SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 98404 / September 15, 2023

Admin. Proc. File No. 3-19892

In the Matter of the Application of

ROBERT L. BRYANT III

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Former associated person of a FINRA member firm appeals determination that he is subject to a statutory disqualification. *Held*, application for review is *dismissed*.

APPEARANCES:

Scott C. Matasar and *Jennifer A. Lesny Fleming*, of Matasar Jacobs LLC, for Robert L. Bryant III.

Alan Lawhead and *Andrew Love* for FINRA.

Appeal filed: July 27, 2020
Last brief received: June 23, 2021

Robert L. Bryant III, who was formerly associated with a FINRA member firm, seeks review of FINRA's September 29, 2017 determination that he is subject to a statutory disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934.[1] We hold that Bryant's July 27, 2020 application for review was timely because FINRA failed to file notice of its action with the Commission prior to that date. However, we dismiss Bryant's appeal because FINRA correctly determined that he is subject to a statutory disqualification.

I. Background

Bryant was associated with FINRA member firm Allstate Financial Services, LLC, from September 2001 until June 2017, when he was discharged following "allegations of non-genuine signatures on brokerage account information."[2] Bryant then associated with Chelsea Financial Services from July 2017 until November 2017.

On September 6, 2017, Bryant entered into a consent order (the "Order") with the Nebraska Department of Banking and Finance (the "Department").[3] According to the Order's findings of fact, Bryant "acknowledged to the Department that he had signed customer signatures on five New Account Documents." The Order concluded that Bryant had violated Nebraska Revised Statute Section 8-1102(1), which largely tracks Exchange Act Rule 10b-5.[4] Bryant did not admit or deny the Order's findings and the Order stated that "any findings of violations of the Act are solely for purposes of this Order and for no other purposes," but he waived his right to a hearing and his right to appeal the Order. The Order suspended Bryant's registration for 20 business days, required Bryant to pay a fine and costs, and required that Chelsea provide heightened supervision of Bryant for two years.

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1 15 U.S.C. § 78c(a)(39).

2 BrokerCheck Report for Robert L Bryant III, https://files.brokercheck.finra.org/individual/individual_2494572.pdf. We take official notice of this report pursuant to Commission Rule of Practice 323. *See Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records and citing Rule of Practice 323, 17 C.F.R. § 201.323).

3 The Order was signed by the Director of the Department.

4 The Order found that Bryant violated Nebraska Revised Statute § 8-1102(1), which makes it "unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly":

> (a) To employ any device, scheme, or artifice to defraud;
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> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Cf. 17 C.F.R. § 240.10b-5 (containing similar proscriptions).

On September 8, 2017, the Department filed a Form U6 to report the Order to FINRA's Central Registration Depository.[5] Question 12 on Form U6 asks: "Does the order constitute a *final order* based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?"[6] Notwithstanding the Order's findings and Bryant's waiver of his right to appeal, the Department answered "No."

On September 29, 2017, FINRA sent Chelsea a notice (the "SD Notice") stating that, due to the Order, Bryant is subject to a statutory disqualification under Exchange Act Section 3(a)(39). FINRA sent a carbon copy of the SD Notice to Bryant, but it did not contemporaneously file notice of its action with the Commission. The SD Notice informed Chelsea that, as a result of Bryant's statutory disqualification, the firm either had to initiate the Membership Continuance process or terminate its association with him by October 18, 2017.

FINRA staff provided Chelsea with several extensions of the SD Notice's deadline. On October 12, 2017, Chelsea emailed FINRA stating that the Department had "verbally informed" Chelsea that "it was not their intention to subject Mr. Bryant to Statutory Disqualification," and Chelsea pointed out the Department's answer to Question 12 of Form U6. Then, on October 30, 2017, Chelsea emailed FINRA a letter from the Department's legal counsel stating that "[t]he Department has determined that the Form U-6 accurately reflects the terms of the Consent Order, including the Department's answer in response to Question #12."

On November 13, 2017, FINRA staff acknowledged the Department's response in an email to Chelsea but stated that this "determination is not conclusive." Instead, FINRA staff stated that the Order subjected Bryant to a statutory disqualification because Nebraska Revised Statute Section 8-1102(1) is "a law or regulation that prohibits fraudulent, manipulative, and/or deceptive conduct and closely mirrors Rule 10b-5 under the Exchange Act." FINRA's letter thus clarified that, notwithstanding the Department's view, Bryant was subject to a statutory disqualification because he had violated an antifraud statute and therefore met the statutory criteria for disqualification.

On November 14, 2017, Chelsea emailed FINRA, claiming that the Department had believed the letter from its legal counsel would "provide clarification" for FINRA that "Bryant should not be subject to Statutory Disqualification." Chelsea also claimed that it had forwarded FINRA's "findings" to the Department with the hope that the Department then would "amend the original order to remove Mr. Bryant from Statutory Disqualification." But it is not clear what Chelsea meant by these assertions, and the record does not include Chelsea's supposed correspondence with the Department about amending the Order. Regardless, on November 30, 2017, Chelsea emailed FINRA stating: "Even though [the Department] ha[s] told us (and supplied us with a letter) that it was not their intention for Bryant to become disqualified, they are not going to amend their order." As a result, Chelsea terminated its association with Bryant on November 30, 2017.

