were not introduced earlier, and we find no basis for that failure. We accordingly decline to admit this evidence.[78]

FINRA also considered ACP's proposed supervisory plan. In assessing a supervisory plan, "we require . . . stringent supervision for a person subject to a statutory disqualification."[79] ACP clearly failed in this responsibility. Most troubling is the firm's conscious decision not to place Weiss on heightened supervision for approximately two years after learning that Weiss had been statutorily disqualified. Although ACP eventually placed Weiss under supervision, it did so only after FINRA expressed the importance of doing so.[80] Even after ACP instituted a plan, and revised it twice, it still contained inconsistencies about how often Weiss's primary supervisor would review Weiss's daily transactions[81] and proposed a backup supervisor who had been

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75 Gregory F. Grose, CFA, *Actionable Update, InPhonic, Inc.*, Am. Capital Partners, LLC, Sept. 24, 2007, at 1, 3 (attached to Appellant's Reply Brief).

76 *Cf. Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *69 (Feb. 1, 2010) (stating that a registered representative "cannot shift the blame for her violations to others or claim that others' misconduct somehow excuses her own misdeeds"), *aff'd*, 647 F.3d 1156 (D.C. Cir. 2011).

77 *Maximo Justo Guevara*, Exchange Act Release No. 42793, 54 SEC 655, 2000 SEC LEXIS 986, at *18 (May 18, 2000) (rejecting petitioner's argument that none of his customers had complained about him); *petition for review denied*, 47 F. App'x 198 (3d Cir. 2002).

78 On August 31, 2012, FINRA moved for leave to file a surreply. FINRA represented that a surreply was "necessary, and should be accepted by the Commission, because of new evidence and arguments based upon such new evidence raised by Weiss for the first time in his reply brief." FINRA's Motion for Leave to File Surreply and Surreply in Opposition to Eric J. Weiss's Application for Review at 1. Because we have denied Weiss's attempts to introduce the new evidence, FINRA's surreply is not necessary and FINRA's motion is accordingly denied.

79 *Haberman*, 1998 SEC LEXIS 2466, at *16.

80 *Cf. Andrew P. Gonchar*, Exchange Act Release No. 60506, 2009 SEC LEXIS 2797, at *54 (Aug. 14, 2009) (stating that registered representatives are expected to follow SRO rules and that, because of this, compliance with those rules is not a mitigating factor), *petition for review denied*, 409 F. App'x 396 (2d Cir. 2010).

81 As the NAC noted, ACP's plan stated in one section that Weiss's supervisor would review "'[e]very document related to Weiss's transactions' no later than the next business day," while stating in another section that Weiss's supervisor would review Weiss's trade and check blotters "weekly." NAC Decision at 11 (quoting supervisory plan).

subject to various customer complaints and regulatory action, including alleged failures to supervise.

ACP's inaction and indifference to the supervision of a statutorily disqualified person represents a striking failure to appreciate its obligations to the markets and investors. It also raises serious concerns about whether ACP would comply with its supervisory plan going forward.[82] Such "inattention to the requirements of heightened supervision," we have previously noted, "is not acceptable in statutory disqualification matters."[83]

Weiss himself recognizes that ACP's proposed plan is deficient, but argues that "it does not seem fair or equitable to deny [his] application simply because ACP failed to correctly set forth an adequate heightened supervisory plan."[84] A stringent supervisory plan, however, is an essential condition of employing a statutorily disqualified person.[85] Moreover, regardless of whether ACP could implement a more stringent plan, Weiss now states on appeal that he "is no longer willing to be sponsored by ACP."[86] He instead asks the Commission to restore him "to the same position as he was prior to the NAC hearing but with another broker deal[er] that is willing to sponsor [his] application for association."[87]

Weiss asks for a remedy that we cannot (and need not) provide. Section 19(f) "leaves no discretion to the SEC with respect to the appropriate remedy."[88] We "must either dismiss the proceeding or set aside the denial and order admission."[89] Therefore, the only decision before us in this case is whether to dismiss Weiss's appeal or to set aside FINRA's denial of ACP's application. For all the reasons above, we have determined to dismiss Weiss's appeal. But our conclusion does not limit Weiss's ability to pursue association with another firm, under a different supervisory arrangement. FINRA did not expel Weiss from the securities industry, nor did FINRA impose a penalty or remedial sanction.[90] FINRA merely denied Weiss "relief from a

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[82] *See, e.g.*, *Pedregon*, 2010 SEC LEXIS 1164, at *27 (expressing concern about whether firm would provide the required heightened level of supervision where, among other things, the firm proposed an unqualified backup supervisor).

[83] *Emerson*, 2009 SEC LEXIS 2417, at *20–21 (expressing concern with whether firm would comply with supervisor plan given the firm's failure to comply with its other internal supervisory rules).

[84] Appellant's Br. in Sup. of Pet. for Review at 13.

[85] *See supra* note 79 and accompanying text.

[86] Reply at 11.

[87] *Id.*

[88] *Feins v. AMEX, Inc.*, 81 F.3d 1215, 1220 (2d Cir. 1996).

[89] *Id.*

[90] *See Dennis Milewitz,* Exchange Act Release No. 40254, 53 SEC 701, 1998 SEC LEXIS 1524, at *13 (July 23, 1998) ("NASD's consideration of the applicant's disciplinary history prior to the statutory disqualification, including misconduct for which sanctions were imposed previously, does not amount to a further penalty for that prior misconduct."); *Halpert & Co., Inc.*, 1990 SEC LEXIS 3564, at *5 (noting that NASD's denial of membership was not "imposing a penalty on applicants in this matter or even a remedial sanction").

previously existing disqualification."[91] Weiss remains free to restart the association process with a different firm at any time. If he does so, any new firm would then need to submit its own, separate membership continuation application for FINRA to consider in accordance with its rules.

For these reasons, we dismiss this review proceeding. An appropriate order will issue.[92]

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

Elizabeth M. Murphy
Secretary

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[91] *Milewitz,* 1998 SEC LEXIS 1524, at *12; *see also Halpert & Co., Inc.*, 1990 SEC LEXIS 3564, at *5 (stating that the denial of an application is a denial only of the "request *at this time* for relief from [his] previously incurred disqualifcation" (emphasis added)).

[92] 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. 69177 / March 19, 2013

Admin. Proc. File No. 3-14844

In the Matter of the Application of

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For Review of Action Taken by

FINRA

ORDER DISMISSING REVIEW PROCEEDINGS

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

ORDERED that the application for review filed by Eric J. Weiss is hereby dismissed.

By the Commission.

Elizabeth M. Murphy
Secretary