FINRA

Financial Industry Regulatory Authority

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May 6, 2019

VIA MESSENGER

Vanessa A. Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, N.E.
Room 10915
Washington, D.C. 20549-1090

RE: In the Matter of the Application of Gregory Acosta
Administrative Proceeding No. 3-18637

Dear Ms. Countryman:

Enclosed please find the original and three copies of the FINRA's Brief in Response to the Commission's Order Requesting Additional Briefing in the above-captioned matter.

Please contact me at (202) 728-8177 if you have any questions.

Very truly yours,

Michael M. Smith

cc: Richard D'Amura, Esq.
Brennan Love

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application for Review of

Gregory Acosta

Administrative Proceeding File No. 3-18637

FINRA'S BRIEF IN RESPONSE TO THE COMMISSION'S ORDER REQUESTING ADDITIONAL BRIEFING

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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application for Review of

Gregory Acosta

Administrative Proceeding File No. 3-18637

FINRA'S BRIEF IN RESPONSE TO THE COMMISSION'S ORDER REQUESTING ADDITIONAL BRIEFING

FINRA has not barred Acosta, in law or in fact. FINRA's Registration and Disclosure department (the "Registration Department") determined that Acosta is statutorily disqualified due to an order entered by the Insurance Commissioner of the State of California. A statutory disqualification is an encumbered status, but it is not a bar. A FINRA member may associate with a statutorily disqualified person if FINRA (and for some disqualifications, the Commission also) grants permission. Although no member has submitted an application seeking to associate with Acosta, any firm may do so in the future. Acosta's ability to associate with a FINRA member depends on the outcome of that process, *not* on the Registration Department's determination that he is statutorily disqualified. Unless and until FINRA denies a member's application to associate with Acosta, FINRA has not prohibited Acosta from associating with any FINRA member, and therefore has not barred him.

Nor has FINRA prohibited or limited Acosta's access to any service offered by FINRA or any FINRA member. Under FINRA's By-Laws, a FINRA member firm may submit an application seeking to associate with a disqualified person. FINRA has not precluded any firm from submitting an application seeking permission to associate with Acosta. Acosta cannot

access this service himself because FINRA does not offer this service to *any* individual. FINRA therefore has not prohibited or limited Acosta's access to any service that FINRA offers.

For the reasons explained in this brief and in FINRA's Brief on Jurisdiction, the Commission lacks jurisdiction to review Acosta's application and should dismiss it.

BACKGROUND

I. Statutory Disqualification

A. Statutory Disqualification Under the Exchange Act

A statutory disqualification arises automatically by operation of the Exchange Act upon the occurrence of a disqualifying event. *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *37 (Mar. 15, 2016), *aff'd*, 672 F. App'x 865 (10th Cir. 2016). FINRA cannot impose a statutory disqualification; it can only determine, based on the facts known, whether a statutory disqualification exists.[1] The Exchange Act imposes an affirmative duty on FINRA to exercise "reasonable care" to identify statutorily disqualified persons. 15 U.S.C. § 78o-3(g)(2).

The Exchange Act does not prohibit a statutorily disqualified person from associating with a FINRA member or engaging in the securities business. *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 2270, at *4 (June 26, 2014) (statutory disqualification

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[1] In a disciplinary proceeding, FINRA may make findings that automatically subject a person to a statutory disqualification, but FINRA does not impose the statutory disqualification. The statutory disqualification arises automatically under the Exchange Act based on FINRA's findings. *See McCune*, 2016 SEC LEXIS 1026, at *37 ("FINRA does not subject a person to statutory disqualification as a penalty or remedial sanction. Instead, a person is subject to statutory disqualification by operation of Exchange Act . . . whenever there has been, among other things, a determination that a person willfully failed to disclose material information on a Form U4.").

"constitutes an encumbrance to . . . association with a member . . . but it does not necessarily preclude a person from participating in the securities industry.").[2] Rather, Exchange Act Section 15A provides that FINRA *may* prohibit a statutorily disqualified person from associating with a member. 15 U.S.C. § 78o-3(g)(2). Under Exchange Act Section 15A, FINRA must notify the Commission before allowing a statutorily disqualified person to associate with a FINRA member. *Id.* FINRA also must notify the Commission if it prohibits a statutorily disqualified person from associating with a FINRA member, but that notification is provided pursuant to Exchange Act Section 19(d). *See* 15 U.S.C. § 78s(d); 17 C.F.R. § 240.19d-1.

B. Statutory Disqualification Under FINRA's By-Laws and Rules

FINRA's By-Laws prohibit a FINRA member from associating with a statutorily disqualified person unless FINRA grants permission for the firm to do so. FINRA By-Laws Art. III § 3(b). Generally, when a member learns that one of its associated person is statutorily disqualified, the member has two options—it can either (a) file an application seeking FINRA's permission to continue associating with the person, or (b) terminate its association with the

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[2] *See also Provision for Notices By Self-Reg. Orgs. of Disciplinary Sanctions; Stays of Such Actions; Appeals; and Admissions to Membership or Ass'n of Disqualified Persons*, Exchange Act Release No. 13726, 1977 SEC LEXIS 1303, at *8 (July 8, 1977) ("A statutory disqualification does not necessarily bar the person from membership or participation in [a self-regulatory organization ("SRO")]. It permits the SRO to deny or condition the membership or participation or association with a member of such a person, but the Act requires the SRO to take such action if the Commission so orders. An SRO proposing to admit to membership, participation or association a person subject to a statutory disqualification must give notice to the Commission 30 days prior to such action.").

person. *See* FINRA By-Laws Art. III, § 3(d).[3] This is true regardless of how the member learns about the person's statutory disqualification.

