

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Release No. 83501 / June 22, 2018

Admin. Proc. File No. 3-18143

In the Matter of the Application of  
  
ROBERT J. ESCOBIO  
  
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 permit continued association of an individual who became subject to a statutory disqualification after a federal district court issued an injunction against him. *Held*, the application for review is *dismissed*.

APPEARANCES:

*Joseph W. Beasley*, Beasley, Demos & Brown, LLC, for Robert J. Escobio.

*Alan Lawhead*, *Jennifer Brooks*, and *Andrew J. Love*, for FINRA.

Appeal filed: August 25, 2017  
Last brief received: December 08, 2017

Robert J. Escobio appeals from a FINRA decision denying an MC-400 membership continuance application by Southern Trust Securities, Inc. (“STS”), a FINRA member, to remain a FINRA member while continuing to employ Escobio notwithstanding his statutory disqualification. FINRA denied the application because it found that the conduct underlying Escobio’s statutory disqualification was egregious, the statutory disqualification was recent, and STS had failed to satisfy its burden of demonstrating that it was capable of providing stringent supervision over a statutorily disqualified individual such as Escobio. We base our findings on an independent review of the record, and we dismiss Escobio’s appeal for the reasons set forth below.

## I. Background

### A. Escobio became subject to a statutory disqualification.

Escobio has been in the securities industry for over 35 years and has been active in on-exchange and off-exchange commodity trading during that time. He founded Southern Trust Securities Holdings (“STS Holdings”) in 1999 and STS,<sup>1</sup> its main subsidiary, in 2000. Escobio was STS Holdings’ and STS’s CEO, director, and largest shareholder until April 2014. At that time, Escobio transferred his ownership interests of STS Holdings and STS to his spouse Susan Escobio. Escobio remained associated with STS but Susan Escobio, who had been STS’s chief compliance officer (“CCO”) since approximately 2004, began serving as STS’s principal.

In July 2014, the Commodity Futures Trading Commission (“CFTC”) filed a complaint against Escobio alleging violations of the antifraud provisions of the Commodity Exchange Act and accompanying regulations. On August 29, 2016, the court granted the CFTC summary judgment.<sup>2</sup> The court found that Escobio, through subsidiaries of STS Holdings that he controlled, engaged in an elaborate fraudulent commodities scheme between July 2011 and April 2013.<sup>3</sup>

Specifically, the court found that Escobio falsely represented to customers that he would purchase precious metals on their behalf using money that he would loan to them and that the interest payments from the customers on the loans would be used to pay storage fees for the metals on behalf of the customers.<sup>4</sup> Escobio and the subsidiaries, the court found, did not purchase precious metals, and did not use the customers’ interest payments as promised.<sup>5</sup> Instead, they used the customers’ “interest payments” on the purported loans to engage in

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<sup>1</sup> STS changed its name from Capital Investment Services, Inc., to STS in February 2008.

<sup>2</sup> *CFTC v. S. Tr. Metals, Inc.*, No. 14-CV-22739, 2016 WL 4523851 (S.D. Fla. Aug. 29, 2016); *see also CFTC v. S. Tr. Metals, Inc.*, 180 F. Supp. 3d 1124 (S.D. Fla. 2016) (order dated April 07, 2016, granting partial summary judgment).

<sup>3</sup> *S. Tr.*, 2016 WL 4523851, at \*5 n.2.

<sup>4</sup> *See id.* at \*2-8.

<sup>5</sup> *See id.* at \*3-4.

margined derivatives trading.<sup>6</sup> The court found that Escobio’s scheme involved at least 100 customers and thousands of misleading transactions.<sup>7</sup> Victims lost at least \$1.5 million over the course of the two-year scheme.<sup>8</sup>

In imposing sanctions, the court found that Escobio’s violations were “egregious, systematic, and calculated,”<sup>9</sup> and that his continued participation in the industry—and association with STS—would present significant risk to the public interest:

There is a strong likelihood that unless enjoined, Mr. Escobio’s occupation will present opportunities for future violations. Mr. Escobio remains an SEC and CFTC registrant. He remains involved in the operations of Southern Trust Securities and in that capacity has clear opportunities to engage in the same type of conduct at issue in this case. Unless enjoined, he is in a position to continue to work as he has in the past in the futures and securities markets, and to handle customer funds.<sup>10</sup>