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[5] Self-regulatory organizations and state and federal regulators use Form U6 "to report disciplinary actions against broker-dealers and associated persons." *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 WL 2887272, at *3 n.23 (June 26, 2014).

[6] The emphasis appears in Question 12 on the form itself.

Bryant appealed the SD Notice through a letter dated June 4, 2020 and filed with the Commission on July 27, 2020. FINRA first provided the Commission with notice of its action against Bryant (*i.e.*, the SD notice) when it filed the certified record in this appeal in August 2020.

II. Timeliness

A. Bryant's appeal is timely because FINRA did not provide the Commission with notice of its action against Bryant until it filed the certified record in this case.

Before addressing the substantive question of whether Bryant was subject to a statutory disqualification, we first consider whether his appeal is properly before us as timely filed.[7] Exchange Act Section 19(d)(1) provides in relevant part that, if a self-regulatory organization ("SRO") "bars any person from becoming associated with a member, the [SRO] shall promptly file notice thereof with the" Commission.[8] But here, although the SD Notice effectively barred Bryant from becoming associated with any FINRA member firm,[9] FINRA did not provide the Commission with notice of its action until it filed the certified record in this case.

This fact matters here because the deadline for filing an application for review of FINRA action barring a person from becoming associated with a member is tied to the date when FINRA files notice of its action with the Commission. Exchange Act Section 19(d)(2) provides:

> Any action with respect to which a[n SRO] is required by paragraph (1) of this subsection to file notice shall be subject to review by the [Commission], on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with [the Commission] and received by such aggrieved person, or within such longer period [the Commission] may determine.[10]

Thus, under Exchange Act Section 19(d), an application for review must be filed within thirty days of the date that notice of the action was filed with the Commission and received by the aggrieved person.[11] Similarly, Commission Rule of Practice 420(b) provides that, absent an extension by the Commission, an application for review must be filed "within 30 days after the

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7 *See Robert L. Bryant III*, Exchange Act Release No. 90670, 2020 WL 7364196 (Dec. 15, 2020) (requesting additional briefing regarding timeliness); *Robert L. Bryant III*, Exchange Act Release No. 92036, 2021 WL 2182224 (May 26, 2021) (based on the parties' additional submissions, requesting additional briefing regarding timeliness).

8 15 U.S.C. § 78s(d)(1).

9 *Gregory Acosta*, Exchange Act Release No. 89121, 2020 WL 3428890, at *1, *4-6 (June 22, 2020).

10 15 U.S.C. § 78s(d)(2).

11 *Id.* § 78s(d).

notice of the determination is filed with the Commission and received by the aggrieved person applying for review."[12]

Both the statute and the regulation provide that the 30-day deadline begins to run when notice of an action is filed with the Commission *and* received by the aggrieved person. Because these provisions use the conjunctive term "and,"[13] we understand them to mean that the 30-day period only begins once both actions are complete: FINRA has filed its notice of action with the Commission, *and* FINRA has provided notice of the action to the aggrieved person. Because FINRA only filed its notice of action with the Commission when filing the certified record, the 30-day period could not have begun to run until that time, *i.e.*, August 2020. Bryant's application for review, filed in July 2020, is therefore timely.

B. We reject FINRA's argument that the statutory language should be construed to eliminate the requirement that FINRA provide notice of its action to the Commission.

FINRA argues that Bryant's application is untimely because, according to FINRA, the deadline for filing an application for review should begin to run when the aggrieved person receives notice of the action, regardless of when FINRA files notice of the action. We disagree because FINRA's interpretation is inconsistent with the statutory language. That is, FINRA would have us read Exchange Act Section 19(d)(2) as if it said that an application for review must be "filed within thirty days after the date [the] notice was ~~filed with [the Commission] and~~ received by [the] aggrieved person."[14] But doing so would require us to ignore a portion of the statute.[15]

In support of its interpretation, FINRA argues that the word "and" means "or" here. But applying a disjunctive meaning to the word "and" would not even produce the result FINRA advocates—that the appeal deadline depend only on the date when the aggrieved person receives notice of the SRO's action. Instead, if we read "and" disjunctively here, the statute would provide that the deadline would begin to run when notice of the action was filed with the Commission *or* received by the aggrieved person. This revised text would be ambiguous, as it would be unclear whether the deadline would begin to run on the earlier or the later of the two dates. If the deadline began to run on the later of the two dates, Bryant's appeal would still be timely because the deadline would not begin to run until the Commission received notice of FINRA's action. If the deadline began to run on the earlier of the two dates, the deadline could

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12 17 C.F.R. § 201.420(b).

