ADMINISTRATIVE PROCEEDING FILE NO. 3-13678R

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

JOHN M.E. SAAD,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

IN THE MATTER OF THE APPLICATION OF JOHN M.E. SAAD
FOR REVIEW OF DISCIPLINARY ACTION TAKEN BY FINRA

ON REMAND FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT, CASE NO. 15-1430

BRIEF FOR PETITIONER JOHN M.E. SAAD

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INTRODUCTION

The D.C. Circuit remanded this case to the Commission with instructions to address the relevance of the Supreme Court's recent decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). *Saad v. SEC*, 873 F.3d 297, 299 (D.C. Cir. 2017) ("*Saad II*"). As discussed below, applying *Kokesh* to the facts of this case makes clear that the permanent bar imposed on Mr. Saad is punitive, rather than remedial. However, D.C. Circuit precedents authorize the Commission to approve a permanent bar only when the sanction is remedial and not punitive. In addition, FINRA's Sanction Guidelines require that a permanent bar be remedial and not punitive. And the Commission has upheld the permanent bar imposed on Mr. Saad on the ground that it was in fact remedial and not punitive. Given this conflict, the sanction is invalid and should be rescinded. At a minimum, the Commission should remand and require FINRA to update its guidelines, come into compliance with *Kokesh*, and consider Mr. Saad's conduct in light of legally valid standards.

STATEMENT OF ISSUES

The Commission ordered briefing on "the issue of the relevance—if any—of the Supreme Court's recent decision in *Kokesh v. SEC.*" *In the Matter of the Application of John M.E. Saad For Review of Disciplinary Action Taken by FINRA*, Release No. 34-82348, 2017 WL 6462614, at *1 (Dec. 18, 2017) (internal quotation marks omitted).

STATEMENT OF THE CASE AND FACTS

A. FACTUAL BACKGROUND

This case stems from a disciplinary proceeding that was brought over eleven years ago. In 2006, Mr. Saad was employed as a regional director in the Atlanta office of Penn Mutual Life Insurance Company ("Penn Mutual") and was registered with Penn Mutual's broker-dealer affiliate, Hornor, Townsend, & Kent, Inc. ("HTK"), a Financial Industry Regulatory Authority ("FINRA") member firm. *Saad II*, 873 F.3d at 300.[1] As described in the D.C. Circuit opinion, Mr. Saad submitted two falsified expense reports: one for a replacement cell phone, and one for air travel from Atlanta to Memphis and for a two-night stay at a Memphis hotel. *Ibid.* At the time, he was experiencing severe personal and professional distress. *Ibid.* A Penn Mutual administrator discovered the falsified reports, and Mr. Saad was discharged by both Penn Mutual and HTK. *Ibid.* Following Mr. Saad's termination, investigators from the National Association of Securities Dealers ("NASD"), FINRA's predecessor, investigated the underlying conduct.

[1] The background section of this brief is limited to the D.C. Circuit's recitation of the facts in *Saad II*. Mr. Saad reserves the right to present a different view of the underlying facts should it become procedurally appropriate to do so.

Ibid. In responding to their questions, Mr. Saad made several misrepresentations. *Id.* at 300-01.[2]

B. PROCEDURAL HISTORY

FINRA brought a disciplinary proceeding against Mr. Saad in September 2007, alleging "Conversion of Funds" in violation of FINRA Rule 2010 (formerly NASD Rule 2110). *Id.* at 301. The hearing panel found that Mr. Saad's conduct violated Rule 2010, and imposed a permanent bar prohibiting Mr. Saad from associating with any FINRA member firm in any capacity. *Ibid.* Mr. Saad appealed to the National Adjudicatory Council ("NAC"), which affirmed the hearing panel, finding that Mr. Saad's misconduct involved several aggravating factors and that there were no mitigating factors warranting a lesser sanction. *Ibid.* The Commission, in turn, affirmed the NAC, concluding that the permanent bar was an appropriate sanction because it was "neither excessive nor oppressive" and because it "serve[d] a remedial rather than punitive purpose." *In the Matter of the Application of John M.E. Saad for Review of Disciplinary Action Taken by FINRA*,

[2] FINRA, however, did not charge Mr. Saad with making false statements or obstructing its investigation. Instead, its complaint alleged only that Mr. Saad "violated Rule 2110 by submitting false expense reports and receipts" to his employer. *Dep't of Enforcement v. John M. Saad*, National Adjudicatory Council, Complaint No. 2006006705601, 2009 WL 3223812, at *1 (Oct. 6, 2009).

