

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**

In the Matter of the Application of

Michael Clark for Review of

FINRA Action

File No. 3-20276

**FINRA'S BRIEF IN OPPOSITION TO  
APPLICATION FOR REVIEW**

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**I. INTRODUCTION**

In January 2021, California’s Department of Insurance revoked Michael Clark’s insurance license. California revoked Clark’s license after he failed to respond to its inquiry concerning New York State’s November 2019 revocation of his insurance license. As a result of California’s license revocation, Clark was prohibited from transacting insurance business in the state and California’s revocation order had the practical effect of barring him. Consequently, FINRA notified Clark’s employing firm that the California order rendered Clark statutorily disqualified under the Securities Exchange Act of 1934 (“Exchange Act”) and FINRA’s By-Laws.<sup>1</sup> FINRA informed Clark’s firm that, because Clark is a disqualified individual, his firm

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<sup>1</sup> FINRA’s disqualification notice informed Clark’s firm that Clark was disqualified as a result of California’s order and New York’s revocation order. Since Clark filed his appeal, he reapplied for an insurance license and New York recently granted Clark’s request. *See infra* Part II.D. Clark is therefore no longer prohibited from selling insurance in New York, and New York’s 2019 revocation of his insurance license no longer renders Clark statutorily disqualified. Consequently, this brief focuses on California’s revocation as the basis for Clark’s disqualification.

would either need to seek FINRA's approval for Clark to continue to associate with the firm or terminate him.

Clark now appeals FINRA's determination that he is statutorily disqualified. He argues that California's revocation of his insurance license, which admittedly prohibits him from engaging in insurance business in the state, nonetheless does not bar him from engaging in insurance business. He bases this argument on the fact that he can reapply for his California insurance license and in fact, has done so, although California has not yet approved his application and might never approve it. Clark also argues that it is unfair that FINRA issued the disqualification notice because it allegedly provided guidance that license revocations are not the equivalent of bars and selectively issued Clark a disqualification notice but not other similarly situated registered representatives.

The Commission should reject these arguments. Under the Exchange Act, an individual is statutorily disqualified if he is subject to a final order by a state insurance regulator that bars him from engaging in insurance activity. The Commission has held that a state regulator's order constitutes a disqualifying bar order if it has the practical effect of prohibiting a person from engaging in an activity. FINRA applied this precedent to properly conclude that Clark is statutorily disqualified. It is undisputed that currently Clark may not engage in insurance business in California because California revoked his license. Unless and until California reinstates Clark's license, he is prohibited from engaging in this activity and thus he is barred and disqualified under the Exchange Act. Clark's ability to seek permission from California to engage in the insurance business, without actual approval from the state, does not change the practical effect of California's order, which prohibits Clark from selling insurance.

Moreover, the Commission should reject Clark’s arguments that it was unfair for FINRA to issue the disqualification notice. FINRA followed published Commission precedent and guidance when it determined that Clark was disqualified. Further, Clark’s argument that FINRA selectively sent Clark a disqualification notice while not sending notices to similarly situated brokers is baseless and not supported by the record. FINRA urges the Commission to dismiss this appeal and affirm FINRA’s determination that Clark is statutorily disqualified.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Clark**

Clark has more than 25 years of experience in the securities industry, and he has been registered with Ameriprise Financial Services, LLC (“Ameriprise”) as a general securities representative since 1995. (RP 048-49.)<sup>2</sup> Clark is currently employed by Ameriprise. (RP 048.)

In addition to Clark’s securities licenses, and as is relevant here and described in detail below, Clark has held and currently holds insurance licenses from several states. *See, e.g.*, RP 001, 005.

### **B. California Revokes Clark’s Insurance License**

In November or December 2019, Clark entered into a stipulation with New York’s Department of Financial Services (the “New York Stipulation”). (RP 001-003.) Pursuant to the New York Stipulation, Clark admitted that he “demonstrated untrustworthiness and/or incompetence” because he failed to respond to three letters from New York’s Department of

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<sup>2</sup> “RP \_\_\_” refers to the page numbers in the certified record filed by FINRA on May 10, 2021.

