SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 86751 / August 23, 2019

Admin. Proc. File No. 3-13678r

In the Matter of the Application of

JOHN M.E. SAAD

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDING

Court of appeals remanded matter to the Commission after Commission sustained FINRA disciplinary action for Commission to determine in the first instance whether Supreme Court decision had any bearing on matter. *Held*, Supreme Court decision had no bearing on determination that FINRA disciplinary action should be sustained.

APPEARANCES:

*Sarah L. Levine, Joan E. McKown*, and *Alex Potapov*, of Jones Day, and *Sara E. Kropf* of the Law Office of Sara Kropf PLLC, for John M.E. Saad.

*Alan Lawhead*, *Gary Dernelle*, and *Michael Garawski*, for FINRA.

Case remanded: December 5, 2017
Last brief received: April 10, 2018

## Introduction

In 2015, the Commission sustained a FINRA disciplinary action barring John M.E. Saad from associating with any FINRA member firm following his misappropriation of employer funds.[1] After Saad appealed, the D.C. Circuit granted in part and denied in part Saad's petition for review.[2] The court found that we had "provided a careful and comprehensive analysis of Saad's arguments seeking a reduction in his sanction."[3] The court also found that our decision "reasonably focused on the record of Saad's prolonged pattern of falsehoods and deception, as well as the direct threat that his misconduct posed to customers' and other participants' faith in the integrity of the securities industry."[4] Nonetheless, the court remanded for us to consider the relevance, if any, of the Supreme Court's recent decision in *Kokesh v. SEC* to Saad's contention that the bar FINRA imposed on him is impermissibly punitive.[5]

## Analysis

*Kokesh* held that disgorgement is a "penalty" for purposes of the five-year statute of limitations in 28 U.S.C. § 2462, which applies to any "action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture."[6] In so holding, the Supreme Court said that a "'civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.'"[7] The D.C. Circuit has stated that the Commission may affirm only FINRA sanctions that are "remedial" and not "punitive,"[8] so, Saad argues, because FINRA bars serve deterrent purposes,[9] a FINRA bar is "categorically punitive" under *Kokesh* and thus impermissible.[10]

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1 *John M.E. Saad*, Exchange Act Release No. 76118, 2015 WL 5904681 (Oct. 8, 2015) ("*Saad III*"). We first sustained FINRA's bar in 2010. *John M.E. Saad*, Exchange Act Release No. 62178, 2010 WL 2111287 (May 26, 2010) ("*Saad I*"). Saad sought review, and the D.C. Circuit remanded for us to consider potentially mitigating factors. *Saad v. SEC*, 718 F.3d 904 (D.C. Cir. 2013) ("*Saad II*"). The proceedings following that remand resulted in *Saad III*.

2 *Saad v. SEC*, 873 F.3d 297, 298 (D.C. Cir. 2017) ("*Saad IV*").

3 *Id.* at 304.

4 *Id.*

5 *Id.* (citing *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)).

6 137 S. Ct. at 1639.

7 *Id.* at 1645 (emphasis original) (quoting *Austin v. United States*, 509 U.S. 602, 621 (1993)).

8 *See, e.g.*, *Siegel v. SEC*, 592 F.3d 147, 158 (D.C. Cir. 2010).

9 *See, e.g.*, *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *13 (Jan. 9, 2015), *aff'd*, 641 F. App'x 27 (2d Cir. 2016).

10 Saad does not argue that the five-year statute of limitations in Section 2462 prohibits the imposition of FINRA's bar. Even assuming that FINRA bars are penalties within the meaning of Section 2462 (and we do not believe that they are) and that Section 2462 applies to FINRA

(continued. . .)

We see no basis for extending *Kokesh* in the manner that Saad suggests. Courts have recognized that a sanction does not become punitive simply because the person on whom it is imposed feels punished. Courts have also recognized that all sanctions will have some deterrent effect. Accepting Saad's argument would render essentially all sanctions punitive. This cannot be.

*Kokesh* does not render FINRA bars impermissible. The "sole question presented" in *Kokesh* was whether a particular pecuniary sanction—disgorgement—constituted a fine, penalty, or forfeiture "within the meaning" of Section 2462.[11] The Court held that a "*pecuniary* sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss."[12] But it makes no sense to extend this compensation-based test to *non*pecuniary sanctions—which by their nature do not compensate victims—lest we render all noncompensatory sanctions penalties.

No Supreme Court precedent supports this result. Rather, the Supreme Court has recognized that debarments from practicing a profession after misconduct occurs are to be regarded *not* as "imposi[ng] . . . an additional penalty" but instead as securing the public "against the consequences of ignorance and incapacity as well as deception and fraud."[13] As a result, such debarments are "remedial sanctions."[14]

Similarly, the D.C. Circuit, specifically in the context of FINRA bars, has held that debarments to protect the public are remedial. A FINRA bar may be imposed, not as punishment, but "'as a means of protecting investors,'" and "'general deterrence . . . may be

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(. . . continued)
proceedings (an issue we need not decide here), FINRA's action is not time-barred under that provision because it was brought within five years of Saad's misconduct. *See Saad IV*, 873 F.3d at 300-01 (Saad submitted false expense reports and forged receipts in 2006, lied to investigators in 2006 and 2007, and FINRA brought a disciplinary proceeding in 2007).

[11] 137 S. Ct. at 1639, 1642 n.3.

[12] *Id.* at 1642 (emphasis added).

[13] *Hawker v. People of New York*, 170 U.S. 189, 200 (1898) (citing *Ex parte Wall*, 107 U.S. 265, 288 (1883) (holding that debarment of an attorney "is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them" and to "protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws")). The Supreme Court has stated, in considering the procedural protections that must accompany attorney disbarment proceedings, that disbarring an attorney "is a punishment or penalty" such that the lawyer "is entitled to procedural due process." *In re Ruffalo*, 390 U.S. 544, 550 (1968). We recognize that debarments are significant remedial sanctions necessitating procedural protections. Our point is that *Kokesh* does not establish that all sanctions are penalties in all contexts unless they provide recompense to victims.

[14] *Helvering v. Mitchell*, 303 U.S. 391, 399 & n.2 (1938) (citing *Hawker* and *Ex parte Wall*).

considered as part of the overall remedial inquiry.'"[15] Other circuit courts and the Commission also recognize this framework for sustaining FINRA bars.[16] *Kokesh* does not purport to overturn this precedent. As to a FINRA bar, we see no basis to extend *Kokesh*'s test for resolving a challenge to pecuniary sanctions under Section 2462.