Release No. 34-62178, 2010 WL 2111287, at *8 (May 26, 2010). Mr. Saad appealed to the D.C. Circuit.

The D.C. Circuit panel granted Mr. Saad's petition for review on the ground that the Commission's decision "ignore[d] several potentially mitigating factors asserted by Saad and supported by evidence in the record." *Saad v. S.E.C.*, 718 F.3d 904, 913 (D.C. Cir. 2013) ("*Saad I*"). The panel remanded the case to the Commission with instructions to address all potentially mitigating factors, including Mr. Saad's termination by HTK and his significant personal and professional stress. *Id.* at 913-14. The Court observed that it is especially important to consider mitigating factors "before affirming a permanent bar." *Id.* at 913. It also reaffirmed the principle that the Commission can affirm a sanction only if its purpose is remedial rather than penal. *Ibid.*

On remand, the Commission returned the matter to the NAC with instructions to reconsider the imposition of the permanent bar. *Saad II*, 873 F.3d at 301-02. The NAC concluded that there were no mitigating factors, and that "a permanent bar remained the appropriate remedy for Saad's misconduct." *Id.* at 302.

The Commission again affirmed, finding that Mr. Saad's attempts to conceal his misconduct constituted an aggravating factor which supported the permanent

bar, and that there were no mitigating circumstances in the record. *In the Matter of the Application of John M.E. Saad for Review of Disciplinary Action Taken by FINRA*, Release No. 34-76118, 2015 WL 5904681, at *5-7 (Oct. 8, 2015). The Commission concluded that the permanent bar was "remedial, not punitive," explaining that it was the appropriate sanction in this case because it "serves important deterrent objectives" and is "necessary to protect FINRA members, their customers, and other securities industry participants." *Id.* at *7.

Mr. Saad once again appealed to the D.C. Circuit. The Court considered two arguments raised by Mr. Saad: first, that "the Commission's decision [was] insufficiently attentive to mitigating factors," and second, "that the permanent bar is impermissibly punitive rather than remedial." *Saad II*, 873 F.3d at 298. The Court rejected Mr. Saad's first argument, concluding "that the Commission reasonably grounded its decision in the record." *Id.* at 298-99. The Court issued a remand, however, "[w]ith respect to the permanent bar." *Id.* at 299; *see id.* at 304. The panel instructed the Commission "to determine in the first instance whether *Kokesh v. SEC*, __ U.S. __ , 137 S.Ct. 1635 (2017), has any bearing on Saad's case." *Id.* at 299. Judge Millett authored a *dubitante* opinion questioning whether the remand was proper. *Id.* at 307-12. Judge Kavanaugh issued a concurring opinion arguing that the remand was necessary. *Id.* at 304-07.

ARGUMENT

I. UNDER *KOKESH*, THE PERMANENT BAR IMPOSED ON MR. SAAD IS PUNITIVE RATHER THAN REMEDIAL

A. *Kokesh* Clarified The Test For Distinguishing Between Punitive And Remedial Sanctions

Kokesh held that the remedy of "[d]isgorgement in the securities enforcement context is a 'penalty' within the meaning of [28 U.S.C.] § 2462." 137 S. Ct. at 1639. In reaching this conclusion, the Supreme Court articulated several principles for evaluating whether a particular sanction is punitive or remedial.