Financial Services concerning tax liens filed against him. (RP 002.) Pursuant to the New York Stipulation, Clark surrendered his license to conduct insurance business in New York. *Id.*

Clark failed to report New York's license revocation to California, as he was required to do. *See* RP 005. In May 2020, California's Department of Insurance (the "Department") sent Clark a written request seeking information about the New York Stipulation and the circumstances surrounding Clark's license revocation. *See Exhibit A* (May 1, 2020 request to Clark).<sup>3</sup> The Department warned Clark that if he failed to reply to its written request, his insurance license could be revoked. *Id.*

Clark did not respond to the Department's request. Consequently, on January 8, 2021, the Department entered an Order of Summary Revocation against Clark (the "California Order"). (RP 005-007.) The California Order stated that Clark failed to respond to the Department's May 2020 written inquiry, in violation of its rules and regulations. (RP 006.) The California Order further stated that, pursuant to its rules and regulations, the Department could summarily revoke Clark's license based upon the New York Stipulation.<sup>4</sup> *Id.* Consequently, the Department

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<sup>3</sup> The request was dated May 1, 2020 (and not May 20, 2020, as referenced in the California Order). FINRA did not include this written request in the record because when it filed the record in May 2021, Clark was disqualified by virtue of the New York Stipulation and the California Order, and at that point the parties focused on the New York Stipulation as the basis for Clark's disqualification. As noted herein, since filing the record, New York granted Clark's reapplication for an insurance license and Clark is no longer disqualified by virtue of the New York Stipulation. The Commission should accept this letter pursuant to Commission Rule of Practice 452, as it is material to this appeal and good cause exists for failing to include it in the original record.

<sup>4</sup> California Insurance Code Section 1669 addresses grounds on which a license may be summarily revoked. Specifically, Section 1669(c) states that the Commissioner may:

without hearing, deny an application if the applicant . . . (h)ad a previously issued professional, occupational, or vocational license suspended or revoked for cause by a licensing authority, within five years of the date of the filing of the

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summarily revoked Clark's insurance license, effective within 30 days of its entry. (RP 006-007.) Clark was served with a copy of the California Order by regular and certified mail. (RP 014.)

Clark took no further action in connection with the California Order. Consequently, the revocation of his insurance license became effective on February 8, 2021.

C. FINRA Determines that the New York Stipulation and the California Order Renders Clark Statutorily Disqualified

Clark disclosed on his Uniform Application for Securities Industry Registration or Transfer ("Form U4) both the New York Stipulation and the California Order on March 18, 2021. (RP 065-66.)<sup>5</sup> After receiving notice of the New York Stipulation and the California Order, FINRA issued Ameriprise a notice dated March 29, 2021 (the "SD Notice").<sup>6</sup> (RP 027-

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application to be acted upon, on grounds that should preclude the granting of a license by the commissioner under this chapter.

Cal. Ins. Code § 1669 (Deering 2021).

<sup>5</sup> Article V, Section 2(c) of FINRA's By-Laws requires an associated person to keep his Form U4 current at all times and to update information on Form U4 within 10 days if the amendment involves a statutory disqualification. Further, FINRA Rule 1122 states that, "[n]o member or person associated with a member shall file with FINRA information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof." Clark did not timely disclose the 2019 New York Stipulation. Nor did he timely disclose the California Order.

<sup>6</sup> See FINRA Rule 9522(a)(1) (providing that "[i]f FINRA staff has reason to believe that a disqualification exists . . . , FINRA staff shall issue a written notice to the member or applicant for membership under Rule 1013"). FINRA Rule 9522(a) further provides that if FINRA staff concludes that an individual is statutorily disqualified, it shall notify the individual's employing firm so that the firm can initiate an eligibility proceeding or terminate its association with the individual within 10 days (unless FINRA staff extends such 10-day period). See FINRA Rule 9522(a)(3).

28.) The SD Notice informed Ameriprise that the New York Stipulation and the California Order rendered Clark statutorily disqualified under the Exchange Act and FINRA's By-Laws. It further stated that, as a result of Clark's statutory disqualification, Ameriprise was required to seek and obtain FINRA's approval to continue his association. The SD Notice further provided that, if the firm declined to initiate an eligibility proceeding to obtain approval for Clark's continued association, it must terminate him on or before April 15, 2021. FINRA staff extended the time for Ameriprise to initiate an eligibility proceeding until May 6, 2021.<sup>7</sup> (RP 043.)

