SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 72485 / June 26, 2014

Admin. Proc. File No. 3-15017

In the Matter of the Application of

NICHOLAS S. SAVVA and HUNTER SCOTT FINANCIAL, LLC
c/o Michael Schwartzberg, Esq.
Winget, Spadafora & Schwartzberg, LLP
45 Broadway, 19th Floor
New York, New York 10006

For Review of Action Taken by
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DENIAL OF MEMBERSHIP CONTINUANCE APPLICATION

Registered securities association denied member firm's application to permit continued association of an individual who was subject to a statutory disqualification because of his consent to a 2004 final order of a state regulatory authority based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct. *Held*, the review proceeding is *dismissed*.

APPEARANCES:

Michael Schwartzberg and *Steven E. Mellen*, of Winget, Spadafora & Schwartzberg, LLP, for Nicholas S. Savva and Hunter Scott Financial, LLC.

Alan Lawhead, *Michael J. Garawski*, and *Andrew J. Love*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: September 10, 2012
Last brief received: January 23, 2013

Hunter Scott Financial, LLC ("Hunter Scott" or the "Firm") and Nicholas S. Savva ("Savva") appeal from FINRA's[1] denial of Hunter Scott's MC-400 Membership Continuance Application ("MC-400 Application" or the "Application") requesting permission for Savva to continue his association with the Firm as a general securities representative notwithstanding that he was subject to a statutory disqualification under Section 3(a)(39)(F) of the Securities Exchange Act of 1934,[2] which is incorporated by reference in Article III, Section 4 of FINRA's By-Laws.[3] Savva became subject to a statutory disqualification because of his consent in 2004 to a final order of the Vermont State Department of Banking, Insurance, Securities and Health Care Administration (the "Vermont Department") based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct in the securities business (the "Vermont Order").[4] On appeal, Hunter Scott and Savva contend that the Vermont Order was not a "final order" within the meaning of the Exchange Act's statutory disqualification provision, and that FINRA's denial of Hunter Scott's MC-400 Application was unfair.[5] For the reasons set forth below, we conclude that FINRA's denial of Hunter Scott's MC-400 Application was in

---

1 In July 2007, the National Association of Securities Dealers, Inc. ("NASD") was consolidated with the regulatory arm of the New York Stock Exchange, LLC, resulting in the formation of the Financial Industry Regulatory Authority, Inc. ("FINRA"). *See* Securities Exchange Act Release No. 56148, 2007 WL 2159604, at *2 (July 26, 2007). Because this proceeding was instituted after consolidation, all references to FINRA will include references to NASD.

2 15 U.S.C. § 78c(a)(39)(F) (defining a "statutory disqualification" by reference to Exchange Act Section §15(b)(4)(H)(i) and (ii) and including certain final orders of state securities regulators).

3 FINRA By-Laws, Art. III, § 4 (stating that a person is subject to "disqualification" if such person is subject to "statutory disqualification" as defined in Exchange Act Section 3(a)(39) (formerly Art. II, § 4 of the FINRA By-Laws). The definition of "disqualification" in FINRA's By-Laws directly conforms to the definition of "statutory disqualification" in the Exchange Act. *See* Exchange Act Release No. 56145, 2007 WL 5185330, at *8 (July 26, 2007).

4 *Nicholas S. Savva*, No. 04-019-S, Order Imposing Administrative Sanctions and Consent to Same (Vt. Dep't of Banking, Ins., Sec. & Health Care Admin. Aug. 3, 2004). The Vermont Department was renamed the Vermont Department of Financial Regulation in 2012.

5 Hunter Scott and Savva are persons aggrieved by FINRA's denial of Hunter Scott's MC-400 Application. *See* 17 C.F.R. § 201.420 (providing that any person aggrieved by a FINRA denial of membership may file an application for Commission review); *cf. Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 WL 3554584, at *1 (Sept. 13, 2010) (considering appeal by associated person from FINRA's denial of firm's membership continuance application).

accordance with its rules, and that those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act, and we therefore dismiss this appeal.[6]

I. Background

A. Statutory disqualifications and FINRA's eligibility proceedings

A statutory disqualification constitutes an encumbrance to membership in, or association with a member of, a self-regulatory organization ("SRO"), but it does not necessarily preclude a person from participating in the securities industry.[7] Instead, a statutory disqualification can render a member or associated person ineligible to participate: a person subject to statutory disqualification cannot become or remain associated with a FINRA member firm unless the person's member firm applies for, and is granted, in FINRA's discretion, relief from the statutory disqualification.[8] A member firm can apply for relief from the statutory disqualification by filing an MC-400 Application, which initiates an eligibility proceeding.[9] The critical inquiry in every eligibility proceeding is whether the proposed or continued association of the person subject to disqualification would be consistent with the public interest and the overriding

---

[6] Hunter Scott and Savva moved for a stay of FINRA's action pending appeal, but we denied the request. *See Nicholas S. Savva*, Order Denying Stay, Admin. Proc. File No. 3-15017 (Oct. 31, 2012).

[7] *See Statutory Disqualification Review Process*, Audit No. 363 (May 13, 2003), *available at* http://www.sec.gov/about/oig/audit/363fin.htm. Events that subject a person to a statutory disqualification include, but are not limited to, certain misdemeanor convictions, all felony convictions, certain court injunctions, suspensions and bars ordered by the Commission or an SRO, and, as relevant here, certain final orders of state securities regulators. *See* 15 U.S.C. § 78c(a)(39).

[8] FINRA By-Laws, Art. III, § 3(b), (d); *see Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at *1 n.4 (Apr. 18, 2013).

[9] FINRA Rules 9520 to 9527 (the "FINRA Rule 9520 Series") set forth eligibility procedures pursuant to which FINRA may allow a person to become or remain associated with a member despite the existence of a statutory disqualification. In proceedings such as this one, after a member applies for relief, FINRA's Department of Member Regulation reviews the application and makes a recommendation to FINRA's Statutory Disqualification Committee. If the Department of Member Regulation recommends rejecting the application, the applicant may request a hearing. Following the hearing, the Hearing Panel makes a recommendation to the Statutory Disqualification Committee. The committee reviews the record and the Hearing Panel's recommendation and presents a recommendation to FINRA's National Adjudicatory Council (the "NAC"). The NAC's decision considers the request for relief, the recommendation, the public interest, and the protection of investors.

regulatory goal of ensuring the protection of investors.[10] Denials of a member's application to permit the proposed or continued association of the person are reviewable by the Commission.[11]

The Sarbanes-Oxley Act of 2002 expanded the definition of "statutory disqualification" in Exchange Act Section 3(a)(39) by creating new categories of disqualification.[12] Under the expanded definition, a person is subject to statutory disqualification if the person is subject to a final order of a state securities regulator that either bars the person from association with an entity regulated by such a regulator or is based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive conduct.[13] The statutory disqualifications in Exchange Act Section 3(a)(39) are not self-executing and must be implemented by an SRO through its own provisions. FINRA did not amend its By-Laws to implement the Sarbanes-Oxley Act's expanded definition of "statutory disqualification" until 2007, when FINRA made its By-Laws coextensive with Exchange Act Section 3(a)(39), such that any person who was subject to "statutory disqualification" under the Exchange Act also would be subject to "disqualification" under FINRA rules.[14]

In 2009, FINRA proposed, and the Commission approved, amendments to the eligibility proceedings—the FINRA Rule 9520 Series—to cover persons subject to disqualification as a result of the amended By-Laws.[15] Among other things, the amendments established eligibility proceedings for persons currently in the securities industry who were subject to disqualification

---

[10] *See* http://www.finra.org/industry/enforcement/adjudication/nac/statutorydisqualificationprocess.

[11] *See supra* note 5.

[12] Pub. L. No. 107-204, 116 Stat. 745 (2002).

[13] 15 U.S.C. § 78*o*(b)(4)(H).

[14] *See* Exchange Act Release No. 56145, 2007 WL 5185330, at *8 (July 26, 2007), as amended by Exchange Act Release No. 56145A, 2008 WL 2677219 (May 30, 2008). From 2002 until 2007, FINRA's By-Laws and corresponding eligibility procedures subjected persons to disqualification based on certain events, including certain misdemeanor and felony criminal convictions for a period of ten years from the date of conviction, a temporary or permanent injunction issued by a court of competent jurisdiction, SRO expulsions, and bars ordered by the Commission and SROs. These By-Laws and procedures implemented the definition of "statutory disqualification" in Exchange Act Section 3(a)(39) as it existed before its amendment by the Sarbanes-Oxley Act.