First, a remedial sanction must be compensatory. *Id.* at 1644.[3] As the Court put it, "[w]hen an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Ibid; see also id.* at 1642 (noting that a remedial sanction "compensat[es] a victim for his loss"); *id.* at 1643 (explaining that a liability that "was compensatory and paid entirely to a private plaintiff" was not a penalty). Disgorged funds, for example, are often paid to the treasury rather than to the victim. *Id.* at 1644. Accordingly, disgorgement is not always compensatory, and

[3] The government acknowledged this principle in its *Kokesh* briefing, defining "remedial" as "intended to lessen the effects of a violation." U.S. Br. at 17, *Kokesh*, 137 S. Ct. 1635 (No. 16-529).

must therefore be regarded as a penalty. *Ibid.*[4]

One implication of this principle is that the question whether a sanction is remedial "turns in part on whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." *Id.* at 1642 (internal quotation marks omitted); *see ibid.* (observing that "a compensatory remedy for a private wrong" is not a penalty). Disgorgement, the Court observed, is sought in cases that involve offenses against the public, rather than against "an aggrieved individual." *Id.* at 1643. This is evidenced by the fact that "a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Ibid.* In other words, disgorgement is a penalty because it is imposed in the public interest, rather than on behalf of specific injured parties. *Ibid.*; *see also ibid.* ("'[D]isgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets.'" (quoting *S.E.C. v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993))).

Second, sanctions that are motivated even in part by punitive considerations are penalties. *Kokesh*, 137 S. Ct. at 1643-45. As the Court put it, "[a] civil

[4] *See also, e.g., Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 6-7 (D.C. Cir. 2000) (because monetary sanctions against bus companies were "not a function of a would-be passenger's injury, but of the number of times the company has violated the ADA in the past," there was "no connection between the fine imposed and the injury suffered" and therefore the sanctions had to be regarded as punitive).

sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1645 (internal quotation marks omitted). Accordingly, it did not matter that "in some cases" disgorged funds were used for "compensatory goals." *Ibid.* Because disgorgement also serves a deterrent purpose, it must be a penalty. *Id.* at 1643-44.[5]

Third, it may be relevant whether a sanction merely "restore[s] the status quo" or "leaves the defendant worse off." *Id.* at 1645.[6] The Court observed that, in some cases, "SEC disgorgement ... exceeds the profits gained as a result of the violation," thereby leaving the defendant in a worse position than if he had not committed the violation. *Id.* at 1644-45. That, in turn, means that disgorgement cannot be justified as an effort to prevent unjust enrichment, and must be based at least in part on punitive considerations. *Id.* at 1645.

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[5] *See also, e.g.*, *Slater*, 231 F.3d at 7 (where a sanction has "several objectives," it is "a penalty even if only one of its various objectives is to punish wrongful conduct"); *ibid.* ("[T]his Court regards as a penalty any sanction that goes *beyond* remedying the damage caused to the harmed parties by the defendant's action." (internal quotation marks omitted)).

[6] As the government acknowledged in its *Kokesh* brief, penalties typically punish defendants "by rendering them worse off financially than they would have been if they had committed no violation." U.S. Br. at 16, *Kokesh*, 137 S. Ct. 1635 (No. 16-529).

B. Mr. Saad's Expulsion Is Punitive Under The *Kokesh* Test

As Judge Kavanaugh explained in his separate opinion, in light of *Kokesh*, the permanent bar that was imposed on Mr. Saad constitutes a penalty. *Saad II*, 873 F.3d at 304-06.

1. Expulsions Are Categorically Punitive Under *Kokesh*

a. Permanent bars are a penalty under each of the principles the Supreme Court articulated in *Kokesh*.[7]

First, a permanent bar does nothing to compensate victims. As Judge Kavanaugh put it, "expulsion[s] ... do not provide a remedy to the victim" and therefore "are not remedial" "[u]nder any common understanding of the term." *Id.* at 304. Nor is a permanent bar tailored to the extent of a victim's injury. To the contrary, the FINRA Sanction Guidelines provide (at 36) that, in conversion cases, a bar should be imposed "*regardless* of amount converted" (emphasis added).

This is no surprise—like disgorgement, the expulsion remedy is imposed in order to protect *the public* rather than any particular victim. As Judge Millett put it in her separate opinion, the FINRA Sanction Guideline on conversion "reflects a deliberate and objective assessment of the type of remedy needed *to protect the*

[7] The Commission is also considering the relevance of *Kokesh* and *Saad II* to FINRA-imposed permanent bars in another case. *See In the Matter of the Application of Kimberly Springsteen-Abbott for Review of Disciplinary Action Taken by FINRA*, Release No. 34-82378, 2017 WL 6554182, at *2 (Dec. 21, 2017) (ordering additional briefing on the issue).