13 *See, e.g.*, *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620-21 (2021) (holding that a criminal statute's "requirements are connected by the conjunctive 'and,' meaning defendants must meet all three"); *DeWitt Inv. Co.*, Exchange Act Release No. 4076, 1948 WL 29381, at *3 (Apr. 14, 1948) (finding that "and" is a "clearly conjunctive expression").

14 15 U.S.C. § 78s(d)(2) (strikethrough added).

15 *See Corley v. United States*, 556 U.S. 303, 314 (2009) (stating that "one of the most basic interpretive canons" is that a "'statute should be construed so that effect is given to all its provisions'" (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004))).

begin to run and could even expire in a case where FINRA provided notice of its action to the Commission but not to the aggrieved person, which would raise grave fairness concerns.[16]

In any event, the two cases that FINRA cites for the proposition that "and" can mean "or" are inapposite. FINRA cites a 1958 circuit court opinion holding that the statutory phrase "an employer engaged . . . in the ginning and compressing of cotton" could encompass an employer who engaged in only the ginning of cotton or only the compressing of cotton.[17] The court reasoned that, otherwise, the phrase would be read "out of the statute" because, in fact, no employers were actually engaged in both the ginning and compressing of cotton.[18] Here, by contrast, applying a conjunctive meaning to the word "and" does not read any words out of the statute. FINRA also cites a 1978 Supreme Court case that considered whether the statutory language "any person required to collect, truthfully account for, and pay over any tax imposed by this title" meant that the person had to be responsible for all three duties with respect to the particular tax dollars at issue, or rather just had to have all three duties "in terms of their general responsibilities."[19] The Court found that the statutory text might be read to encompass either construction but rejected the first "as inconsistent with its purpose."[20] Here, however, FINRA has not proposed a statutory construction that is consistent with the language of the statute.

Moreover, more recent cases have recognized that the word "and" should be considered to be conjunctive, unless such a reading renders other statutory language superfluous, produces absurd results, or otherwise produces an incoherent reading of the statute.[21] Here, reading "and" conjunctively does not render any other statutory language superfluous, produce absurd results, or otherwise produce an incoherent reading of the Exchange Act.

FINRA further argues that its proposed reading is consistent with the purpose of the Exchange Act—and that a contrary approach would "subvert" the statutory scheme by undermining the finality of FINRA actions. Our interpretation denies "finality" to a FINRA action (or, more precisely, allows an aggrieved person to appeal it more than 30 days after receiving notice of it) only when FINRA does not file the statutorily-required notice of this

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16 *Cf.* Exchange Act Section 15A(b)(8), 15 U.S.C. § 78o-3(b)(8) (requiring that FINRA provide a "fair procedure" for barring persons from association with member firms).

17 *Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893-95 (5th Cir. 1958).

18 *Id.*

19 *Slodov v. United States*, 436 U.S. 238, 245-47 (1978).

20 *Id.* at 247.

21 *See, e.g.*, *United States v. Lopez*, 998 F.3d 431, 436, 438 (9th Cir. 2021) (recognizing that the plain meaning of "and" is conjunctive, but noting "a handful of cases in which we construed the statutory term 'and' to mean 'or' because not doing so would have (1) rendered other statutory language superfluous or (2) produced absurd results"); *OfficeMax, Inc. v. United States*, 428 F.3d 583, 589 (6th Cir. 2005) (noting that "dictionary definitions, legal usage guides and case law compel us to start from the premise that 'and' usually does not mean 'or,'" and noting that courts have interpreted "and" to mean "or" "only to avoid an incoherent reading of a statute").

action with the Commission. FINRA does not explain why denying "finality" in these particular (and hopefully limited) circumstances subverts the purposes of the Exchange Act. Indeed, our reading of Section 19(d) advances the Act's purposes by providing an incentive for FINRA to comply with its statutory obligation to file the required notices. In addition, our reading of Section 19(d) means that the Commission's opportunity to review a FINRA action *sua sponte* will generally coincide with the appeal deadline.[22] Moreover, FINRA's reading of the statute would not truly promote the finality of its actions, as any FINRA action would not be final and unreviewable until the Commission received notice of it and declined to exercise *sua sponte* review, even if that occurred years after FINRA's proposed deadline for filing an appeal.[23] FINRA's reading would thus make certain actions unappealable before they even became final.

