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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application for Review of

WD Clearing, LLC, et al.

File No. 3-16209

FINRA'S MOTION TO DISMISS WD CLEARING'S APPLICATION FOR REVIEW AND TO STAY ISSUANCE OF BRIEFING SCHEDULE

Alan Lawhead
Vice President and
Director – Appellate Group

Jennifer C. Brooks
Associate General Counsel

FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
(202) 728-8083

December 29, 2014

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I. INTRODUCTION

This matter concerns the withdrawn continuing membership application ("CMA") of FINRA member, Wilson-Davis & Co., Inc. In February 2014, Wilson-Davis filed with FINRA a CMA requesting a change in the firm's ownership. Wilson-Davis was to be purchased by the applicant, WD Clearing, LLC, et al., an entity which is not a FINRA member. Wilson-Davis, however, withdrew its CMA in September 2014 before FINRA issued a final decision in the matter.

Nonetheless, in October and November 2014, WD Clearing filed an application for review with the Commission and sought to challenge FINRA's processing of Wilson-Davis's application. WD Clearing's "appeal" suffers from fatal procedural flaws—many of which WD Clearing concedes—and attempts to circumvent both FINRA's and the Commission's rules. Initially, WD Clearing's "appeal" should be dismissed because it concerns FINRA's actions that were not final and were not appealed within FINRA. Moreover, the Commission lacks the statutory jurisdiction to entertain the "appeal." In short, this appeal involves the wrong party, a

failure to follow FINRA rules, and a challenge to a decision made not by FINRA, but by Wilson-Davis, who chose not to pursue final FINRA action.

Pursuant to SEC Rule of Practice 154, FINRA now moves the Commission to dismiss this proceeding for lack of appellate jurisdiction. There is no FINRA action that is "subject to review" under § 19(d) of the Securities Exchange Act of 1934 ("Exchange Act"). Thus, none of the four possible grounds for Commission jurisdiction set forth by Exchange Act § 19(d) applies to this case. The Commission should follow its well-established precedent related to its jurisdiction and dismiss WD Clearing's application for review.[1]

II. BACKGROUND

A. Factual Background

1. FINRA Member Wilson-Davis Seeks Financing from Nonmember WD Clearing, LLC, et al.

Wilson-Davis became a FINRA member firm in 1968 and is headquartered in Salt Lake City, Utah. (RP 2846.)[2] The firm conducts a general securities business and lists private placements, financial advisory services, mergers and acquisitions, and debt restructuring among its other lines of business. (RP 2848-49.)

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[1] Pursuant to Commission Rule of Practice 161, FINRA also requests that the Commission stay issuance of a briefing schedule in this matter while this motion is pending. *See* 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive argument that WD Clearing's appeal should be dismissed on procedural grounds before it reaches the underlying substance of this appeal.

[2] "RP ___" refers to the page numbers in the certified record filed by FINRA on December 18, 2014.

In order to meet short-term cash requirements in April 2013, Wilson-Davis borrowed, pursuant to a financing agreement, $4 million from John Hurry, a director of Alpine Securities Corporation and Scottsdale Capital Advisors.[3] (RP 134, 285-301, 3012-13, 3018.) The financing agreement granted Hurry, or his assignees, the right to purchase the outstanding stock of Wilson-Davis. (RP 134-35, 285-86.) On December 2, 2013, Wilson-Davis and its stockholders, and Hurry's assignees (known collectively as WD Clearing, LLC, et al.)[4] entered into a securities purchase agreement ("SPA") to effectuate the purchase. (RP 134, 303-388, 965-1051.) Under the SPA, all of Wilson-Davis's stockholders proposed to sell the firm's outstanding stock to WD Clearing, LLC, et al. (RP 134, 304, 332-33, 966, 994-95.) The SPA contemplated that Wilson-Davis would seek approval from FINRA of the change in ownership. (RP 135, 306, 968.)

