

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No.66549 / March 9, 2012

Admin. Proc. File No. 3-14544

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In the Matter of the Application of

JAMES LEE GOLDBERG  
c/o Simon S. Kogan, Esq.  
Attorney at Law  
27 Weaver Street  
Staten Island, NY 10312

For Review of Action Taken by  
  
FINRA

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OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF ASSOCIATION  
ACTION DENYING WAIVER OF EXAMINATION REQUIREMENTS

Registered securities association denied the request by a member firm, on behalf of a registered general securities representative seeking registration as an investment banking representative, that the applicable qualification examination be waived and that the representative be permitted to obtain that license without qualifying by examination.  
*Held*, review proceeding *dismissed*.

APPEARANCES:

*Simon S. Kogan*, for James Lee Goldberg.

*Marc Menchel, Jennifer C. Brooks, and Michael J. Garawski*, for Financial Industry Regulatory Authority, Inc.

Appeal filed: September 6, 2011  
Last brief received: December 21, 2011

**I.**

James Lee Goldberg, a registered representative associated with Katalyst Securities, LLC ("Katalyst"), a FINRA member firm, seeks review of a FINRA action. FINRA denied a request by Katalyst, on Goldberg's behalf, for a waiver of the qualification examination required by NASD Membership and Registration Rules 1031(c) and 1032(i), for a Series 79 (investment banking representative) securities license.<sup>1</sup> We base our findings on an independent review of the record.

**II.**

In December 1985, Goldberg passed the Series 7 (general securities representative) examination. Since then, Goldberg has served as a registered general securities representative with seven different member firms and has also worked periodically as a self-employed consultant, in both investment related and non-investment related capacities.<sup>2</sup> As detailed below, Goldberg's Series 7 license had lapsed by late 2007. In January 2011, Goldberg joined Katalyst. He became a Katalyst general securities representative on March 3, 2011, after FINRA granted him a waiver of the Series 7 examination requirement. Goldberg has never taken the Series 79 qualification examination.

**A. Goldberg's Prior Associations with Westor Capital Group, Inc.****1. First Association: October 2007 – July 2008**

In October 2007, Goldberg was hired by Westor Capital Group, Inc. ("Westor"), then a FINRA member firm. On October 31, 2007, Westor filed a Uniform Application for Securities Industry Registration or Transfer ("Form U4") seeking to register Goldberg as a Series 7 general securities representative.<sup>3</sup> FINRA did not approve Goldberg's registration with Westor because

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<sup>1</sup> FINRA was formed on July 26, 2007, as a result of the merger of the member firm regulatory functions of the National Association of Securities Dealers, Inc. ("NASD") and NYSE Regulation, Inc. ("NYSE"). Securities Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. FINRA has since begun consolidating NASD and NYSE rules as new FINRA rules; however, many NASD rules, including NASD Membership Rules 1031, remain in effect. Exchange Act Rel. No. 58643 (Sept. 25, 2008), 73 Fed. Reg. 57,174 (Oct. 1, 2008).

<sup>2</sup> In addition to our consideration of the record in this case, we take official notice of the various filings and general information regarding Goldberg in the Central Registration Depository ("CRD"), an electronic database maintained by FINRA and *available at* <https://crd.finra.org>. 17 C.F.R. § 201.323.

<sup>3</sup> Goldberg's previous registration with FINRA had terminated in June 2006.

Goldberg had failed to complete a required continuing education course.<sup>4</sup> On April 28, 2008, because Goldberg failed to timely complete the course, FINRA's Central Registration Depository ("CRD") system automatically changed his registration status to "purged."<sup>5</sup>

Two days later, Westor filed an amended Form U4. This action gave Goldberg an additional 120 days to renew his registration by taking the continuing education course. Goldberg completed the course on May 12, 2008. By this time, however, FINRA had suspended Westor's membership for the firm's failure to file an annual report for 2007 and thus Goldberg's registration was not approved. On July 8, 2008, Westor terminated Goldberg's association with the firm by filing a Uniform Termination Notice for Securities Industry Registration ("Form U5"). The Form U5 explained that Goldberg's resignation was "voluntary" because Westor was "unable to facilitate deals at this time." Goldberg's Form U4 represents that, for a period thereafter, he was self-employed as a "consultant."

## **2. Second Association: June 2009 – April 2010**

In June 2009, Goldberg rejoined Westor. However, he learned shortly thereafter that his previous registration with FINRA had been purged and that he was no longer licensed.