D. Clark Appeals the SD Notice and Seeks a Stay

On April 26, 2021, Clark appealed the SD Notice and filed a motion to stay the effectiveness of the SD Notice. FINRA opposed Clark's stay request, which is pending. After FINRA filed its opposition to Clark's stay request, on June 17, 2021, Clark informed the Commission that New York granted Clark's re-application for an insurance license. *See* Clark's Supplement to Reply in Support of Petitioner's Motion to Stay Statutory Disqualification, filed on June 17, 2021. Consequently, the New York Stipulation no longer serves as a basis for disqualification because he is no longer prohibited from selling insurance in New York.<sup>8</sup>

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<sup>7</sup> The parties subsequently agreed to again extend this deadline until the Commission ruled upon Clark's motion to stay the effectiveness of the SD Notice, which he filed on April 26, 2021.

<sup>8</sup> *See SEC No-Action Letter*, 2009 SEC No-Act. LEXIS 349, at \*3 (Mar. 17, 2009) (stating view "that a person is no longer subject to a statutory disqualification when the time limitation of a bar or license revocation has expired provided that (i) application for reentry is not required or has been granted; (ii) the bar or revocation has no continuing effect; and (iii) the bar was not issued in connection with a final order based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive conduct"); *FINRA Regulatory Notice 09-19*, 2009 FINRA LEXIS 52 (Apr. 2009) (providing that for state bar orders, an MC-400 application to initiate an eligibility proceeding is required if the sanctions are still in effect).

On appeal, Clark argues that California's revocation of his insurance license is not the equivalent of a bar, and thus does not render him disqualified, because he was permitted to reapply for an insurance license and in fact recently reapplied and is waiting for California's decision on his application. Although California has not granted Clark permission to engage in insurance business, he asserts that the *possibility* that California may do so in the future shows that the sanction imposed by California was not "lasting" or permanent and somehow nullifies the fact that the California Order currently prohibits him from engaging in insurance business. Clark also argues that it is unfair for FINRA to determine that he is disqualified while he is in the process of reapplying for his insurance license. Further, he asserts that FINRA provided guidance in support of his claim that the revocation of his insurance license is not a disqualifying bar and selectively issued him the SD Notice, which purportedly renders FINRA's issuance of the SD Notice unfair.

### **III. ARGUMENT**

The Commission should dismiss this appeal because the California Order is a final order of a state insurance regulator that prohibits Clark from engaging in insurance business. As such, unless and until California grants Clark permission to engage in insurance business, the California Order renders Clark statutorily disqualified because it is a bar order under the Exchange Act and FINRA's By-Laws. Moreover, there is nothing unfair about FINRA's issuance of the SD Notice. FINRA issued the SD Notice based upon Commission precedent and published guidance, and the fact that he is currently reapplying for his insurance license does not somehow make FINRA's issuance of the SD Notice unfair.

Exchange Act Section 19(f) sets forth the applicable standard of review. *See Gregory Acosta*, Exchange Act Release No. 89121, 2020 SEC LEXIS 3470, at \*20-21 (June 22, 2020). That section provides that if the Commission finds that: (1) the “specific grounds” upon which FINRA based its action “exist in fact”; (2) such action is in accordance with FINRA’s rules; and (3) such rules are, and were applied in a manner consistent with the purposes of the Exchange Act, it “shall dismiss the proceeding,” unless it finds that such action “imposes any burden on competition not necessary or appropriate in furtherance of the purposes” of the Exchange Act. *See* 15 U.S.C. § 78s(f); *Acosta*, 2020 SEC LEXIS 3470, at \*20-21; *William J. Haberman*, 53 S.E.C. 1024, 1027 (1998), *aff’d*, 205 F.3d 1345 (8th Cir. 2000) (table).<sup>9</sup> Applying the standard set forth in Exchange Act Section 19(f), the Commission should dismiss Clark’s appeal.

A. The Specific Grounds of the SD Notice Exist in Fact

Under the Exchange Act, a person is statutorily disqualified if, among other things, he is subject to a final order of a state insurance regulator that bars him from engaging in the insurance business. *See* 15 U.S.C. §§ 78c(a)(39)(F), 78o(b)(4)(H)(i); *see also* FINRA By-Laws, Art. III, Sec. 4 (incorporating the definition of statutory disqualification set forth in the Exchange Act). As set forth below, the California Order is a disqualifying state bar order.

1. The California Order is a “Final Order”

First, Clark does not dispute that the California Order is a “final order” of a state insurance regulator, and the record shows that it is such an order. The California Order is the final disposition of the Department and was issued pursuant to its statutory authority. *See Nicolas S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 5100, at \*25 (Jun. 26,

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<sup>9</sup> Clark does not assert, and the record does not demonstrate, that FINRA’s SD Notice imposes an unnecessary or inappropriate burden on competition.