securities industry and the investing public." 873 F.3d at 307 (emphasis added); *see also Seghers v. S.E.C.*, 548 F.3d 129, 136 (D.C. Cir. 2008) (noting that the Commission imposed a permanent bar in order "to protect the public interest"); *In the Matter of the Application of Stephen Grivas for Review of Disciplinary Action Taken by FINRA*, Release No. 34-77470, 2016 WL 1238263, at *7 (Mar. 29, 2016) (explaining that FINRA's approach of routinely imposing permanent bars in conversion cases "reflects the judgment that, absent mitigating factors, conversion poses [a] substantial ... risk to investors and/or the markets" (internal quotation marks omitted)). And, as with disgorgement, FINRA permanent bars are imposed in proceedings which can go forward regardless of the support or participation of any particular victim. *See, e.g.*, FINRA Oversight, *available at* http://www.finra.org/industry/enforcement (explaining that "FINRA may initiate investigations from many varied sources" such as "examination findings," "anonymous tips," "automated surveillance reports" and "referrals from other regulators or other FINRA departments"); *see also PAZ Secs., Inc. v. S.E.C.*, 566 F.3d 1172, 1175 (D.C. Cir. 2009) (upholding a permanent bar for a procedural violation which caused no "direct harm to consumers").

Second, permanent bars indisputably serve punitive purposes. As the "securities industry equivalent of capital punishment," *Saad I*, 718 F.3d at 906, a

permanent bar clearly imposes retribution upon the wrongdoer and serves to deter others. *See, e.g., In the Matter of the Application of Blair Alexander West for Review of Disciplinary Action Taken by FINRA*, Release No. 34-74030, 2015 WL 137266, at *13 (Jan. 9, 2015) ("The imposition of a bar will ... prevent West from harming additional customers and will serve as a deterrent to other securities professionals tempted to misuse their customers' assets."); *In the Matter of Tzemach David Netzer Korem*, Release No. 34-70044, 2013 WL 3864511, at *10 (July 26, 2013) ("In sum, a bar ... will protect the public interest by deterring Korem and others from violating the provisions of the federal securities laws, misleading investors, and manipulating the market."). Moreover, by preventing the offender from associating with a member firm, a bar also serves to incapacitate the offender. *See Graham v. Florida*, 560 U.S. 48, 71 (2010), *as modified* (July 6, 2010) (referring to deterrence, retribution and incapacitation as recognized "goals of penal sanctions"); *United States v. Godoy*, 706 F.3d 493, 496 (D.C. Cir. 2013) (referring to deterrence and incapacitation as "goals of punishment").

Third, permanent bars go far beyond restoring the status quo and leave the offender significantly worse off than if she had never committed a violation. Indeed, a permanent bar is the harshest sanction that can be imposed in the securities industry because it ends an individual's career. *See PAZ Secs., Inc. v.*

S.E.C., 494 F.3d 1059, 1066 (D.C. Cir. 2007) (characterizing a permanent bar as "the most severe, and therefore apparently punitive sanction"). Such a sanction disrupts the pre-violation status quo and cannot reasonably be described as remedial.[8]

b. The question here is far easier than the question the Supreme Court faced in *Kokesh.* As the Court acknowledged, in many cases disgorgement does nothing more than (1) compensate the victim and (2) restore the perpetrator to the status quo; nevertheless, the Court held that disgorgement is a penalty. 137 S. Ct. at 1644-45. Expulsions, by contrast, are never compensatory and rarely if ever restore the status quo. After *Kokesh*, there is no serious question that expulsions must be regarded as punitive.[9]

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[8] FINRA permanent bars are especially punitive in that, unlike the SEC, FINRA does not allow a barred individual to independently apply for re-association with a FINRA member firm. *Compare* FINRA Rule 9522(b) (allowing only a member firm to initiate eligibility proceedings) *with* 17 C.F.R. § 201.193 (outlining procedure for barred individuals to apply to the SEC for re-association).