On April 20, 2010, Westor filed a Form U4 seeking to register Goldberg as a Series 7 "general securities representative." FINRA granted Goldberg a waiver of the Series 7 examination requirement in August 2010, conditioned on Goldberg's completion of a continuing education course within ninety days; however, Goldberg did not complete the required course during the time provided. In subsequent correspondence with FINRA, Goldberg stated that he was unable to take the course because Westor "owed FINRA \$2,000 for prior registration and fees . . . [and it] was unwilling to pay the outstanding balance . . . [which] left my waiver in limbo."<sup>6</sup>

On November 15, 2010, FINRA withdrew its conditional waiver of the Series 7 examination requirement and Goldberg's Series 7 registration with Westor was never approved. On January 25, 2011, Westor filed a Form U5 terminating Goldberg's association. The Form U5 stated the reason for the termination was "voluntary" but also stated, without explanation, that

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<sup>4</sup> Goldberg states on appeal that he "was duly registered with [Westor] until 2008." This is not accurate. Despite numerous attempts commencing in 2007, Goldberg was never registered with Westor.

<sup>5</sup> See FINRA, *Web CRD Firm User's Manual* at p. 5-32, available at <http://finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p005317.pdf>.

<sup>6</sup> The record does not clarify the basis for the connection between the purported amount owed by Westor to FINRA and Goldberg's failure to take the continuing education course.

the termination date for Goldberg's association was April 23, 2010, three days after Westor filed a Form U4 on Goldberg's behalf.<sup>7</sup>

### **3. The November 2009 – May 2010 "Opt-In" Period for the Series 79 Exam**

During Goldberg's second association with Westor, FINRA adopted amendments to NASD Rule 1032 requiring "individuals whose activities are limited to investment banking . . . to pass [a] new Limited Representative – Investment Banking Qualification Examination (Series 79 Exam)."<sup>8</sup> As part of the new requirement, FINRA offered a six-month transitional "opt-in" period, between November 2, 2009 and May 3, 2010, in which "[i]nvestment bankers who hold the Series 7 registration . . . may opt in to the Investment Banking Representative registration, provided that, as of the date they opt in, such individuals are engaged in investment banking activities."<sup>9</sup> To opt in, the individual's member firm was required to "submit an amended Form U4 to request the Limited Representative—Investment Banking registration."<sup>10</sup> Individuals who qualified for the "opt-in" relief were exempt from taking the Series 79 examination. After the opt-in period, any person who sought to engage in investment banking activities would be required "to pass the Series 79 Exam or obtain a waiver" from FINRA.

Westor did not file an amended Form U4 seeking an Investment Banking Representative registration on Goldberg's behalf during the Series 79 opt-in period. In February 2010, Goldberg's counsel sent a letter to FINRA in connection with the reinstatement of Goldberg's Series 7 registration. That letter did not indicate that Goldberg intended to obtain a Series 79 securities license.

## **B. Goldberg Joins Katalyst**

### **1. Katalyst Requests Waiver of the Series 7 and 79 Exams**

In February 2011, Katalyst filed a Form U4 seeking to register Goldberg as a general securities representative and as an investment banking representative. Katalyst also requested waiver of the Series 7 and 79 examination requirements on Goldberg's behalf. FINRA granted Katalyst's Series 7 waiver request on February 17, 2011, conditioned on Goldberg taking a required continuing education course. Goldberg completed the required course and FINRA approved his Series 7 registration on March 3, 2011.

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<sup>7</sup> This April 2010 termination date is also reflected in Goldberg's employment history in CRD.

<sup>8</sup> FINRA Notice to Members 09-41, at \*1 (July 2009).

<sup>9</sup> *Id.* at \*3.

<sup>10</sup> *Id.* at \*6.

On February 22, 2011, FINRA's Department of Testing and Continuing Education (the "Department") requested additional information regarding Katalyst's waiver request for the Series 79 qualification examination. The Department asked for a description of what Goldberg's duties would be at Katalyst, an explanation of "why [Westor] did not opt-in [Goldberg] to the [Investment Banking] position" previously, and a "detailed description" of Goldberg's investment banking experience.

On March 8, 2011, Katalyst responded that Goldberg would be involved in "the private placement of securities" and "various corporate restructurings and M&A activities." Katalyst also included a statement by Goldberg that he believed that Westor did not opt him into the Series 79 because of "the firm's financial problems."