2014) (holding that to satisfy the Exchange Act’s fairness requirements, a final order means a written directive from a state regulator pursuant to its statutory authority that provides for notice, an opportunity to be heard, and constitutes a final disposition by the regulator).

Moreover, before the Department entered the California Order against Clark and it became effective, the Department provided him with notice and an opportunity to explain why his license should not have been revoked. *Id.* Indeed, in May 2020 the Department requested that Clark explain the circumstances surrounding the New York Stipulation, warned Clark that his license could be revoked if he failed to provide the Department with information related to the New York Stipulation, and invited Clark to ask questions or notify the Department of any concerns. *See Exhibit A.* Clark never responded to the Department’s written inquiry.

Further, Clark failed to take any action after entry of the California Order but before it became effective and his license was revoked. Pursuant to its express terms, the California Order did not become effective—and Clark’s license was not revoked—until 30 days after the order’s entry. (RP 006-007.) The Department served a copy of the California Order on Clark several days after it was entered, and thus notified Clark that his insurance license was going to be revoked in 30 days. (RP 014.) Before the California Order became effective and Clark’s license was revoked, Clark could have contested the basis for its entry and argued that the Department should not revoke his insurance license.<sup>10</sup> Clark, however, did not contest the California Order or otherwise respond in any way to its entry.

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<sup>10</sup> Individuals such as Clark who receive a summary revocation order may seek reconsideration or appeal the order to a state court. *See* Cal. Gov’t Code § 11521 (Deering 2021) (“The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party”); Cal. Gov’t Code § 11523 (Deering 2021) (“Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as

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Clark—despite being notified twice that his license was in jeopardy—did not take advantage of either the opportunity to prevent entry of the California Order or an opportunity to prevent it from becoming effective, and his insurance license was therefore revoked on February 8, 2021. Under the circumstances, Clark had notice and a fair opportunity to challenge the grounds for the California Order, prevent the revocation of his insurance license, and thus prevent the collateral consequence of having the California Order render him statutorily disqualified. That he did not avail himself of these opportunities is irrelevant in determining whether the California Order is a final order under the Exchange Act. *Cf. Savva*, 2014 SEC LEXIS 5100, at \*31 (stating that even though a hearing was not conducted before entry of the disqualifying state consent order, applicant had an opportunity for a hearing and this is sufficient to satisfy the Exchange Act’s requirements).

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otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered.”); *see also* California Department of Insurance, Background Review FAQs (2021), <http://www.insurance.ca.gov/0200-industry/0035-background-info/background-faq.cfm> (explaining how to appeal a denial decision and request reconsideration within thirty days of an order by sending a written request “setting forth the reasons why you feel the reconsideration should be granted. You should include any and all additional evidence you would like reconsidered. It is important that you not just include the same information previously provided. Examples of the types of evidence to include would include rehabilitation evidence, letters of recommendation, witness statements, etc.”).

Although the decision whether to conduct a hearing on a request to reconsider is within the Insurance Commissioner’s discretion pursuant to Cal. Gov’t Code § 11521, the record does not show that Clark ever requested a hearing. Regardless, Clark had an opportunity to do so and an opportunity to file a petition for reconsideration and make his arguments before the California Order became effective. *See* Cal. Gov’t Code § 11521(b).

2. The California Order Bars Clark from Engaging in Insurance Business

Second, the California Order bars Clark because it prohibits him from engaging in insurance business in California. The Commission has stated that if a state regulator's order prohibits a person from engaging in an activity, it has the practical effect of a bar regardless of the nomenclature used in the order, and thus is disqualifying under Exchange Act Section 15(b)(4)(H)(i). *See Meyers Assocs., L.P.*, Exchange Act Release No. 81778, 2017 SEC LEXIS 3096, at \*15-16 (Sept. 29, 2017). In *Meyers Associates*, the Commission held that the state order at issue was disqualifying under Exchange Act Section 15(b)(4)(H)(i) because it had the practical effect of a bar by prohibiting Meyers from engaging in securities business, and the Commission observed that FINRA had previously and appropriately employed a similar "functional approach" to determining whether a state regulator's order was disqualifying in accordance with Commission guidance. *See id.* at \*20-21.