We also reject any argument that we should deem Bryant's appeal to be untimely because FINRA was unaware it was required to file notices of statutory disqualification determinations until we decided *Gregory Acosta* in 2020. In *Acosta*, we held that when FINRA determines that a person is subject to a statutory disqualification, that determination amounts to a bar prohibiting the individual from becoming associated with member firms and is therefore subject to Exchange Act Section 19(d) and appealable to the Commission.[24] That FINRA may have misunderstood its obligation to file notices of such determinations with the Commission prior to *Acosta* does not justify shortening Bryant's deadline for filing an appeal under Section 19(d).[25]

We recognize that we have previously held that the deadline for filing an application for review begins to run as soon as the aggrieved person receives notice of an action appealable under Section 19(d), regardless of when or whether the SRO files notice of that action with the Commission.[26] But the cases holding as such did not address the plain language of Exchange Act Section 19(d)(2). Indeed, the issue was not even briefed in the case with the most analysis on the question, *Orbixa*, which provided only a brief discussion of its conclusion in a footnote.[27] Specifically, *Orbixa* stated that Section 19(d) required notice to be filed with the Commission for it to determine whether to review a sanction on its own motion, but that an SRO's failure to file a

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22 *See* Exchange Act Section 19(d)(2), 15 U.S.C. § 78s(d)(2) (providing us with the authority to review certain FINRA actions on our own motion); Rule of Practice 421(a), 17 C.F.R. § 201.421(a) (governing *sua sponte* Commission review of SRO determinations).

23 *See* Rule of Practice 421(a), 17 C.F.R. § 201.421(a) (providing that "[t]he Commission may, on its own initiative, order review of any [appealable] determination by a self-regulatory organization . . . within 40 days after notice thereof was filed with the Commission").

24 2020 WL 3428890, at *4-9.

25 *See* 15 U.S.C. § 78s(d).

26 *See, e.g.*, *Orbixa Techs., Inc.*, Exchange Act Release No. 70893, 2013 WL 6044106, at *3 n.12 (Nov. 15, 2013) (holding that an SRO's failure to file notice with the Commission does not extend the deadline for filing an application for review, without focusing on the plain language of Exchange Act Section 19(d)(2)); *Eric David Wanger*, Exchange Act Release No. 79008, 2016 WL 5571629, at *3 n.26 (Sept. 30, 2016) (citing *Orbixa* for the same proposition).

27 *See Orbixa*, 2013 WL 6044106, at *3 n.12.

notice with the Commission did not preclude Commission review.[28] *Orbixa* then stated, without further explanation, that, "[l]ikewise, an SRO's failure to file notice with the Commission of the decision under review does not extend the applicant's deadline to file an application for review."[29] But to the extent *Orbixa* suggests an equivalency between the trigger for when the Commission can exercise its review versus when an application for review is timely, Section 19(d) differentiates between the two. The statute specifies that the Commission may review an SRO action when the SRO's notice to the Commission "is required" to be filed—not when that notice "*was* filed."[30] By contrast, the statute also specifies that an application for review is timely when it is filed within thirty days of when the SRO's notice "*was* filed"—not when that notice was "*required*" to be filed.[31] Accordingly, for all the reasons stated herein, we find *Orbixa*'s conclusion as to timeliness when an SRO fails to file notice of an action with the Commission conflicts with the plain meaning of Section 19(d). We therefore no longer follow that line of precedent on this issue.

* * *

In sum, we hold that the deadline for filing an application for review begins to run when notice of an SRO action is filed with the Commission *and* received by the aggrieved person.[32] We therefore conclude that Bryant's application for review is timely because FINRA failed to file notice of its action with the Commission until after Bryant filed his application for review.[33]

III. Analysis

Under Exchange Act Section 19(f), we review this action to determine if (1) the specific grounds on which FINRA based the action exist in fact; (2) the action was in accordance with FINRA's rules; and (3) FINRA's rules are, and were applied in a manner, consistent with the Exchange Act's purposes.[34] We find that the SD Notice satisfied each of these three criteria.

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28 *Id.*

29 *Id.*

30 15 U.S.C. § 78s(d)(2) (emphasis added).

31 *Id.* (emphasis added).

32 15 U.S.C. § 78s(d)(2).

33 FINRA has not argued that its ability to respond to Bryant's appeal was prejudiced by the passage of time.

34 15 U.S.C. § 78s(f); *see also Acosta*, 2020 WL 3428890, at *9 (applying Exchange Act Section 19(f) when reviewing FINRA statutory disqualification notice). Section 19(f) also requires that the action not impose an undue burden on competition. 15 U.S.C. § 78s(f). Bryant does not argue, and the record does not show, that FINRA's action imposes such a burden here.

A. The specific ground on which FINRA based the action exists in fact.

FINRA based the SD Notice on its determination that Bryant is subject to a statutory disqualification under Exchange Act Section 3(a)(39). We agree that Bryant is subject to a statutory disqualification and thus find that the specific ground for FINRA's action exists in fact.

1. The plain language of the provision Bryant violated establishes that he is subject to a statutory disqualification under Exchange Act Section 3(a)(39).