[15] On July 27, 2007, FINRA sought, and the Commission granted, no-action relief for the transitional period from 2007, when the amended FINRA By-Laws became effective, to 2009, the effective date of the related eligibility procedures. FINRA requested this relief only with respect to notice filings for the "limited" number of persons whom FINRA proposed to admit to or continue in membership or association with a member notwithstanding disqualification as a result of the Sarbanes-Oxley Act. *See* NASD: No-Action Letter dated July 27, 2007, *available at* http://www.sec.gov/divisions/marketreg/mr-noaction/2007/nasd072707-19h-1.htm.

as a result of the Sarbanes-Oxley Act.[16] In a notice to members describing the amendments, FINRA specified the circumstances under which members would be required to file a membership continuance application under the new eligibility rules.[17] In particular, and as relevant here, members had to file a membership continuance application to associate with persons who, as of March 17, 2009, were subject to a final order of a state regulator based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct, or where the sanctions involved licensing or registration revocation or suspension (or analogous sanctions) and the sanctions were still in effect.

B. Savva's statutorily disqualifying event and Hunter Scott's application seeking Savva's continued association despite the disqualification

Savva has been employed in the securities industry as a registered representative since 1996. In January 2004, he became associated with Hunter Scott, a FINRA member with its main office in Delray Beach, Florida and branch offices in Florida and New York.[18] On August 17, 2009, Hunter Scott filed an MC-400 Application seeking FINRA's approval for Savva to continue his association with the Firm as a general securities representative notwithstanding that he was subject to a statutory disqualification. Hunter Scott filed the Application after FINRA's Department of Registration and Disclosure ("RAD") notified it on June 15, 2009 that Savva was subject to disqualification under Exchange Act Section 3(a)(39) as a result of his consent to a final order of the Vermont Department on August 3, 2004. RAD advised Hunter Scott of the need to either file an MC-400 Application seeking approval for Savva's continued association with the Firm or immediately terminate his employment (and file a Form U5 or Uniform Termination Notice for Securities Industry Registration).[19]

---

[16] *See* Exchange Act Release No. 59586, 2009 WL 763690, at *1 (Mar. 17, 2009). In approving the amended eligibility procedures, the Commission stated that the changes were consistent with the Exchange Act's provisions because they would allow FINRA "to integrate filings mandated by the revised definition of disqualification into established programs that monitor subject persons and allow FINRA and the Commission to focus resources on filings that raise important investor protection concerns." *Id.* at *3.

[17] *See* FINRA Notice 09-19, 2009 WL 971688, at *3 (Apr. 9, 2009), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p118466.pdf.

[18] Hunter Scott placed Savva on heightened supervision in March 2004, after only two months on the job, because of customer complaints. Savva was also on heightened supervision while working for his prior employer J.P. Turner & Company ("J.P. Turner"). The specifics of J.P. Turner's heightened supervision plan are not part of the record.

[19] The MC-400 application form requests information about the terms and conditions of the proposed employment, with special emphasis on the proposed supervision to be accorded the disqualified person. The failure of the member to either terminate the person's employment or submit an MC-400 application may subject the member to a statutory disqualification. S*ee* http://www.finra.org/industry/enforcement/adjudication/nac/statutorydisqualificationprocess.

The Vermont Order found that from August 2002 until November 2003, while associated with his prior employer J.P. Turner and while on heightened supervision, Savva engaged in unauthorized transactions in customer accounts, made unsuitable recommendations to customers, and regularly used high pressure or "boiler room"[20] tactics to sell securities, in violation of provisions of the Vermont Securities Act.[21] Specifically, the Vermont Order alleged that Savva entered transactions in a customer's account without consulting the customer and without obtaining the customer's approval; recommended securities to customers without reasonable grounds to believe that the securities were suitable for the customers; recommended small capital, aggressive growth stocks without considering the customers' investment experience, investment objectives, or financial resources; regularly pressured customers to make hasty decisions to purchase securities that he was recommending; and coerced customers through repeated, rehearsed telephone calls to purchase securities and open accounts so that he could execute unauthorized transactions in those accounts.

Without admitting or denying Vermont's findings of fact or conclusions of law, Savva consented to a censure, a cease-and-desist order, and a $25,000 fine. He also agreed not to seek registration in Vermont as a broker-dealer sales representative or an investment adviser representative and agreed not to supervise any Vermont registered broker-dealer sales representative or investment adviser representative without the Vermont Department's prior written consent. He further agreed to waive his right to a hearing before the Commissioner of the Vermont Department and to all other procedures otherwise available to him under the Vermont Securities Act, any right to judicial review, and compliance with provisions of Vermont's Administrative Procedures Act applicable to contested cases.[22] Savva has not received relief from Vermont, nor has Vermont granted him permission to seek registration as a broker-dealer sales representative or an investment adviser representative or to supervise any registered broker-dealer sales representative or investment adviser representative.[23] As a result, the sanctions imposed on Savva remain in effect.

---

[20] "A 'boiler-room' operation is characterized by numerous sales people making a high volume of telephone calls to previously unknown individuals and using high-pressure tactics to sell securities, often through the use of misrepresentations." *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *2 & n.8 (Apr. 20, 2012).

[21] *See* 9 V.S.A. §§ 4201 *et seq*., Regulation S-91-1, §§ 3.03, 3.05, & 3.06, promulgated pursuant to 9 V.S.A. § 4221a(a)(8). After the events at issue, the Vermont Securities Act was repealed and superseded by the Vermont Uniform Securities Act, 9 V.S.A. §§ 5101 *et seq*.

[22] *See* 3 V.S.A. §§ 801 *et seq*. (Vermont Administrative Procedures Act).

[23] In October 2004, Vermont filed a Form U6 or Uniform Disciplinary Action Reporting Form to disclose the Vermont Order to FINRA's Central Registration Depository ("CRD") system. Form U6 is used by SROs and state and federal regulators to report disciplinary actions against broker-dealers and associated persons. *Disqualification of Felons and Other Bad Actors From Rule 506 Offerings*, Securities Act Release No. 9414, 2013 WL 3817311, at *22 n.135 (July 10, 2013). One of the questions on the Form U6 asked whether the Vermont Order "constitute[d] a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct." Vermont answered in the affirmative.

In the MC-400 Application, Hunter Scott proposed that Savva would work in its Brooklyn, New York office and that the manager of the Brooklyn office would supervise Savva. The Firm also represented that, in addition to its standard written supervisory procedures applicable to all registered personnel, Savva would continue to be subject to certain heightened supervisory procedures, which had been in place since March 2004.[24] Those heightened procedures required the Brooklyn manager to: (1) initial Savva's trade tickets prior to execution; (2) review Savva's customer account activity on a monthly basis with special attention to margin accounts and items such as extensions, liquidations, and trade corrections; (3) review Savva's new account forms to verify the accuracy and completeness of information contained in the forms; and (4) provide Savva with additional continuing education training on such topics as customer suitability and ethics.[25]

On June 29, 2011, FINRA's Department of Member Regulation ("Member Regulation") recommended to FINRA's Statutory Disqualification Committee that Savva's continued association with Hunter Scott be prohibited and that the Application be denied. A subcommittee of FINRA's Statutory Disqualification Committee thereafter informed the parties in writing that FINRA's Statutory Disqualification Committee found the alleged basis for Savva's disqualification to be "unclear," and requested supplemental briefing addressing whether Savva was disqualified because he was subject to a final order barring him from association, as described in Exchange Act Section 15(b)(4)(H)(i), or because he was subject to a final order based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct, as described in Exchange Act Section 15(b)(4)(H)(ii). Both parties submitted briefs, with Member Regulation asserting that the Vermont Order was disqualifying under both provisions.

On November 17, 2011, a Hearing Panel consisting of a two-person subcommittee of FINRA's Statutory Disqualification Committee held a hearing at which Savva, the Brooklyn manager, and Hunter Scott's CCO testified.[26] Following the hearing, the Hearing Panel submitted a written recommendation to the Statutory Disqualification Committee, which considered the record and Hearing Panel's recommendation and presented its own written recommendation (to deny Hunter Scott's MC-400 Application) to the NAC for approval.[27]

---

[24] *See supra* note 18.

[25] More than eight months after the hearing, but before the NAC issued a decision on the Application, Hunter Scott notified FINRA that it proposed to revise its supervisory plan and provide that Savva would work in the firm's Delray Beach office under the supervision of the Firm's Chief Compliance Officer ("CCO").

[26] *See* FINRA Rule 9524(a)(1) (stating that when an applicant requests a hearing, "the National Adjudicatory Council or the Review Subcommittee shall appoint a Hearing Panel composed of two or more members, who . . . shall conduct a hearing and recommend a decision on the request for relief").