[9] This conclusion draws further support from the D.C. Circuit's decision in *Johnson v. S.E.C.*, 87 F.3d 484 (D.C. Cir. 1996), which considered whether a censure and a six-month suspension imposed by the Commission constituted a "penalty" for the purposes of the same statute of limitations provision that was at issue in *Kokesh*. The Court observed that the sanctions "clearly resemble[d] punishment in the ordinary sense of the word." *Id.* at 491. They were "certainly not remedial" because they were "not directed toward correcting or undoing the effects of Johnson's allegedly faulty supervision." *Id.* Ultimately, the sanctions did not represent an "attempt to restore the stolen funds to their rightful owner," and therefore they had to be regarded as a penalty. *Id.* at 492.

2. At A Minimum, Mr. Saad's Expulsion Was Punitive

a. The Commission's most recent decision in this case makes clear that, even if some expulsions could be characterized as remedial, the bar imposed on Mr. Saad cannot be. *See In the Matter of the Application of John M.E. Saad*, 2015 WL 5904681.

The Commission expressly acknowledged that the bar was in part based on deterrence. *Id.* at *7 (observing that "a bar in this situation serves important deterrent objectives"); *id.* at *6 (stating that Mr. Saad's termination from his job "was insufficient to dissuade him from further misconduct").

Beyond deterrence, the sanction was clearly motivated by retributive and incapacitative considerations. As to retribution, the decision frequently refers to potentially "aggravating" or "mitigating" circumstances. *E.g.*, *id.* at *5; *see Black's Law Dictionary* (10th ed. 2014) (defining "aggravating circumstance" as "a fact or situation that increases the degree of liability or culpability" and a "mitigating circumstance" as "a fact or situation ... that reduces the degree of culpability"). It also addresses the blameworthiness of Mr. Saad's conduct, and the extent to which it is reflective of bad character. *In the Matter of the Application of John M.E. Saad*, 2015 WL 5904681, at *6 (Mr. Saad's "deceptive conduct demonstrated a high degree of intentionality over a long period of time"); *id.* at *7

(observing that the circumstances of the case do not "mitigate [Mr. Saad's] responsibility"); *ibid.* (Mr. Saad's "actions betray a dishonest character"). None of these concerns are remedial in nature; they make sense only as part of a retributive inquiry into what sort of punishment Mr. Saad *deserved*. And as to incapacitation, the Commission repeatedly observed that Mr. Saad had to be barred because otherwise he would present too great a danger. *See, e.g.*, *id.* at *7 (concluding that Mr. Saad "would pose a continuing and unacceptable threat to investors and other industry participants if not barred"); *id.* at *6 (observing that termination does not "overcome[] the threat [Mr. Saad] would pose to investors and other securities industry participants were he to return to the industry").

More generally, it is apparent that the Commission was concerned about the public good rather than about individual victims. The decision never discusses making any particular victim whole. By contrast, it repeatedly addresses the importance of protecting the public. *See, e.g.*, *id.* at *5 (noting that FINRA's approach "reflects the judgment that, absent mitigating factors, conversion poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry" (internal quotation marks omitted)); *ibid.* (stating that the Commission's decision was based on "public interest

concerns"); *id.* at *4 (observing that FINRA imposed the bar in order to "protect the public from future harm" (internal quotation marks omitted)).

Under the *Kokesh* framework, then, it is apparent that FINRA imposed—and the Commission approved—a punitive sanction in this case.

b. In her separate opinion, Judge Millett offered several arguments as to why Mr. Saad's expulsion might be regarded as remedial. However, those arguments are ultimately insufficient to distinguish *Kokesh.*

For example, Judge Millett compared the permanent bar to "[o]rdering the fox out of the henhouse." 873 F.3d at 312. But removing a fox from a henhouse does not provide compensation for the harm the fox has inflicted; instead, it prevents the fox from doing more harm in the future. Thus, the analogy actually tends to suggest that the permanent bar serves incapacitative (rather than remedial) purposes.

Moreover, Judge Millett acknowledged that the sanction in this case is not focused on any particular victim. Instead, it serves "to protect the securities industry and the investing public," *id.* at 307—a clear indication that it is not remedial under *Kokesh*.

Judge Millett also suggested that Mr. Saad "squandered FINRA's and its members' resources, forcing them to expend time, personnel and money." *Id.* at

309. However, she does not explain how an expulsion could compensate for these harms, or why it is commensurate with them.