Three reasons support our decision: (1) Congress explicitly authorized bars by mandating that FINRA adopt rules providing for them in appropriate cases; (2) the Supreme Court has recognized outside the context of Section 2462 that a deterrent purpose does not make a sanction punitive; and (3) FINRA bars are not penalties even under *Kokesh*'s test.

## I. FINRA bars cannot be categorically impermissible because Congress authorized FINRA to impose bars and gave the Commission authority to review such sanctions to ensure they are not impermissibly punitive and thus excessive or oppressive.

FINRA bars cannot be categorically impermissible under the Securities Exchange Act of 1934, because Congress explicitly authorized FINRA to impose such bars and, where an individual barred by FINRA seeks Commission review, directed the Commission to determine whether the bar is excessive or oppressive. This congressional scheme thus contemplates both that some bars may be imposed by FINRA and that, where a bar is challenged, the Commission will assess whether the bar is impermissibly punitive—a judgment that the D.C. Circuit has emphasized must be based on the particular facts of the case.[17]

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[15] *PAZ Secs., Inc. v. SEC*, 494 F.3d 1059, 1065-66 (D.C. Cir. 2007) (quoting *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940) then *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)).

[16] *See, e.g.*, *West v. SEC*, 641 F. App'x 27, 30 (2d Cir. 2016) ("The purpose of a sanction is to protect investors, not to penalize brokers, although deterrence may be an additional consideration as part of the overall remedial inquiry."); *May Capital Grp.*, Exchange Act Release No. 53796, 2006 WL 1312955, at *5 n.32 (May 12, 2006) (stating that whether "taken by this Commission or the NASD, the purpose of all [disciplinary actions under the Exchange Act] is remedial, not penal" because they are "not designed to punish, but to protect the public interest against further risk of harm") (alteration in original) (internal quotation marks and citation omitted).

[17] *See PAZ Secs.*, 494 F.3d at 1064-65 (stating that when evaluating whether a sanction is "excessive or oppressive," the Commission must "give '[s]ome explanation addressing the nature of the violation and the mitigating factors presented in the record'") (quoting *McCarthy*, 406 F.3d at 189-90); *cf. Steadman v. SEC*, 603 F.2d 1126, 1137-1140 (5th Cir. 1979) (stating that "when the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors"), *aff'd on other grounds*, 450 U.S. 91 (1981).

### A. Sanctions Congress authorized cannot be categorically impermissible.

Congress authorized FINRA sanctions by requiring that any association of brokers and dealers that registers as a national securities association (such as FINRA) have rules providing that persons associated with its members may be disciplined by barring them from associating with a member.[18] As discussed above, the Commission and the courts have long held that FINRA sanctions imposed pursuant to this authority are permissible only so long as the sanctions are designed not to punish offenders but to protect investors and the public interest.[19]

This understanding stems from the statutory text and structure. Our review of FINRA bars is governed by Section 19(e)(2) of the Exchange Act.[20] Under that provision, if the Commission finds a sanction to be "excessive or oppressive" or to impose an unnecessary or undue burden on competition, the sanction may be modified or cancelled.[21] In making that determination, the Commission must have "due regard for the public interest and the protection of investors."[22] This statutory language indicates that Congress did not intend FINRA to impose sanctions in a punitive way, but as a remedial measure.[23] The inquiry is objective and focuses on the purpose of the bar, as opposed to the subjective impact on the respondent. In other words, if a sanction is imposed for punitive purposes as opposed to remedial purposes, the sanction is excessive or oppressive and therefore impermissible.[24]

Although Exchange Act Section 19(e)(2) provides the framework for determining whether bars that FINRA has imposed pursuant to its authority under Section 15A(b)(7) are

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[18] Exchange Act Section 15A(b)(7), 15 U.S.C. § 78*o*-3(b)(7).

[19] *See supra* notes 15 and 16 and accompanying text.

[20] 15 U.S.C. § 78s(e)(2).

[21] Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2). Saad has never argued that FINRA's bar imposes an unnecessary or undue burden on competition.

[22] *Id*.

[23] *See Staten Secs. Corp.*, Exchange Act Release No. 18628, 1982 WL 32503, at *3 (Apr. 9, 1982) (stating that "Congress adopted the Securities Exchange Act and the Maloney Act amendment thereto as part of a comprehensive scheme to protect the public by maintaining the integrity of the securities markets" and finding that the sanctions NASD imposed were "neither excessive nor oppressive" and were not "penal" because they "serve[d] 'an important remedial function'") (citation omitted). *See generally Klein v. SEC*, 224 F.2d 861, 862 (2d Cir. 1955) ("Section 15A, enacted in 1938 and generally known as the Maloney Act, is an amendment to the Securities Exchange Act . . . [that] provides for the establishment and registration with the Commission of national associations of securities dealers which, in the first instance, would supervise the conduct and ethical standards of its members and exercise disciplinary power if necessary. If a dealer is disciplined . . . he may appeal to the Commission . . . .").

[24] In contrast, when Congress intends to provide for penalties, it does so directly. *See, e.g.*, Exchange Act Section 32, 15 U.S.C. § 78ff (authorizing criminal penalties); Exchange Act Section 21(d)(3), 15 U.S.C. § 78u(d)(3) (authorizing civil monetary penalties).

permissible or impermissible, in Saad's view FINRA bars are "categorically punitive" and thus may never be imposed. But as Judge Millett explained in *Saad IV*, "[d]isciplinary tools required by Congress . . . cannot categorically be impermissibly 'excessive or oppressive'" under the congressional scheme.[25] In *Kokesh*, the inquiry was whether a certain sanction fell within the meaning of Section 2462. To the contrary, the inquiry under Section 19(e)(2) is not whether a certain sanction falls within the meaning of another statute, but whether the sanction is imposed for punitive purposes and therefore excessive or oppressive. The fact that Congress authorized the Commission to set aside sanctions that are excessive or oppressive clearly implies that some sanctions that Congress authorized are not excessive or oppressive. It is nonsensical to say that a sanction Congress explicitly authorized—complete with a test to determine its permissibility in each case—is always punitive, rendering it categorically impermissible under that same congressional scheme.

### B. Each bar must be evaluated under the facts of the case to determine whether it is remedial or punitive and thus excessive or oppressive.