2. Wilson-Davis Files a CMA with FINRA

On February 24, 2014, FINRA accepted Wilson-Davis's CMA requesting approval of the firm's change in ownership.[5] (RP 53-78, 2158-60.) The CMA indicated that Hurry, as manager of WD Clearing, LLC, would become associated with Wilson-Davis as an owner. (RP 57, 135.)

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[3] The Hurry Family Revocable Trust owns Alpine Securities and Scottsdale Capital, two FINRA member firms. (RP 2285, 3012-13.)

[4] WD Clearing, LLC, et al. is composed of a series of trusts affiliated with Hurry, and WD Clearing, LLC, a Nevada limited liability company formed for the purpose of holding the Hurry Family Revocable Trust's investment in Wilson-Davis. Hurry, through the Hurry Family Revocable Trust, was the source of capital for WD Clearing, LLC, et al. (RP 134-35, 149, 2158.)

[5] The firm submitted an initial CMA on January 22, 2014, which FINRA deemed substantially incomplete. (RP 2158 n.1.) After the firm provided additional information on February 24, 2014, FINRA accepted the CMA as substantially complete. (RP 2158 & n.1.)

The CMA further stated that Hurry, through the Hurry Family Revocable Trust, was the source of the funding for the purchase of Wilson-Davis. (RP 71, 149). Wilson-Davis further indicated in the CMA that Hurry "has the individual financial assets to fund both the purchase of the [firm] and meet the net capital reserve requirements." (RP 71, 149.) The firm stated that if additional funding became necessary, "Hurry, through the Hurry Family Revocable Trust, would invest his own personal capital into the [firm]." (RP 71, 150.)

3. FINRA Places Interim Restrictions upon the Firm

FINRA notified Wilson-Davis in a February 25, 2014 letter that, pursuant to NASD Rule 1017(c), interim restrictions were being placed on the firm to ensure that investors were protected during the pendency of the CMA review process. (RP 2159-60.) NASD Rule 1017(c)(1) provides that a member may effect a change in ownership or control prior to the conclusion of the CMA process. FINRA may, however, place interim restrictions on the member based on the standards set forth in NASD Rule 1014, pending FINRA's final decision on the CMA. *Id.* As FINRA has explained, "[a] firm may effect the change before the final, written decision is issued, but the FINRA MAP Group may impose interim restrictions that would remain in effect until the application is decided," including an interim restriction that prohibits a deal from closing prior to FINRA approval. *Continuing Membership Guide*, http://www.finra.org/Industry/Compliance/Registration/MemberApplicationProgram/CMGuide/P009723.

During the pendency of the CMA, and in accordance with NASD Rule 1017, FINRA prohibited the firm from:

- Effecting any portion of the aforementioned ownership change transaction, including unapproved individuals or entities acting in

any capacity that would suggest that they are approved direct and/or indirect owners of the Firm, and

- Permitting any trustee, grantor, or beneficiary of the trusts – including, but not limited to, Mr. Hurry – to act in any principal, supervisory, or control capacity.

(RP 2159.) FINRA stated that these restrictions were based on the fact that FINRA lacked sufficient information from Wilson-Davis at the initial stages of the CMA review process to determine whether the firm could meet all of the standards set forth in NASD Rule 1014. (RP 2159-60.) FINRA staff explained these restrictions to Wilson-Davis's and WD Clearing's counsel. (RP 2157, 2158-60, 2167.)

The February 25, 2014 letter, setting forth the interim restrictions, specifically identified the following concerns pursuant to NASD Rule 1014. (RP 2159-60.) FINRA staff needed additional information regarding the individuals and entities that would indirectly control Wilson-Davis subsequent to the transaction and needed to analyze the agreements and documentation submitted in support of the change. (RP 2159); *see* NASD Rule 1014(a)(1) (requiring a firm's application and supporting documents be complete and accurate). FINRA staff also required additional information related to the proposed new owners—the trusts affiliated with Hurry. The February 25, 2014 letter referred to an investigation involving Scottsdale Capital and Alpine Securities, firms where Hurry is a director and which he controls through the Hurry Family Revocable Trust. FINRA therefore required additional information "to assess and review the regulatory history of [the] Firm, and all associated persons (including the individuals that will become associated or affiliated with the Firm), in connection with the requested change in ownership." (RP 2159-60); *see* NASD Rule 1014(a)(3) (requiring FINRA to assess whether an applicant and its associated persons are capable of complying with the federal

securities laws, the rules and regulations thereunder, and FINRA rules, including observing high standards of commercial honor and just and equitable principles of trade).