Finally, Judge Millett argued that this case can be distinguished from *Kokesh* because FINRA is a self-regulatory organization. *Id.* at 308. But as Judge Kavanaugh correctly observed in response, "the federal courts of appeals do not distinguish between SEC orders that affirm FINRA disciplinary sanctions and SEC orders that affirm sanctions imposed through the SEC's administrative hearing system." *Id.* at 305 n.1 (internal quotation marks omitted). This is because "FINRA is heavily regulated by the SEC, and a FINRA-sanctioned party has a right to appeal FINRA sanctions to the SEC." *Id.* at 305.

In sum, under *Kokesh*, contrary to the Commission's previous conclusion, 2015 WL 5904681, at *8, the permanent bar that was imposed on Mr. Saad is punitive rather than remedial.

II. BECAUSE THE PERMANENT BAR WAS PUNITIVE, IT SHOULD BE RESCINDED

A. Under Governing Precedent, The Commission Lacks The Power To Approve Punitive Sanctions

As Judge Kavanaugh observed, the D.C. Circuit's "precedents say that the SEC may approve expulsion ... of a securities broker as a remedy, but not as a penalty." *Saad II*, 873 F.3d at 304. For example, *Siegel v. S.E.C.* explained that "the agency may impose sanctions for a remedial purpose, but not for

punishment," so "the SEC must review the sanction imposed by the NASD ... and ensure that it serve[d] a remedial purpose." 592 F.3d 147, 157-58 (D.C. Cir. 2010) (internal quotation marks omitted); *see Saad I*, 718 F.3d at 913; *PAZ Secs.*, 494 F.3d at 1065; *McCurdy v. S.E.C.*, 396 F.3d 1258, 1264 (D.C. Cir. 2005); *see also* 5 U.S.C. § 558(b) ("A sanction may not be imposed ... except within jurisdiction delegated to the agency and as authorized by law.")

In short, under current D.C. Circuit law, the Commission can approve *only* sanctions that are remedial. As discussed in Part I, the permanent bar that was imposed on Mr. Saad is punitive. Accordingly, the bar must be rescinded.[10]

B. At A Minimum, The Commission Cannot Approve This Sanction Based On A Finding That It Was Remedial Rather Than Punitive

Assuming the Commission concludes that it at least potentially has the power to approve an expulsion like Mr. Saad's, it still should not do so in this instance. The Commission's analysis of Mr. Saad's permanent bar—as well as FINRA's analysis of it—was crucially premised on the finding that the sanction was remedial. Now that this core premise has been disproven, there is no longer a

[10] In a recent decision, an administrative law judge concluded that a permanent bar could be imposed in an SEC enforcement proceeding "even assuming that a permanent bar is punitive under *Kokesh*." *In the Matter of Talman Harris & Victor Alfaya*, Release No. ID-1213, 2017 WL 4942807, at *9 (Oct. 30, 2017). However, as shown above, the relevant D.C. Circuit decisions flatly prohibit the Commission from approving punitive sanctions. Indeed, even the administrative law judge acknowledged that, under D.C. Circuit precedent, permanent bars that are "imposed by a self-regulatory organization must be remedial." *Ibid.*

justification for imposing the sanction. Accordingly, the Commission should either rescind the permanent bar, or at least remand to FINRA to give FINRA an opportunity to reconsider the standards it must apply when imposing expulsions and whether the bar can or should be imposed in this case.

1. By its terms, the Commission's decision "consider[ed] whether the sanctions imposed by FINRA are remedial in nature and not punitive" and approved FINRA's action because it found that the sanction was "remedial." 2015 WL 5904681, at *5, 7. The Commission's entire analysis was geared to this purpose.

Now that it has become clear in light of *Kokesh* that the sanction is punitive, the rationale for the Commission's order affirming the sanction has been vitiated. Reaffirming the same sanction, which would amount to relabeling a sanction that the Commission determined was "remedial" as "punitive," would violate a number of core legal principles. In particular, approving a punitive sanction on the basis of an administrative record that the Commission has already ruled supported a finding that the sanction was remedial—not punitive—would violate the American Procedure Act ("APA"). Such an action would undoubtedly be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right[s]" (including the right to due process of law); "in

excess of statutory jurisdiction, authority, or limitations"; and "unwarranted by the facts."[11] 5 U.S.C. § 706(2); *see generally Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that agency actions which lack "a reasoned basis" or "fail[] to consider an important aspect of the problem" must be set aside under the APA).