Accordingly, on August 29, 2016, the court entered a final judgment permanently enjoining Escobio from directly or indirectly engaging in various activities governed by the Commodities Exchange Act and from applying for registration, and engaging in any activity requiring registration, under the Commodities Exchange Act.<sup>11</sup>

On September 7, 2016, FINRA notified STS that Escobio had been deemed statutorily disqualified as a result of the permanent injunction and was therefore no longer qualified to register as an associated person with a FINRA member firm.<sup>12</sup>

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<sup>6</sup> *See id.* at \*4.

<sup>7</sup> *See id.* at \*10.

<sup>8</sup> *See id.* at \*5-6, 10.

<sup>9</sup> *Id.* at \*12.

<sup>10</sup> *Id.* at \*10.

<sup>11</sup> *Id.*

<sup>12</sup> *See* FINRA By-Laws, Art. III, §§ 3(b) & 4 (providing that no person shall continue to be associated with a FINRA member if such person becomes subject to a “disqualification” and defining a “disqualification” as “any ‘statutory disqualification’ as such term is defined in Section 3(a)(39)” of the Securities Exchange Act of 1934); Exchange Act Section 3(a)(39), 15 U.S.C. § 78c(a)(39), cross-referencing Exchange Act Section 15(b)(4)(C), 15 U.S.C. § 78o(b)(4)(C) (providing that a person is subject to statutory disqualification if he is “enjoined by . . . any court of competent jurisdiction from acting as an . . . entity or person required to be registered under the Commodity Exchange Act . . . , or from engaging in or continuing any conduct or practice in connection with any such activity”).

## **B. STS filed a membership continuance application.**

On September 23, 2016, in accordance with Article III, Section 3(d) of FINRA’s By-Laws, STS filed an MC-400 Membership Continuance Application requesting to continue its membership while employing Escobio as a general securities representative, general securities principal, and options principal, notwithstanding his statutory disqualification.<sup>13</sup> The application stated that, although “Mr. Escobio will not hold a position in management . . . he will assist the firm whenever needed due to its limited size and resources,” that he “assists the firm with certain responsibilities due to his expertise with securities investments and long term customers he has serviced without any complaints,” and “he will continue to be responsible for business development.” The application stated further that “Susan Escobio is the CCO who will continue to supervise [Escobio]” from STS’s one office “Monday through Friday, 9:00AM to 5:00PM.”

STS also attached a one-page “Proposed Plan for Supervision.” The plan stated that Susan Escobio “will amend the [STS’s] Written Supervisory Procedures to state that she is the primary supervisor responsible for Robert Escobio,” and that her “staff is trained and will assist by reporting all activity performed by Robert Escobio to ensure he adheres to the firms procedures.” The plan also stated that Escobio would not “maintain discretionary accounts” or “act in a supervisory capacity,” and that “[d]uring the firm’s regular business hours, while [Escobio] is in the office, he will be supervised closely by Susan Escobio, who will be assisted by her trained staff” from STS’s office in Miami. Under the plan, Susan Escobio would review all of Escobio’s securities accounts (prior to opening), incoming and outgoing correspondences, and order tickets (prior to execution). Escobio would be required to disclose to Susan Escobio (on a monthly basis) details related to his outside sales activity, including an activity log, phone call log, appointment log and a to-do list. Susan Escobio would certify quarterly to Escobio’s compliance with all conditions of the heightened supervision plan.

The plan did not specify a backup supervisor or identify any members of Susan Escobio’s “trained staff” who would be available to assist in Escobio’s supervision. Nonetheless, at the hearing on the membership continuance application STS called Frank Trombatore, whom STS described as an “assistant” principal for the firm and a “backup” supervisor for compliance. Trombatore testified concerning his role as Escobio’s proposed backup supervisor.