Pursuant to this precedent, the California Order is a disqualifying bar order. The California Order revoked Clark's license to engage in insurance business in California and, without a license, Clark cannot conduct such business. *See* Cal. Ins. Code § 1631 (Deering 2021) (providing that "a person shall not solicit, negotiate, or effect contracts of insurance, or act in any of the capacities defined in Article 1 (commencing with Section 1621) unless the person holds a valid license from the commissioner authorizing the person to act in that capacity"); *see also* Cal. Ins. Code § 1633 (Deering 2021) (stating that engaging in an insurance transaction without a license is a misdemeanor). Because the California Order prohibits Clark from engaging in insurance transactions, it has the practical effect of a bar and renders him statutorily disqualified under Exchange Act Section 15(b)(4)(H)(i).

Clark nevertheless argues that because he can reapply for an insurance license in California, and has recently done so, the California Order is not a disqualifying bar order because it does not impose “any lasting sanctions.” *See* Clark’s Brief, at 4-7. The Commission should reject this argument. In determining whether a state order is a disqualifying bar order, the Commission has never based its analysis on whether the sanction at issue is “lasting” or permanent. Indeed, in *Meyers Associates* the Commission found that a state regulator’s order was disqualifying even though the order permitted the disqualified individual to apply for a securities license after three years. *See* 2017 SEC LEXIS 3096, at \*3, \*14-17. The Commission focused instead on the practical impact of the order at issue and whether the order prohibited the individual from engaging in an activity. *Id.* at \*14-17.

Currently, and pursuant to the Commission’s analysis in *Meyers Associates*, Clark’s insurance license in California is revoked and he remains unable to legally conduct insurance business in the state. Unless and until California reinstates his insurance license and thereby permits him to engage in insurance business—which may never happen—the prohibition imposed by the California Order remains in effect and Clark remains statutorily disqualified.<sup>11</sup> *Cf. SEC No-Action Letter*, 2009 SEC No-Act. LEXIS 349, at \*3 (stating view “that a person is no longer subject to a statutory disqualification when the time limitation of a bar or license

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<sup>11</sup> Clark states that “whether an advisor has a right to reapply for his license should impact issues involving statutory disqualification” and cites to *May Capital Group, LLC*, Exchange Act Release No. 53796, 2006 SEC LEXIS 1068 (May 12, 2006) in support. *See* Clark’s Brief, at 5. That case, which involved a FINRA suspension for an individual’s willful failure to disclose matters on his Form U4 and FINRA’s subsequent denial of the firm’s application to continue to employ the disqualified individual, is inapposite to the facts here and has no bearing on whether the California Order renders Clark disqualified because it is a state bar order. Rather, *May Capital* discussed what factors should be considered in determining whether to approve a statutory disqualification application in the context of an eligibility proceeding.



revocation has expired provided that (i) application for reentry is not required or has been granted; (ii) the bar or revocation has no continuing effect; and (iii) the bar was not issued in connection with a final order based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive conduct”); *FINRA Regulatory Notice 09-19*, 2009 FINRA LEXIS 52 (providing that for state bar orders, an MC-400 application to initiate an eligibility proceeding is required if the sanctions are still in effect).

Clark also argues that the Commission’s decision in *Savva* bolsters his contention that a state revocation order must impose a lasting sanction for it to constitute a disqualifying bar order. *See* Clark’s Brief, at 5-6. *Savva* provides no support for this position. *Savva* was disqualified because of a state securities regulator’s order that was based upon findings that he violated laws that prohibit fraudulent, manipulative, or deceptive conduct. *See* 2014 SEC LEXIS 5100, at \*11-12, \*24-36. *Savva* agreed not to register in the state as a broker-dealer or investment adviser representative. *Id.* at \*13. The Commission noted that *Savva*’s sanctions were still in effect because the state had not granted him permission to engage in these activities, which is precisely the situation that Clark currently faces. *See id.*

In analogous circumstances, the Commission has focused on the current status of a disqualifying order—not what the future status of the order could be. For example, the Commission has repeatedly held that a pending appeal of a disqualifying injunction does not impact its status as a statutorily disqualifying event. *See, e.g., Robert J. Escobio*, Exchange Act Release No. 83501, 2018 SEC LEXIS 1512, at \*15 (June 22, 2018) (“we have stated previously [that] an injunction is the action of a court of competent jurisdiction, and the fact that an appeal is taken does not affect the injunction’s status as a statutory disqualification”); *Robert J. Sayegh*, 52 S.E.C. 1110, 1112 (1996) (holding that the pendency of an appeal of a permanent injunction

“would not alter the ‘factual’ existence of the injunction ‘and its public interest implications’”); *Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992) (rejecting argument that excluding individual from the securities business was unfair where he was disqualified as a result of a preliminary injunction that was still awaiting final determination).