FINRA's Registration Department exercises "reasonable care" to identify statutorily disqualified individuals by routinely reviewing filings by state and federal regulators, Forms U4 and U5, and other sources that could contain information about disqualifying events. If the Registration Department staff has "reason to believe" that a person associated with a member is statutorily disqualified, and the firm cannot associate with the person without obtaining FINRA's permission, the staff is required by rule to notify the member. FINRA Rule 9522(a)(1).[4]

C. Associating With a Statutorily Disqualified Person

Once notified of the Registration Department's determination that its associated person is statutorily disqualified, the member must seek FINRA's permission if it wishes to continue associating with the person. The process for doing so is set forth in FINRA Rules 9521 through 9527 (the "Membership Continuance" process). A FINRA member initiates the Membership Continuance process by filing an application, known as an MC-400, on behalf of the associated person. The member that files the MC-400 is known as the "sponsoring member." The

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[3] In limited circumstances, a FINRA member is not required to seek FINRA's permission to associate with a statutorily disqualified person. *See* FINRA Reg. Notice 09-19 (Apr. 2009); FINRA, SEC Interpretive Letter, 2009 SEC No-Act. LEXIS 349 (Mar. 17, 2009). Acosta's case does not fall within any of the exceptions to the general rule that a member must obtain permission to associate with a statutorily disqualified person. *See id.*

[4] Under the "reason to believe" standard, the staff must notify a firm if it has knowledge of facts from which a reasonable person would conclude that a person associated with the firm is statutorily disqualified. *Hunt v. Chicago Housing Auth.*, 1992 U.S. App. LEXIS 20161, at *24 & n.7 (7th Cir. Aug. 19, 1992) (unpublished) (explaining the "reason to believe" legal standard).

sponsoring member's filing of an MC-400 application triggers FINRA's notice obligation under Exchange Act Section 15A. *See* 17 C.F.R. § 240.19h-1.

The Membership Continuance process involves multiple levels of review within FINRA. The first review is by FINRA staff. If the staff recommends denying the MC-400 application, an evidentiary hearing before FINRA's National Adjudicatory Council (the "NAC") may be requested. FINRA Rule 9524. During this hearing, the sponsoring member and the person may be represented by counsel and present any relevant evidence. FINRA Rule 9524(a). FINRA staff has the burden of proving that the person is, in fact, statutorily disqualified.[5] If FINRA staff meets its burden, the sponsoring member has the burden of showing that it is in the public interest to permit the person's employment. *Timothy H. Emerson*, Jr., Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *11 (July 17, 2009).

If FINRA approves the MC-400 application, it must file a notice of final action proposing to admit or continue the person in association with the member. *See* 17 C.F.R. § 240.19h-1(a).

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[5] In his reply to FINRA's Brief on Jurisdiction (dated Nov. 19, 2018), Acosta incorrectly states that he cannot challenge the Registration Department's determination that he is statutorily disqualified during the Membership Continuance process. Acosta Reply Br. at 3. In fact, applicants routinely challenge the Registration Department's statutory disqualification determinations. *See, e.g., Meyers Associates, L.P.*, Exchange Act Release No. 81778, 2017 SEC LEXIS 3096 (Sept. 29, 2017). FINRA staff has the burden of establishing the statutory disqualification. *See, e.g., In the Matter of the Continued Membership of Firm 1*, Redacted Decision No. SD04016, slip. op. at 7 (NASD NAC 2004), https://www.finra.org/sites/default/files/ NACDecision/p036513_0.pdf (concluding that FINRA staff failed to meet its burden of proving the existence of a statutory disqualification).

The Commission reviews every final notice FINRA files under Exchange Act Section 15A(g)(2) and Exchange Act Rule 19h-1.[6]

If FINRA denies the MC-400 application, it must file notice of the denial under Exchange Act Section 19(d). 15 U.S.C. § 78s(d)(1); 17 C.F.R. § 240.19d-1(b). The timing, form, and content of the required notice is set forth in Exchange Act Rule 19d-1. *See* 17 C.F.R. § 240.19d-1(b). FINRA's filing of the notice triggers the Commission's appellate jurisdiction under Exchange Act Section 19(d). 15 U.S.C. § 78s(d)(2). Either the sponsoring member or the person may appeal FINRA's decision. The Commission's review of FINRA's decision focuses on the public interest and the protection of investors. 15 U.S.C. § 78o-3(g)(2); *see Frank Kufrovich*, 55 S.E.C. 616, 624 (2002).

If the member does not pursue the Membership Continuance process, and chooses instead to terminate its association with the associated person, FINRA does not file any notice with the Commission.