With respect to his past investment banking experience, Goldberg represented that over the preceding five years he had "assisted several companies requiring investment banking services." Goldberg stated that he provided "business and financial planning strategies[,] introductions to potential financing candidates[,] discussions with legal and accounting specialists[,] and offering solutions to management and stakeholder's goals and expectations during the entire process." According to Goldberg, he also worked "alongside" the ex-treasurer of PepsiCo, with whom he "assisted companies with deal structure, contract negotiations, corporate and securities compliance issues, exit strategies, buy-sell arrangements, merger and acquisitions, among other services on an as needed basis."

## **2. FINRA's Determination**

On March 29, 2011, the Department denied Katalyst's Series 79 examination waiver request. The Department stated that, after "carefully considering the material [Katalyst] presented" on Goldberg's behalf, "neither [Katalyst's] representations . . . nor the official registration record, provide a basis for waiving the required qualification examination." On April 15, 2011, Goldberg appealed that decision to the Waiver Subcommittee of FINRA's National Adjudicatory Council ("Waiver Subcommittee"), asserting that the Series 79 examination requirement should be waived "for the same reasons that his Series 7 exam was waived." In this connection, Goldberg referred the Waiver Subcommittee to an e-mail from FINRA staff regarding the expiration of his Series 7 license, three letters of recommendation from individuals with whom Goldberg previously worked, and a statement from a compliance official from STG Secure Trading Group, Inc. ("STG"), indicating that Goldberg had no "outstanding issues" with that firm as of May 22, 2006.<sup>11</sup>

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<sup>11</sup> These letters describe Goldberg's investment banking experience by saying that Goldberg was "a prime mover in . . . efforts to raise investment capital for clients, in areas such as identifying potential investors, conducting pre-money business evaluations and analysis of comparables, developing investor exit strategies, and negotiating financing terms"; "particularly helpful in assisting with the preparation of business plans, identifying potential investors,

(continued...)

On August 2, 2011, the Waiver Subcommittee affirmed the Department's denial of the waiver request. The Waiver Subcommittee found that Goldberg's waiver request did not present the "exceptional case" that would justify "accept[ing] other standards as evidence of [his] qualification for registration" in lieu of passing the Series 79 examination. According to the Waiver Subcommittee, Katalyst "present[ed] limited evidence concerning Goldberg's experience with the wide variety of tasks that the Series 79 examination qualifies one to perform." In addition, the Waiver Subcommittee found insufficient evidence supporting Goldberg's claim that a waiver was warranted because of an alleged filing error by Westor for failing to opt him into the Series 79 category during his association with the firm. Goldberg appealed the Waiver Subcommittee's decision.

### III.

We review FINRA denial of a request for waiver of an examination requirement pursuant to Section 19(f) of the Securities Exchange Act.<sup>12</sup> In accordance with that section, we must dismiss an application for review of a denial of a waiver request if we find that: (1) the specific grounds upon which FINRA based its denial "exist in fact"; (2) the action is in accordance with FINRA rules; (3) FINRA applied its rules in a manner consistent with the purposes of the Exchange Act; and (4) the action does not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.<sup>13</sup>

#### A. Specific Grounds for Denying Waiver Exist in Fact

NASD Membership and Registration Rules 1031 and 1032(i) require associated persons seeking to engage in investment banking activities to pass the Series 79 qualification examination. FINRA designed the Series 79 examination to "provide a more targeted assessment of the competency of investing banking personnel to perform their unique job

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<sup>11</sup> (...continued)

preparing investor presentations, structuring deals, and negotiating financing agreements"; and "essential in establishing relationships and structure in every aspect of Investment Banking."

<sup>12</sup> 15 U.S.C. § 78s(f); see *Gina M. Guzzone*, 57 S.E.C. 592, 596 (2004) (explaining that a "denial of a waiver . . . , in effect, constitutes a bar . . . from associating" with a FINRA member firm).

<sup>13</sup> *Fog Cutter Capital Group v. SEC*, 474 F.3d 822, 825 (D.C. Cir. 2007). Goldberg mistakenly states that we review this proceeding pursuant to Section 19(e) of the Exchange Act. He also argues that the Act "requires FINRA to evaluate if its determinations impose a burden on competition" and that FINRA improperly failed to make this evaluation. The Act requires the Commission, not FINRA, to make this determination.

functions and, as a result, provide investors better protection."<sup>14</sup> In accordance with NASD Membership and Registration Rule 1070(d), FINRA may "in exceptional cases and where good cause is shown" waive an examination requirement and accept "other standards as evidence of an applicant's qualifications for registration."