[27] *See* FINRA Rule 9525(a)(10) ("On the basis of the record, the Hearing Panel shall present a recommended decision in writing on the request for relief to the Statutory Disqualification Committee. After considering the record and recommendation of the Hearing

(continued…)

C. FINRA's NAC denied Hunter Scott's MC-400 Application.

On August 10, 2012, the NAC denied Hunter Scott's MC-400 Application. The NAC found Savva's conduct underlying the Vermont Order to be "serious," "highly troubling," and "securities related." It also found that between 1999 and 2008 Savva was the subject of at least ten customer complaints relating to potential sales practice violations:

- August 1999–a customer sought $5,400 in damages based on allegations that Savva engaged in unauthorized trading and failed to execute trades in the customer's account. Savva personally settled the matter for $5,585.

- November 1999–a customer sought $166,000 in damages based on allegations that Savva engaged in unauthorized trading. Savva's then firm, J.P. Turner, settled the matter for $100,000, with Savva personally contributing $8,333 to the settlement.

- April 2000–a customer sought $5,057 in damages based on allegations that Savva charged excessive commissions. Savva personally paid between $1,500 and $4,000 to settle the matter.

- March 2003–a customer sought $31,000 in damages based on allegations that Savva improperly handled his account. J.P. Turner settled the matter for $19,980,[28] without Savva personally contributing to the settlement.

- April 2003–a customer sought $86,000 in damages based on allegations that Savva engaged in unauthorized trading, but the matter was subsequently dismissed.

- September 2003–a customer sought $60,000 in damages based on allegations that Savva engaged in excessive trading. J.P. Turner settled the matter for $24,000, without Savva personally contributing to the settlement.

- August 2005–a customer sought $47,000 in damages based on allegations that Savva charged excessive commissions. Hunter Scott settled the matter for $40,000, without Savva personally contributing to the settlement.

(…continued)

Panel, the Statutory Disqualification Committee shall present its recommended decision in writing to the National Adjudicatory Council."). The Hearing Panel's recommendations are not part of the record.

[28] In a written, post-hearing statement to the Hearing Panel, Savva reported that J.P. Turner settled the matter for $9,990, as opposed to the $19,980 disclosed on the CRD. FINRA did not find this discrepancy to be material; nor do we.

- June 2007–a customer sought $56,000 in damages based on allegations that Savva charged excessive commissions. Hunter Scott settled the matter for $37,000, without Savva personally contributing to the settlement.

- July 2007–a customer sought $45,057 in damages based on allegations that Savva, while at J.P. Turner, engaged in improper and unsuitable trading. J.P. Turner settled the matter for $9,995, without Savva personally contributing to the settlement.

- January 2008–a customer alleged that Savva engaged in an unauthorized transaction. Hunter Scott settled the matter for $2,284.

Of the ten customer complaints, three involved allegations of unauthorized transactions, and all ten resulted in either Savva or his firms paying a total of more than $240,000 to settle the complaints.

Along with the customer complaints, the NAC found that Savva was the subject of two regulatory matters. In November 2005, the State of Illinois required Savva to withdraw his registration and prohibited him from reapplying for registration for two years because he failed timely to update his Form U4 to reflect the November 1999 customer complaint described above. In April 2009, FINRA issued a Cautionary Action to Savva in connection with unsuitable recommendations in a customer's account and excessive trading.[29] The NAC stated that the ten customer complaints, coupled with the two regulatory matters, raised serious concerns about Savva's dealings with customers and his ability to comply with securities laws and regulations.

The NAC further found that Hunter Scott's proposed heightened supervision plan was inadequate. For instance, it did not contain procedures for reviewing and monitoring Savva's communications with customers, did not contain procedures for handling any future customer complaints against Savva, and did not designate a backup supervisor for Savva.

In addition, the NAC found that Hunter Scott failed to establish its ability to comply with the plan. Four of the ten customer complaints and the two regulatory matters arose while Savva was on heightened supervision. And, in April 2009, Hunter Scott received a Cautionary Action from FINRA for failing to follow its heightened supervision procedures with respect to Savva. Based on all the facts and circumstances, the NAC determined that Savva's continued association with Hunter Scott would not serve the public interest and would present an unreasonable risk of harm to the market or investors.

---

[29] A Cautionary Action is a warning that similar violations in the future could result in formal disciplinary action. While Cautionary Actions are considered by FINRA staff in any future disciplinary action, they do not constitute formal discipline and are not reportable to the CRD or on Form BD (Uniform Application for Broker-Dealer Registration), the form used by entities to register as broker-dealers. *See* FINRA Regulatory Notice 09-17, 2009 WL 741194, at *2 (Mar. 18, 2009).

II. Analysis

A. Standard of Review

Section 19(f) of the Exchange Act establishes the criteria that govern our review of FINRA's denial of Hunter Scott's MC-400 Application.[30] We must dismiss Hunter Scott and Savva's appeal if we find that: the specific grounds on which FINRA based its action exist in fact; the denial was in accordance with FINRA's rules; and FINRA's rules are, and were applied in a manner, consistent with the Exchange Act's purposes.[31] Because we conclude that FINRA's denial of Hunter Scott's MC-400 Application satisfied these criteria, we dismiss this appeal.[32]

B. The specific grounds for FINRA's denial of Hunter Scott's MC-400 Application exist in fact.

We find that the specific grounds for FINRA's denial of Hunter Scott's MC-400 Application exist in fact. FINRA's By-Laws provide that a person is subject to "disqualification" if the person is subject to "statutory disqualification" under Exchange Act Section 3(a)(39).[33] Exchange Act Section 3(a)(39)(F) provides, in pertinent part, that a person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, an SRO if such person is subject to an order enumerated in Exchange Act Section 15(b)(4)(H),[34] including:

> any final order of a State securities commission (or any agency or officer performing like functions) [or] State authority that supervises or examines banks . . . that—
>
> (i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or
>
> (ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.[35]

---

30 15 U.S.C. § 78s(f).

31 *Id.*

32 Exchange Act Section 19(f) also requires us to set aside FINRA's action if we find that the action imposes an undue burden on competition. 15 U.S.C. § 78s(f). Hunter Scott and Savva do not claim, nor does the record support finding, that FINRA's actions impose such a burden.

33 *See supra* note 3.

34 15 U.S.C. § 78o(b)(4)(H).

35 *Id.*

The record shows that, pursuant to Exchange Act Section 15(b)(4)(H)(ii), Savva was subject to a statutory disqualification because he was subject to a final order of the Vermont Department, a state securities regulator, based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.[36]

1. The Vermont Order was a "final order."

Exchange Act Section 15(b)(4)(H) encompasses final orders of state securities regulators, but does not indicate whether a consent order like the Vermont Order falls within the scope of the term "final order." Notwithstanding the potential statutory ambiguity, we believe that it is appropriate to construe "final order" under Exchange Act Section 15(b)(4)(H) to mean a written directive or declaratory statement issued by a state agency under statutory authority that provides for notice and opportunity for a hearing and constitutes a final disposition or action by the state agency.[37] We base this definition, in part, on the definition that FINRA uses in its uniform registration forms, which require broker-dealers and their associated persons to disclose final orders of state securities regulators.[38] The FINRA forms, which we approved in 2003,[39] define "final order" to mean "a written directive or declaratory statement issued by an appropriate federal or state agency . . . pursuant to applicable statutory authority and procedures[] that constitutes a final disposition or action by that federal or state agency."[40] In addition, we believe that, in the context of Exchange Act Section 15(b)(4)(H), the definition of "final order" should be limited to those orders issued under statutory authority providing for notice and an opportunity for a hearing, in order to address fundamental fairness concerns. Thus, our definition of "final order" under the Exchange Act is narrower that the definition in the FINRA forms because, for disqualification purposes, we are imposing a basic requirement that the state agency's statutory authority provide for notice and an opportunity for a hearing. Applying our definition here, we conclude that the Vermont Order was a "final order" under Exchange Act Section 15(b)(4)(H) because (1) it was a written directive issued by the Vermont Department that constituted a final

---

36 *Id.* at § 78o(b)(4)(H)(ii). In light of this finding, we, like FINRA, do not decide whether the Vermont Order was also disqualifying under Exchange Act Section 15(b)(4)(H)(i).

37 We have not previously provided a definitive interpretation of the term "final order" in Section 15(b)(4)(H) of the Exchange Act. *Disqualification of Felons and Other Bad Actors From Rule 506 Offerings*, Securities Act Release No. 9211, 2011 WL 2045833, at *13 (May 28, 2011).

38 *Cf. id.* at *13 & n.53 (adopting the definition of "final order" used in FINRA registration forms in the context of promulgating disqualification rules implementing Section 926 of the Dodd-Frank Act Wall Street Reform and Consumer Protection Act of 2010).