II. The Registration Department's Determination That Acosta Is Statutorily Disqualified

In June 2018, the Registration Department staff learned about an order entered against Acosta and his company, Diamond Bar Executive Benefit Programs & Insurance Services, Inc. ("EBP"), by the Insurance Commissioner. RP 41-43. The order expressly incorporated a Stipulation and Waiver executed by Acosta on behalf of himself and EBP. RP 15. In his Stipulation and Waiver, Acosta acknowledged that, "if proven true and correct, the facts alleged

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[6] *Provision for Notices By Self-Regulatory Organizations of Disciplinary Sanctions; Stays of Such Actions; Appeals; and Admissions to Membership or Association of Disqualified Persons*, 1977 SEC LEXIS 1303, at *24 ("all of these actions will be reviewed by the Commission (for all SRO's) on the merits and not merely where an appeal is taken from the SRO action or the Commission calls up the matter").

in [the Department of Insurance's Accusation against Acosta and EBP] are grounds for the discipline . . . of [Acosta's and EBP's] licenses and licensing rights, pursuant to the provisions of the Insurance Code of the State of California referred to in said Accusation[.]" RP 16.

The Department of Insurance's Accusation alleged that Acosta had induced an elderly client to make a $750,000 loan to Acosta, and that Acosta also had taken out a $750,000 Universal Life insurance policy on the same elderly client. RP 2.[7] The Department of Insurance's Allegation further alleged that the client told investigators that he "had no knowledge of [life insurance] policies being taken out on himself to secure any loans and for EBP to be listed as the beneficiary." RP 3.

Based on these allegations, the Department of Insurance alleged that Acosta and EBP were "subject to discipline pursuant to California Insurance Code sections 785, 1738, 1738.5, 1739, 1742 for violations of Sections 1668(i) and (j)." RP 4. California Insurance Code Section 1668(i) authorizes the Insurance Commissioner to revoke or suspend the license of any person who has "engaged in a fraudulent practice or act or has conducted any business in a dishonest manner," while Section 785 imposes "a duty of honesty, good faith, and fair dealing" on any licensee engaged in a transaction with a prospective insured who is 65 years of age or older. The Accusation further alleged that Acosta and EBP violated California Insurance Code Section 1668.1(a), which prohibits a licensee from inducing a client to make a loan to the licensee, and

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[7] In his Declaration in Support of Preliminary Injunctive Relief (the "Acosta Declaration"), attached as Exhibit 1 to his Response to Order Requesting Additional Briefing, Acosta states that "as [his client] got older, a decision was made to take out an insurance policy [on the client] . . . so that any [of Acosta's] unpaid debts [to the client] could be funded by the Policy proceeds upon [the client's] death." Acosta Declaration ¶ 13.

Section 1668.1(b), which prohibits a licensee from inducing a client to name a licensee as a beneficiary of a life insurance policy.

Based on the Insurance Commissioner's Order, the Registration Department staff had reason to believe that Acosta was statutorily disqualified under Exchange Act Section 3(a)(39)(F).[8] Under FINRA Rule 9522(a)(1), the staff was required to notify Acosta's firm, Kestra Investment Services, LLC, that Acosta was disqualified, and that the firm needed to file an MC-400 application if it wished to continue associating with him. Rather than submitting an MC-400 application, however, Kestra decided to terminate Acosta. RP 79-83.

III. Acosta's Appeal of the Registration Department's Determination

Acosta filed an application seeking the Commission's review of the Registration Department's letter to Kestra. RP 85. In September 2018, the Commission asked the parties to submit briefs limited to the issue of whether it has jurisdiction over Acosta's appeal. In March 2019, the Commission requested additional briefing on jurisdiction and whether the Insurance Commissioner's order is disqualifying, and specifically asked the parties to address the following issues:

1. Whether the Registration Department's letter to Kestra constituted an action barring Acosta from becoming associated with a member or prohibiting or limiting him in respect to access to services offered by FINRA or any FINRA member.[9]

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[8] This section provides that a person is statutorily disqualified if he is subject to a final order of a state insurance commission that is "based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct." 15 U.S.C § 78c(a)(39)(F) (incorporating within the definition of "statutory disqualification" any order listed in Exchange Act Section 15(b)(4)(H), 15 U.S.C. § 78o(b)(4)(H)).

[9] Addressed in Section I.A. and I.B, below.

2. Whether there are any other administrative remedies available to Acosta through FINRA to appeal the Registration Department's determination that he is statutory disqualified.[10]

3. The relevance, if any, of Acosta's assertions that (a) he neither admitted nor denied the allegations in the Department of Insurance's Accusation;[11] (b) the Insurance Commissioner's order "does not refer to Section 1668(i) of the California Insurance Code," and (c) the order "is not based on fraud" because "[t]he only non-procedural statute referenced is . . . Section 1668.1 [which] is not a fraud based statute, and is entirely and completely separate and distinct from 1668.(i)."[12]

4. The relevance, if any, of the Insurance Commissioner's order's acknowledgment that "if proven to be true and correct, the facts alleged in [the] Accusation are grounds for the discipline, . . . pursuant to the provisions . . . referred to in [the] Accusation."[13]

ARGUMENT

I. FINRA Has Not Barred Acosta or Limited His Access to Services

A. The Registration Department's Letter to Kestra Did Not Bar Acosta

The Registration Department's letter to Kestra did not bar Acosta from associating with any FINRA member. To establish jurisdiction on this basis, Acosta must show that the letter prohibited him from associating with any FINRA member. *WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 SEC LEXIS 3699, at *19 (Sept. 9, 2015) ("But FINRA did not bar [respondent firm] or its representatives from associating with . . . any other FINRA-member firm, let alone all FINRA-member firms, as would be required for us to assume jurisdiction on

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10 Addressed in Section I.C, below.