FINRA "examines the merits of any waiver request based on its Waiver Guidelines,"<sup>15</sup> a non-exhaustive list of factors "to assist member firms in recognizing situations where a basis may exist for requesting a waiver."<sup>16</sup> Goldberg based his Series 79 examination waiver request on two factors in the Waiver Guidelines: (1) an alleged filing error caused by Westor's failure to "opt" him into the Series 79 category during the opt-in period, and (2) Goldberg's experience in the securities industry. We find that specific grounds for the Waiver Subcommittee's denial of Goldberg's waiver request existed in fact.

1. The Waiver Guideline applicable to a filing error provides that FINRA may grant a waiver to an individual who has been functioning in good faith in the securities industry and believes himself to be properly registered, but whose application forms had been incorrectly filed and are therefore not reflected in the CRD. The Waiver Guideline requires that the "firm(s) involved document the nature of the filing error" as well as evidence showing the individual's "good faith" belief, notwithstanding the filing error, that he or she was appropriately registered.

The record amply supports the Waiver Subcommittee's conclusion that Westor's failure was a result of a "purposeful" financial decision by the firm, rather than an inadvertent filing mistake, as contemplated by the Waiver Guideline.<sup>17</sup> Goldberg presented no evidence that, during the opt-in period for the Series 79 license, he believed in good faith that he was properly registered as a Series 79 licensee.<sup>18</sup> To the contrary, the February 2010 letter from Goldberg's attorney admits that Goldberg knew since at least June 2009 that he lacked even a Series 7

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<sup>14</sup> Series 79 Exam Adopting Release, 74 Fed. Reg. at 39,985.

<sup>15</sup> *Michael Stegawski*, Exchange Act Rel. No. 59326 (Jan. 30, 2009), 95 SEC Docket 13819, 13823 (citing NASD Notice to Members 04-59 (Aug. 2004)).

<sup>16</sup> FINRA, Qualification Examination Waiver Guidelines, *available at* <http://www.finra.org/RegistrationQualifications/BrokerGuidanceResponsibility/Qualifications/p010600> (last visited January 26, 2012).

<sup>17</sup> Waiver Guidelines, *supra* note 16 (noting that, "[i]n a typical case, a member firm files an incomplete application that is eventually purged from the CRD system. After two years, the CRD system will reschedule the appropriate qualification examination if the individual re-submits an application for registration. This normally occurs when the individual attempts to transfer to another firm.").

<sup>18</sup> *Jon G. Symon*, 54 S.E.C. 102, 108 (1999) (finding applicant failed to provide sufficient evidence supporting his claim of a registration error).

license, the prerequisite for seeking an exemption from the Series 79 examination during the "opt-in" period. Moreover, Westor did not file a Series 79 opt-in application on behalf of Goldberg, much less claim that any error had been made in connection with such an application, as required by the Waiver Guideline. Goldberg essentially conceded that he knew Westor never submitted such an application when he admitted that he believed the main reason Westor failed to seek an exemption during the "opt-in" period was due to Westor's "financial problems" at the time.

Goldberg further argues that he was "deprived of the opportunity to opt in to the Series 79 registration because of a registration error involving his Series 7 license." Even if a filing error with respect to one licensing application could be the basis for a waiver of another, different license, Goldberg has not established any such error with respect to his Series 7 application. The lapse in his Series 7 registration was due initially to his failure to complete a continuing education course. This does not constitute a "filing error," but rather a failure to meet his continuing education obligations as required by FINRA Rule 1250.<sup>19</sup> Rule 1250 prescribes the frequency with which registered persons must take continuing education courses, and that, during any period of non-compliance with the continuing education requirements a registered person must cease to perform any duties as a registered person. Since Goldberg was required to be aware of his continuing education obligations, it is unclear how he could have been eligible for a "filing error" waiver based on a good faith belief that he was properly registered, at least until he completed his continuing education course in May of 2008.<sup>20</sup>

When Goldberg eventually took the course, his Series 7 registration was not approved because Westor's membership had been suspended for failure to file its 2007 annual report. This does not constitute a "filing error" in connection with Goldberg's Series 7 application, but a filing failure in connection with Westor's annual report.