39 *See* Exchange Act Release No. 48161, 2003 WL 21635304 (July 10, 2003), corrected by Exchange Act Release No. 48161A, 2003 WL 21664202 (July 16, 2003).

40 *See* "Explanation of Terms" applicable to FINRA Forms U4, U5 and U6, *available at* http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p116979.pdf.

disposition of the securities law violations alleged against Savva,[41] and (2) the Vermont provisions provided notice and an opportunity for a hearing, which Savva waived when he consented to the imposition of administrative sanctions.[42]

Our definition of "final order" under the Exchange Act is consistent with the definition of "final order" that we adopted in the context of "essentially identical"[43] language in Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").[44] Like Exchange Act Section 15(b)(4)(H), Section 926 does not specify what constitutes a "final order" triggering disqualification,[45] so we later defined "final order" in Section 926 to mean "a written directive or declaratory statement issued by a federal or state agency . . . under

---

41 *Cf. Bennett v. Spear*, 520 U.S. 154, 177 (1997) (holding that an order is final under the Administrative Procedure Act when it "mark[s] the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature . . . [and] the action must be one by which rights or obligations have been determined, or from which legal consequences will flow"); *Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254, 257 (2d Cir. 1994) (holding that orders are final for purposes of Exchange Act Section 25(a) when they "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process") (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

Vermont uses a similar definition of the term "final order," *see Jordan v. Vt. Agency of Transp*, 166 Vt. 509, 513, 702 A.2d 58, 61 (Vt. 1997) (stating that "[f]or an [administrative] order to be final, it must have disposed of all matters that should or could properly be settled at the time and in the proceeding then before the [decision-making body]") (internal quotations omitted), and, as previously noted, reported the Vermont Order as a final order on Form U6. *See supra* note 23.

42 *See* 9 V.S.A. § 4221a(a)(8) (stating that "[t]he commissioner, *subject to notice and opportunity for hearing* and in accordance with the procedures set forth in chapter 25 of Title 3 (Administrative Procedure Act), by order may deny, suspend, or revoke any registration, limit the securities or investment advisory activities that an applicant or registered person may perform in this state, bar an applicant or registered person from association with a registered broker-dealer or investment adviser, or a federal covered investment adviser, or bar from employment with a registered broker-dealer or investment adviser a person who is a partner, limited liability company member, officer, director, or a person occupying a similar status or performing a similar function for an applicant or registered person. Those actions may be taken on if the commissioner finds that the . . . registered person . . . : has engaged in unethical or dishonest practices in the securities business") (emphasis added).

43 *See Disqualification of Felons and Other Bad Actors From Rule 506 Offerings*, 2013 WL 3817311, at *22 & n.134.

44 Public Law No. 111-203, § 926, 124 Stat. 1376, 1851 (July 21, 2010).

45 *See Disqualification of Felons and Other Bad Actors From Rule 506 Offerings*, 2013 WL 3817311, at *22.

applicable statutory authority that provides for notice and an opportunity for a hearing, which constitutes a final disposition or action by that federal or state agency."[46]

Hunter Scott and Savva argue that consent orders and settlement agreements are not "final orders," but they provide no authority for this interpretation, and the cases they cite are inapposite.[47] We find that consenting to the entry of an order or settling charges would not justify excluding such an action from the definition of "final order."

There are several independent policy reasons for including consent orders and settlement agreements within the definition of "final order." For purposes of disqualification, it would not be in the public interest to restrict the definition of "final order" to orders entered only after a fully litigated hearing. Restricting the definition in this way could, among other things, cause parties to expend valuable resources litigating cases when settlement would have been preferable. Further, the distinction between final orders entered after litigation and those entered after settlement negotiation is arbitrary and could expose the public to a risk of harm from persons who would have been subject to disqualification had they not chosen to settle. Although this definition of "final order" includes consent orders and settlement agreements, it still serves to address basic due process and fairness concerns by requiring notice and an *opportunity* for a hearing, as opposed to requiring that a hearing actually take place.[48]

Hunter Scott and Savva also argue that a consent order with a "neither admit nor deny" provision cannot be used as a basis for disqualification under Exchange Act Section 15(b)(4)(H). To the contrary, the Commission's 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.[49] As we

---

[46] *See* 17 C.F.R. § 501(g) (defining "final order" in Regulation D); *see also Disqualification of Felons and Other Bad Actors From Rule 506 Offerings*, 2013 WL 3817311, at *22.

[47] For instance, *SEC v. Pace*, 173 F. Supp. 2d 30 (D.D.C. 2001), concerned whether an issue had been adjudicated for purposes of claim preclusion. The district court found that the Commission was not precluded from asserting a fraud claim against the defendant based on a settlement in a tax court proceeding. *Id.* at 33-34. In *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976), the plaintiff corporation urged that a consent decree resolving another administrative action was a decision on the merits and thus binding on the Federal Trade Commission in determining the legality of the plaintiff's acquisition under antitrust laws. The court of appeals held that the consent decree was not binding. *Id.* at 312.

[48] We note that, in adopting a definition of "final order" in the context of disqualification rules implementing Section 926 of the Dodd-Frank Act, we considered whether settled cases should be treated the same as cases that were not settled. We stated that a settlement should be considered a "final order" if applicable provisions provide for notice and an opportunity for hearing. *Disqualification of Felons and Other Bad Actors From Rule 506 Offerings*, 2013 WL 3817311, at *23.

[49] *See* Securities Act Release No. 5337, 1972 WL 126309, at *1 (Nov. 28, 1972) and 17 C.F.R. § 202.5(e) ("announc[ing Commission] policy not to permit a defendant or respondent to

(continued…)

stated in *Marshall E. Melton*, "[d]efendants in Commission injunctive actions must understand that, if the Commission institutes an administrative proceeding against them based on an injunction to which they consented after issuance of this opinion, they may not dispute the factual allegations of the injunctive complaint in the administrative proceeding."[50] We further stated that "[f]or purposes of consent injunctions that are agreed to and entered by a court . . . , we will construe the 'neither admit nor deny' language as precluding a person who has consented to an injunction in a Commission enforcement action from denying the factual allegations of the injunctive complaint in a follow-on proceeding before this agency."[51] Hunter Scott and Savva do not address the *Melton* opinion or the Commission's longstanding practice in their briefs, nor do they offer any persuasive reason for us to deviate from that practice here.

2. The Vermont Order was based on violations of Vermont regulations prohibiting fraudulent, manipulative, or deceptive conduct.

We also find that the Vermont Order was based on violations of Vermont regulations prohibiting fraudulent, manipulative, or deceptive conduct.[52] The Vermont Order found that Savva violated Sections 3.03, 3.05, and 3.06 of Vermont Regulation S-91-1, promulgated pursuant to 9 V.S.A. § 4221a(a)(8) of the Vermont Securities Act. Section 3.03 prohibited, in

---

(…continued)

consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings"); *see also, e.g., Marshall E. Melton*, Investment Adviser Act Release No. 2181, 56 SEC 695, 2003 WL 21729839, at *8 (July 25, 2003) ("[T]he Advisers Act and Exchange Act draw no distinction between injunctions entered after litigation or by consent. We do not believe that the statutes require the Enforcement Division to prove the allegations of an injunctive complaint in a follow-on administrative proceeding before any disciplinary action can be taken."); *Martin R. Kaiden*, Exchange Act Release No. 41629, 54 SEC 194, 1999 WL 507860, at *7 (July 20, 1999) ("Under Exchange Act Section 15(b)(6), we may institute administrative proceedings against an associated person of a broker-dealer based on an injunction from engaging in or continuing any conduct or practice in connection with acting as a broker-dealer."); *Kaye, Real & Co.*, Exchange Act Release No. 5226, 36 SEC 373, 1955 WL 43169, at *2 (Sept. 9, 1955) ("Under Section 15(b) of the [Exchange] Act, the mere issuance of the injunctions, the validity of which has not been attacked, furnishes a statutory basis for revocation if we find such action to be in the public interest.").

50 *Melton*, 2003 WL 21729839, at *9.

51 *Id.* at *8.

52 Hunter Scott and Savva argued before FINRA that the meaning of the phrase "fraudulent, manipulative, or deceptive conduct" was unclear and could be applied erroneously to violations that were merely "technical" in nature. FINRA disagreed, finding that Savva's alleged conduct underlying the Vermont Order was "serious" and not "technical" in nature. Hunter Scott and Savva do not renew their argument on appeal. In any event, we agree with FINRA that Savva's misconduct, involving unauthorized transactions, unsuitable recommendations, and the use of high-pressure sales tactics, was serious and not technical in nature.

pertinent part, "effecting a transaction in the account of a customer without authority to do so . . . ." Section 3.05 prohibited "recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's other securities holdings, investment objectives, financial situation and needs and any other relevant information known by the broker-dealer or sales representative." Section 3.06 prohibited "engaging or aiding in boiler room operations or high pressure tactics in connection with the solicitation of a sale or purchase of a security by means of an intensive telephone campaign or unsolicited calls to persons not known by, nor having an account with, the sales representative or broker-dealer represented by the sales representative, whereby the prospective purchaser is encouraged to make a hasty decision to buy, irrespective of his or her investment needs and objectives."