This is not to say that FINRA bars can never be excessive or oppressive and therefore punitive. In *PAZ Sec., Inc. v. SEC*, the D.C. Circuit remanded a Commission decision affirming a FINRA bar as not excessive or oppressive because "the Commission did not adequately explain why the sanctions the NASD [FINRA's predecessor] imposed upon the petitioners were not punitive rather than remedial."[26] The court read the Commission's opinion to do no more "than say, in effect, petitioners are bad and must be punished."[27] In doing so, the court found, the Commission did not consider the necessity of the bar "with 'due regard for the public interest and the protection of investors.'"[28] Conversely, the D.C. Circuit affirmed a FINRA bar after the Commission reasonably found that petitioners "posed 'a clear risk of future misconduct'" and the bar was therefore "necessary to protect investors."[29] These distinctions highlight the remedial—as opposed to punitive—nature of appropriately-issued FINRA bars.

We recognize that bars have important consequences for sanctioned individuals. But as numerous courts have explained, the test for whether a sanction is a "penalty" must be objective, "not measured from the subjective perspective of the accused (which would render virtually

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[25] 873 F.3d at 309 (dubitante opinion of Millett, J.). *See generally Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (stating that "statutory language cannot be construed in a vacuum" and that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute 'as a symmetrical and coherent regulatory scheme' and 'fit, if possible, all parts into an harmonious whole.'") (citations omitted).

[26] 494 F.3d at 1066.

[27] *Id.* at 1064.

[28] *Id.* at 1065 (quoting 15 U.S.C. § 78s(e)(2)).

[29] *Paz Secs., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009).

every sanction a penalty).'"[30] This is because, as the Supreme Court has pointed out, "from the defendant's standpoint 'even remedial sanctions carry the sting of punishment.'"[31]

The D.C. Circuit's case law concerning the application of Section 2462 to administrative bar orders is also instructive. In *Johnson v. SEC*, the D.C. Circuit held that a suspension the Commission imposed in an administrative proceeding was a penalty for purposes of Section 2462 because the Commission "justifie[d] the sanction solely in view of Johnson's past misconduct."[32] But the court held that the sanction "would less resemble punishment if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public."[33]

In so holding, the court recognized that in "various *constitutional* contexts" the Supreme Court and courts of appeals had determined "that a license suspension—if motivated by a *bona fide* goal of protecting the public"—was not "punishment."[34] But the court found that these cases did "not control the question of whether license suspension is a *penalty for purposes of Section 2462*" because "the main focus of these cases has been on whether the law imposing the sanctions has an overall remedial *purpose* of protecting the public (with the sanctions being the reasonable means of achieving that purpose)."[35] The court stated that the inquiry under Section

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[30] *Coghlan v. NTSB*, 470 F.3d 1300, 1306 (11th Cir. 2006) (citation omitted); *accord United States v. Stoller*, 78 F.3d 710, 715 (1st Cir. 1996) (stating that "an inquiring court must scrutinize a civil sanction objectively rather than subjectively" to determine if it constitutes "punishment").

[31] *Stoller*, 78 F.3d at 715 (quoting *United States v. Halper*, 490 U.S. 435, 447 n.7 (1989)); *see also Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.*, 909 F.3d 446, 455 (D.C. Cir. 2018) ("Courts need a sorting mechanism for distinguishing statutes with punitive purposes from statutes with merely burdensome effects. Put another way, the ultimate question is whether the burden is a means to an end or an end in and of itself."); *cf. Fleming v. Nestor*, 363 U.S. 603, 613-14 (1960) ("In determining whether legislation which bases a disqualification on the happening of a certain past event imposes a punishment, the Court has sought to discern the objects on which the enactment in question was focused. Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified. . . . [The disqualification] was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment.") (quoting *Ex Parte Garland*, 4 Wall 333 (1866)).

[32] 87 F.3d 484, 490 (D.C. Cir. 1996).

[33] *Id.* at 489.

[34] *Id.* at 491 (emphasis in original) (referencing *Hawker*, 170 U.S. at 200; *Wall*, 107 U.S. at 297; *Stoller*, 78 F.3d at 724; *DiCola v. FDA*, 77 F.3d 504, 507 (D.C. Cir. 1996)).

[35] *Id.* (emphasis in original).

2462, however, is whether the sanction is "a form of punishment of the individual for unlawful or proscribed conduct, going beyond compensation of the wronged party."[36]

The D.C. Circuit has not extended *Johnson* to hold that all Commission suspensions—which may be imposed "for a remedial purpose, but not for punishment"[37]—are categorically punitive. Rather, the D.C. Circuit has distinguished *Johnson* outside the context of Section 2462 and upheld a suspension the Commission imposed where the Commission demonstrated that the purpose of the sanction "was not to punish [the respondent], but rather to protect the public from his demonstrated capacity for recklessness in the present, and presumably to encourage his more rigorous compliance with [the law] in the future."[38]

These cases demonstrate that the Commission must evaluate any bar FINRA imposes on its own facts to determine if it is remedial and not punitive (and thus not excessive or oppressive).[39] A sanction based solely on past misconduct without regard for the public interest —like the one at issue in *Johnson*—would be impermissibly punitive and thus excessive or oppressive.[40] In Saad's case, however, the D.C. Circuit held that we "reasonably concluded" that barring Saad was necessary in light of "the threat [he] would pose to investors and other securities industry participants were he to return to the industry."[41]

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[36] *Id.*

[37] *McCurdy v. SEC*, 396 F.3d 1258, 1264 (D.C. Cir. 2005) (finding that Commission "acted within the bounds of its authority" in suspending an accountant from appearing or practicing before it even though Commission "based its suspension solely on [McCurdy's] past conduct").

[38] *Id*. at 1264-65; *see also Siegel*, 592 F.3d at 158 (distinguishing *Johnson* and affirming suspensions because "the SEC imposed consecutive suspensions not to punish Siegel, but rather to protect the public from two fundamentally different types of harms"); *Meadows v. SEC*, 119 F.3d 1219, 1228 n.20 (5th Cir. 1997) (rejecting petitioner's contention that *Johnson* stood "for the proposition that a temporary bar from the securities industry is a punitive rather than remedial sanction" and distinguishing *Johnson* because in the case on appeal there were findings that petitioner posed a risk to the investing public and was unfit to serve the investing public).