## **C. FINRA denied the membership continuance application.**

FINRA’s National Adjudicatory Council (“NAC”) denied the application on July 27, 2017. The NAC found that Escobio was statutorily disqualified notwithstanding his pending appeal of the district court’s injunction. It then determined that “it is not in the public interest, and would create an unreasonable risk of harm to the market or investors, for Escobio to

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<sup>13</sup> See FINRA By-Laws, Art. III, § 3(d) (providing that a member may file an application to continue in membership while associating with a statutorily disqualified individual); *see also* FINRA Rules 9520-27 (setting forth procedures for a member firm to sponsor the proposed association of a person subject to disqualification).

continue to associate with the Firm.”<sup>14</sup> The NAC considered the nature and gravity of the statutorily disqualifying conduct, the time elapsed since the disqualification, and the capacity of the sponsoring firm to provide adequate supervision. Citing *Timothy P. Pedregon, Jr.*,<sup>15</sup> the NAC noted that “[t]he Firm has the burden to demonstrate that it is capable of providing stringent supervision to a statutorily disqualified individual.” Applying these factors, the NAC denied the application in light of the recency of his disqualification, the seriousness of Escobio’s misconduct, and the failure of the proposed supervisory plan to select supervisors with the experience and objectivity necessary to stringently supervise a statutorily disqualified individual such as Escobio.

As to the disqualifying event, the NAC found that the judgment, entered just eleven months prior to its decision, involved “extremely serious” misconduct and “too little time has passed since entry of the Judgment for Escobio and the Firm to show that he is currently able to comply with securities laws and regulations and refrain from engaging in fraudulent practices.”

As to supervision, the NAC found that STS failed to demonstrate that it could stringently supervise a statutorily disqualified individual such as Escobio. The NAC found that Susan Escobio lacked experience directly supervising registered representatives and sales activities let alone anyone subject to heightened supervision. Apart from “a little supervision” at a previous firm, Susan Escobio’s testimony evidenced that her only oversight of personnel was in her role as CCO. The only other evidence that Susan Escobio had experience supervising registered representatives was a statement STS submitted in support of its membership continuance application asserting that Susan Escobio had supervised the sales activities of one registered representative beginning in February 2014. Moreover, the NAC found that STS had not demonstrated that Susan Escobio possessed the necessary independence to supervise her husband. In her testimony, Susan Escobio admitted that she had not previously supervised Escobio due to the potential conflict of interest as a result of her marriage to Escobio. Susan Escobio was unable to show or explain how the conflict of interest had been mitigated.

The NAC also found Trombatore, Escobio’s proposed backup supervisor, wholly inadequate because he lacked experience supervising registered representatives or disqualified individuals, worked for STS from New Jersey as an “independent contractor,” lacked supervisory experience at STS, and had a regulatory history of his own.

Finally, the NAC found that STS’s proposed supervisory plan was too vague and lacked specific measures designed to prevent Escobio from engaging in future fraudulent activities. The NAC noted that (1) the plan provides for Susan Escobio to review “only those registrations with other firms that Escobio affirmatively discloses on his Form U4 and corporations formed by Escobio in the State of Florida”; (2) many of the plan’s provisions “appear to be general provisions applicable to all of the Firm’s registered representatives and not heightened or special

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<sup>14</sup> The Eleventh Circuit has now affirmed the district court’s permanent injunction. *See CFTC v. S. Tr. Metals, Inc.*, 880 F.3d 1252 (11th Cir. 2018).

<sup>15</sup> Exchange Act Release No. 61791, 2010 WL 1143089, at \*7-8 (Mar. 26, 2010) (holding that an applicant must be able to stringently supervise a statutorily disqualified individual).

supervisory procedures in any way”; (3) the plan “fails to provide for documentation of the Firm’s compliance with the plan”; and (4) the plan “fails to explicitly designate Trombatore as Escobio’s alternate supervisor in the event that Susan Escobio is out of the office.”

## II. Analysis

Section 19(f) of the Securities Exchange Act of 1934 establishes the criteria that govern our review of FINRA’s denial of a membership continuance application.<sup>16</sup> Section 19(f) directs us to dismiss Escobio’s appeal if we find that: (1) the specific grounds on which FINRA based its action exist in fact; (2) FINRA acted in accordance with its rules; and (3) FINRA’s rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.<sup>17</sup> We find that each of these requirements has been satisfied.