Goldberg blames his failure to take his required continuing education course during his second association with Westor on Westor's failure to pay outstanding fees owing to FINRA. However, Westor's failure to pay fees is not a "filing error" with respect to Goldberg's registration. Moreover, the record is clear that Goldberg was aware of his unregistered status throughout his second association with Westor, and therefore could not have in good faith

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<sup>19</sup> Former NASD Rule 1120.

<sup>20</sup> Registered persons such as Goldberg are required to be familiar with all applicable FINRA rules. *Ryan Henry*, Exchange Act Rel. No. 53957 (June 8, 2006), 88 SEC Docket 587, 592 n.13. Goldberg blames FINRA for not notifying him of his Series 7 continuing education deficiency during his association with Westor. We have long held that "[a]pplicants 'cannot shift their burden of compliance to [FINRA].'" *CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13813 n.33 (quoting *Hans N. Beerbaum*, Exchange Act Rel. No. 55731 (May 9, 2007), 90 SEC Docket 1863, 1871 n.22).



believed himself to be properly registered and therefore eligible for a "filing error" waiver for his Series 7 registration.

Goldberg asserts that but for "the SNAFU with respect to his Series 7 registration . . . Goldberg would have opted in to the [Series] 79" category. This assertion is not supported by the record. Westor did not seek an "opt-in" for Goldberg at any time. Moreover, the February 2010 letter sent by Goldberg's counsel to FINRA during the Series 79 opt-in period made no reference to any intention of Goldberg to register as an investment banking representative. Even if Goldberg had sought to take advantage of the opt-in period, he was not eligible because his Series 7 registration had lapsed.<sup>21</sup>

2. There is also ample support for the Waiver Subcommittee's denial of Goldberg's waiver request based on his purported investment banking experience. The Waiver Guidelines provide six factors that FINRA considers in determining whether to grant a waiver request based on applicant's industry experience.<sup>22</sup> Goldberg based his waiver request on four of those factors: (1) the length and quality of his experience; (2) the specific registration he requested and type of business he would conduct; (3) his previous registration history; and (4) the nature of any regulatory matters as disclosed on his application for registration.

In assessing his investment banking credentials, the Waiver Subcommittee considered Goldberg's more than eleven years as a registered general securities representative (although that experience was not consecutive), his current registration in that capacity, and the various letters submitted by individuals with whom he has worked. The Waiver Subcommittee, however, determined that Goldberg's experience did not present "an exceptional case," finding that Goldberg's description of his investment banking experience was "only in general terms," that "he has no direct experience in investment banking as a registered representative," and that Katalyst presented "limited evidence concerning Goldberg's experience with the wide variety of tasks that the Series 79 examination qualifies one to perform."

We agree with FINRA's assessment. Goldberg has not demonstrated, under NASD Rule 1070, that his industry experience presents an "exceptional case" to waive the Series 79 examination requirement. Passing the Series 79 examination qualifies an investment banking representative to advise on or facilitate debt or equity offerings through a private placement or public offering or to advise or facilitate mergers or acquisitions, tender offers, financial

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<sup>21</sup> We are unclear about the basis for Goldberg's assertion on appeal that "[d]uring the past few years, believing that he was properly registered at both STG and [Westor], Mr. Goldberg was actively engaged in investment banking activities," at least with respect to Goldberg's tenure at Westor. The lapse of his Series 7 registration during the entire opt-in period, of which he was admittedly aware, required him to cease all duties as a registered person during the lapse. CRD shows that his registration with STG ended in June 2006, well before the events at issue.

<sup>22</sup> Waiver Guidelines, *supra* note 16.

restructurings, asset sales, divestitures or other corporate reorganizations or business combination transactions.<sup>23</sup> Goldberg's waiver request, however, consisted of a four-line, unspecified list of "investment banking services" with which he "assisted" for "several companies," without any indication of the level or breadth of his involvement, or the specific services in which he was involved.