11 Addressed in Section II.A, below.

12 Addressed in Section II.B, below.

13 Addressed in Section II.B, below.

this ground.").[14] The letter did not prohibit Acosta from associating with Kestra or any other FINRA member.

The Registration Department's letter to Kestra did not state that Acosta could not associate with the firm. Rather, the letter notified Kestra of the Registration Department's determination that Acosta is statutorily disqualified and reminded the firm of its obligations as a FINRA member. Specifically, the letter stated that Kestra was required to file an MC-400 application if it wished to continue associating with Acosta. Had Kestra filed an MC-400, the firm could have continued associating with Acosta throughout the Membership Continuance process. This would not have been possible if the Registration Department's letter had barred Acosta, as Acosta contends. Instead of filing an MC-400, however, Kestra chose to terminate its association with Acosta.

Kestra's decision to terminate Acosta in response to the Registration Department's letter did not transform the letter into a FINRA action barring Acosta. As the Commission recognized in *Joseph Dillon & Company*, FINRA does not bar an associated person merely by requiring his firm to comply with its obligations as a FINRA member, even if doing so means the firm can no longer associate with that person. In *Dillon*, FINRA staff determined that the firm was subject to FINRA's "taping rule" after it hired a number of registered representatives who previously were employed by disciplined firms. *Joseph Dillon & Company, Inc.*, 54 S.E.C. 960, 961 (2000).[15]

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[14] *See also Meyers Associates,* 2017 SEC LEXIS 3096, at *16 ("bars are orders . . . that have the effect of barring a person from association with certain regulated entities [or] from engaging in the business of securities").

[15] FINRA's "taping rule" requires a member to record all telephone conversations between its associated persons and existing and potential customers. The rule applies to a member if a certain percentage of its associated persons were associated with disciplined firms within the last three years. *See* FINRA Rule 3170 (effective from Dec. 1, 2014, through May 7, 2019).

The firm applied for an exemption from the rule, but the staff denied its request. *Id.* at 961-62. The NAC affirmed the staff's denial. *Id.* at 962.

On appeal, the firm argued that the Commission had jurisdiction to review the NAC's decision because it effectively barred the representatives from associating with the firm unless the firm complied with the taping rule, which the firm claimed it could not do. *Id.* at 965. The Commission rejected this argument. The Commission acknowledged that, as a result of the firm's obligation to comply with the taping rule, the firm might not be able to continue associating with the representatives. *Id.* at 965. But the Commission noted that, generally, "any member firm's failure to comply with [FINRA] rules jeopardizes its membership and potentially inhibits the ability of registered persons to associate with that firm." *Id.* The Commission concluded that FINRA had not barred the representatives because, even if the firm could not associate with them due to its inability to comply with the taping rule, they were free to find another firm that could. *Id.* at 966.

Acosta's position is parallel to that of the representatives in *Dillon*. After the Registration Department determined that Acosta was statutorily disqualified, Kestra was required either to seek FINRA's permission to associate with him or terminate him. Kestra chose the latter. But FINRA has not barred Acosta because he is free to find another firm, and that firm can submit an MC-400 application initiating the Membership Continuance process.

Acosta's position is readily distinguishable from the applicants' positions in cases in which the Commission held that FINRA had effectively barred the applicants. In those cases, FINRA had taken final action in which it found that the applicant, at that moment, was prohibited from associating with any FINRA member. In *Richard T. Sullivan*, for example, FINRA cancelled the applicant's registration after he failed to pay the fine and costs imposed in

an earlier disciplinary proceeding. *Richard T. Sullivan*, 53 S.E.C. 998, 999 (1998). FINRA rejected the applicant's request to reinstate his registration. *Id.* at 1001. At that moment, the applicant could not associate with any FINRA member. The applicant asked the Commission to review FINRA's revocation of his registration. The Commission held that it had jurisdiction to do so because, once FINRA revoked the applicant's registration, he could not associate with any FINRA member, and therefore he had been effectively barred. *Id.* at 1003.

Here, by contrast, FINRA has not taken final action determining that Acosta cannot associate with any FINRA member. Rather, the Registration Department staff has determined that Acosta is statutorily disqualified, which, in and of itself, does not preclude Acosta from associating with any FINRA member. A firm that wishes to associate with Acosta must initiate the Membership Continuance process and receive a final decision before doing so. It is the outcome of that process—*not* the Registration Department's determination—which will decide whether Acosta is precluded from associating with a FINRA member. If the NAC denies a firm's MC-400 application to associate with Acosta, Acosta may seek the Commission's review

of the NAC's adverse decision. Until that happens, FINRA has not prohibited Acosta from associating with any FINRA member, and therefore has not barred him.[16]

B. FINRA Has Not Prohibited or Limited Acosta's Access to Services

FINRA has not prohibited or limited Acosta in respect to access to services offered by FINRA or any of its members. To establish jurisdiction on this basis, Acosta must show that FINRA has denied or limited his access to "a 'fundamentally important' service that is central to the function of [FINRA]." *See Sky Capital LLC*, Exchange Act Release No. 55828, 2007 SEC LEXIS 1179, at *15 (May 30, 2007). FINRA has not denied or limited Acosta's access to any service offered by FINRA, much less a "fundamentally important" one.