Vermont found that Savva violated these provisions by engaging in unauthorized customer transactions, making unsuitable customer recommendations, and engaging in high pressure sales tactics as part of a "boiler room" operation. Our cases have found that such business practices are, at a minimum, deceptive and violate antifraud provisions of the securities laws.[53] Accordingly, we conclude that the Vermont Order was disqualifying under Exchange Act Section 15(b)(4)(H)(ii) because Savva was found to have violated Vermont regulations prohibiting, at a minimum, deceptive practices in the securities business.[54]

---

[53] *See, e.g., SEC v. Wolfson*, 539 F.3d 1249, 1252 n.6 (10th Cir. 2008) (explaining that "the term 'boiler room' is typically used to describe a telemarketing operation in which salespeople call lists of potential investors in order to peddle speculative or fraudulent securities. A broker using so-called 'boiler-room tactics' generally gives customers a high-pressure sales pitch containing misleading information about the nature of the investment, as well as the broker's own commission on the sale."); *SEC v. Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992) (finding that defendants' unauthorized trades in connection with boiler room operations violated antifraud provisions because those trades were the result of material deception, misrepresentation or non-disclosure); *Martin Herer Engelman*, Exchange Act Release No. 35729, 52 SEC 271, 1995 WL 315515, at *1 (May 18, 1995) (finding that brokers' fraudulent conduct, "which was compounded by their use of high pressure sales tactics," included engaging in unauthorized trading in customer accounts and making unsuitable recommendations).

[54] We have stated that the phrase "fraudulent, manipulative or deceptive conduct" in Exchange Act Section 15(b)(4)(H) is not limited to scienter-based violations. *See Disqualification of Felons and Other Bad Acts From Rule 506 Offerings*, 2013 WL 3817311, at *25 (stating that Section 926 of the Dodd-Frank Act is not limited to matters involving scienter; Exchange Act Section 15(b)(4)(H), from which the language of Section 926 is drawn, does not contain a scienter requirement). Hunter Scott and Savva do not assert on appeal that Exchange Act Section 15(b)(4)(H) contains a scienter requirement.

C. FINRA's denial of Hunter Scott's MC-400 Application was in accordance with FINRA rules.

We also find that FINRA's denial of Hunter Scott's MC-400 Application was in accordance with FINRA rules. Among other things, FINRA conducted a hearing at which it afforded Savva an opportunity to be heard and to submit evidence and allowed Hunter Scott to submit a revised supervisory plan after the hearing.[55]

We reject each of the four arguments made by Hunter Scott and Savva in support of their position that FINRA misapplied its own rules, which, together with other actions, rendered the proceedings unfair. Hunter Scott and Savva contend that FINRA: (1) impermissibly and retroactively applied its 2009 amended eligibility proceedings to Savva; (2) failed to properly notify Savva of the basis for his disqualification; (3) erroneously admitted into evidence a transcript of the Vermont securities regulator's investigative interview of Savva; and (4) improperly delayed the institution and resolution of the proceedings. FINRA did not misapply its rules or otherwise deprive Savva of a fair proceeding.[56]

1. FINRA's application of its 2009 amended eligibility procedures to Savva was not impermissibly retroactive.

Hunter Scott and Savva argue that FINRA's application of its 2009 amended eligibility procedures to Savva was impermissibly retroactive because those procedures required Savva to submit to an eligibility proceeding when he was not required to do so before the amendment. We find that the application of the 2009 procedures to Savva was not impermissibly retroactive.

The U.S. Supreme Court has observed that "a statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'"[57] The Supreme Court has explained

---

55 *See supra* note 25; *see also* FINRA By-Laws, Art. III, § 3(d) (stating that FINRA "may conduct such inquiry or investigation into the relevant facts and circumstances as it, in its discretion, considers necessary to its determination" of whether to approve a member's application for relief from ineligibility for membership).

56 We have held, and Hunter Scott and Savva do not dispute, that the fairness requirements of constitutional due process do not apply to FINRA proceedings because FINRA is not a state actor. *See, e.g.*, *Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at *6 n.40 (Mar. 19, 2013) (citing cases). Nevertheless, the Exchange Act requires FINRA to provide fair procedures for its disciplinary proceedings. *See, e.g.*, 15 U.S.C. §§ 78*o*-3(b)(8), (h)(1). This obligation gives rise to "due-process-like" requirements. *D'Alessio v. SEC*, 380 F.3d 112, 121, 123 (2d Cir. 2004). Thus, we consider Hunter Scott's and Savva's arguments here in light of this statutory fairness requirement.

57 *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 n.24 (1994) (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)); *see Vartelas v. Holder*, 132 S. Ct. 1479, 1487 (2012) (holding that a statute authorizing prospective remedies may consider conduct pre-dating the statute without having a genuinely retroactive effect).

that applying a new statute "passed after the events in suit is unquestionably proper"[58] when the statute "addresses dangers that arise post enactment."[59] This is the case even though such statutes "may unsettle expectations and impose burdens on past conduct."[60]

FINRA's application of the 2009 amended eligibility procedures to Savva did not have an impermissibly retroactive effect for two reasons. First, although the 2004 Vermont Order was the antecedent event that subjected Savva to disqualification (as a result of the Sarbanes-Oxley Act of 2002), the eligibility proceeding itself entailed an assessment of the *present* risk of future harm to investors and the markets that could be posed by Savva's continued participation in the securities industry.[61] Accordingly, while FINRA considered the conduct underlying the 2004 Vermont Order, FINRA also took into account other relevant facts and circumstances, including Savva's and Hunter Scott's arguments, the proposed plan of supervision, and evidence of Savva's conduct since 2004, such as the ten customer complaints and two regulatory matters. Thus, FINRA's determination that Savva would present an unreasonable risk of future harm to investors and the markets did not rest solely on the antecedent fact of the Vermont Order but on evidence relevant to an assessment of the current threat posed by Savva.

FINRA's determination is consistent with decisions from courts holding that administrative proceedings involving an assessment of a present risk of future harm are not impermissibly retroactive even where those proceedings are triggered by an antecedent event.[62] In *Boniface v. U.S. Department of Homeland Security*, for example, the Transportation Security Administration ("TSA") denied Boniface's application for a hazardous materials endorsement ("HME"), which was a prerequisite for renewing his commercial driver's license.[63] Although

---

58 *Landgraf*, 511 U.S. at 273.

59 *Vartelas*, 132 S. Ct. at 1489 n.7; *see, e.g.*, *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *13 (July 12, 2013) (considering respondent's conduct predating the Dodd-Frank Act in assessing his future risk to the investing public and stating that "prospective remedies whose purpose is to protect the investing public from future harm" do not implicate retroactivity concerns).

60 *Landgraf*, 511 U.S. at 270 n.24.

61 *See supra* notes 9-10 and accompanying text.

62 *See Boniface v. Dep't of Homeland Sec.*, 613 F.3d 282, 288 (D.C. Cir. 2010) (holding that denial of future occupational opportunities based on thirty-year-old conviction for transporting hazardous materials did not trigger any of the effects deemed retroactive in Landgraf and thus conviction could be considered as evidence of future risk), *cert. denied*, 131 S. Ct. 931 (2011); *see also Ohio Head Start Ass'n v. Dep't of Health and Human Services*, 873 F. Supp. 2d 335, 247-48 (D.D.C. 2012) (discussing U.S. Supreme Court precedent and concluding that the principal focus for determining whether to allow "regulations [to] use antecedent information in making future decisions lies in the notion of imposing a 'liability' versus denying an individual a 'future benefit'") (citations omitted), *aff'd*, 510 F. App'x 1 (D.C. Cir. 2013) (per curiam) (unpublished).

63 *Boniface*, 613 F.3d at 288.

that denial was triggered by a 1975 conviction that predated the 2003 adoption of the regulations governing the HME application process, the court stated that the disqualifying conviction created only an evidentiary presumption. That presumption was provisional and could be rebutted by seeking a waiver from TSA and showing that an HME would pose no current threat.[64] Therefore, the court found that applying the regulations to Boniface did not have an impermissible retroactive effect. Quoting *Landgraf*, the court stated that the regulatory scheme did not impair rights that Boniface possessed when he acted, increase his liability for past conduct, or impose new duties on transactions already completed.