FINRA staff also needed additional information to assess the funding and financial wherewithal of the proposed new owners. The CMA indicated that Hurry would provide the funds necessary to meet the firm's net capital reserve requirements and provide additional funding if necessary. (RP 71, 149-50.) FINRA therefore needed to review all of the information and documents provided in the initial filing to ascertain Wilson-Davis's ability to maintain a level of net capital in excess of the minimum net capital requirements set forth in SEC Rule 15c3-1, and the firm's ability to establish and maintain its source of funding to support the firm's intended business operations on a continuing basis. (RP 2160); *see* NASD Rule 1014(a)(7). FINRA staff explained that it was "in the process of reviewing all of the information and documentation provided in order to ascertain" whether Wilson-Davis "may circumvent, evade or otherwise avoid compliance with the federal securities laws, the rules and regulations thereunder, and FINRA Rules." (RP 2160); *see* NASD Rule 1014(a)(13).

4. Hurry Receives a Wells Notice and Wilson-Davis Withdraws Its CMA

On September 12, 2014, FINRA's Department of Enforcement notified Hurry and his firm, Scottsdale Capital, through a Wells Notice that FINRA had preliminarily determined that it should bring disciplinary actions against Hurry and Scottsdale Capital. (RP 3029.) FINRA preliminary determined that Hurry and Scottsdale Capital potentially violated FINRA Rule 2010 by allegedly selling securities in violation of Section 5 of the Securities Act of 1933, and that Hurry, as an owner of Scottsdale Capital, aided and abetted or caused the alleged violations. (RP 3028-29.)

On September 15, 2014, Wilson-Davis, in a conversation with FINRA staff overseeing the firm's CMA, learned that Hurry received this Wells Notice. (RP 2713.) Counsel for Wilson-Davis subsequently notified FINRA staff that because the firm understood that "the issues associated with the Wells [N]otice would ultimately cause FINRA to deny the CMA," Wilson-Davis was withdrawing the pending CMA. (RP 2713.) On September 17, 2014, FINRA, acknowledged the withdrawal. (RP 2713.)

B. Procedural History

On October 14, 2014, WD Clearing filed an application for review and request for oral argument with the Commission. (RP 2715-2822.) The Commission, in a letter dated October 22, 2014, stated that the matter was "not ripe for Commission review" and rejected WD Clearing's filing because it appeared that FINRA had not entered a final decision. (RP 2823.) The Commission further stated that WD Clearing could "pursue a final decision on a continuing membership application with FINRA." (RP 2823.)

On November 10, 2014, WD Clearing once again submitted an application for review with the Commission. (RP 2825-28.) The Commission, on November 20, 2014, acknowledged WD Clearing's application for review, but stated that acceptance of the filing did not "constitute a Commission determination as to the proper statutory basis" for the application or "a prejudgment . . . pertaining to the Commission's jurisdiction to consider this matter." (RP 2829-30.)

III. ARGUMENT

The Commission should dismiss WD Clearing's application for review because it lacks a statutory basis for the Commission to exercise jurisdiction. The Commission's authority to review FINRA actions is governed by § 19(d) of the Exchange Act, which grants the Commission authority to review only four classes of actions by a self-regulatory organization ("SRO"). 15 U.S.C. § 78s(d). Specifically, § 19(d) authorizes Commission review of an SRO action only if that action: (1) imposes any final disciplinary sanction on any member (or person associated with a member) of the SRO or participant therein; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by such organization or member thereof; or (4) bars any person from becoming associated with a member. 15 U.S.C. § 78s(d)(1), (2).