FINRA has done nothing to deny Acosta access to the Membership Continuance process because *no* individual has access to that process. Under FINRA's By-Laws, the Membership Continuance process is open to FINRA members only. Any FINRA member can submit an MC-400 application seeking FINRA's permission to associate with Acosta. But there is no similar process open to individuals like Acosta. FINRA cannot limit or prohibit Acosta's access to a service that does not exist. *See Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 960 (2004) ("[FINRA's]

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[16] Accepting Acosta's theory that he has been effectively barred would create an untenable situation in which the Commission's jurisdiction in cases like this one would vary depending on how a member learned its employee was statutorily disqualified. For example, consider a firm that has two employees, Employee A and Employee B. One state agency enters identical orders against both employees. Employee A discloses his order to the firm. The firm determines it is disqualifying and terminates him. The firm discloses the disqualification on Employee A's Form U5. Employee B does not disclose his order to the firm, but FINRA learns about it from the state agency and determines it is disqualifying. FINRA notifies the firm by letter, and the firm terminates Employee B. Employee A and Employee B are identically situated—each has been terminated and cannot associate with another member unless the member gets permission from FINRA—but only Employee B has a letter from FINRA. Under Acosta's theory, Employee B has been effectively barred, and can therefore appeal to the Commission. Employee A has no letter from FINRA, and thus has nothing to appeal. When the Commission is interpreting its jurisdiction over an SRO's actions, it should reach the same result for similarly situated individuals.

action in disapproving the proposed [subordinated loan agreements] does not constitute a denial of access to services offered by [FINRA] because it has no impact on [applicant's] access to any such service.").

Indeed, rather than requesting access to a service, Acosta actually is demanding that FINRA provide him with a *new* service that it does not provide to anyone else. The Commission does not have jurisdiction to consider such a demand under Section 19(d) of the Exchange Act. *Cf. Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 SEC LEXIS 956, at *9 n.15 (Apr. 30, 2008) ("[Applicant] asks that we direct [FINRA] to establish prospectively a formal procedure allowing barred individuals to request that [FINRA] vacate the sanctions against them. Exchange Act Section 19(d) does not provide for such relief.").[17]

C. The Absence of an Immediate Appeal Does Not Confer Jurisdiction on the Commission to Review the Registration Department's Determination

Under FINRA's By-Laws, Acosta's administrative remedy is through the Membership Continuance process. While Kestra declined to request FINRA's permission to associate with Acosta, any other FINRA member may do so. Indeed, each year, FINRA receives numerous

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[17] Acosta's case is distinguishable from *Securities Industry and Financial Markets Association* and *Tower Trading, L.P.*, because those cases involved the members' access to services actually offered by SROs to their members. In *Securities Industry*, members challenged a rule change that increased the fees SROs charged them for certain market data. *Sec. Industry and Fin. Markets Ass'n*, Exchange Act Release No. 72182, 2014 SEC LEXIS 1686, at *31-34 (May 16, 2014). The Commission stated that it generally had jurisdiction to review fee increases for services offered by SROs because increased fees typically limited access to such services. *Id.* In *Tower Trading, L.P.*, a member challenged an SRO's decision to terminate the member's appointment as a Designated Primary Market-Maker ("DPM"). The Commission held that it had jurisdiction because the SRO's action stripped the member of its ability to participate in certain options transactions, and therefore the SRO had denied the member a "substantial benefit" that the SRO provided to other DPMs. *Tower Trading, L.P.*, 56 S.E.C. 270, 279-80 (2003). By contrast, in this case, FINRA has not created a new barrier limiting or denying Acosta's access to the Membership Continuance process, it has merely complied with its own By-Laws that require a member to initiate the Membership Continuance process.

MC-400 applications submitted by firms seeking to associate with statutorily disqualified individuals.[18]

Acosta's inability to immediately appeal the Registration Department's determination that he is statutorily disqualified does not make that determination subject to Commission review. As a self-regulatory organization, FINRA routinely makes determinations that adversely affect its members and their associated persons. Many of those determinations are not immediately appealable within FINRA. But that does not make them reviewable by the Commission. *See Lance E. Van Alstyne*, 53 S.E.C. 1093, 1098 (1998) ("The fact that [the applicant] may have been affected adversely by the NAC's denial does not transform the denial into a reviewable [FINRA] order.").[19] The Commission may review a FINRA action only if it falls within one of the jurisdictional bases enumerated in Exchange Act Section 19(d). *Id.* at 1097. As explained in this brief and in FINRA's Brief on Jurisdiction, the Registration Department's determination that Acosta is statutorily disqualified does not fall within any of those bases, and therefore the Commission lacks jurisdiction to review it.