Under Exchange Act Section 3(a)(39)(F),[35] a person subject to an order enumerated in Exchange Act Section 15(b)(4)(H) is also subject to a statutory disqualification. And Section 15(b)(4)(H)(ii) includes "any final order of a State securities commission (or any agency or officer performing like functions)" that "constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct."[36] Bryant does not dispute, and we find, that the Order was a final order of a state securities commission or agency.[37] We have construed a "final order" under Exchange Act Section 15(b)(4)(H)(ii) to mean "a written directive or declaratory statement issued by a state agency under statutory authority that provide[d] for notice and opportunity for a hearing and constitute[d] a final disposition or action by the state agency."[38] The Order here provided Bryant with notice, and he specifically waived his right to a hearing.[39] And the Order is the final disposition or action by the state agency because Bryant waived his right to appeal it.[40]

We also find that the Order was based on violations of a law that prohibits fraudulent, manipulative, or deceptive conduct. The Order found that Bryant violated Nebraska Revised Statute Section 8-1102(1), which provides that it "shall be unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:"

(a) To employ any device, scheme, or artifice to defraud;

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35 15 U.S.C. § 78c(a)(39)(F).

36 15 U.S.C. § 78*o*(b)(4)(H)(ii).

37 *See Savva*, 2014 WL 2887272, at *7-8 (finding that a consent order in which the associated person waived a right to a hearing was a "final order," even though the applicant did not admit or deny its findings); *see also* Neb. Rev. Stat. § 8-1120(1) (stating that, generally, "the Securities Act of Nebraska shall be administered by the Director of Banking and Finance").

38 *Savva*, 2014 WL 2887272, at *7.

39 *See* Neb. Rev. Stat. § 8-1108.01(4) (providing that a fine may be imposed for a violation of the Securities Act of Nebraska only "after giving reasonable notice and opportunity for a hearing").

40 *See Meyers Assocs.*, Exchange Act Release No. 81778, 2017 WL 4335044, at *4 n.21 (Sept. 29, 2017) ("The disposition was final because [the applicants] voluntarily waived their right to seek judicial review when they consented to the [relevant state order].").

> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.[41]

The plain language of this statute prohibits fraudulent, manipulative, or deceptive conduct.[42] Thus, the Nebraska Supreme Court has referred to Section 8-1102(1) as "fraud provisions" and recognized that civil liability under this statute can attach based on intentional misrepresentations or omissions.[43] Indeed, Bryant does not argue that the above language does not encompass fraudulent, manipulative, or deceptive conduct. Instead, Bryant's only argument regarding the state statute is that, because the provision is entitled "[f]raudulent and other prohibited practices," it covers non-fraudulent practices. But even assuming that the section's title could change the plain language of the statutory text,[44] and that the "other prohibited practices" referred to in the title are not manipulative or deceptive practices, the title applies to Section 8-1102 as a whole rather than to subsection (1), which Bryant violated.[45] As discussed above, the plain language of Section 8-1102(1) prohibits fraudulent, manipulative, or deceptive conduct.

Accordingly, we find that Bryant was subject to a final order based on a violation of a law that prohibits fraudulent, manipulative, or deceptive conduct. Notably, Bryant's conduct underlying the Order was, at a minimum, deceptive.[46] One of the Order's findings of fact was that "Bryant acknowledged to the Department that he had signed customer signatures on five New Account Documents." And in an affidavit Bryant submitted in connection with this

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41 Neb. Rev. Stat. § 8-1102(1).

42 *Cf. SEC v. Dorozhko*, 574 F.3d 42, 50 (2d Cir. 2009) (holding in the context of interpreting federal antifraud securities laws that "[i]n its ordinary meaning, 'deceptive' covers a wide spectrum of conduct involving cheating or trading in falsehoods").

43 *State v. Fries*, 337 N.W.2d 398, 404-05 (Neb. 1983). Although the Nebraska Supreme Court has stated that civil liability can also attach based on negligent misrepresentations or omissions, *id.*, as discussed herein, the court held that Section 8-1102(1) also prohibits intentional misconduct. And, here, Bryant acted intentionally rather than negligently when he forged customer signatures without their prior authorization. *See infra* note 50 and accompanying text.

44 *Cf.* Neb. Rev. Stat. § 49-802 ("[S]ection and subsection heads or titles, . . . in the statutes of Nebraska, supplied in compilation, do not constitute any part of the law.").

45 *Cf., e.g.*, Neb. Rev. Stat. § 8-1102(3)(a) (providing that generally it is unlawful for an investment adviser or investment adviser representative "to enter into, extend, or renew any investment advisory contract" that provides compensation based on capital appreciation).