The Commission has ruled repeatedly in other cases that these four grounds are the only ones upon which a review of FINRA action can occur. *See Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 955 (2004); *see, e.g.*, *Russell A. Simpson*, 53 S.E.C. 1042, 1046 (1998) ("Section 19(d) does not, however, grant [the Commission] jurisdiction to review disciplinary actions generally, but only those in which a final disciplinary sanction is imposed."); *Morgan Stanley & Co.*, 53 S.E.C. 379, 382, 384 (1997) (explaining that § 19(d) authorizes Commission review when FINRA takes action denying or restricting membership or impacting a member firm's access to services offered by FINRA). The Commission cannot review FINRA determinations simply because an applicant claims "extraordinary circumstances" or "compelling reasons." *Allen Douglas*, 57 S.E.C. at 955 n.14.

There is a second, independent reason the Commission should dismiss this appeal. As the Commission aptly recognized in its October 22, 2014 letter initially rejecting WD Clearing's

application for review, the legal issues raised are not yet ripe for Commission review because FINRA never issued a final decision. (RP 2823.) Indeed, Wilson-Davis's withdrawal of the CMA terminated FINRA's review of its member's request to transfer ownership. This means, necessarily, that no statutory basis exists for the Commission to exercise its jurisdiction. WD Clearing is asking the Commission to intervene before the membership process is completed pursuant to FINRA rules, and Exchange Act § 19 does not serve as a bootstrap for that result. Because Wilson-Davis's withdrawal of its CMA from FINRA consideration falls within none of the categories of actions subject to Commission review, the Commission should dismiss WD Clearing's appeal.

A. The Commission Should Dismiss WD Clearing's Appeal Because WD Clearing Failed to Follow FINRA's and the Commission's Procedures

WD Clearing's application for review is not permitted by either FINRA or Commission rules. It appears to be an attempt to circumvent Wilson-Davis's withdrawal and insert the Commission into a failed business deal. But this is plainly not the Commission's role. As WD Clearing accurately concedes, under FINRA rules, only Wilson-Davis as the FINRA member firm and CMA applicant can appeal an adverse decision made by FINRA's membership staff. (RP 2827); *see* NASD Rule 1017(a) ("A member shall file an application for approval of any of the following changes to its ownership, control, or business operations . . . ."), (j) ("An Applicant may file a written request for review of the Department's decision with the National Adjudicatory Council pursuant to Rule 1015."). Under these rules, a FINRA member can appeal the denial of a CMA to the NAC and, after FINRA issues a final decision, to the Commission. *See* NASD Rule 1015(j)(3).

Nonetheless, on October 14, 2014, and again on November 10, 2014, WD Clearing sought Commission review of Wilson-Davis's withdrawal, irrespective of the FINRA rules that govern the membership process and preclude such action. WD Clearing has no standing to appeal, as reflected by these rules. Moreover, when the FINRA member withdraws a CMA, like Wilson-Davis did here, there is no final action of FINRA that is ripe for appeal to the Commission. Accordingly, the Commission should dismiss this appeal. Wilson-Davis, as the FINRA member, may, however, elect to submit another application to FINRA in order to restart the CMA review process.[6] *See* NASD Rule 1017(f).

Dismissing this appeal would also be consistent with the long line of Commission decisions in which it has dismissed applications for review because an applicant failed to obtain appellate review within FINRA before filing an application for review with the Commission. *See Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 SEC LEXIS 283, at *9-13 (Jan. 24, 2014); *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 SEC LEXIS 1147, at *11-15 (Apr. 18, 2013); *Datek Sec. Corp.*, Exchange Act Release No. 32306, 1993 SEC LEXIS 1205, at *1-3 (May 14, 1993); *Royal Sec. Corp.*, 36 S.E.C. 275, 276-78 (1955). As the Commission recently emphasized, "[i]t is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing the review." *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268, at *9 (Apr. 10, 2014) (internal quotation marks omitted). A broad consensus of federal courts agrees with the Commission's application of the failure to exhaust administrative remedies doctrine to FINRA proceedings. *See MFS Sec. Corp. v. SEC*, 380 F.3d

[6] Likewise, WD Clearing, as a nonmember could submit a new member application to become a FINRA member pursuant to NASD Rule 1013.