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[18] In its Order Requesting Additional Briefing, the Commission asked FINRA to provide the number of persons to whom the Registration Department had sent notices under FINRA Rule 9522. That information is provided in the attached Declaration of Christopher Dragos.

[19] *See also, e.g.*, *Dillon*, 54 S.E.C. 960 (FINRA's denial of a waiver from the taping rule is not reviewable); *Allen Douglas*, 57 S.E.C. 950 (FINRA's determination that a firm could not use subordinate loan agreements to cure its net capital deficiency is not reviewable); *Morgan Stanley & Company, Inc.*, 53 S.E.C. 379 (1997) (FINRA's denial of an exemption from firm's two-year prohibition on engaging in municipal securities business is not reviewable); *Larry A. Saylor*, Exchange Act Release No. 51949, 2005 SEC LEXIS 1536 (June 30, 2005) (FINRA's denial of a motion to vacate an order imposing a principal bar is not reviewable); *Eric David Wanger*, Exchange Act Release No. 79008, 2016 SEC LEXIS 3770 (Sept. 30, 2016) (FINRA's refusal to modify a BrokerCheck disclosure is not reviewable); *Citadel Sec. LLC*, Exchange Act Release No. 78340, 2016 SEC LEXIS 2464 (July 15, 2016) (exchanges' imposition of marketing fees is not reviewable).

II. The Insurance Commissioner's Order Gave the Registration Department Reason to Believe Acosta Is Statutorily Disqualified

A. Whether Acosta Admitted the Allegations in the Accusation Is Not Relevant

The Commission asked the parties to address the relevance of Acosta's assertion that he neither admitted nor denied the allegations in the Accusation. This assertion is not relevant. The Commission previously addressed this exact issue in *Savva* and found that the inclusion of a "neither admit nor deny" provision in a consent order had no impact on whether the order was disqualifying under the Exchange Act.

In *Savva*, the applicant was statutorily disqualified after he consented to a state securities regulator's entry of an order based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive conduct in the securities business. *Savva*, 2014 SEC LEXIS 2270, at *2. Like Acosta, the applicant in *Savva* argued that the order was not disqualifying under Exchange Act Section 15(b)(4)(H) because he neither admitted nor denied the order's findings or conclusions of law. *Id.* at *32. The Commission rejected the applicant's argument. *Id.* The Commission noted that its "longstanding practice has been to use consent judgments or settlement orders containing such 'no admit, no deny' language as a statutory basis for administrative proceedings under various provisions of the federal securities laws," and that in its own administrative proceedings, it "construe[d] 'neither admit nor deny' language as precluding a person who has consented to an injunction . . . from denying the factual allegations of the injunctive complaint in a follow-on proceeding before" the SEC. *Id.* at *32-33.[20] In finding that

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[20] *See also Nicholas Rowe*, Initial Decisions Release No. 746, 2015 SEC LEXIS 750, at *5 (Feb. 27, 2015) (accepting as true allegations in a state regulator's consent order that the respondent did not admit or deny when he consented to the order); *Marshall E. Melton*, 56 S.E.C. 695, 712 (2003) ("[I]t would be illogical and a waste of resources for us not to rely on the factual allegations of the injunctive complaint in a civil action settled on consent in determining the appropriate remedial action in the public interest.").

a consent order with "neither admit nor deny" language was disqualifying, the Commission definitively resolved that the inclusion of such language in a consent order does not shield the subject of the order from becoming statutory disqualified as a result of a final order entered by a state regulator. *Id.* Accordingly, the inclusion of the provision stating that Acosta neither admits nor denies the allegations in the Accusation is not relevant to whether the Insurance Commissioner's order is disqualifying.

B. The Insurance Commissioner's Order Sanctions Acosta Based on All of the Violations Alleged in the Accusation

The Commission asked the parties to address Acosta's argument that the Insurance Commissioner's order "does not refer to Section 1668(i) of the California Insurance Code," and that the order "is not based on fraud" because "[t]he only non-procedural statute referenced is . . . Section 1668.1 [which] is not a fraud based statute, and is entirely and completely separate and distinct from 1668(i)." Acosta's argument has no merit because the Insurance Commissioner's order sanctions Acosta based on *all* of the violations alleged in the Accusation, including his

violations of California Insurance Code Section 1668(i). The Registration Department therefore had reason to believe that Acosta is statutorily disqualified.[21]

The Insurance Commissioner's order imposes remedial sanctions on Acosta by revoking his insurance licenses based on the violations of the California Insurance Code alleged in the Accusation. These remedial sanctions are imposed in the first four paragraphs of the Stipulation and Waiver, which is expressly incorporated in the Insurance Commissioner's order.