In such situations, the Commission has observed that if an individual is successful on appeal he may seek to have FINRA’s action related to the disqualification vacated. *See Tannenbaum*, 50 S.E.C. at 1140 (stating that, “[s]hould a respondent ultimately prevail, the justification for any regulatory action based on a preliminary order would disappear and such action would be vacated”). Similarly, if Clark successfully obtains his insurance license from California, he would no longer be prohibited from conducting insurance business, the California Order’s sanctions would no longer be in effect, and he would no longer be disqualified pursuant to the California Order. These potential future events, however, have no bearing on Clark’s current status as a disqualified individual because the California Order continues to prohibit him from engaging in insurance business in California.

For all these reasons, the specific grounds for Clark’s statutory disqualification exist in fact, and the Commission should reject Clark’s arguments to the contrary.

B. FINRA Issued the SD Notice in Accordance with its Rules

Turning to the second prong of Exchange Act Section 19(f), there is no dispute that FINRA issued the SD Notice in accordance with its rules.

After reviewing the California Order, FINRA staff had reason to believe that Clark was statutorily disqualified. Consequently, and pursuant to FINRA Rule 9522(a)(1), FINRA staff issued Ameriprise the SD Notice. The SD Notice notified the firm that the California Order rendered Clark statutorily disqualified under the Exchange Act, and that if Ameriprise wished to

continue his association, it must initiate an eligibility proceeding on Clark's behalf or terminate him. (RP 027-28.) FINRA followed its rules when it issued the SD Notice.

C. FINRA Rule 9522 is in Accord and Consistent with the Exchange Act's Purposes

Finally, FINRA Rule 9522's requirement that FINRA staff send a notification if it determines that an individual is statutorily disqualified, and FINRA's issuance of the SD Notice here, is in accord and consistent with the purposes of the Exchange Act. A central purpose of the Exchange Act is to promote market integrity and enhance investor protection. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 658 (1997) (stating that in passing the Exchange Act, one of Congress's animating objectives was "to insure honest securities markets and thereby promote investor confidence"). In this vein, FINRA was formed to "adopt, administer, and enforce rules of fair practice," "[t]o promote . . . high standards of commercial honor," and "to promote just and equitable principles of trade for the protection of investors." FINRA Manual, Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc., Objects or Purposes (Third) (1) and (3) (July 2, 2010). Within the structure created by the Exchange Act, FINRA promulgates and enforces rules to protect investors and the public interest.

Under the Exchange Act, individuals subject to state bar orders are statutorily disqualified and must seek and obtain FINRA's approval to continue to associate with a broker-dealer. *See* 15 U.S.C. §§ 78c(a)(39)(F), 78o(b)(4)(H)(i); FINRA By-Laws, Art. III, Sec. 4; FINRA Rule 9522. The Exchange Act and its rules establish the framework within which FINRA evaluates whether to allow an individual who is subject to a statutory disqualification to associate with a broker-dealer. *See* 15 U.S.C. § 78o-3(g)(2) ("A registered securities association may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection of investors shall, deny membership to any registered broker

or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification.”); *see also* 17 C.F.R. § 240.19h-1. The FINRA Rule 9520 Series sets forth the process pursuant to which a disqualified individual may associate, or continue to associate, with a member firm notwithstanding his statutory disqualification. *See Savva*, 2014 SEC LEXIS 5100, at \*6 (stating that the Exchange Act’s statutory disqualification provisions “are not self-executing” and must be implemented by a self-regulatory organization).

The first step that FINRA takes in connection with the statutory disqualification process is to evaluate whether individuals are disqualified and, if it determines that they are, to send notification of that determination. *See* FINRA Rule 9522(a)(1). In doing so here, and promptly after receiving notice of the California Order, FINRA evaluated the order and whether it prohibited Clark from engaging in insurance business pursuant to Commission precedent. FINRA staff concluded that Clark was statutorily disqualified and issued the SD Notice to further the purposes of the Exchange Act’s statutory disqualification provisions and to ensure that his continued participation in the industry was in the public interest and did not create an unreasonable risk of harm to the markets or investors. *See Acosta*, 2020 SEC LEXIS 3470, at \*17 (“we reiterate the important role that disqualification plays in ensuring that persons who come within the statutory parameters for disqualification are monitored effectively and prevented from returning to the industry absent a finding that such association would be in the public interest”); *Savva*, 2014 SEC LEXIS 5100 (holding that FINRA appropriately denied membership continuance application based upon its determination that Savva’s continued association with his firm was not in the public interest and would create an unreasonable risk of harm to the markets or investors). FINRA Rule 9522(a)(1), and FINRA’s issuance of the SD Notice in accordance with that rule, is entirely consistent with the purposes of the Exchange Act. *See Meyers Assocs.*,