Moreover, although Goldberg's waiver request represented that, "for the past five years, [he] actively provided investment banking on wide variety of matters," FINRA found that "he has no direct experience in investment banking as a registered representative and gained -- at best -- only 15 months of investment banking experience at Westor . . . ." Goldberg offered little explanation of his past associations or his consulting practice to provide a basis to determine whether they compare with being an investment banking representative associated with a regulated broker-dealer. The letters of recommendation submitted on Goldberg's behalf were also vague, giving little indication of the kinds of investment banking services Goldberg provided.<sup>24</sup>

#### **B. Waiver Denial Was in Accordance with FINRA Rules**

FINRA conducted its review of Katalyst's waiver request on behalf of Goldberg in accordance with its rules. An applicant may request an exemption from FINRA's examination requirements pursuant to the procedures set forth in the 9600 Series of NASD's Code of Procedure. In addition, the Waiver Guidelines provide guidance to member firms regarding the proper procedures for submitting examination waiver requests on behalf of individual applicant.<sup>25</sup>

On February 16, 2011, Katalyst filed a Form U4 requesting a Series 79 waiver on Goldberg's behalf. On March 29, 2011, the Department rendered a written decision, in accordance with NASD Procedural Rule 9620, denying the request. On April 15, 2011, and in accordance with NASD Procedural Rule 9630, Goldberg filed a timely written appeal of the

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<sup>23</sup> NASD Membership and Registration Rule 1032(i). The Series 79 examination covers four main topics (in order of concentration): (1) collection, analysis, and evaluation of data (75 questions); (2) underwriting/new financing transactions, types of offerings and registration of securities (43 questions); (3) mergers and acquisitions, tender offers and financial restructuring transactions (34 questions); and (4) general securities industry regulations (23 questions). Series 79 Exam Adopting Release, 74 Fed. Reg. at 39,985.

<sup>24</sup> We disagree with Goldberg's assertion that his lack of recent disciplinary history is indicative of his specific qualification to serve as an investment banking professional. *See Symon*, 54 S.E.C. at 108 (denying waiver request despite applicant's "thirty-one years of experience in the securities industry, unblemished record," and investment management experience).

<sup>25</sup> Waiver Guidelines, *supra* note 16.

Department's decision to the Waiver Subcommittee. The Waiver Subcommittee gave Goldberg an opportunity to provide an explanation for the basis of his appeal. On May 16, 2011, Goldberg submitted a brief in support of his appeal to the Waiver Subcommittee. On August 2, 2011, the Waiver Subcommittee issued a written decision "setting forth its findings and conclusions" denying the waiver request, in accordance with NASD Procedural Rule 9630(e).<sup>26</sup>

Goldberg argues that the Department's denial of his waiver request was arbitrary and capricious for failing to provide a basis for the denial. The Department's decision, however, is not before us in this appeal. The Waiver Subcommittee considered the Department's decision *de novo*,<sup>27</sup> and its decision is the one before us on appeal.<sup>28</sup>

### C. FINRA Applied Its Rules Consistently with Exchange Act's Purposes

We also find that FINRA applied its rules in a manner consistent with the purposes of the Exchange Act. Exchange Act Section 15(b)(7) authorizes the Commission to regulate persons associated with broker-dealers by establishing qualification standards.<sup>29</sup> Among these standards is Exchange Act Rule 15b7-1, which requires associated persons to "pass[] any required examinations" established by the rules of the self-regulatory organizations.<sup>30</sup> In adopting that rule, we stated that "[self-regulatory organization] qualification of associated persons of broker-dealers is of substantial importance in promoting compliance with the substantive requirements of the federal securities laws," that we "rely principally on the [self-regulatory organizations] in the formulation and administration of qualification standards, subject to [our] review and oversight," and that requiring compliance with such standards advances "investor protection."<sup>31</sup>

Goldberg has failed to show that he currently possesses the requisite skills necessary to competently perform the functions of an investment banking professional. Thus, we agree with the Waiver Subcommittee's conclusion that "it is important for Goldberg to familiarize himself

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<sup>26</sup> See *Stegawski*, 95 SEC Docket at 13828 n.27 (explaining that FINRA created the Waiver Subcommittee as a means of providing expedited review of appeals of waiver requests).

<sup>27</sup> FINRA Rule 9630(e)(2).

<sup>28</sup> Cf. *Harry Friedman*, Exchange Act Rel. No. 64486 (May 13, 2011), 101 SEC Docket 41227 (holding that in disciplinary cases, NAC decisions, not Hearing Panel decisions, are subject to Commission review). *Accord Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17.

<sup>29</sup> 15 U.S.C. § 78o(b)(7).

<sup>30</sup> 17 C.F.R. § 240.15b7-1.