The Stipulation and Waiver includes a critical acknowledgement: in the second paragraph, Acosta "acknowledge[s] that, if proven to be true and correct, the facts alleged in [the] Accusation are grounds for the discipline . . . of [Acosta's] licenses and licensing rights, *pursuant to the provisions of the Insurance Code of the State of California referred to in [the]*

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[21] The Commission should note that a letter from the Registration Department notifying a firm of a statutory disqualification is not typically FINRA's final action on a statutory disqualification; a NAC decision denying an MC-400 application is. The lack of finality here is highlighted by the Registration Department's letter, which instructs Kestra that it must complete an MC-400 application to start the Membership Continuance process. One of the traditional reasons to require final action by a party is to provide an appellate body with a fully developed record, which facilitates appellate review. *Cf. MFS Sec. Corp.*, Exchange Act Release No. 47626, 2003 SEC LEXIS 3158, at *23-24 (Apr. 3, 2003) (dismissing appeal for failure to exhaust available procedures when applicant lacked a record to establish its asserted issues), *aff'd*, 380 F.3d 611 (2d Cir. 2004). The record here is markedly incomplete when compared to the record created in statutory disqualification applications. Although the Registration Department had reasonable grounds for determining that Acosta is statutorily disqualified, if a sponsoring member had filed an MC-400 application for Acosta, the parties could have briefed the issue of whether the Insurance Commissioner's order is based on violations of a state statute that prohibits fraudulent, manipulative, or deceptive conduct. The undeveloped state of the record underscores FINRA's argument that the Commission lacks jurisdiction.

Accusation[.]"[22] Among the provisions of the Insurance Code referred to in the Accusation is Section 1668(i), which states that the Insurance Commissioner may revoke the license of anyone who has "engaged in a fraudulent practice or act or has conducted any business in a dishonest manner[.]" Cal. Ins. Code § 1668(i); 1668 § 1668.1 (stating that the Insurance Commissioner may suspend or revoke a license on the grounds set forth in Section 1668(i)). Acosta's acknowledgement does *not* exclude, expressly or impliedly, the Accusation's allegation that he violated Section 1668(i).

In the third and fourth paragraphs of the Stipulation and Waiver, Acosta waives the right to a hearing on all of the violations alleged in the Accusation, and consents to the Insurance Commissioner's revocation of his licenses based on all of the violations of the California Insurance Code alleged in the Accusation—including his violation of Section 1668(i).

As a result of the Insurance Commissioner's order, Acosta satisfies the criteria for statutory disqualification under Exchange Act Section 3(a)(39)(F). Under that section, a person

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[22] Contrary to Acosta's assertion, the parol evidence rule does not bar consideration of the allegations in the Accusation when interpreting the Insurance Commissioner's order. Under the parol evidence rule, "extrinsic evidence pre-dating a written agreement may not be used to add to or otherwise modify the terms of a written agreement in instances where the written agreement has been adopted by the parties as an expression of their final understanding." *Teg-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 133-39 (Fed. Cir. 2006). However, "extrinsic evidence such as prior agreements and documents will be considered part of a contract when they are incorporated into the contract." *Id.* Moreover, the parol evidence rule "does not bar the use of extrinsic evidence to interpret the terms of a contract when the plain and ordinary meaning is not clear from the contract itself." *Id.* Here, the allegations in the Accusation are incorporated by reference within the Insurance Commissioner's order and the Accusation and Waiver (which itself is incorporated within the Insurance Commissioner's order). Additionally, the allegations in the Accusation do not contradict or add to the terms of the Insurance Commissioner's order or the Stipulation and Waiver. Both documents state that Acosta is being sanctioned for the misconduct described in the Accusation. Without referring to the Accusation, there is no way to know why Acosta is being sanctioned. The allegations in the Accusation therefore are not barred by the parol evidence rule.

is statutorily disqualified if he is subject to any final order described in Section 15(b)(4)(H). 15 U.S.C § 78c(a)(39)(F). This includes any order of a state insurance commission that "constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct." 15 U.S.C. § 78o(b)(4)(H). Acosta is subject to the Insurance Commissioner's final order. That order incorporates Acosta's acknowledgement that, if proven true and correct, the allegations against him would establish his violation of a regulation prohibiting licensees from engaging in fraudulent and deceptive practices. Acosta therefore mects the critera for disqualification under Exchange Act Section 3(a)(39)(F).[23]

Contrary to Acosta's assertion, the Stipulation and Waiver's specific reference to California Insurance Code Section 1668.1 does not limit the scope of the Insurance Commissioner's order in any way. Section 1668.1 is referenced among the prospective conditions imposed on Acosta's restricted licenses—not the remedial sanctions imposed for the violations alleged in the Accusation (i.e., the revocation of his unrestricted licenses).

The prospective conditions are described in the fifth through tenth paragraphs of the Stipulation and Waiver. In the fifth paragraph, Acosta agrees that he "shall comply with the California Insurance Code and its regulations," which by definition includes Section 1668(i), and obey all other laws and regulations. In the sixth paragraph, Acosta specifically agrees to "come into compliance with" Section 1668.1 by repaying the loan from the elderly customer and

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[23] This determination is supported by the decision in *Melton*, in which the Commission looked to the allegations in an injunctive complaint when interpreting the resulting consent injunction, even though the allegations were not proven in court. *Melton*, 56 S.E.C. at 701 ("In accordance with our traditional policy, we properly may take into account the allegations underlying the injunction to which Respondents consented when considering their arguments that a revocation and bar are not necessary in the public interest.").

relinquishing the insurance policy he took out on the customer's life.[24] In the seventh and eight paragraphs, Acosta agrees that his license may be summarily revoked if, in the future, he becomes the beneficiary on any insurance policy for any customer or enters into any loan with any customer. In the ninth and tenth paragraphs, Acosta agrees that his license will be subject to these conditions until the Insurance Commissioner removes or modifies them, and that the Insurance Commission may do so after five years if there has not been a justified complaint against Acosta during that period and there is no pending investigation or disciplinary action against him. These prospective conditions in no way limit the remedial sanctions imposed for the violations alleged in the Accusation.