### A. The specific grounds for FINRA’s denial exist in fact.

#### 1. The permanent injunction subjected Escobio to a statutory disqualification.

We agree with FINRA that the district court’s permanent injunction subjected Escobio to a statutory disqualification. A person is subject to a statutory disqualification if he is “enjoined by . . . any court of competent jurisdiction from acting as an . . . entity or person required to be registered under the Commodity Exchange Act . . . , or from engaging in or continuing any conduct or practice in connection with any such activity . . . .”<sup>18</sup> A federal district court with jurisdiction over the matter permanently enjoined Escobio from applying for registration under, and engaging in numerous activities governed by, the Commodity Exchange Act.<sup>19</sup>

Escobio argues that he was not statutorily disqualified either because the district court erred in entering the injunction or because he has not exhausted his appeals from the district court’s judgment. We reject these arguments. First, “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.’”<sup>20</sup> Second, “we have stated previously [that] an injunction is the action of a court of competent jurisdiction, and the fact that an appeal

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<sup>16</sup> 15 U.S.C. § 78s(f).

<sup>17</sup> *Id.* Section 19(f) also requires us to set aside FINRA’s action if we find that the action imposes an undue burden on competition. *Id.* Escobio does not claim, nor does the record support finding, that FINRA’s action imposes such a burden.

<sup>18</sup> 15 U.S.C. § 78o(b)(4)(C) (incorporated by reference into 15 U.S.C. § 78c(a)(39)).

<sup>19</sup> *S. Tr.*, 2016 WL 4523851 at \*10.

<sup>20</sup> *Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at \*5 (Mar. 19, 2013) (citation omitted) (citing cases).

is taken does not affect the injunction's status as a statutory disqualification."<sup>21</sup> In any event, the Eleventh Circuit has now affirmed the district court's judgment.<sup>22</sup>

**2. The seriousness of Escobio's misconduct and the recency of the injunction support FINRA's decision to deny the membership continuance application.**

The district court found that Escobio engaged in a large-scale, multi-year, fraudulent commodities scheme in which over 100 customers lost at least \$2.1 million.<sup>23</sup> Noting that Escobio's violations were "egregious, systematic, and calculated," the court emphasized that Escobio would present a significant risk to the public interest if permitted to remain associated with STS because his involvement in the operations of the firm "will present opportunities for future violations."<sup>24</sup> The NAC concluded reasonably that the seriousness of Escobio's misconduct supported denying the membership continuance application.<sup>25</sup>

Likewise, we agree with the NAC that because the injunction was entered less than two years ago "far too little time has passed . . . for Escobio and the Firm to demonstrate that he is currently able to comply with securities laws and regulations and to refrain from engaging in fraudulent practices." Escobio argues that, although the statutory disqualification occurred eleven months before the NAC issued its decision, "the alleged violations on which the judgment is purportedly based are not recent." We find that the NAC properly evaluated the recency of Escobio's statutory disqualification by considering the date of the permanent injunction.<sup>26</sup> In enjoining Escobio, the court found at that time that Escobio presented a risk to the public

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<sup>21</sup> *Citadel Sec. Corp.*, Exchange Act Release No. 49666, 2004 WL 1027581, at \*2 & n.12 (May 7, 2004).

<sup>22</sup> *S. Tr.*, 880 F.3d at 1262-66. On March 6, 2018, Escobio filed a petition for panel rehearing with the Eleventh Circuit. Appellants' Petition for Panel Rehearing. The Eleventh Circuit entered an order on March 20, 2018, directing CFTC to respond to Escobio's petition for panel rehearing. *CFTC v. S. Tr. Metals, Inc.*, No. 14-16544 (11th Cir. Mar. 20, 2018). Briefing on the petition is ongoing.

<sup>23</sup> *See S. Tr.*, 2016 WL 4523851, at \*2-12.

<sup>24</sup> *Id.* at \*10, 12.

<sup>25</sup> *See, e.g., Robert J. Sayegh*, Release No. 37953, 1996 WL 662498, at \*2 & n.13 (Nov. 15, 1996) (finding decision to deny membership continuance application in the public interest where district court found misconduct underlying injunction to be "knowing and egregious").