46 *See Savva*, 2014 WL 2887272, at *9 (finding that Exchange Act Section 15(b)(4)(H)(ii) applied where the conduct underlying the order was "at a minimum, deceptive").

appeal,[47] he admits that he signed several existing customers' signatures on the New Account Documents without their prior authorization. That conduct was deceptive.[48] He also acted deceptively towards Allstate when he submitted forms to the company creating the false impression that they were validly signed.[49] Bryant's admitted forgery of his customers' signatures also demonstrates that he acted with scienter.[50] We note, however, that Bryant does not argue that he is subject to a statutory disqualification only if his underlying conduct involved scienter, and therefore he has forfeited that argument.[51]

In his affidavit, Bryant avers that the "New Account Documents" on which he "signed the names of several of [his] existing customers" were "purely firm-internal administrative forms confirming the financial profiles for customers who had been [his] clients for many years." Bryant also avers that his customers were not financially impacted by the forms and he understands that the clients whose names he signed "either affirmatively ratified and/or did not contest the New Account Documents, as the forms merely confirmed the customers' already-existing financial profiles." But the fact that the customers had been his customers for many years, were not harmed, and may not have objected after the fact does not mean Bryant did not act deceptively in intentionally forging their signatures.[52]

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47 Bryant attached this affidavit to his opening brief, and FINRA has not objected to it. We admit this affidavit under Rule of Practice 452 because it is "material" and there were "reasonable grounds" for Bryant's failure to adduce it previously. 17 C.F.R. § 201.452.

48 *Cf. Mark F. Mizenko*, Exchange Act Release No. 52600, 2005 WL 2573375, at *5 (Oct. 13, 2005) (describing forgery as an "act[] of deception").

49 *See United States v. Finnerty*, 533 F.3d 143, 148 (2d Cir. 2008) (stating that deceptive conduct "irreducibly entails some act that gives the victim a false impression"); *Joseph John VanCook*, Exchange Act Release No. 61039A, 2009 WL 4026291, at *8 (Nov. 20, 2009) (finding deceptive conduct where the submission of orders to mutual funds "created the false impression that the orders were received before" the pricing time set forth in the relevant prospectuses, "when, in fact, the trading decisions were made after" that time).

50 *See, e.g.*, *United States v. Jamar*, 561 F.2d 1103, 1107 n.7 (4th Cir. 1977) ("Clearly without merit is defendant's suggestion that . . . there was no evidence of scienter . . . . The considerable evidence relating to Mrs. Jamar's forgery and uttering of the check permits the strongest inference that she did not possess it innocently."); *Brendan E. Murray*, Advisers Act Release No. 2809, 2008 WL 4964110, at *5-6 (Nov. 21, 2008) (finding that respondent "acted knowingly, and thus with scienter," where he admitted to preparing faked invoices on faked letterhead).

51 *See* Rule of Practice 420(c), 17 C.F.R. § 201.420(c) (explaining that issues that are not briefed "may, at the discretion of the Commission, be deemed to have been waived by the applicant"); *Savva*, 2014 WL 2887272, at *9 n.54 (noting that the applicants had not raised this argument).

52 We note that the alleged lack of customer harm may be considered as a mitigating factor if a FINRA member firm files a membership continuance application to associate with Bryant despite his statutory disqualification. *See infra* note 65 and accompanying text.

Bryant avers further that he did not understand that entering into the Order "would subject [him] to even the possibility of statutory disqualification" and that he "certainly did not, and do[es] not, believe that [he] had committed any fraudulent, manipulative or deceptive conduct, but rather had a lapse of judgment" due to certain personal issues. But we find that Bryant had adequate notice that he could be subject to a statutory disqualification by entering into the Order, given the plain language of the order entered against him, Nebraska Revised Statute Section 8-1102(1), and Exchange Act Sections 3(a)(39)(F) and 15(b)(4)(H)(ii) discussed above.[53]

2. The state regulator's unexplained answer on Form U6 does not alter our conclusion that Bryant violated a law that prohibits fraudulent, manipulative, or deceptive conduct within the meaning of Exchange Act Section 15(b)(4)(H)(ii).

Bryant argues that he is not subject to a statutory disqualification because the Department answered "No" to Question 12 of Form U6, which asked whether the Order "constitute[d] a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct."[54] A state regulator's answer to this question can potentially be relevant to determining the finality of a particular state order or to assessing the scope of the state law or regulation that was violated.[55] And decisions of the highest court of a state provide the definitive explanation of the scope of a state law.[56] But whether the Order was a final one based on a law or regulation that prohibits fraudulent, manipulative, or deceptive conduct *within the meaning of Exchange Act Section 15(b)(4)(H)(ii)* is a question of federal, not state, law.[57] So we do not

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[53] *See Meyers Assocs.*, 2017 WL 4335044, at *6 (holding that applicants had sufficient notice that entering into consent order would result in statutory disqualification, given Commission guidance, FINRA precedent, and FINRA guidance that suggested this result).

[54] FINRA, *Form U6* at 11 (May 2009) (emphasis omitted) https://www.finra.org/sites/default/files/AppSupportDoc/p116975.pdf (Question 12 of the Form U6 Regulatory Action Disclosure Reporting Page).

[55] *Cf. Acosta*, 2020 WL 3428890, at *10-11 (finding that the applicant was not subject to a statutory disqualification based on a state order, and noting that "[i]t appears, based on the parties' submissions," that the relevant state regulator had not reported that the order was a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct); *Savva*, 2014 WL 2887272, at *3 n.23, *9 (finding that the applicant was subject to a statutory disqualification based on a state order, and noting that the relevant state regulator had reported on Form U6 that the order was a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct).