Like the driver's 1975 conviction in *Boniface*, Savva's Vermont Order was the antecedent event that subjected him to statutory disqualification, but, similar to the proceedings in *Boniface*, Savva and his firm could seek relief from the statutory disqualification through the MC-400 Application process, during which they had the opportunity to demonstrate that Savva's continued participation in the securities industry did not pose a current threat to investors. The application of the 2009 eligibility procedures to Savva did not impair rights that he possessed at the time of the 2004 Vermont Order, increase his liability for the conduct that was the basis of the Vermont Order, or impose new duties for transactions already completed.

Second, an inquiry into retroactivity is often informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations,"[65] and those considerations do not support Hunter Scott's and Savva's retroactivity argument. Since 2002, when the Sarbanes-Oxley Act amended the Exchange Act, Hunter Scott and Savva have had fair notice that a "final order," including a final order issued by a state securities regulator, would constitute a disqualifying event for purposes of eligibility to participate in the securities industry. Indeed, in early 2003, FINRA notified members that it proposed to amend the definition of "disqualification" in its By-Laws to be consistent with the Exchange Act's definition and incorporate the additional categories of statutory disqualification enacted in the Sarbanes-Oxley Act.[66] That same year, the Commission approved amendments to FINRA's uniform registration forms to require reporting of the additional disqualifying events created by the Sarbanes-Oxley Act, including a definition of "final order" that would encompass the 2004 Vermont Order.[67]

Although FINRA did not have the necessary rules and procedures in place until 2009 for those persons subject to disqualification as a result of the Sarbanes-Oxley Act, FINRA's application of the amended eligibility procedures to Hunter Scott and Savva could not have undermined their reasonable reliance interests or settled expectations. Historically, FINRA's rules had required persons subject to then-existing statutory disqualifications to apply for relief from the disqualifications. Thus, Savva cannot reasonably rely on the fact that there was a lag between the time the Exchange Act's definition of statutory disqualification was amended in

---

64 *Id.*

65 *Landgraf*, 511 U.S. at 270.

66 FINRA Notice to Members 03-04 (January 2003), *available at* http://www.finra.org/Industry/Regulation/Notices/2003/P003363.

67 *See supra* note 39.

2002 and FINRA's conforming amendments. Furthermore, industry participation is a privilege, not a right, and Savva had no vested right in future association with Hunter Scott.[68]

2. Hunter Scott and Savva had fair notice of the basis for disqualification.

Hunter Scott and Savva argue that they did not have fair notice of the basis for Savva's statutory disqualification. FINRA Rule 9522(a) provides that if FINRA has reason to believe that an associated person is statutorily disqualified, it "shall specify the grounds for such disqualification or ineligibility" in a written notice to the member.[69] FINRA's RAD issued such a notice on June 15, 2009, informing Hunter Scott that Savva was subject to a statutory disqualification under Exchange Act Section 3(a)(39) because of the Vermont Order. Thus, Hunter Scott and Savva have known since at least June 2009 that the Vermont Order was the basis for FINRA's determination that Savva was subject to disqualification. FINRA properly satisfied the notice requirements of FINRA Rule 9522(a).

Hunter Scott and Savva argue that after the June 2009 notice, Member Regulation had asserted, as the sole basis for disqualification, that the Vermont order was disqualifying because it was a final order barring Savva. They argue that until the Hearing Panel ordered the parties to brief the precise grounds for disqualification, Member Regulation had not asserted that the Vermont Order was also disqualifying because it was based on laws or regulations prohibiting fraudulent, manipulative, or deceptive conduct, and that it was unfair for Member Regulation to assert this additional reason why the Vermont order was disqualifying.

As an initial matter, Hunter Scott and Savva, who at all times were represented by counsel, had ample notice and opportunity throughout the proceedings to address and argue the legal issue of whether the Vermont Order was disqualifying under Exchange Act Section 15(b)(4)(H)(i) and/or (ii). Several months before the November 2011 hearing, the Hearing Panel requested the parties to brief whether Savva was disqualified because he was subject to a final order barring him from association with a broker-dealer, or because he was subject to a final order based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive misconduct. The Hearing Panel made this request because, after its preliminary review of the record, the exact basis for disqualification was unclear. The parties each filed briefs on the issue, and Member Regulation argued that the Vermont Order was disqualifying under both Exchange Act Sections 15(b)(4)(H)(i) and (ii). FINRA ultimately did not reach the issue of whether the Vermont Order was disqualifying under Exchange Act Section 15(b)(4)(H)(i) because it found that the Vermont Order was disqualifying under Exchange Act

---

[68] *Cf. Kornman v. SEC*, 592 F.3d 173, 188 (D.C. Cir. 2010) (describing industry participation as "'a privilege voluntarily granted" rather than a right) (quoting *Hudson v. United States*, 522 U.S. 93, 104 (1997)); *Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758, at *13 (Mar. 7, 2014) (imposing collateral bar on respondent in follow-on administrative proceeding, and stating that respondent, was not then associated with municipal advisors or nationally recognized statistical rating organizations, did not have a "vested right" to any such future association), *appeal filed* No. 14-1070 (D.C. Cir. May 6, 2014).

[69] FINRA Rule 9522(a).

Section 15(b)(4)(H)(ii). Consequently, Hunter Scott and Savva cannot establish that they lacked fair notice of the basis for Savva's statutory disqualification.[70]

3. FINRA properly admitted a post-hearing exhibit.

Hunter Scott and Savva argue that FINRA unfairly based its denial of the MC-400 Application on a transcript of the Vermont securities regulators' October 2003 sworn investigative interview of Savva. Hunter Scott and Savva contend that, because FINRA admitted the transcript into evidence after the November 2011 hearing, they had no opportunity to explain Savva's testimony at the hearing. We disagree and conclude that FINRA properly admitted the transcript.

The record shows that approximately one month after the hearing, Member Regulation filed a motion seeking to introduce the transcript of Savva's October 2003 sworn investigative interview in which he testified before Vermont securities regulators that he spoke to a customer and recommended the securities at issue in the Vermont Order. Member Regulation sought to introduce the transcript of the October 2003 investigative interview to rebut Savva's testimony at the hearing that he merely filled out the customer's order ticket and had no further involvement with the customer. Savva objected to Member Regulation's motion, arguing that introduction of the transcript would create the potential for serious prejudice and that Member Regulation should not be allowed to "reopen" the record following the hearing. After affording Hunter Scott and Savva an opportunity to respond to Member Regulation's motion and after receiving pleadings in response, the NAC admitted the transcript into evidence "solely for the purpose of considering Savva's differing explanations of the events surrounding the Vermont Order."

FINRA's rules confer upon an adjudicator the authority to decide procedural matters in FINRA eligibility proceedings and do not require the adjudicator to apply the formal rules of evidence operative in the federal courts.[71] We find that FINRA acted properly under its rules

---

[70] In addition, the NAC was not bound by Member Regulation's characterization of the alleged basis for Savva's statutory disqualification. The NAC, as an adjudicator, was free to raise and address this legal issue sua sponte. *See, e.g.*, *Henderson v. Dep't of Interior*, 202 F.3d 1356, 1360 (Fed. Cir. 2000) (an adjudicator is free to address sua sponte legal issues that neither party raised) (citing *Special Counsel v. Filiberti*, 27 M.S.P.R. 498, 504 (1984), *affirmed in part and remanded in part*, 804 F.2d 1504 (9th Cir. 1986)). To promote FINRA's mission to protect public investors, the NAC may independently determine whether a person is statutorily disqualified under the Exchange Act on grounds other than those urged by the parties. *See, e.g.*, *FCS Sec.*, Exchange Act Release No. 64852, 2011 WL 2680699, at *7 (July 11, 2011) (holding that the Commission was not bound by statements of its staff) & n.27 (collecting cases); *JJFN Serv., Inc.*, Exchange Act Release No. 39343, 53 SEC 335, 1997 WL 722029, at *4 (Nov. 21, 1997) (holding that statements made by Nasdaq staff with respect to an application for listing on the automatic quotation system did not bind NASD).

[71] *See* FINRA Rules 9146(j)(3) ("In the Rule 9500 Series, a motion shall be decided by an Adjudicator, except that a procedural motion made pursuant to the Rule 9520 Series or Rule

(continued…)

when it admitted the transcript of Savva's October 2003 investigative interview for the limited purpose of evaluating his credibility.[72] The NAC's use of the transcript for this limited purpose had no impact on the fact that the Vermont Order was a disqualifying event, that it involved serious, securities-related misconduct, that Savva was the subject of at least ten customer complaints and two regulatory matters, that Hunter Scott's proposed plan of supervision was inadequate, and that the Firm failed to establish its ability to comply with the plan.