Simply relabeling a purportedly remedial sanction as punitive and upholding it on that ground would reflect precisely the sort of "inconsistent[] and opportunistic[] fram[ing]" that the D.C. Circuit has routinely rejected. *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1148 (D.C. Cir. 2011); *cf. Town of Barnstable v. FAA,* 740 F.3d 681, 689 (D.C. Cir. 2014) (explaining that an agency on remand must "address[] the court's concern"). In addition, the D.C. Circuit has specifically warned of "the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues." *Food Mktg. Inst. v. I.C.C.*, 587 F.2d 1285, 1290 (D.C. Cir. 1978). Accordingly, an "agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result." *Id.* And to ensure that agencies appropriately reconsider their actions, courts apply a

[11] Indeed, such a decision could be set aside under *each* of the grounds enumerated in 5 U.S.C. § 706(2).

"greater degree of scrutiny" to decisions which arrive at "precisely the same conclusion as [an] order previously remanded by [the same] court." *Id.* at 1289-90; *see also Greyhound Corp. v. I.C.C.*, 668 F.2d 1354, 1358 (D.C. Cir. 1981) (similar); *Chamber of Commerce v. S.E.C.*, 443 F.3d 890, 899 (D.C. Cir. 2006) (noting that "more exacting review may be required when the presumption of regularity is rebutted, as may occur when the agency arrives at an identical result on remand under circumstances that throw into question the regularity of its proceedings."). This makes it all the more imperative for the Commission to conduct a genuinely new analysis rather than simply rest on its old conclusions.[12]

Independently, the Commission is obligated to evaluate whether the permanent bar is "excessive or oppressive." 15 U.S.C. §78s(e)(2). The Commission concluded that it was not, but its analysis presumed that the sanction was remedial. 2015 WL 5904681, at *5, 7. With that premise removed, there is currently no basis for the Commission to affirm the sanction under Section 78s(e)(2).

2. Given that the permanent bar is punitive, any effort to affirm it must rely on fundamentally revised standards. The Commission should not articulate a new

[12] Indeed, when a court concludes that "clear resolution on remand" is unlikely, and that "it would be futile to allow the [agency] a third 'shot at the target,'" a court may simply instruct an agency to "dismiss the charge." *Checkosky v. S.E.C.*, 139 F.3d 221, 227 (D.C. Cir. 1998).

framework for approving the imposition of permanent bars without hearing from FINRA as to when FINRA believes punitive sanctions are appropriate. *See, e.g.*, *In the Matter of the Application of WD Clearing, LLC, A Nevada Ltd. Liab. Co., et al. for Review of Action Taken by FINRA*, Release No. 75868, 2015 WL 5245244, at *6 (Sept. 9, 2015) (declining to "divest FINRA of its 'self-regulatory function'" by deciding an issue that "FINRA did not have the opportunity to decide ... for itself").

At the moment, FINRA Sanction Guidelines *prohibit* punitive sanctions and *require* sanctions to be remedial. Guideline 1, for example, provides that "[a]djudicators should consider a firm's size with a view toward ensuring that the sanctions imposed are *remedial* and designed to deter future misconduct, but are *not punitive*." (emphases added). Similarly, Guideline 3 states that "[s]anctions in disciplinary proceedings are *intended to be remedial*" and that adjudicators must "determin[e] remedial sanctions in each case." (emphasis added). In other words, under the current guidelines, the penalty that was imposed on Mr. Saad is impermissible. Accordingly, the Commission should rescind the permanent bar. Short of rescission, the Commission should remand to FINRA to give FINRA an opportunity to revise its guidelines (and to determine whether it would be lawful or

appropriate to apply such revised guidelines to behavior that occurred before they were promulgated).[13]

A remand is also necessary because the FINRA order at issue is unlawful and it would be an abuse of discretion for the Commission to affirm it. As explained above, the sanction imposed by FINRA violated FINRA's own guidelines, which required sanctions to be remedial; this is a due process violation. *See Rooms v. S.E.C.*, 444 F.3d 1208, 1214 (10th Cir. 2006) (applying due process requirements to NASD action); *Intercontinental Indus. Inc. v. Am. Stock Exch.*, 452 F.2d 935, 941 (5th Cir. 1971) (observing that "[t]he intimate involvement of the [American Stock] Exchange with the Securities and Exchange Commission brings it within the purview of the Fifth Amendment controls over governmental due process").