[39] *See Hal S. Herman*, Exchange Act Release No. 44953, 2001 WL 1245910, at *5 (Oct. 18, 2001) (stating, in sustaining self-regulatory organization bar, that Commission's "determination of whether a particular sanction is excessive or oppressive is made with regard to 'the facts and circumstances of each particular case'") (citation omitted); *see also West*, 2015 WL 137266, at *10-11, 13 (stating that application of FINRA Sanction Guidelines "depends on the facts and circumstances of each case" and sustaining bar to "prevent West from harming additional customers" and "deter[] other securities professionals").

[40] *See Siegel*, 592 F.3d at 157 (stating that the Commission must "give some explanation addressing the nature of the violation and the mitigating factors presented in the record" in order to make "the necessary findings regarding the protective interests to be served by expulsion") (cleaned up) (quoting *Paz*, 494 F.3d at 1064-65 and *Paz*, 566 F.3d at 1175-76).

[41] *Saad IV*, 873 F.3d at 303.

Nothing in *Kokesh*, which addresses only the application of a statute of limitations to a pecuniary sanction, disturbs the D.C. Circuit's jurisprudence upholding similar bars or requires that, for purposes of determining whether a FINRA sanction is excessive or oppressive, bars should be considered categorically punitive. Nor does it displace Congress's mandate that we evaluate the particular bar at issue with due regard for the public interest and the protection of investors. *Kokesh* does not require that the bar in this case be set aside.

### C. Saad's attempts to reconcile the Exchange Act's requirement that FINRA have rules authorizing the imposition of bars with his argument that bars are categorically impermissible are unpersuasive.

Saad acknowledges a "tension" between Congress's mandate in the Exchange Act that FINRA be able to impose bars and his position that *Kokesh* renders FINRA bars categorically punitive. He tries to reconcile this tension by positing that FINRA could impose bars that are remedial under *Kokesh*—bars that "merely 'restore[] the status quo'" or "'simply return[] the defendant to the place he would have occupied had he not broken the law.'"[42] But his argument highlights *Kokesh*'s inapplicability to FINRA bars like the one imposed on Saad to protect the public from the risks he poses. *Kokesh*'s test for determining whether "a pecuniary sanction" is punitive or remedial contemplates that the sanction "compensat[es] a victim for his loss."[43] Saad provides no reason why that test should apply to a nonpecuniary sanction. Nor does he explain

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[42] In a footnote, Saad argues that FINRA bars are "especially punitive" because FINRA "does not allow a barred individual to independently apply for re-association with a FINRA member firm"; rather, the barred individual must find a member firm to sponsor his readmission. Saad ignores the fact that all individuals, barred or not, must find a FINRA member firm with which to associate. Saad's bar does not change the fact that he must find a firm with which to associate in order to be an associated person of a FINRA member firm. Saad also fails to explain why requiring a member firm to sponsor his readmission is punitive. This requirement ensures that barred individuals that are allowed to associate with FINRA member firms notwithstanding their bars do so "'subject to stringent oversight by supervisors who are fully qualified to implement the necessary controls.'" *Ascensio & Co.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *7 (Dec. 20, 2012) (citations omitted). In any case, Saad's reference to this allowance for barred individuals to remain in the industry undercuts his repeated suggestion that a FINRA bar represents an impermissible imposition of "capital punishment." *See, e.g.*, *Rizek v. SEC*, 215 F.3d 157, 161 (1st Cir. 2000) (explaining that the possibility of permission to reassociate suggests "a remarkably porous definition of a permanent bar").

[43] *Kokesh*, 137 S. Ct. at 1642.

how barring a person from association with a FINRA member firm could restore the status quo or return the defendant to where he was before the violation.[44]

In any event, Saad's argument ignores the purpose of nonpecuniary sanctions like bars: "Ordering the fox out of the henhouse," where "necessary to protect the investing public and the integrity of the security industry," "falls comfortably within the common understanding of the term remedial."[45] *Kokesh* does not hold otherwise, and it should not be read to preclude such remedies where the Exchange Act requires FINRA to adopt rules providing for bars and directs the Commission to review bars with due regard for the public interest and protection of investors.

Saad's argument that "it would be strange" if *Kokesh*'s definition of "penalty" did not apply uniformly "in the securities-enforcement context" misunderstands both Section 2462 and *Kokesh*. Section 2462 is not a securities-law provision.[46] It is a statute whose antecedents date to the Nation's founding,[47] more than a century before the federal securities laws were enacted and self-regulatory organizations were woven into the fabric of federal securities regulation. Section 2462 "governs many penalty provisions throughout the U.S. Code,"[48] but there is nothing in its text or history to suggest that Congress would have intended it to inform the distinct question of how self-regulatory organizations (or the Commission) should impose bars designed to protect the investing public. We see no reason that *Kokesh*'s application of Section 2462 should apply in a context so far removed from *Kokesh* itself.

Moreover, importing *Kokesh*'s analysis of whether disgorgement is a penalty under Section 2462 into the analytically distinct determination of whether a FINRA bar is a penalty would be inconsistent with Supreme Court precedent recognizing that a "'[p]enalty' is a term of

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[44] All the cases Saad cites as purported examples of bars that restored the status quo involved bars that, like Saad's bar, prevented the applicant from associating with a FINRA member in the future in light of the need to protect the public from the risks the applicant presented. *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at *12 (Apr. 18, 2013) (finding bar was "an appropriate remedial response to [applicant's] misconduct that "will protect investors and the public interest"); *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *14-15 (Nov. 9, 2012) (finding bar "will protect investors and the public interest" because applicant's conduct "suggests that he is likely to engage in similar misconduct in the future"); *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 WL 5001956, at *11-12 (Oct. 20, 2011) (finding bar "will adequately serve the public interest and protect investors" because applicant's conduct suggested his "lack of fitness to be in the securities industry").

[45] *Saad IV*, 873 F.3d at 312 (dubitante opinion of Millett, J) (internal quotation marks omitted).

[46] *Gabelli v. SEC*, 568 U.S. 442, 445 (2013) (Section 2462 is "not specific . . . to securities law").

[47] *3M v. Browner*, 17 F.3d 1453, 1458 n.7 (D.C. Cir. 1994).