<sup>26</sup> *See, e.g., Weiss*, 2013 WL 1122496, at \*7 (finding that "FINRA reasonably concluded" that because the consent order constituting the disqualifying event was entered into approximately three-and-a-half years prior to the filing of the MC-400 application, it was "too recent" for the disqualified individual "to have demonstrated a sufficiently long-term change in behavior to show he would comply with the securities regulations going forward").

interest. The NAC concluded reasonably that this determination was too recent for Escobio to have demonstrated that he could comply with the securities laws in the future.<sup>27</sup>

### **3. The inadequacy of STS’s proposed supervisory plan supports FINRA’s decision to deny the membership continuance application.**

In assessing a proposed supervisory plan, we require “stringent supervision for a person subject to a statutory disqualification.”<sup>28</sup> The NAC properly concluded that STS’s proposed supervisory plan did not meet this standard. The NAC found that Susan Escobio—Escobio’s primary supervisor under the plan—lacked the direct supervisory experience necessary to supervise a statutorily disqualified individual like Escobio. Notwithstanding her significant compliance experience, the NAC determined that Susan Escobio—based on statements from STS and her own testimony in the matter—had minimal direct supervisory experience over registered representatives’ sales activities and had never supervised a statutorily disqualified individual. We agree that Susan Escobio’s lack of experience supervising statutorily disqualified individuals rendered the proposed supervisory plan inadequate.<sup>29</sup>

Escobio contends for the first time in his appeal to us that Susan Escobio has previously supervised a statutorily disqualified individual. But Escobio fails to cite anything in the record in support of such a claim and our review reveals none. To the contrary, the NAC relied on Susan Escobio’s testimony that her direct supervisory experience was minimal. Nowhere in that testimony does Susan Escobio mention the supervision of any statutorily disqualified persons. Escobio has not identified any such statutorily disqualified person, has not specified the circumstances of such alleged supervision, and has not filed a motion for leave to adduce additional evidence under Rule 452, which would require him to “show . . . that there were reasonable grounds for failure to adduce such evidence previously.”<sup>30</sup>

We also agree with the NAC’s finding that STS failed to demonstrate that Susan Escobio possessed the necessary independence to supervise Escobio. Indeed, Susan Escobio conceded that she was prevented from supervising Escobio prior to the statutory disqualification due to the conflict presented by their marriage. Yet, as the NAC found, “Susan Escobio . . . could not adequately explain why or how this potential conflict . . . has been mitigated, particularly in light of Escobio’s recent statutory disqualification.” Nor did STS present any other evidence that the

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<sup>27</sup> See, e.g., *Timothy H. Emerson, Jr.*, Release No. 60328, 2009 WL 2138439, at \*4 (July 17, 2009) (agreeing with FINRA that the three years since the conviction constituting the disqualifying event was insufficient time to demonstrate that the disqualified individual “can conduct himself in a responsible and compliant fashion in the securities industry”).

<sup>28</sup> *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 WL 2887272, at \*15 (June 26, 2014) (citation omitted).

<sup>29</sup> See, e.g., *Emerson*, 2009 WL 2138439, at \*5 (finding plan inadequate because of proposed supervisor’s “lack of experience supervising statutorily disqualified persons”).

<sup>30</sup> 17 CFR § 201.452.



firm had taken action to mitigate the conflict, despite proposing that Susan Escobio serve as Escobio's primary supervisor in its membership continuance application. We share the NAC's belief that Susan Escobio could not adequately supervise Escobio because "stringent supervision free of any conflicts of interest between the supervised [disqualified] individual and his supervisor (and, in turn, firm management) is of the utmost importance."<sup>31</sup>

Escobio claims that "FINRA's position that Mrs. Escobio cannot 'supervise her long-term spouse' reeks of sexist discriminatory bias." This claim is without merit. There is no evidence to suggest that the NAC was concerned with Susan Escobio's gender. Rather, the NAC noted "the potential for the importance of the spousal relationship overriding the duty to apply stringent heightened supervision," something that is true regardless of the gender of the supervising spouse. The NAC further observed that the potential conflict is "exacerbated by the Firm's dependence on Escobio as the source for a large portion of its customers, and in turn Susan Escobio's dependence upon the Firm for her income." We have found that such factors undermine the independence of a supervisor, and we find that it was these factors and not Susan Escobio's gender that made her proposed supervision inadequate.<sup>32</sup>