2017 SEC LEXIS 3096, at \*31-33 (holding that FINRA’s determination that individual was statutorily disqualified and denial of membership continuance application was consistent with the Exchange Act and its purposes and rejecting applicants’ argument that FINRA’s interpretation of what constitutes a disqualifying state securities regulator’s bar order was against public policy).

Clark argues that fairness supports setting aside the SD Notice because he is currently in the process of attempting to regain his California insurance license. *See* Clark’s Brief, at 8. Clark ignores that when the SD Notice was issued, he had not yet reapplied for his California license. Indeed, Clark did not reapply for his California insurance license when the revocation became effective on February 8, 2021, or when FINRA issued the SD Notice on March 29, 2021, but rather he reapplied on May 12, 2021. *See* Exhibit A to Clark’s Supplement to Reply in Support of Petitioner’s Motion to Stay Statutory Disqualification, filed on June 17, 2021. Regardless, and as set forth above, the fact that California may in the future permit Clark to sell insurance does not alter the fact that he currently is unable to do so (and is thus disqualified under the Exchange Act). There was nothing unfair about FINRA’s issuance of the SD Notice.

Clark also argues that it is fundamentally unfair for FINRA “to (1) provide guidance indicating that license revocations are not the equivalent of bars and (2) selectively choose to statutorily disqualify certain brokers whose insurance licenses are revoked but not others.” Clark’s Brief, at 9. In support, Clark points to a statement contained in FINRA’s Sanction Guidelines describing a bar as a “permanent expulsion of an individual from associating with a firm in any and all capacities” and states that it has taken the opposite position regarding Clark. *Id.* (citing FINRA Sanction Guidelines, at 3-4 (General Principles Applicable to All Sanction Determinations, No. 3 (Adjudicators should tailor sanctions to respond to the misconduct at

issue.), [https://www.finra.org/sites/default/files/Sanctions\\_Guidelines.pdf](https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf)). He further asserts that FINRA staff informed Ameriprise and Clark's attorney that it does not consider all insurance license revocations to be bars and bases its disqualification determinations on undisclosed factors. *See* Clark's Brief, at 10.

The Commission should reject these arguments. FINRA's Sanction Guidelines, which address misconduct in a disciplinary setting, are not pertinent to FINRA's determination whether the California Order rendered Clark statutorily disqualified under the Exchange Act because it prohibited him from engaging in insurance business. The Guidelines explain the effect of a FINRA bar—not a sanction imposed by a state regulator.<sup>12</sup> And, pursuant to *Meyers Associates*, the pertinent inquiry is whether the order at issue prohibits an individual from engaging in an activity—not whether the sanction imposed by a state is “permanent.” *See Meyers Assocs.*, 2017 SEC LEXIS 3096, at \*14-17.

Moreover, the record shows that contrary to Clark's assertion that FINRA staff informed him that it determines whether a state order is a disqualifying bar order based upon undisclosed and non-public factors, FINRA staff informed Clark and Ameriprise that it relies upon *Meyers*

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<sup>12</sup> It is well established that a statutory disqualification determination is not a sanction. *See Escobio*, 2018 SEC LEXIS 1512, at \*31 (stating that “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 Section 3(a)(39)(F).”). Further, the Commission should reject Clark's argument that his ability to reapply for an insurance license in California demonstrates that California did not intend to permanently bar Clark. Even if a permanent, ever-lasting sanction is required to show that a state regulator's order is a disqualifying bar order under the Exchange Act (which it is not), California's intent has no bearing on the determination whether Clark is statutorily disqualified because the California Order prohibited him from engaging in insurance business. *See Meyers Assocs.*, 2017 SEC LEXIS 3096, at \*22-23 (stating that for unambiguous orders, “[w]e need not look beyond the four corners of the [disqualifying order] to discern the parties' intent because that provision of the consent order had the effect of barring him from the securities business in that state”).