[48] *Gabelli*, 568 U.S. at 445.

varying and uncertain meaning,"[49] and that a remedy may be punitive for one purpose but not for others.[50] Indeed, courts have repeatedly recognized that the inquiry under Section 2462 is distinct from the inquiry into whether a remedy is appropriate as a substantive matter.[51] Nothing in *Kokesh* supports deviating from that settled approach.

In any case, *Kokesh* does not establish that bars are penalties even for purposes of Section 2462. As discussed above, *Kokesh* discussed the test for considering a pecuniary sanction to be a penalty and said nothing about nonpecuniary sanctions. This difference in context leads us to conclude that *Kokesh* does not render nonpecuniary sanctions authorized by statute outside the context of Section 2462 to be categorically punitive.

## II. Supreme Court precedent establishes that nonpecuniary sanctions such as bars are not rendered punitive solely because they may serve as a deterrent.

### A. *Kokesh* held disgorgement to be a penalty because in some cases the primary justification for that remedy is the deterrence of others.

Supreme Court precedent bolsters the conclusion that a nonpecuniary sanction Congress authorized may serve as a deterrent and still be remedial and not punitive. *Kokesh* held that a sanction is punitive for purposes of Section 2462 if it "cannot fairly be said *solely* to serve a remedial purpose, but rather can *only* be explained as *also* serving either retributive or deterrent purposes."[52] The Court acknowledged that disgorgement serves the remedial goals of restoring the *status quo ante* and compensating injured investors.[53] But in a meaningful category of cases—as when insider traders are forced to disgorge profits "they never received" or when

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[49] *Life & Cas. Ins. Co. of Tenn. v. McCray*, 291 U.S. 566, 574 (1934); *see also, e.g.*, *United States v. City of Spokane*, 918 F.2d 84, 88 (9th Cir. 1990) (rejecting the "fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted to an entirely different context"); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 613 (D.C. Cir. 1988) ("[W]ords can take on vastly different meanings in different contexts."); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 696 (2d Cir. 1952) (rejecting in the context of statutory interpretation the "'familiar one-word-one-meaning . . . fallacy,' grounded on reasoning which 'would . . . make it impossible to speak of drinking a toast'") (citation omitted).

[50] *See, e.g., United States v. Ursery*, 518 U.S. 267, 278-88 (1996) (holding that, although civil forfeiture is punishment for purposes of the Eighth Amendment, it is not punishment for purposes of the Fifth Amendment's Double Jeopardy clause); *Tull v. United States*, 481 U.S. 412, 424 (1987) (stating that "disgorgement of improper profits [is] traditionally considered an equitable remedy," but also characterizing disgorgement as a "limited form of penalty").

[51] *See, e.g.*, *Johnson*, 87 F.3d at 486-87; *Zacharias v. SEC*, 569 F.3d 458, 470 (D.C. Cir. 2009) (per curiam).

[52] *Kokesh*, 137 S. Ct. at 1645 (internal quotation marks omitted) (first emphasis in original).

[53] *Id.* at 1644-45.

disgorged funds are disbursed to the Treasury rather than to victims of securities violations—the Court found that disgorgement is not justified on those remedial grounds.[54] In those cases, the Court determined that disgorgement is justified by the need to deter violations of the securities laws by "others," and the Court held that a "pecuniary" remedy is punitive within the meaning of Section 2462 when general deterrence is a necessary justification for the remedy.[55] Because the Court viewed general deterrence as "not simply an incidental effect of disgorgement" but a "primary purpose" of the remedy (at least in a significantly large category of disgorgement cases), disgorgement's non-punitive goals were insufficient to make the remedy non-punitive for purposes of Section 2462.[56]

The Court's discussion of the principle that a sanction is punitive if it "cannot fairly be said *solely* to serve a remedial purpose," taken in context, does not bear on the imposition of sanctions like FINRA bars. As an initial matter, the Court aimed its entire discussion in *Kokesh* towards determining when a "pecuniary sanction" operates as a penalty. It was for the purpose of answering that question that the Court distinguished sanctions imposed to "deter others from offending in like manner" on the one hand, "as opposed to compensating a victim for his loss," on the other hand.[57] That distinction makes sense for monetary sanctions, but not for sanctions that, like the bar at issue here, have no monetary component.

Moreover, extending *Kokesh* to cases not involving the applicability of Section 2462 to pecuniary sanctions would risk contravening Supreme Court precedent criticizing the use of that "solely remedial" test in contexts where the Court itself had not.[58] The *Kokesh* Court did not indicate that its analysis has the ramifications Saad ascribes to it. As such, the *Kokesh* analysis is properly confined to the "sole question presented" to the Court.[59]

### B. The Supreme Court has recognized in other contexts that the fact that a sanction may have a deterrent effect does not make it a penalty.

*Kokesh* quoted the "solely remedial" test from *Austin v. United States*, a case involving whether civil *in rem* forfeiture proceedings were "punishment" under the Eighth Amendment's

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54 *Id.* at 1643-44.

55 *Id.* at 1644-45.

56 *Id*. at 1643 (internal quotation marks and editing deleted).

57 *Id.* at 1642 (internal quotation marks omitted).

58 *See Ursery*, 518 U.S. at 282-87 (stating that the Sixth and Ninth Circuits had "misread" the Court's past cases and that the Court "decline[d] to import" a test "that found a civil sanction to be punitive if it could not 'fairly be said solely to serve a remedial purpose'" into the question of whether civil forfeiture constituted "punishment for the purpose of the Double Jeopardy Clause" because none of the Court's prior cases discussing that test "dealt with the subject of . . . *in rem* civil forfeitures for the purposes of the Double Jeopardy Clause") (internal citations omitted).