In addition, the FINRA order (like the Commission's affirmance of it) was premised on the false idea that the permanent bar was remedial. *Dep't of Enforcement v. John M.E. Saad,* National Adjudicatory Council, Complaint No.

[13] Any such guidelines should ensure that the punishment is proportionate to the violation. *See, e.g.*, *Solem v. Helm*, 463 U.S. 277, 284 (1983) (observing that the "principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence"). An especially hefty justification would be necessary to impose a permanent bar, the "securities industry equivalent of capital punishment." *Saad I*, 718 F.3d at 906. At a minimum, FINRA would have to reconsider its current stance that a permanent bar should be imposed regardless of the amount that was converted. FINRA Sanction Guidelines 36.

2006006705601R, 2015 FINRA Discip. LEXIS 49, at *49 (Mar. 16, 2015) (imposing a permanent bar because it was "an appropriate remedial sanction").[14] Accordingly, the FINRA order violated the APA for the same reasons that the Commission's order did. Moreover, FINRA's imposition of a punitive sanction on the ground that it was remedial is a patent violation of the Exchange Act's "fair procedure" requirement. 15 U.S.C. § 78f(b)(7); *see D'Alessio v. S.E.C.*, 380 F.3d 112, 121 (2d Cir. 2004) (explaining that the "fair procedure" language in Section 78f(b)(7), at a minimum, imposes one "due-process-like requirement" "in SRO disciplinary proceedings").

In short, it is clear after *Kokesh* that imposing a permanent bar on Mr. Saad—if it is possible at all—can be done only under a new analytical framework put forward by FINRA. The Commission should either rescind the sanction or remand to FINRA.

[14] The NAC's original order in Mr. Saad's case similarly relied on the proposition that the permanent bar was "appropriately remedial." *Dep't of Enforcement v. John M. Saad*, National Adjudicatory Council, Complaint No. 2006006705601, 2009 WL 3223812, at *11 (Oct. 6, 2009).

C. The Claim That the Permanent Bar Is Improperly Punitive Has Been Properly Presented And Remains Viable

Mr. Saad has consistently raised the argument that the permanent bar was punitive rather than remedial.[15] This is all that was required to preserve the claim. As Judge Kavanaugh put it, Mr. Saad "preserved the argument that the sanction imposed on him was a penalty, not a remedy" by "expressly" presenting it "both to the SEC and to [the D.C. Circuit]." *Saad II*, 873 F.3d at 305; *see ibid.* (noting that Mr. Saad "of course did not cite *Kokesh* because *Kokesh* was not yet decided").

Nor is the relevance of *Kokesh* diminished by "law of the case" principles. While the D.C. Circuit may have previously suggested that the Commission may approve expulsions, "dispositive doctrine has evolved" since that time. *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 n.14 (D.C. Cir. 1990) (R.B. Ginsburg, J.). And where "intervening legal authority makes clear that a prior decision bears qualification, that decision must yield." *Ibid.* "'Law of the case' cannot be substituted for the law of the land." *Ibid.* (internal quotation marks omitted).

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[15] *See, e.g.*, Initial Brief of Petitioner at xxvi, 15, 38-40, *Saad v. S.E.C.*, No. 10-1195 (D.C. Cir. Aug. 9, 2012); Brief for Petitioner at 1, 14, 18, *Saad v. S.E.C.*, No. 15-1430 (D.C. Cir. Apr. 27, 2016).

CONCLUSION

For the reasons stated above, the Commission should rescind Mr. Saad's permanent bar, or, in the alternative, remand the matter to FINRA.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word limit set forth in 17 C.F.R. § 201.450(c), because it contains 4,730 words, excluding the parts of the brief exempted by § 201.450(c).

Dated: February 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of February, 2018, I caused true and correct copies of the foregoing document to be served by courier upon:

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Office of the Secretary
100 F Street Northeast
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Dated: February 20, 2018

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