611, 621-22 (2d Cir. 2004); *see also Lang v. French*, 154 F.3d 217, 220 (5th Cir. 1998) (holding that "[NASD] disciplinary orders are reviewable by the [Commission] after administrative remedies within the NASD are exhausted"); *Swirsky v. National Ass'n of Secs. Dealers, Inc.*, 124 F.3d 59, 62 (1st Cir. 1997) (and cases cited therein); *First Jersey Sec. v. Bergen*, 605 F.2d 690, 696 (3d Cir. 1979). "Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised. . . . The SEC's exhaustion requirement thus promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations." *MFS*, 380 F.3d at 621-22. Here, Wilson-Davis, who is the CMA applicant and the only party who properly could seek appellate review after FINRA issues a decision, has not even completed the FINRA process that is currently available.

To be sure, the policy reasons supporting the exhaustion doctrine apply with equal force here. Administrative exhaustion requirements "promote[] the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review. It also provides SROs with the opportunity to correct their own errors prior to review by the Commission." *Id.* at 621. Because Wilson-Davis withdrew its CMA, there are no FINRA written decisions from the membership staff or the NAC to analyze and explain the reasons supporting FINRA's actions.

Not only is WD Clearing's application not permitted under FINRA rules, it is not authorized by any provision in the Commission's Rules of Practice because FINRA made no final determination on the CMA before Wilson-Davis withdrew. Rule 420 of the Commission's Rules of Practice only permits an application for review *after* a determination of a self-regulatory

organization is made "with respect to any final disciplinary sanction; denial or conditioning of membership or participation; prohibition or limitation in respect to access to services offered by that self-regulatory organization or a member thereof; or bar from association as to which a notice is required to be filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act, 15 U.S.C. § 78s(d)(1)." Because Rule 420(a) repeats the four bases of jurisdiction from § 19(d), it does not establish any broader jurisdiction than the statute. Consequently, the application for review is not permitted under the Commission's Rules of Practice.

The Commission should dismiss WD Clearing's application because there is no FINRA action to review and, even if there was, WD Clearing is not the proper party to seek that review.

B. The Commission Should Dismiss WD Clearing's Appeal Pursuant to § 19(d) of the Exchange Act

It should come as no surprise that Wilson-Davis's withdrawal of its CMA, which is not a FINRA final action, also does not qualify for Commission jurisdiction under any of the four bases listed in Exchange Act § 19(d).

1. FINRA Did Not Deny Membership or Participation or Prohibit or Limit Any Person in Respect to Access to Services Offered by FINRA

WD Clearing's application for review does not qualify as a denial of membership or participation under Exchange Act § 19(d). The Commission has interpreted this provision as directed at decisions denying applications for membership in an SRO or restrictions on business activities as a condition of SRO membership. *Morgan Stanley*, 53 S.E.C. at 382; *see also Domestic Sec., Inc.*, 52 S.E.C. 934 (1996) (finding jurisdiction where SRO denied requested modification of restrictive agreement to increase number of securities in which applicant could make markets); *First Potomac Inv. Servs., Inc.*, 50 S.E.C. 848 (1992) (finding jurisdiction where SRO denied requested modification of restriction agreement to permit the trading of uncovered

put options under certain conditions). FINRA's acknowledgment of Wilson-Davis's withdrawal of the CMA has no bearing on the firm's continued membership in FINRA. In fact, Wilson-Davis, as WD Clearing acknowledges, continues to be a member of FINRA, notwithstanding the withdrawn CMA. (RP 2827, 2846-47.)