59 *Kokesh*, 137 S. Ct. at 1642, n.3.

excessive fines clause.[60] *Austin* quoted the language in turn from *United States v. Halper*, a case involving pecuniary sanctions and the Double Jeopardy Clause.[61] But in *Hudson v. United States*, the Supreme Court abandoned *Halper*'s "test for determining whether a particular sanction is 'punitive'" for Double Jeopardy purposes as "ill considered" and "unworkable."[62]

*Hudson* held that if "a sanction must be 'solely' remedial (i.e., entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause" because "all civil penalties have some deterrent effect."[63] As a result, the Court held that debarment from the banking industry was not "so punitive in form and effect as to render [it a] criminal" sanction under the Double Jeopardy Clause.[64]

The Court stated that debarment has not "historically been viewed as punishment."[65] And the fact that the debarment "will deter others" was "insufficient" to render the sanction punitive because the debarment "also serve[d] to promote the stability of the banking industry."[66] The Supreme Court stated that to hold "that the mere presence of a deterrent purpose renders such sanctions 'criminal' for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation of institutions such as banks."[67]

*Hudson*'s reasoning is equally applicable to the determination of whether a sanction FINRA imposed is impermissibly punitive and therefore excessive or oppressive. Because "each of the remedies" at the Commission's disposal—including "debarment"—"has th[e] capacity to varying degrees" to "act[] as a deterrent,"[68] and because we may not affirm FINRA bars that are punitive,[69] it would undermine the Commission's ability to effectively regulate the securities industry to hold that all bars are impermissibly punitive due to the mere presence of a deterrent effect. Notwithstanding *Kokesh*'s holding with respect to pecuniary sanctions in the context of the statute of limitations in Section 2462, Supreme Court precedent does not require the result Saad advances.[70]

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60 509 U.S. 602, 621 (1993).

61 490 U.S. 435, 448 (1989).

62 522 U.S. 93, 101-02 (1997).

63 *Id.* at 102.

64 *Id.*at 104 (quoting *Ursery*, 518 U.S. at 290).

65 *Id.*

66 *Id*. at 105.

67 *Id.*

68 *Steadman*, 603 F.2d at 1142.

69 *See supra* note 8.

70 *See Hudson*, 522 U.S. at 105 (recognizing that sanctions may "'serve[] a deterrent purpose distinct from any punitive purpose'") (quoting *Bennis v. Michigan*, 516 U.S. 442, 452 (1996));

(continued. . .)

*Hudson* is consistent with other decisions—outside the context of Section 2462—holding that debarments are remedial and not punitive even though they also have a deterrent effect.[71] Some of these decisions state explicitly that the test first conceived in *Halper* for "determining the nature of a civil sanction" should be "limited to cases involving fines, forfeitures, or other monetary penalties designed to make the sovereign whole" and "is inapposite in the typical debarment case."[72] These decisions reflect the principle that, at least outside the context of Section 2462, debarments that protect the public from future risks are remedial.[73] The Eleventh Circuit has even held *within* the context of Section 2462 that such debarments are remedial and not punitive.[74] In any case, *Kokesh* does not call into question decisions outside the context of

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*see also Ursery*, 518 U.S. at 284 n.2 (stating that if *Halper* "were applied literally, then virtually every sanction would be declared to be a punishment" and rejecting this view).

[71] *See, e.g.*, *Stoller*, 78 F.3d at 724 (holding that FDIC debarment order was remedial because "[r]egulators who act principally to safeguard the integrity of the industries that they oversee or to shield the public from the machinations of unscrupulous persons . . . are not purveyors of punishment in a constitutionally relevant sense . . . even if effectuating a specific remedy sometimes carries with it an unavoidable component of deterrence"); *cf. SEC v. Collyard*, 861 F.3d 760, 764–65 (8th Cir. 2017) (holding that a "nonpecuniary" injunction requiring "obedience with the law" was not a penalty under Section 2462 because its "primary purpose" is "to protect the public prospectively, not redress public wrong," even if it also has an "incidental effect" of deterring the defendant from committing further violations). Saad's argument that a FINRA bar is punitive because in addition to deterring others it "serves to incapacitate the offender" is unavailing. *United States v. Borjesson*, 92 F.3d 954, 955-56 (9th Cir. 1996) (holding that debarment from participating in HUD programs "serves 'important nonpunitive goals'—maintaining the integrity and the appearance of integrity of government programs" and that "these goals may resemble the legitimate objectives of punishment—including deterrence and incapacitation—is inevitable, and does not change the essentially remedial character of debarment").

[72] *Stoller*, 78 F.3d at 717.

[73] *United States v. Naftalin*, 606 F.2d 809, 812 (8th Cir. 1979) (explaining that a sanction barring a defendant "as well as his company from broker activities," to prevent him from "start[ing] a new firm and continu[ing] his deceptive dealing," is "not punitive but rather [a] device[] to protect the investing public"); *see also, e.g.*, *United States v. Furlett*, 974 F.2d 839, 844 (7th Cir. 1992) (finding that CFTC order barring respondent from participating in any contract market was remedial because it would "ensure the integrity of the markets and protect them from people like" respondent); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (holding that two-year bar from participating in HUD programs was "prophylactic government action" and "remedial by definition" as it served the "clear" purposes of "purg[ing] government programs of corrupt influences and . . . prevent[ing] improper dissipation of public funds").

[74] *Coghlan*, 470 F.3d at 1307 (finding revocation of pilot's license was remedial and not a penalty for purposes of Section 2462 because the FAA revoked the pilot's license "not to

(continued. . .)

Section 2462 holding that debarments designed to protect the public are remedial and not punitive.

### C. Supreme Court precedent indicates that the limitations on the manner in which FINRA may impose bars make the *Kokesh* test inappropriate here.

Another feature of the *Hudson* analysis bears emphasis. One reason the Court gave for abandoning the *Halper* test for determining whether a sanction is punitive was that "some of the ills at which *Halper* was directed are addressed by other constitutional provisions"—the due process, equal protection, and excessive fines clauses.[75] The Court explained in *Hudson* that the "additional protection afforded by extending double jeopardy protections" in the debarment context would thus be "more than offset by the confusion created by attempting to distinguish between 'punitive' and 'nonpunitive' penalties."[76]

The same is true here. If *Kokesh* had not interpreted Section 2462 to apply to disgorgement, there would have been no time limit on the imposition of that remedy. But in this case there are established limits on FINRA's ability to sanction violations. The Exchange Act limits the manner in which FINRA may impose its bars and FINRA's Sanction Guidelines further "elaborate upon the contours of its rules of conduct."[77] The Commission then has an obligation (where review is sought) to ensure that the sanction is not excessive or oppressive.[78] And as prior proceedings in this very case demonstrate, courts can correct missteps in the process that result in inadequately justified sanctions.[79] Therefore, as in *Hudson*, importing the "solely remedial" test is unnecessary to limit any FINRA overreach. And applying that test in this context would introduce uncertainty into an analytical framework that has long been applied.

We conclude that *Kokesh*'s test for determining whether a pecuniary sanction is a penalty for purposes of Section 2462 should not apply when determining whether a FINRA sanction is punitive and therefore excessive or oppressive.