[56] Here, as discussed above, the Nebraska Supreme Court has held that Nebraska Revised Statute Section 8-1102(1) are "fraud provisions" that cover, among other things, intentional misrepresentations and omissions. *See Fries*, 337 N.W.2d at 405; *supra* note 43 and accompanying text.

[57] *See, e.g.*, *Johnson v. United States*, 559 U.S. 133, 137-38 (2010) (holding that, in determining whether the Florida felony offense of battery by actually and intentionally touching

defer to the Nebraska regulator on that question. Here, we find for the reasons discussed above that, for the purposes of Section 15(b)(4)(H)(ii), the Order finding that Bryant violated Nebraska Revised Statute Section 8-1102(1) is a final order based on a violation of a law that prohibits fraudulent, manipulative, or deceptive conduct.

The Department's contrary view is also not persuasive, let alone sufficient to override our determination. Indeed, the record contains no explanation at all for the Department's statement in its letter to Chelsea that its answer to Question 12 "accurately reflects the terms of the Consent Order." We also note that, because the Order itself unambiguously results in a statutory disqualification, we do not consider extrinsic evidence of whether the Department intended this result.[58] Moreover, the record evidence regarding the Department's intent is mixed. Although Chelsea convinced the Department to send a letter stating that the Department's answer to Question 12 of Form U6 "accurately reflects the terms of the Consent Order," Chelsea was unable to convince the Department to amend the Order to remove the statutory disqualification.[59]

3. We reject Bryant's remaining challenges to the determination that he is subject to a statutory disqualification as a result of the Order.

Bryant further argues that the Order is not statutorily disqualifying because, when FINRA later entered into a Letter of Acceptance, Waiver and Consent ("AWC") with Bryant regarding

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another person involves the use of physical force for purposes of a federal statute, the Court was not bound by the Florida Supreme Court's conclusion that any unwanted physical touching did not involve "physical force" for purposes of a Florida statute because the "meaning of 'physical force'" in the federal statute "is a question of federal law, not state law"); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111-12 (1983) ("Whether one has been 'convicted' within the language of the [federal] statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State."), *superseded by statute*, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101(5), 100 Stat. 449, 449 (1986) (codified at 18 U.S.C. § 921(a)(20)); *see also id.* at 119-20 (noting that it is normally presumed "when Congress enacts a statute that it does not intend to make its application dependent on state law," even when the federal law's application is predicated on an event under state law).

[58] *Meyers Assocs.*, 2017 WL 4335044, at *6; *see also United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) ("[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it."); *United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 340 (D.C. Cir. 2014) ("In interpreting a consent decree, … 'a court may not look to extrinsic evidence of the parties' subjective intent unless the document itself is ambiguous.'") (quoting *Segar v. Mukasey*, 508 F.3d 16, 22 (D.C. Cir. 2007)).

[59] *Cf. Meyers Assocs.*, 2017 WL 4335044, at *6 (finding that a Connecticut Order gave rise to a statutory disqualification, and noting that "Applicants repeatedly attempted to have Connecticut endorse their position and modify the registration prohibitions in the Connecticut Order, but those attempts were consistently rebuffed"); *id.* at *8 n.45 (emphasizing that "Connecticut was unquestionably aware of the regulatory implications of the Connecticut Order but declined to modify it, despite applicants' request").

the same underlying conduct as the Order, FINRA reported that the AWC was not a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct. Unlike the Order, however, the AWC was based on violations of FINRA rules, rather than laws or regulations, and was issued by FINRA, rather than a state regulator. As a result, FINRA properly concluded that the AWC was not statutorily disqualifying under Exchange Act Section 15(b)(4)(H)(ii) because it did not meet the requisite elements identified in that section. Regardless, even if FINRA had mischaracterized the AWC, this fact would not be determinative given our finding that the Order is indeed statutorily disqualifying.

To the extent Bryant argues that he should not be subject to a statutory disqualification because the AWC did not bar him, we reject this argument. The sanctions in the AWC have no bearing on whether Bryant is subject to a statutory disqualification as a result of the Order. Bryant is subject to a statutory disqualification by operation of Exchange Act Section 3(a)(39)(F), and FINRA may find both that a person is subject to a statutory disqualification as a result of certain conduct and that the conduct warrants a sanction less than a bar.[60] In this regard, we note that a statutory disqualification does not necessarily preclude a person from participating in the securities industry.[61] A person subject to a statutory disqualification may still associate with a FINRA member firm if the firm applies to FINRA and is granted permission to remain a member while associating with that person despite their disqualification.[62]

Bryant also suggests that he should not be subject to a statutory disqualification because of mitigating circumstances. But under the Exchange Act, a statutory disqualification exists irrespective of any mitigating circumstances. A person is subject to a statutory disqualification if they fall within the terms of Exchange Act Section 3(a)(39).[63] A statutory disqualification is not a sanction over which a FINRA adjudicator has discretion.[64] Nonetheless, any mitigating circumstances may be relevant in the event a FINRA member firm subsequently initiates on

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60 *See Richard Allen Riemer, Jr.*, Exchange Act Release No. 84513, 2018 WL 5668898, at *8-9 (Oct. 31, 2018) (noting that FINRA had imposed a suspension for conduct that also resulted in the applicant's statutory disqualification).