4. Hunter Scott and Savva were not prejudiced by the passage of time.

Hunter Scott and Savva argue that they were unfairly prejudiced by the five-year delay between the Vermont Department's entry of its order in August 2004 and FINRA's notice in June 2009 that Savva was subject to a statutory disqualification, and that they were further prejudiced by the additional three years until FINRA denied Hunter Scott's MC-400 Application in August 2012. They cite to *Jeffrey Ainley Hayden*[73] for the proposition that the asserted delays "expose[] the inherent unfairness of these proceedings."

In *Hayden*, the Commission set aside a disciplinary proceeding by the New York Stock Exchange that resulted in findings that Hayden engaged in misconduct by, among other things, making unsuitable recommendations and making material misrepresentations and omissions. The Commission found that the delay in bringing the underlying disciplinary proceeding against Hayden—approximately fourteen years from the time of the first act of misconduct to the filing of charges against Hayden and more than six years from the last act—violated the Exchange Act's fairness requirements.

Hunter Scott and Savva have not shown how any of the asserted delays rendered the proceeding unfair. Moreover, since *Hayden*, we have made it clear that even in disciplinary proceedings, there are no "bright line rules" or "mechanical tests" to determine whether a delay is unfair; rather, fairness is determined by examining the entire record.[74] We have conducted an independent review of the record and find no unfairness as a result of the asserted delays.

(…continued)
9559(q)(3) may be decided by Counsel to the National Adjudicatory Council.") & 9145(a) ("The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.").

[72] *See, e.g.*, *Boleslaw Wolny*, Exchange Act Release No. 40013, 53 SEC 590, 1998 WL 254806, at *2 (May 20, 1998) (holding that FINRA correctly adhered to its long-standing policy of prohibiting collateral attacks on underlying disqualifying events). Furthermore, Hunter Scott and Savva's argument that the hearing had been "closed," and therefore the Hearing Panel could not admit any additional evidence, runs contrary to FINRA rules, which provide that the Hearing Panel may order the parties to supplement the record "at any time prior to the issuance of its recommendation." FINRA Rule 9524(a)(3)(C).

[73] Exchange Act Release No. 42772, 54 SEC 651, 2000 WL 649146 (May 11, 2000).

[74] *Mark H. Love*, Exchange Act Release No. 49248, 57 SEC 315, 2004 WL 283437, at *4 (Feb. 13, 2004).

D. FINRA rules are, and were applied in a manner, consistent with the Exchange Act.

We last turn to whether FINRA's rules are, and were applied in a manner, consistent with the Exchange Act.[75] FINRA may deny a firm's application for continued association with a statutorily disqualified person if FINRA determines that such association would be inconsistent with the public interest and protection of investors.[76] To this end, FINRA must "'independently [evaluate the] application, based upon the totality of the circumstances, and . . . explain the bases for its conclusion.'"[77] In doing so, FINRA "may demand a high level of integrity from securities professionals" to protect the investing public.[78] We also have recognized that FINRA has discretion in determining whether persons subject to disqualification should be permitted to associate with a member.[79] Moreover, in a FINRA proceeding such as this one, "the burden rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested employment."[80] Here, we find that FINRA acted in a manner consistent with the Exchange Act when it considered the allegations underlying the Vermont Order, Savva's history

---

[75] We previously found that FINRA's By-Law definition of disqualification "is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities association." Exchange Act Release No. 56145, 2007 WL 5185330, at *19 (July 26, 2007). In particular, we found the definition of disqualification in FINRA's By-Laws to be "consistent with Section 15A(b)(6) of the Exchange Act, in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest." *Id.* We made similar findings in approving the amendments to FINRA's eligibility rules. *See* Exchange Act Release No. 59586, 2009 WL 763690, at *3 (Mar. 17, 2009).

[76] *See* 15 U.S.C. § 78o-3(g)(2); *see generally Frank Kufrovich*, Exchange Act Release No. 45437, 55 SEC 616, 2002 WL 215446, at *4 (Feb. 13, 2002) (describing the steps that FINRA, then NASD, must take when denying an application to be consistent with the purposes of the Exchange Act).

[77] *Arouh*, 2010 WL 3554584, at *12 (quoting *Timothy P. Pedregon*, Exchange Act Release No. 61791, 2010 WL 1143089, at *5 (Mar. 26, 2010)).

[78] *Id.* at *13 (quoting *Kufrovich*, 2002 WL 215446, at *5).

[79] *See, e.g.*, *Arouh*, 2010 WL 3554584, at *13 (stating that the Commission has "afforded FINRA discretion in determining whether persons subject to statutory disqualification should be permitted to associate with a member firm"); *Am. Inv. Servs., Inc.*, Exchange Act Release No. 43991, 54 SEC 1265, 2001 WL 167861, at *3 (Feb. 21, 2001) ("NASD is afforded discretion in considering the circumstances under which a person subject to a statutory disqualification may associate with a member."); *Halpert & Co.*, Exchange Act Release No. 28615, 50 SEC 420, 1990 WL 322213, at *3 (Nov. 14, 1990) ("Particularly in matters involving a firm's employment of persons subject to a statutory disqualification, it is appropriate to recognize the NASD's evaluation of appropriate business standards for its members.").

[80] *Emerson*, 2009 WL 2138439, at *4 (quoting *Gershon Tannenbaum*, Exchange Act Release No. 31080, 50 SEC 1138, 1992 WL 213844, at *2 (Aug. 24, 1992)).

of customer complaints and regulatory matters, and Hunter Scott's proposed supervisory plan, and concluded that Hunter Scott did not meet its burden of showing that it would be in the public interest for Savva to continue associating with the Firm.

FINRA properly considered that the Vermont Order stemmed from allegations of serious, securities-related misconduct. We have repeatedly stated that "[u]nauthorized trading is very serious misconduct,"[81] emphasized the importance of ensuring that recommended securities are suitable for customers,[82] and condemned the use of high-pressure sales tactics.[83] We agree with FINRA that the seriousness of Savva's conduct weighed against allowing the Application.

We also agree with FINRA that Savva's history of at least ten customer complaints and two regulatory matters raised serious concerns about Savva's dealings with customers and his ability to comply with securities laws and regulations.[84] Hunter Scott and Savva argue that the customer complaints are stale and that FINRA based its denial on events that happened nearly a decade ago. But their argument overlooks that at least three customer complaints were filed against Savva between 2007 and 2008, and that in April 2009, Savva received a Cautionary Action from FINRA for, among other things, making unsuitable recommendations and engaging in excessive trading. In any event, FINRA appropriately reviewed and considered Savva's entire regulatory history in determining that Savva's continued association with Hunter Scott would present an unreasonable risk of future harm to the market or investors.[85]

Hunter Scott and Savva fault FINRA for assigning little or no weight to Savva's "recent, positive track record, including the fact that he has not had a single customer complaint during the last four years." In support, they attach to their opening brief eleven affidavits from customers that purportedly demonstrate their satisfaction with Savva and his "current business practices."[86] Hunter Scott and Savva did not, however, attempt to offer these affidavits during

---

81 *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 WL 2597567, at *6 & n.32 (July 1, 2008) (quoting *Howard Alweil*, Exchange Act Release No. 31278, 51 SEC 14, 1992 WL 288827, at *4 (Oct. 1, 1992)).

82 *See, e.g.*, *Weiss*, 2013 WL 1122496, at *7.

83 *See, e.g.*, *Bugarski*, 2012 WL 1377357, at *2 n.8 (collecting cases).

84 *See Emerson*, 2009 WL 2138439, at *5 (holding that FINRA reasonably concluded that two customer complaints filed against disqualified individual and settled by his firm, as well as discharges from prior firms, reflected poorly on his judgment and trustworthiness); *Kufrovich*, 2002 WL 215446, at *2 (holding it is appropriate to consider individual's prior disciplinary history).

85 *See Emerson*, 2009 WL 2138439, at *5 (stating that "[e]ven where prior misconduct is not recent, it still reflects poorly on [an applicant's] judgment and trustworthiness") (quoting *Kufrovich*, 2002 WL 215446, at *6).