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punish" the pilot but because his misconduct "called into question his fitness to hold [a pilot's license] and implicated matters of public air safety").

75 522 U.S. at 102-03.

76 *Id.* at 103.

77 *Saad IV*, 873 F.3d at 299.

78 *See, e.g.*, *Kirlin Secs.*, Exchange Act Release No. 61135, 2009 WL 4731652, at *18 (Dec. 10, 2009) (sustaining FINRA sanction against one petitioner, but reducing sanction imposed against another because of the latter's limited involvement in the misconduct at issue).

79 *See Saad III*, 718 F.3d at 914 (remanding for us to consider potentially mitigating factors).

## III. FINRA bars are not necessarily punitive even under *Kokesh*'s test.

Contrary to Saad's argument, his FINRA bar would not be a penalty even if the *Kokesh* test applied. Saad recites *Kokesh*'s test correctly: "that a sanction which 'cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.'" But Saad is wrong to say that this means that sanctions that have a deterrent effect are penalties. As a result, he is wrong to say that because FINRA bars may result in deterrence, they must be "unlawful under *Kokesh*." Saad's reading of the *Kokesh* test and his resulting conclusions are incorrect.

As discussed above, the language from *Kokesh* that Saad cites originated in the Supreme Court's decision in *Halper* thirty years ago. Since then, as discussed below, courts applying the test as articulated in *Halper* have recognized that a sanction is not rendered punitive merely because it can be explained as serving a deterrent purpose. Rather, these courts have held that a sanction is properly described as punitive if it can *only* be explained as serving a deterrent purpose.

In *Artway v. Attorney General of State of N.J.*, for example, the Third Circuit recognized that *Halper* stated that a "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can *only* be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[80] But it also recognized that *Halper*'s next sentence was that a "defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution."[81] The Third Circuit interpreted these sentences as holding that "a measure is 'punishment' if it can '*only* be explained as also serving either retributive or deterrent purposes.'"[82] "A measure may not '*fairly* be characterized as remedial' but rather may *fairly* be characterized 'only as a deterrent or retribution' if it can 'only be explained as also serving either retributive or deterrent purposes.'"[83] Saad's bar cannot be so characterized.[84]

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[80] *Artway v. Attorney Gen. of State of N.J.*, 81 F.3d 1235, 1254 n.16 (3d Cir. 1996). (quoting 490 U.S. at 448-49) (emphasis in *Artway*).

[81] *Id.* (quoting 490 U.S. at 448-49) (emphasis in *Artway*).

[82] *Id.* (emphasis in original).

[83] *Id.*

[84] *See Bae v. Shalala*, 44 F.3d 489, 493 (7th Cir. 1995) ("Bae argues that a civil sanction that serves both remedial and punitive goals must be characterized as punishment. . . . We refuse to read *Halper* so broadly. A civil sanction that can fairly be said solely to serve remedial goals will not fail under *ex post facto* scrutiny simply because it is consistent with punitive goals as well. A civil sanction will be deemed to be punishment in the constitutional sense only if the sanction 'may not fairly be characterized as remedial, but *only* as a deterrent or retribution.'") (internal citations omitted).

There is no question that Saad's bar—like all FINRA bars imposed "'as a means of protecting investors'"[85]—is a remedial measure. Our prior opinion in this case held that:

> We, like FINRA, believe that one who, regardless of motivation, intentionally misappropriates money from others on more than one occasion, may do so again. In short, Saad's actions betray a dishonest character that is wholly inconsistent with the high standards demanded of securities professionals. They demonstrate that he cannot be entrusted with firm or customer money, and that therefore he would pose a continuing and unacceptable threat to investors and other industry participants if not barred.[86]

Even under *Kokesh*, therefore, Saad's bar is not punitive but rather fairly characterized as remedial because it can be explained without invoking deterrence as a justification for its imposition.

There is also a critical distinction between deterrence's role as a factor in imposing disgorgement and its role as a factor in imposing FINRA bars. *Kokesh* found it significant that general deterrence is a sufficient justification for the imposition of disgorgement, regardless of whether disgorgement also serves a remedial function.[87] But FINRA bars may not be based solely on the need for general deterrence. Although general deterrence "may be considered as part of the overall remedial inquiry,"[88] general deterrence "is not, by itself, sufficient justification for expulsion or suspension."[89]

The Eighth Circuit emphasized this distinction in explaining why injunctions against future violations of the securities laws are not penalties under Section 2462.[90] It held that those injunctions are "imposed to protect the public prospectively" and that deterrence "is an 'incidental effect' of this injunction, not its primary purpose."[91] As Judge Millett recognized, that analysis applies to Saad's bar because it also was designed "to remedially protect the industry and the investing public."[92] Supreme Court precedent likewise does not support the conclusion that removing a person who poses a demonstrated risk of harm from a position in which he may inflict such harm is punitive, even if doing so also has the effect of deterring misconduct by others.

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85 *PAZ Secs.*, 494 F.3d at 1065.

86 *Saad III*, 2015 WL 5904681, at *7.

87 *See supra* notes 54-56 and accompanying text.

88 *McCarthy*, 406 F.3d at 189.

89 *Id.*

90 *Collyard*, 861 F.3d at 764-65.

91 *Id.*

92 *Saad IV*, 873 F.3d at 310-11.

## Conclusion

In closing, we observe that reading *Kokesh* to prevent FINRA from sanctioning stockbrokers who pose a risk to the investing public would be inconsistent with core purposes of the federal securities laws. The Exchange Act states that "transactions in securities … are affected with a national public interest" that makes it "necessary to provide for regulation and control of such transactions and of practices and matters related thereto."[93] The Supreme Court has likewise recognized that a principal purpose of the securities laws is "to insure honest securities markets and thereby promote investor confidence."[94] The securities laws seek to achieve those goals by promoting "a high standard of business ethics in the securities industry."[95] Ensuring that stockbrokers adhere to basic standards of honesty in all facets of their practices and barring brokers whose failures to do so threaten investors is critical to that effort.

Stockbrokers like Saad play a central role in enabling the participation of investors in the securities markets: because brokers serve as intermediaries between the investing public and the securities markets, oversight of brokers is a central element of the federal securities laws' protection of investors.[96] Misconduct by such persons can expose investors to harm and undermine the operation of the markets. Indeed, "[t]here is no identifiable segment of the securities industry whose ethical conduct is more crucial to the attainment of Congress' goals than the ethical conduct of broker-dealers."[97]

Consistent with these purposes, FINRA has appropriately barred stockbrokers who have failed to live up to the high standards to which they are justifiably held. Such bars seek not to punish past transgressions, but to prevent such misconduct from occurring in the future.[98]

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93 Exchange Act Section 2, 15 U.S.C. 78b.