61 *Id.* at *9.

62 *Id. Compare id*. (recognizing that where FINRA imposes a sanction of less than a bar for conduct that also results in a statutory disqualification, an application to associate notwithstanding the disqualification "may not be denied solely on the basis of the misconduct that led to the original sanction"), *with Commonwealth Cap. Sec. Corp.*, Exchange Act Release No. 89260, 2020 WL 3868981, at *9 (July 8, 2020) (suggesting that where FINRA imposes a sanction of a bar for conduct that also results in a statutory disqualification, nothing more than the nature and seriousness of the underlying conduct is necessarily required to deny an application to associate).

63 15 U.S.C. § 78c(a)(39).

64 *Riemer*, 2018 WL 5668898, at *8.

Bryant's behalf the membership continuance process that allows a member firm to attempt to associate with a statutorily disqualified individual notwithstanding the disqualification.[65]

* * *

Thus, we conclude that the Order "constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct,"[66] such that FINRA properly found that Bryant is subject to a statutory disqualification.[67]

B. FINRA's action was in accordance with its rules.

Under FINRA's By-Laws, "[n]o person shall become associated with a member, continue to be associated with a member, or transfer association to another member" if that person becomes subject to a statutory disqualification under Exchange Act Section 3(a)(39).[68] FINRA rules provide that, generally, if "FINRA staff has reason to believe that a disqualification exists," it "shall issue a written notice to the member" specifying the grounds for the disqualification.[69] Bryant has not argued that FINRA failed to comply with these or any other FINRA rules when it issued the SD Notice, and we conclude that the action was in accordance with FINRA's rules.

C. FINRA's rules are, and were applied in a manner, consistent with the Exchange Act's purposes.

Bryant does not dispute that FINRA's rules are consistent with the Exchange Act's purposes, and we find that they are. Under the Exchange Act, FINRA may "bar from becoming associated with a member any person[] who is subject to a statutory disqualification."[70] In turn, FINRA's rules generally prevent a person who is subject to a statutory disqualification from associating or continuing to associate with a FINRA member firm unless the firm successfully pursues the membership continuance process on the person's behalf.[71] These FINRA rules are consistent with the Exchange Act's purposes "to prevent fraudulent and manipulative acts and practices" and "in general, to protect investors and the public interest."[72] After all, as we have

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65 *See Savva*, 2014 WL 2887272, at *2 ("The critical inquiry in every [membership continuance] proceeding is whether the proposed or continued association of the person subject to disqualification would be consistent with the public interest and the overriding regulatory goal of ensuring the protection of investors.").

66 Exchange Act Section 15(b)(4)(H)(ii), 15 U.S.C. § 78*o*(b)(4)(H)(ii).

67 Exchange Act Section 3(a)(39)(F), 15 U.S.C. § 78c(a)(39)(F).

68 FINRA By-Laws, Art. III, §§ 3(b), 4.

69 FINRA Rule 9522(a)(1).

70 Exchange Act Section 15A(g)(2), 15 U.S.C. § 78*o*-3(g)(2).

71 *See generally* FINRA Rules 9521-9527 (laying out membership continuance process).

72 Exchange Act Section 15A(b)(6), 15 U.S.C. § 78*o*-3(b)(6).

recognized, the membership continuance "process serves important policy objectives by ensuring that any future association of a statutorily disqualified person is in the public interest."[73]

We also find that FINRA applied the rules in a manner consistent with the Exchange Act's purposes. As explained above, Bryant is subject to a statutory disqualification set forth in the Exchange Act. Thus, it is consistent with the Exchange Act's purposes of protecting investors and the public interest to only allow Bryant to associate with a FINRA member firm if that firm successfully completes the membership continuance process on his behalf and therefore shows that his association would be consistent with protecting investors and the public interest.[74]

Accordingly, we dismiss Bryant's application for review.

An appropriate order will issue.[75]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

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73 *Acosta*, 2020 WL 3428890, at *7.

74 *See supra* note 65 and accompanying text.

75 Because our decisional process would not be significantly aided by oral argument, we deny Bryant's motion for oral argument. *See* Rule of Practice 451(a), 17 C.F.R. § 201.451(a). 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. 98404 / September 15, 2023

Admin. Proc. File No. 3-19892

In the Matter of the Application of

ROBERT L. BRYANT III

For Review of Action Taken by

FINRA

ORDER DISMISSING APPEAL OF ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the appeal filed by Robert L. Bryant III be, and it hereby is, dismissed.

By the Commission.

Vanessa A. Countryman
Secretary