<sup>31</sup> *Requirement of Broker-Dealers to Comply with SRO Qualification Standards*, Exchange Act Rel. No. 32261 (May 4, 1993), 54 SEC Docket 39, 40.

with the relevant rules through the [Series 79] examination process." The Series 79 examination, as part of FINRA's qualification examination program, is specifically designed "to measure the degree to which each candidate possesses the knowledge, skills and abilities needed to perform the major functions of an entry-level investment banker."<sup>32</sup> We find that requiring Goldberg to pass the Series 79 examination is fully consistent with the purposes of the Exchange Act by helping ensure that he possesses the minimum standards of competency and awareness of his responsibilities as an investment banking professional before engaging in his firm's investment banking activities,<sup>33</sup> which in turn "provide[s] investors better protection."<sup>34</sup>

#### **D. FINRA Action Did Not Impose an Undue Burden on Competition**

We also reject Goldberg's claim that FINRA's denial of his waiver request imposed an undue burden on competition that is not necessary or appropriate in furtherance of the Exchange Act. We have previously held that denying a waiver request does not impose an undue burden on competition because "[a]ll other similarly situated applicants are required to take the applicable examinations before being issued licenses."<sup>35</sup> Goldberg contends that the denial of his waiver "imposed a burden on competition" because any concerns about "the depth and breadth of his investment banking knowledge can be easily alleviated by conditioning his waiver on [his] completion of appropriate continuing education modules." However, we agree with the Waiver Subcommittee's determination that Goldberg has not demonstrated the requisite level of experience to qualify for a waiver. Goldberg must pass the Series 79 examination before acting as an investment banking representative. Any burden on Goldberg, individually, or his firm, Katalyst, for him in the short term to take and pass the required examination is outweighed by

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<sup>32</sup> FINRA, *Investment Banking Representative Qualification Examination (Test Series 79) Content Outline* (2010), at 2, available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/industry/p119446.pdf>.

<sup>33</sup> *Stegawski*, 95 SEC Docket at 13828 (finding that requiring applicant "to retake the qualification examination for the Series 7 license" after over four years away since his last Series 7 terminated "is fully consistent with the Exchange Act's statutory goal of ensuring the requisite levels of knowledge and competency of associated persons"); *see also Report of the Special Study of Securities Markets*, H.R. Doc. No. 95, 88th Cong., 1st Sess. Pt. I, 54 (1963) ("The way should be left open for newcomers to enter the securities business, as with any other business, but the public interest demands that newcomers meet minimum standards of competency and show an awareness of their responsibilities before being allowed to approach the public as brokers, dealers, or underwriters.").

<sup>34</sup> Series 79 Exam Adopting Release, 74 Fed. Reg. at 39,985.

<sup>35</sup> *Symon*, 54 S.E.C. at 110.

the public interest in ensuring that he is competent to serve as an investment banking representative.<sup>36</sup>

We therefore find that FINRA properly denied Goldberg's request for waiver of the Series 79 examination requirement. Based on the foregoing, we dismiss Goldberg's appeal.

An appropriate order will issue.<sup>37</sup>

By the Commission (Chairman SCHAPIRO and Commissioners WALTER, AGUILAR, PAREDES and GALLAGHER).

Elizabeth M. Murphy  
Secretary

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<sup>36</sup> *Exchange Servs., Inc. v. SEC*, 797 F.2d 188, 191 (4th Cir. 1986) (stating that "any burden on competition created by the overly comprehensive exam is outweighed by the necessity for the public interest protection").

Goldberg claims that, "[h]istorically, FINRA has implemented . . . and enforced [its] rules in a manner design[ed] to burden competition at the expense of smaller broker dealers and their representatives," referencing issues confronting FINRA's predecessor nearly 20 years ago in connection with its then-existing automated system for executing small orders. Without further elaboration, Goldberg concludes "[t]here can be no question that denying Mr. Goldberg the requested waiver under the guise of protecting the public, FINRA is reducing Katalyst's ability to compete in the Investment Banking marketplace." The connection between the referenced issues and the instant case is not clear, and the claim concerning any impact on Katalyst's competitive posture is not substantiated. For the reasons stated in the text, we reject Goldberg's claim that FINRA's action is anti-competitive.

<sup>37</sup> 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  
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ORDER DISMISSING REVIEW PROCEEDING

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

ORDERED that the application for review filed by James Lee Goldberg, be, and it hereby is, dismissed.

By the Commission.

Elizabeth M. Murphy  
Secretary