We also agree with the NAC's finding that the backup supervisor STS proposed, Frank Trombatore, was unqualified. "As we have previously concluded, a supervisory plan lacks the necessary intensive scrutiny when the supervisor will not be in close, physical proximity to the statutorily disqualified person."<sup>33</sup> Trombatore works out of his home office in New Jersey, and STS is located in Miami. Although Trombatore claimed he would travel to Miami in the event of Susan Escobio's absence, the proposed supervisory plan did not designate Trombatore as the backup supervisor let alone mention this contingency. The plan's "lack of specific supervisory coverage when [the primary supervisor] is out of the office is a serious flaw."<sup>34</sup> In any event, we agree with FINRA that Trombatore was not qualified in light of his own testimony that he had no direct supervisory experience.<sup>35</sup>

Finally, we agree with the NAC that STS's supervisory plan for Escobio was impermissibly vague. We have previously found that supervisory plans that contain provisions "no different from the supervision . . . afforded to all employees" and that "lack[] detail" are

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<sup>31</sup> *In the Matter of the Continued Association of Ronald Berman with Axiom Capital Management, Inc.*, SD 1997, slip op. at 17-18 (FINRA NAC Dec. 11, 2014), available at [http://www.finra.org/sites/default/files/Berman%20SD-1997%20FINAL%2019%28d%29%20DECISION%2012%2011%2014\\_0\\_0\\_0\\_0\\_0\\_0\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/Berman%20SD-1997%20FINAL%2019%28d%29%20DECISION%2012%2011%2014_0_0_0_0_0_0_0_0_0.pdf).

<sup>32</sup> *See Citadel Secs. Corp.*, 2004 WL 1027581, at \*4 ("We have previously noted it to be difficult for employees to supervise effectively the activities of the owner of a firm.").

<sup>33</sup> *Emerson*, 2009 WL 2138439, at \*5.

<sup>34</sup> *Leslie A. Arouh*, Release No. 34-62898, 2010 WL 3554584, at \*13 (Sept. 13, 2010).

<sup>35</sup> *Mitchell T. Toland*, Exchange Act Release No. 73664, 2014 WL 6601012, at \*6 (Nov. 21, 2014) (finding "proposed backup supervisor's inexperience" to be "highly problematic").

insufficient.<sup>36</sup> The NAC found that “many of the provisions of the supervisory plan appear to be general provisions applicable to all of the Firm’s registered representatives and not heightened or special supervisory procedures in any way.” The plan also did not specify which staff members would assist Susan Escobio, how they would be trained, or what they would report. The NAC also found that the plan was devoid of any provisions tailored to preventing the type of fraudulent activity underlying Escobio’s disqualifying event. In sum, the NAC concluded reasonably that STS failed to meet its burden to demonstrate that it was capable of providing adequately stringent supervision to a statutorily disqualified individual such as Escobio.

**B. FINRA acted in accordance with its rules.**

The NAC’s denial of STS’s application was also made in accordance with FINRA’s rules. FINRA’s rules provided for, and Escobio and STS received, a hearing in connection with the application.<sup>37</sup> FINRA scheduled the hearing for March 22, 2017, but continued the hearing at Escobio’s request until April 25, 2017.<sup>38</sup> Prior to the hearing, Escobio and the Department of Member Regulation exchanged witness and exhibit lists.<sup>39</sup> Escobio and STS also received Member Regulation’s recommendation, which urged that the application be denied, ten business days before the hearing as required.<sup>40</sup>

FINRA’s rules also provided, and Escobio and STS received, the opportunity to be heard in person, to be represented by an attorney, and to submit any relevant evidence at the hearing.<sup>41</sup> Escobio appeared at the hearing accompanied by counsel and Susan Escobio. Frank Trombatore, although not listed as an alternate supervisor on the proposed supervisory plan, testified by telephone, over the objection of Member Regulation, about his role as an alternate supervisor.