The Commission's decision in *Beatrice J. Feins* is persuasive authority on the point that the Commission does not have jurisdiction over this matter. In *Feins*, the Commission dismissed an appeal by an American Stock Exchange Member for lack of jurisdiction where the exchange refused to allow the member to transfer his exchange membership to a family member. 51 S.E.C. 918, 921 (1993). The Commission noted that the exchange member "retained his membership and all privileges thereto, including his ability to transfer and lease the membership." *Id.*

Just as FINRA's acknowledgment of Wilson-Davis's withdrawal is not a denial of FINRA membership, so too is FINRA's acknowledgment not a prohibition or limitation of access to FINRA services. WD Clearing argues in its November 10, 2014 application for review, however, that "when FINRA advised Wilson-Davis to withdraw the CMA" based on the Wells Notice to Hurry, FINRA prohibited or limited the access to services offered by FINRA to WD Clearing. (RP 2827.) Section 19(d) of the Exchange Act authorizes the Commission to review any action by an SRO that "prohibits or limits any person in respect to access to services offered by such organization or member thereof." 15 U.S.C. § 78s(d)(1). Contrary to WD Clearing's assertion, this provision does not authorize the Commission to review Wilson-Davis's withdrawal. As the Commission held, "SRO action is not reviewable merely because it adversely affects the applicant." *Joseph Dillon & Co.*, 54 S.E.C. 960, 964 (2000).

Unlike in this case, when the Commission has found a denial of access to services, "an SRO had denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the SRO." *Morgan Stanley*, 53 S.E.C. at 385. "The services at issue were not merely important to the applicant but were central to the function of the SRO." *Id.* For example, in *William J. Higgins*, 48 S.E.C. 713, 718-19 (1987), the SEC held that an exchange's denial of a member's request to install direct telephone link-ups between the trading floor and non-member customers prohibited or limited access to the principal service offered by an exchange: the operation of a trading floor.[7] And in *Tower Trading, L.P.*, 56 S.E.C. 270, 280-82 (2003), the SEC held that an exchange's termination of a member's "designated primary market-maker" status denied access to a guaranteed entitlement to participate in certain options transactions, a "substantial benefit" that the exchange provided only to designated primary market-makers.[8] Other activities that the Commission has treated as among an SRO's "services" include the listing of securities[9] and the provision of market quotation data.[10]

Here, FINRA did not deny any FINRA services to WD Clearing, or to Wilson-Davis for that matter. FINRA did not terminate a member's market maker status; it did not deny a

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7 *Cf. Interactive Brokers, LLC*, 53 S.E.C. 466, 469-70 (1998) (restrictions on use of hand-helds in trading groups limited access to SRO's "essential" service of providing a market for securities trading); *MFS Sec. Corp.*, 56 S.E.C. 380, 388 n.15 (2003) (termination of "member" status by exchange constituted denial of access to services).

8 *Cf. Scattered Corp.*, 52 S.E.C. 812 (1996) (reviewing an exchange's refusal to process request for registration as a market-maker in certain issues).

9 *Biorelease Corp.*, 52 S.E.C. 219 (1995) (reviewing decision to delist issuers of securities from exchange's quotation system); *see also Creative Med. Dev., Inc.*, 52 S.E.C. 968 (1996) (involving a delisting of an issuer's securities).

10 *Bloomberg, L.P.*, Exchange Act Release No. 49076, 2004 SEC LEXIS 79 (Jan. 14, 2004) (reviewing SRO's restrictions on vendors' use of market quotation data).

member's request to improve communications with a trading floor; it did not delist the securities of an issuer; and it did not deny Wilson-Davis access to any similar FINRA services. *See Allen Douglas*, 57 S.E.C. at 960-62. FINRA's acknowledgment of Wilson-Davis's withdrawal was not a denial of access to services.[11] (RP 2713.)

In addition, FINRA did nothing to "prohibit[ ]" or "limit[ ]" WD Clearing or Wilson-Davis, within the meaning of § 19(d) of the Exchange Act. In cases where the Commission has found a prohibition or limitation on access to services, the denial of access was a direct result of an SRO's decision. *See Biorelease Corp.*, 52 S.E.C. at 221-22 (involving an NASD decision to delist issuers of securities from exchange's automatic quotation system). In this case, however, FINRA took no action to prohibit or limit Wilson-Davis's activities as a FINRA member. Instead, Wilson-Davis terminated the proposed transfer of ownership transaction to WD Clearing when the firm withdrew the CMA. *Cf. Allen Douglas*, 57 S.E.C. at 960-61 (explaining that Commission lacked jurisdiction to review NASD's disapproval of member firm's subordinated loan agreement).