Acosta erroneously contends that FINRA's interpretation of the order in this case means that no person accused of fraud can ever settle the matter without the resulting order being disqualifying. That is not correct. This issue, among others, can be addressed during negotiations over the terms of an order.[25] Acosta, who was represented by counsel, could have attempted to negotiate different terms in the Stipulation and Waiver. Had Acosta and the Insurance Commissioner not intended for Acosta to be sanctioned based on the Accusation's allegation that he violated California Insurance Code Section 1668(i), language to that effect could have been included in the Stipulation and Waiver. Either Acosta failed to request such

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[24] In his Declaration, Acosta states that he came into compliance with Section 1668.1 by transferring the life insurance policy to the customer and paying off the balance of the loan from the customer within 30 days of the issuance of the Insurance Commissioner's order. Acosta Declaration ¶ 18.

[25] *See Brett Thomas Graham*, Exchange Act Release No. 84526, 2018 SEC LEXIS 3056, at *21 (Nov. 2, 2018) (refusing to consider applicant's argument that the terms of a settlement were "unwarranted and unjustified" because "the time to consider those factors and make those arguments was at the time of settlement, not years later" when requesting the Commission's consent to associate).

language, or the Insurance Commissioner refused his request to include it. Alternatively, upon learning about the Registration Department's interpretation of the Order, Acosta could have asked the Insurance Commissioner to amend the Order to make clear that it is not based on Acosta's alleged violation of Section 1668(i).[26] Either Acosta did not seek that relief, or the Insurance Commissioner denied it.

The Insurance Commissioner's order sanctions Acosta based on his past violations of Section 1668(i) of the California Insurance Code, as well as his violations of Sections 785, 1668.1(a), and 1668.1(b). The order further requires him to comply with all of these provisions going forward. The Registration Department therefore had ample reason to believe that the Insurance Commissioner's order subjects Acosta to statutory disqualification.

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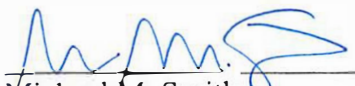
[26] The California Insurance Code authorizes the Insurance Commissioner to correct an order "upon becoming satisfied that it is fair, just and equitable to make the correction and that any such record, finding, determination, order, rule or regulation would have included such correction except for mistake, clerical error, inadvertence, surprise or excusable neglect." Cal. Ins. Code § 12929.

CONCLUSION

The Commission should dismiss Acosta's application because the Registration Department's letter is not a bar or a prohibition or limitation on Acosta's access to a FINRA service and therefore it is not reviewable under Exchange Act Section 19(d).

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, Michael M. Smith, certify that this brief complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 5,635 words.

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CERTIFICATE OF SERVICE

I, Michael M. Smith, certify that, on May 6, 2019, I caused the original and three copies of FINRA's Brief in Response to the Commission's Order Requesting Additional Briefing in the matter of the Application for Review of Gregory Acosta, Administrative Proceeding File No. 3-18637, to be served via messenger on:

Vanessa Countryman, Acting Secretary
Securities and Exchange Commission
100 F Street, N.E.
Room 10915
Washington, D.C. 20549

and via Federal Express Overnight Delivery and Electronic Mail on:

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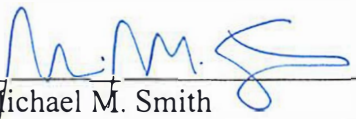
Service was made on the Commission via messenger and on applicant's counsel via Federal Express and Electronic Mail due to the distance between FINRA's office and applicant's counsel's addresses.

Respectfully submitted,



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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application for Review of

Gregory Acosta

Administrative Proceeding File No. 3-18637

DECLARATION OF CHRISTOPHER DRAGOS

I, CHRISTOPHER DRAGOS, declare:

1. I am an Associate Director, Regulatory Review and Disclosure, within FINRA's Registration and Disclosure Department (the "Registration Department"). I have personal knowledge of the matters set forth in this declaration.

2. The Registration Department reviews filings by state and federal regulators, Forms U4 and U5, and other sources of information that could disclose statutorily disqualifying events for associated persons as defined under Section 3(a)(39) of the Securities and Exchange Act of 1934 and Article III, Section 4 of FINRA's By-Laws.

3. When the Registration Department has reason to believe that an associated person is statutorily disqualified and an application or request for relief is required, based on its review of these filings, the Registration Department sends written notice to the FINRA member(s) with which the person is associated.

4. The table below shows, on a year-by-year basis, the number of such notices the Registration Department sent between 2015 and 2018.

Year	Notices Sent
2015	210

2016	170
2017	177
2018	148
Total	**705**

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 30, 2019, in Rockville, Maryland.

Christopher Dragos