FINRA complied further with its post-hearing procedures. The NAC issued its decision after the Hearing Panel submitted a written recommendation to the Statutory Disqualification Committee and the Statutory Disqualification Committee presented a written recommendation to the NAC.<sup>42</sup> And the NAC’s decision included, as required, a description of the basis for the proceeding, a description of the business to be engaged in, and a statement in support of the disposition.<sup>43</sup>

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<sup>36</sup> *Arouh*, 2010 WL 3554584, at \*10.

<sup>37</sup> *See* FINRA Rule 9524(a)(1).

<sup>38</sup> *See* FINRA Rule 9524(a)(2), (5).

<sup>39</sup> *See* FINRA Rule 9524(a)(3)(B).

<sup>40</sup> *See* FINRA Rule 9524(a)(3)(A).

<sup>41</sup> *See* FINRA Rule 9524(a)(4).

<sup>42</sup> *See* FINRA Rules 9524(a)(10), 9524(b)(1).

<sup>43</sup> *See* FINRA Rule 9524(b)(2).

Escobio argues that “FINRA conducted its ‘process’ without any procedures, without any rules, arbitrarily making determinations to deprive [him] of his livelihood without procedural due process.” But Escobio does not identify any specific rule FINRA contravened. The record indicates that FINRA followed the procedures set forth in its rules.

Escobio also insists that FINRA should have provided guidance on the proposed supervisory plan before denying STS’s application. But “[d]rafting a supervisory plan . . . is neither the Commission’s nor FINRA’s role. The burden is instead on [the applicant] to show that his continued employment in the securities industry would be in the public interest.”<sup>44</sup> In any event, FINRA provided guidance by including a link on the membership continuance application to an example of a plan of heightened supervision that includes a checklist of items to consider when submitting such a plan.<sup>45</sup>

**C. FINRA’s rules are, and were applied in a manner, consistent with the Exchange Act.**

We find that FINRA’s rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. “Under the Exchange Act, FINRA may deny a firm’s application for continuation in membership if it determines that the association of the statutorily disqualified person would be inconsistent with the public interest and the protection of investors.”<sup>46</sup> For the NAC’s denial of an application to be consistent with the Exchange Act, it must “independently [evaluate the] application, based upon the totality of the circumstances, and . . . explain the bases for its conclusion.”<sup>47</sup> We “have also afforded FINRA discretion in determining whether persons subject to statutory disqualification should be permitted to associate with a member firm.”<sup>48</sup> The burden “rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested employment.”<sup>49</sup>

In this case, the NAC denied STS’s application in light of the seriousness and recency of Escobio’s disqualifying event and the inadequacy of the supervisors and supervisory plan that STS proposed. The NAC based its conclusions on the totality of the circumstances, supported its conclusions with abundant evidence and precedent, and explained the bases for its conclusions

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<sup>44</sup> *Emerson*, 2009 WL 2138439, at \*6.

<sup>45</sup> <http://www.finra.org/file/sample-supervisory-plan>.

<sup>46</sup> *Arouh*, 2010 WL 3554584, at \*12 (citing Section 15A(g)(2) of the Exchange Act, 15 U.S.C. § 78o-3(g)(2)); *see also* FINRA By-Laws, Art. III, § 3(d) (providing that FINRA grants a membership continuance application only if, “in its discretion,” it determines that approval “is consistent with the public interest and the protection of investors”).

<sup>47</sup> *Arouh*, 2010 WL 3554585, at \*12 (quotation marks and citation omitted).

<sup>48</sup> *Id.* at \*13.

<sup>49</sup> *Emerson*, 2009 WL 2138439, at \*4 (citation omitted).

adequately. We agree that the considerations the NAC cited provided a basis for denying the application.<sup>50</sup>

Escobio argues that the NAC's denial of the membership continuance application was inconsistent with the Exchange Act because the NAC failed to reexamine the facts underlying the permanent injunction against him. According to Escobio, without such review FINRA could not appropriately weigh all the facts and circumstances surrounding his statutory disqualification and the proposed supervisory plan. As discussed above, collateral estoppel prevented Escobio "from re-litigating both the factual findings and legal conclusions of the" injunctive action.<sup>51</sup> Escobio "had the opportunity, which he exercised, to defend in court the merits of the" action that led to the injunction.<sup>52</sup> The NAC "correctly adhered to [FINRA's] long-standing policy of prohibiting collateral attacks on underlying" disqualifying events.<sup>53</sup>