86 All eleven affidavits were submitted for the first time on appeal as an attachment to Hunter Scott's and Savva's unsuccessful stay motion. Each affidavit generally contains similar language regarding the customer's interactions with Savva, his purported expertise, and each

(continued…)

the FINRA process, so FINRA cannot be faulted for disregarding documents that it never had the opportunity to consider. Under the Commission's Rule of Practice 452, a party who wishes to introduce additional evidence must file a motion for leave to do so.[87] This rule requires the motion to "show with particularity that such additional evidence is material and that there were reasonable grounds for failing to adduce such evidence previously."[88] Hunter Scott and Savva meet none of these standards. They did not file a motion seeking permission to introduce the new evidence; they have not explained with particularity why they did not introduce the evidence during the FINRA proceeding; and none of the affidavits deals with the relevant issues here. The letters purport to show that eleven customers were satisfied with Savva's services but do not address the specific circumstances surrounding the Vermont Order or the ten customer complaints and two regulatory matters—circumstances that FINRA reasonably concluded raised serious concerns about Savva's dealings with customers and compliance with securities laws and regulations. We therefore decline to admit this evidence.[89]

Hunter Scott and Savva further argue that permitting Savva to continue his employment with the Firm will serve the public interest because Savva's customers have relied on his expertise in connection with their investment decisions and his disqualification will deprive them of their "right" to choose their own broker. They also argue that FINRA's denial "effectively prevents Mr. Savva from exercising his fundamental right to earn a livelihood and thus merits exceptionally close scrutiny by the Commission." We have rejected similar arguments in other cases and do so again here. Savva has "no absolute right" to engage employment in the

---

(…continued)
customer's belief that Savva would not cause any harm if permitted to continue to associate with Hunter Scott.

87 17 C.F.R. § 201.452.

88 *Id.*; *see also* 17 C.F.R. § 201.460(c) (providing that documents not admitted at the hearing "shall not be considered a part of the record before the Commission").

89 *See Weiss*, 2013 WL 1122496, at *8-9 (declining to admit evidence where applicant had not sought permission to do so, had not explained why he did not introduce the evidence previously, and none of the letters from former and current customers addressed the relevant issues in the case); *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *13 (Nov. 9, 2012) (declining to admit evidence where applicant had not sought permission to do so, had not explained failure to introduce exhibits earlier, and attachments did not address issues relevant to the case); *John Edward Mullins*, Exchange Act Release No. 66373, 2012 WL 423413, at *14 n.60 (Feb. 10, 2012) (declining to admit exhibits attached to an applicant's brief that were "not material to [the applicant's] case" and addressed issues not under review); *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *6 & n.20 (Jan. 30, 2009) (determining not to admit documents when applicants did not file a motion under Rule 452).

securities industry.[90] His customers "remain free to find another [broker]. The Commission has an obligation to protect the investing public."[91]

Finally, FINRA considered Hunter Scott's proposed supervisory plan and properly found that its design and implementation were flawed. In assessing a supervisory plan, "we require . . . stringent supervision for a person subject to a statutory disqualification."[92] FINRA found that Hunter Scott's proposed supervisory plan was "skeletal, lack[ed] specificity, and [was] not specifically tailored to Savva and preventing misconduct similar to the Vermont Order." We agree and conclude that the proposed plan did not contain provisions sufficient to ensure that Hunter Scott properly supervised Savva. For instance, the plan could have, but did not, set forth procedures for reviewing or monitoring Savva's communications with customers, did not contain procedures for handling any future customer complaints filed against Savva, and did not designate a backup supervisor for Savva.[93] The plan also proposed a replacement supervisor, Hunter Scott's CCO, who, as recently as 2008, was the subject of customer complaints alleging excessive and unsuitable trading and churning.[94]

Equally troubling was Hunter Scott's implementation of the heightened supervisory procedures that had been in place since March 2004.[95] Four customer complaints and two regulatory matters arose while Savva was subject to the enhanced supervisory plan. The fact that

---

90 *Walter H. T. Seager*, Exchange Act Release No. 20831, 47 SEC 1040, 1984 WL 589596, at *2 (Apr. 6, 1984) (stating that respondent had "no absolute right" to engage in the securities business).

91 *Christopher A. Lowry*, Investment Advisers Act Release No. 2052, 55 SEC 1133, 2002 WL 1997959, at * 6 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003).

92 *William J. Haberman*, Exchange Act Release No. 40673, 53 SEC 1024, 1998 WL 786945, at *4 (Nov. 12, 1998).

93 *See Morton Kantrowitz*, Exchange Act Release No. 44239, 55 SEC 98, 2001 WL 435668, at *5 (May 1, 2001) (stating that, "[i]n determining whether to permit the employment of a statutorily disqualified person, the quality of the supervision to be accorded that person is of the utmost importance. We have made it clear that such persons must be subject to stringent oversight by supervisors who are fully qualified to implement the necessary controls.") (footnote omitted); *cf. NASD Regulatory and Compliance Alert* (Winter 1999), at 17-18 (stating that, although there is no one plan appropriate for each disqualified individual, most plans should contain certain features, including provisions concerning reporting and handling customer complaints), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/rca/p002379.pdf.

94 According to the CRD, the CCO has been registered with Hunter Scott since March 2006 and was the subject of two customer complaints, one in April 2007 alleging that he engaged in excessive and unsuitable trading, and the other in July 2008 alleging that he churned accounts and charged excessive fees and commissions. Hunter Scott settled both matters for a total of $187,500, without Hughes personally contributing to the settlements.

95 *See supra* note 18.

Savva may not have received a customer complaint since Hunter Scott filed its MC-400 Application with FINRA's RAD in 2009 does not erase his poor track record from 2004 to 2009. We also consider that, in April 2009, Hunter Scott received a Cautionary Action from FINRA for failing to follow its supervisory plan for Savva.[96]

As FINRA found, Hunter Scott's proposed plan does not reflect the careful consideration required to effectively supervise a statutory disqualified individual and lacks specifically tailored provisions designed to prevent and deter future misconduct.[97] Hunter Scott's proposed plan consists merely of four general provisions beyond the supervision to which all Hunter Scott registered representatives are subject. The plan is not sufficiently tailored to address Savva's past misconduct or prevent similar conduct in the future. The lack of details and controls in the plan is particularly troubling considering that the events that led to the Vermont Order occurred while Savva was on heightened supervision at his prior firm, J.P.Turner.

Hunter Scott and Savva argue that FINRA "failed to give appropriate consideration to an amended and strengthened supervision plan that was provided to FINRA in advance of its determination." But the only difference between the firm's original heightened supervisory plan and its amended plan is that Hunter Scott's CCO would serve as Savva's primary supervisor instead of the firm's Brooklyn office manager and that Savva would work in the Delray Beach office instead of the Brooklyn office. FINRA considered these facts and determined that it did not matter who supervised Savva because the proposed plan itself was inherently flawed.

---

96 *See, e.g.*, *Emerson*, 2009 WL 2009 WL 2138439, at *6 (considering a firm's prior violation of its own rules regarding heightened supervision in denying application); *Kantrowitz*, 2006 WL 2252394, at *5 (stating that "[t]he firm's recent regulatory violations, when considered with the disciplinary sanctions imposed against it . . . , suggest that the Firm has continuing difficulties with strict compliance with its regulatory obligations, raising doubts as to the Firm'[s ability to provide the supervision required to ensure that [Applicant] does not engage in future violative conduct.").

97 *See, e.g.*, *Arouh*, 2010 WL 3554584, at *10 (finding inadequate proposed plan of supervision where much of the plan applies to all firm employees). Although counsel for Savva and Hunter Scott represented that the Firm would incorporate into the heightened supervisory plan any other terms necessary for the application to be approved, it was the Firm's burden in the first instance to draft and propose a supervisory plan that provides for stringent supervision. *See, e.g.*, *Pedregon*, 2010 WL 1143089, at *6 & n.32 (holding that FINRA was fully justified in requiring a firm to provide specifics before approving an application rather than accepting assurances that the firm would later devise an appropriate plan); *Emerson*, 2009 WL 2138439, at *6 (holding that drafting a supervisory plan is the firm's responsibility, not FINRA's).

III. Conclusion

For the foregoing reasons, we have determined to dismiss Hunter Scott's and Savva's appeal. An appropriate order will issue.[98]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN; Commissioners GALLAGHER and PIWOWAR concur in the judgment, but base their determination that FINRA's application of its rules was not impermissibly retroactive solely on the ground that Respondents had fair notice of the statutory disqualification).

Jill M. Peterson
Assistant Secretary

---

[98] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72485 / June 26, 2014

Admin. Proc. File No. 3-15017

In the Matter of the Application of

NICHOLAS S. SAVVA and HUNTER SCOTT FINANCIAL, LLC
c/o Michael Schwartzberg, Esq.
Winget, Spadafora & Schwartzberg, LLP
45 Broadway, 19th Floor
New York, New York 10006

For Review of Action Taken by
FINRA

ORDER DISMISSING REVIEW PROCEEDINGS

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by Nicholas S. Savva and Hunter Scott Financial, LLC is hereby dismissed.

By the Commission.

Jill M. Peterson
Assistant Secretary