*Associates* and other publicly available precedent and guidance and examines whether the state order at issue had the practical effect of prohibiting an individual from engaging in an activity. *See* RP 029-36. Clark may not like the end result, but there is simply nothing unfair about FINRA relying upon publicly available Commission precedent and guidance in concluding that Clark is statutorily disqualified.

#### IV. CONCLUSION

The Commission should dismiss Clark's appeal. FINRA relied upon well-reasoned Commission precedent and guidance when it determined that the California Order has the practical effect of prohibiting Clark from engaging in insurance business. Clark had several opportunities to contest the revocation of his insurance license but did not do so. As a result, he must rely on his firm to initiate an eligibility proceeding because California revoked his insurance license and prohibited him from selling insurance. For these reasons, FINRA urges the Commission to dismiss this appeal.

Respectfully submitted,

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July 29, 2021

**CERTIFICATE OF COMPLIANCE**

I, Andrew Love, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

I, Andrew Love, further certify that this Brief of FINRA in Opposition to Application for Review complies with the 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 5,907 words.

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Dated: July 29, 2021



**CERTIFICATE OF SERVICE**

I, Andrew Love, certify that on this 29<sup>th</sup> day of July 2021, I caused a copy of the foregoing Brief in Opposition, Administrative Proceeding File No. 3-20276, to be filed through the SEC's eFAP system and to be served by electronic mail on:

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**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**

In the Matter of the Application of

Michael Clark for Review of

FINRA Action

File No. 3-20276

**INDEX OF ATTACHMENTS TO FINRA'S OPPOSITION TO  
APPLICANT'S APPLICATION FOR REVIEW**

<b><u>Attachment</u></b>	<b><u>Description</u></b>
A	May 1, 2020 request to Clark

# **Exhibit A**

**From:** [Edd, Sarah](#)  
**To:** [michael.k.clark@ampf.com](mailto:michael.k.clark@ampf.com)  
**Subject:** California Department of Insurance - Letter to Michael K. Clark  
**Date:** Friday, May 1, 2020 3:01:00 PM  
**Attachments:** [Michael Clark.pdf](#)  
[image001.png](#)

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Mr. Clark,

My name is Sarah Edd and I am a Background Analyst with the California Department of Insurance. The Department has been made aware of disciplinary actions taken against you on 12/11/19, and there is documentation we need you to provide. Please read the letter I have attached to this email for the details and respond as soon as possible. I also want to emphasize that due to COVID-19, the Department asks that you not only mail the certified documents requested, but email a copy as well to [Sarah.Edd@insurance.ca.gov](mailto:Sarah.Edd@insurance.ca.gov).

If you have any questions or concerns, please let me know and the best way to reach me is by email.

Thank you,

**Sarah Edd**

Staff Services Analyst | Officer Background Section

CA Department of Insurance

(916) 492-3687

[Sarah.Edd@insurance.ca.gov](mailto:Sarah.Edd@insurance.ca.gov)





**RICARDO LARA**  
CALIFORNIA INSURANCE COMMISSIONER

May 1, 2020

Michael K. Clark  
Ameriprise Financial/Riversource Life  
116 S River Rd Unit E  
Bedford, New Hampshire 03110-6734

Dear Mr. Clark:

This office has received information that you had a disciplinary action taken against you by the New York Department of Insurance on December 11, 2019 that you failed to report as a background change within 30 days as required under Insurance code section 1729.2. In order to complete our review, please provide the following as indicated:

- A signed and dated statement stating the circumstances surrounding the incident that led to your disciplinary action and the reason you failed to disclose the disciplinary action as required. Also include a phone number where you can be reached.
- Certified copies of the disciplinary action, including pleading and order.

**DUE TO COVID-19, THE DEPARTMENT REQUESTS THAT YOU MAIL AND EMAIL THE NECESSARY CERTIFIED DOCUMENTS. DO NOT WRITE OR MARK ON ANY DOCUMENTS.**

California Insurance Code section 1736.5 requires that every person shall provide a prompt reply in writing to an inquiry from the commissioner relative to an application for, or the retention or renewal of, a license. The commissioner may revoke, suspend, or refuse to issue or renew a license if the licensee or applicant does not promptly reply in writing to an inquiry from the commissioner within 21 days.

Sincerely,

Sarah Edd  
Background Analyst  
916-492-3687  
Sarah.Edd@insurance.ca.gov