Escobio further urges that his statutory disqualification is a disciplinary sanction equivalent to a lifetime bar from the securities industry.<sup>54</sup> But "FINRA does not subject a person to statutory disqualification as a penalty or remedial sanction."<sup>55</sup> "Instead, a person is subject to statutory disqualification by operation of Exchange Act Section 3(a)(39(F)."<sup>56</sup>

Referring to the concurring opinion in *Saad v. SEC*,<sup>57</sup> Escobio also argues that "the actions taken in denying [his] continued employment is the functional equivalent of a penalty, in effect the 'death penalty,' and is improper and prohibited because it is impermissibly punitive as

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<sup>50</sup> *Meyers Assocs., L.P.*, Exchange Act Release No. 81778, 2017 WL 4335044, at \*8 (Sept. 29, 2017) (finding that "the recency and seriousness of the [disqualifying event], and the inability of the firm's proposed supervisors to stringently supervise Meyers as a statutorily disqualified individual and owner of the Firm provided a basis for [FINRA's] conclusion that the membership continuance application should be denied").

<sup>51</sup> *Asensio & Co.*, Exchange Act Release No. 68505, 2012 WL 6642666, at \*11 (Dec. 20, 2012).

<sup>52</sup> *Jan Biesiadecki*, Exchange Act Release No. 39113, 1997 WL 583736, at \*2 (Sept. 22, 1997).

<sup>53</sup> *Id.* at \*3.

<sup>54</sup> Escobio also argues that, pursuant to *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the imposition of restitution by the district court in *S. Tr.*, 2016 WL 4523851, was improper. That question is not before us in this proceeding. This proceeding concerns STS's membership continuance application and not the propriety of any restitution ordered in the district court proceeding.

<sup>55</sup> *Michael Earl McCune*, Release No. 77375, 2016 WL 1039460, at \*9 (Mar. 15, 2016); *accord Anthony A. Grey*, Release No. 75839, 2015 WL 5172955, at \*11 n.60 (Sept. 3, 2015).

<sup>56</sup> *McCune*, 2016 WL 1039460, at \*9.

<sup>57</sup> *Saad v. SEC*, 873 F.3d 297, 306 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

imposed under the circumstances.” But the denial of a membership continuance application is not the equivalent of a penalty in the form of a bar from employment in the securities industry. It is no more than the denial, in this case, of STS’s request to let Escobio associate with it under the circumstances set forth in its application. Another member firm that proposed to employ Escobio in a different capacity, that proposed a supervisory plan adequately tailored to Escobio’s situation, and that proposed a qualified and independent supervisor, might show that continued employment of Escobio would not be contrary to the public interest. As a result the NAC’s decision here is not, as Escobio claims, “identical in impact and result” to a bar, which would preclude his association with a securities firm in any capacity. The NAC merely determined that STS failed to meet its burden as to this specific application. We find that it made that determination in a manner consistent with the purposes of the Exchange Act.

\* \* \*

Based on the recency and seriousness of Escobio’s disqualifying event and STS’s failure to demonstrate that it could stringently supervise Escobio, the NAC determined that it was in the public interest and in the interest of protecting investors to deny STS’s application. We find that the grounds the NAC articulated in denying STS’s application to associate with Escobio exist in fact, that the NAC acted fairly and in accordance with FINRA’s rules, and that the NAC applied FINRA’s rules in a manner consistent with the purposes of the Exchange Act. We therefore dismiss this review proceeding. An appropriate order will issue.<sup>58</sup>

By the Commission (Chairman CLAYTON and Commissioners STEIN, PIWOWAR, JACKSON and PEIRCE).

Brent J. Fields  
Secretary

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<sup>58</sup> 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. 83501 / June 22, 2018

Admin. Proc. File No. 3-18143

In the Matter of the Application of  
ROBERT J. ESCOBIO  
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 appeal filed by Robert J. Escobio be, and it hereby is, dismissed.

By the Commission.

Brent J. Fields  
Secretary