FINRA did not prohibit Wilson-Davis from operating as a broker-dealer. Nor did FINRA limit Wilson-Davis's FINRA membership status or prohibit it from continuing as a FINRA member. For these reasons, neither the "membership or participation" nor the "access to services" bases for review authorize the Commission to review WD Clearing's appeal.

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[11] The only service that FINRA was arguably providing—the process of reviewing the CMA—was provided. WD Clearing just dislikes the interim restrictions placed on the CMA while it was pending before FINRA and Wilson-Davis's decision to withdraw the application. These events do not qualify as a denial of access to FINRA's services.

2. FINRA Did Not Impose a Disciplinary Sanction or Bar Any Person from Becoming Associated with a Member

Section 19(d) of the Exchange Act also provides the Commission with jurisdiction to review (1) an SRO action that imposes any final disciplinary sanction on any member of the SRO, or (2) an SRO action that bars any person from becoming associated with a member. 15 U.S.C. § 78s(d)(1). These two bases for appellate review are inapplicable to this proceeding.

The Commission has "interpreted the term 'disciplinary' to refer to action responding to an alleged violation of an Exchange rule or Commission statute or rule, or action 'in which a punishment or sanction is sought or intended.'" *Tower Trading*, 56 S.E.C. at 277 (quoting *Pac. Stock Exch. Options Floor Post X-17*, 51 S.E.C. 261, 266 (1992)). Given this standard, FINRA's acknowledgment of the withdrawn CMA was not "disciplinary," and this provision does not provide a basis to review WD Clearing's appeal. There are no allegations that Wilson-Davis violated any FINRA or SEC rule or federal securities statute and WD Clearing is not a FINRA member over whom FINRA has authority to sanction. Nor did FINRA employ its disciplinary procedures or make any "determination of wrongdoing," a prerequisite to the imposition of a punishment or sanction.[12] *See Allen Douglas*, 57 S.E.C. at 955-56; *Morgan Stanley*, 53 S.E.C. at 383. Accordingly, FINRA's acknowledgment of the withdrawn CMA does not qualify as a "disciplinary action" subject to Commission review.

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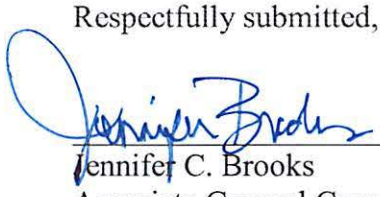
[12] To the extent that WD Clearing argues that the interim restrictions imposed while the CMA was under FINRA review constituted disciplinary sanctions, this too is without basis. Instead, FINRA's imposition of the interim restrictions fulfilled FINRA's responsibility to prospectively evaluate whether Wilson-Davis could comply with the required standards set forth in NASD Rule 1014(a), including whether persons who would become associated or affiliated with the firm, such as Hurry, would comply with the securities laws. (RP 2159-60.) Moreover, these restrictions remained in place only during the pendency of the CMA process. *See* NASD Rule 1017(c) ("An existing restriction shall remain in effect during the pendency of the proceeding.").

As for the bar from becoming associated as basis for review, it does not apply because FINRA's acknowledgment of the withdrawn CMA does not bar any person from becoming associated with any member of FINRA. *See* 15 U.S.C. § 78s(d)(1).

IV. CONCLUSION

The Commission should dismiss WD Clearing's appeal for lack of jurisdiction. FINRA's acknowledgment of Wilson-Davis's withdrawn CMA does not fall within any of the four categories of actions subject to Commission review under § 19(d) of the Exchange Act. Accordingly, the Commission lacks jurisdiction to address WD Clearing's complaints.

Respectfully submitted,



Jennifer C. Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083

December 29, 2014