94 *United States v. O'Hagan*, 521 U.S. 642, 658 (1997).

95 *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988).

96 *See Roth v. SEC*, 22 F.3d 1108, 1109 (D.C. Cir. 1994) (stating that a broker "registered with the Commission is bound to abide by numerous regulations designed to protect prospective purchasers of securities"); *Eastside Church of Christ v. Nat'l Plan, Inc.*, 391 F.2d 357, 362 (5th Cir. 1968) (stating that the "requirement that brokers and dealers register is of the utmost importance in effecting the purposes of the [Exchange] Act" because it is "through the registration requirement that some discipline may be exercised over those who may engage in the securities business"); *Persons Deemed Not To Be Brokers*, Exchange Act Release No. 22172, 1985 WL 634795, at *2 (June 27, 1985) (stating that the obligations imposed upon registered brokers "provide important safeguards to investors"); *see also Charles Hughes & Co., Inc. v. SEC*, 139 F.2d 434, 437 (2d Cir. 1943) ("The essential objective of securities legislation is to protect those who do not know market conditions from the overreachings of those who do.").

97 *Dirks v. SEC*, 681 F.2d 824, 841 (D.C. Cir. 1982), *rev'd on other grounds*, 463 U.S. 646 (1983).

98 *See, e.g., Joseph S. Butler*, Exchange Act Release No. 77984, 2016 WL 3087507, at *8-9 (June 2, 2016) (sustaining bar imposed on broker who converted customer funds and falsified a form because broker's conduct demonstrated that he was "unfit" to work in the securities

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Recidivism is not an idle concern. We frequently see cases involving prior offenders.[99] And these cases frequently involve harm to investors, including retail investors.[100] Indeed, the fact that the Commission's "orders are intended to be remedial rather than penal" is "a result of the fact that the 'design of the statute is to protect investors' and the general public."[101] We do not

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industry and that a bar was "necessary to protect the public"); *John D. Audifferen*, Exchange Act Release No. 58230, 2008 WL 2876502, at *15 (July 25, 2008) (sustaining bar imposed on broker who improperly extended credit for the purchase of securities and improperly benefited from the extension of credit because, "contrary to [the broker's] argument that a bar serves no remedial purpose," the bar "prevents Audifferen from improperly extending credit to his customers or himself in the future" and "will protect the public from Audifferen's willingness to place his own financial interests ahead of those of his customers and his firm"); *Robert J. Prager*, Exchange Act Release No. 51974, 2005 WL 1584983, at *14 (July 6, 2005) (sustaining bar imposed on broker who engaged in market manipulation because bar was "necessary to protect the markets and investing public"); *Bernard D. Gorniak*, Exchange Act Release No. 35996, 1995 WL 442063, at *2 (July 20, 1995) (sustaining bar imposed on a broker who "misuse[d] customer funds for a substantial period of time" because the bar "protects the public interest here by preventing further misconduct"); *Wilshire Disc. Secs.*, Exchange Act Release No. 32561, 1993 WL 243644, at *3 (June 30, 1993) (sustaining bar imposed on a broker who "defrauded investors, engaging in a serious departure from professional standards," because to allow the broker "to continue in the industry, free from the constraints of a permanent bar, would not adequately protect the public from further harm at [the broker's] hands").

[99] *See, e.g.*, *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *24 (July 2, 2013) (sustaining FINRA bar where "Murphy [was] a recidivist with a history of discipline related to his sales practices"), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014); *N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 WL 2151765, at *13 (May 8, 2015) (sustaining FINRA bar in case where the record "support[ed] FINRA's finding that 'respondents are recidivists whose disregard for FINRA rules and regulatory requirements place the public at risk"); *The Dratel Grp.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *15 (Mar. 17, 2016) (sustaining FINRA bar in a case where "Applicants' misconduct fit[] within a broader pattern of noncompliance").

[100] *See, e.g.*, *Murphy*, 2013 WL 3327752, at *2, 5 (recidivist who harmed "a writer and illustrator of children's books" and "an active member of the United States military"); *The Dratel Grp.*, 2016 WL 1071560, at *2 (recidivist who harmed "friends or family"); *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at *3, 24 (Sept. 28, 2017) (recidivist whose prior misconduct demonstrated an "ongoing disregard for rules designed to protect investors" and who harmed athletes who "were young with limited investment experience"). Bars, of course, also protect the public from potential recidivists who have harmed institutional investors. *See, e.g.*, *West*, 2015 WL 137266, at *13 (sustaining FINRA bar for misusing funds of an institutional investor customer as "remedial and not punitive").

[101] *Berko v. SEC*, 316 F.2d 137, 141 (2d Cir. 1963) (citations omitted); *see also Lank v. NYSE*, 548 F.2d 61, 64 (2d Cir. 1977) ("One of the primary purposes of Congress in enacting the Securities Exchange Act of 1934 was to protect the general investing public").

read *Kokesh* as limiting FINRA's or the Commission's efforts to guard against harm to the public by imposing bars justified by the need to protect investors and others dealing with financial professionals.

* * *

The D.C. Circuit remanded for us to consider "the relevance—if any—of the Supreme Court's recent decision in *Kokesh v. SEC*" to Saad's contention that FINRA's bar is "impermissibly punitive."[102] We hold that *Kokesh* has no bearing on our determination that the bar "is necessary to protect FINRA members, their customers, and other securities industry participants" and is therefore "remedial, not punitive."[103] An appropriate order will issue.[104]

By the Commission (Chairman CLAYTON and Commissioners JACKSON, PEIRCE, ROISMAN, and LEE).

Vanessa A. Countryman
Secretary

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[102] *Saad IV*, 873 F.3d at 304.

[103] *Saad III*, 2015 WL 5904681, at *7.

[104] 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. 86751 / August 23, 2019

Admin. Proc. File No. 3-13678r

In the Matter of the Application of

JOHN M.E. SAAD

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

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

ORDERED that the disciplinary action taken by FINRA against John M.E. Saad is sustained.

By the Commission.

Vanessa A. Countryman
Secretary