

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 80164 / March 6, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17682

In the Matter of the Application of

INTERACTIVE BROKERS LLC, and
INTERACTIVE BROKERS CORP.

For Interlocutory Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Brokerage firms filed an application for review of a FINRA hearing panel's decision to proceed with a hearing on the firms' membership continuance application. *Held*, application for review is dismissed.

APPEARANCES:

Douglas I. Koff, Julian Rainero, Michael Kwon, and Amanda Wichot, Schulte Roth & Zabel LLP, for Interactive Brokers.

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

Appeal filed: November 11, 2016
Last brief received: November 18, 2016

Interactive Brokers LLC and Interactive Brokers Corp. seek review of a FINRA hearing panel's decision to proceed with a hearing on the merits of their membership continuance application. We dismiss the appeal for a lack of jurisdiction.

I. Background

FINRA's By-Laws provide that no person shall continue to be associated with a FINRA member if such person becomes subject to a disqualification.¹ The By-Laws further define a "disqualification" as "any 'statutory disqualification' as such term is defined in Section 3(a)(39)" of the Securities Exchange Act of 1934.² Section 3(a)(39)(F) states that a person is subject to a statutory disqualification if he or she has "committed or omitted an act, or is subject to an order or finding, enumerated in [Exchange Act Section 15(b)(4)(G)]."³ One of the enumerated orders includes having been "found, by a foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of" certain foreign securities laws, "another person who commits such violation, if such other person is subject to his supervision."⁴

Jonathan Chait is registered with FINRA as an associated person of both Interactive Brokers firms and is the chief operating officer of Interactive Brokers LLC. The Austrian Financial Market Authority imposed an order finding that Chait failed to sufficiently supervise the trading systems of an Interactive Brokers affiliate in connection with certain trades on the Vienna Stock Exchange (the "Austrian Order"). The Austrian Order found Chait liable under an Austrian law that imposes personal liability on the managing director of a firm for any activities conducted by the firm in violation of Austrian law, irrespective of whether the director himself engaged in any misconduct. FINRA's Department of Registration and Disclosure concluded that the Austrian Order disqualified Chait from associating with Interactive Brokers.

A FINRA member firm that continues to associate with a person subject to a statutory disqualification may become subject to its own disqualification and may lose its membership.⁵ But a member may request discretionary relief from FINRA by submitting a membership continuance application detailing terms of the proposed continued association by the statutorily disqualified individual.⁶ Interactive Brokers filed a membership continuance application with FINRA on Chait's behalf, arguing that the Austrian Order did not trigger disqualification and requesting that, even if it did, FINRA should permit Chait to continue to associate with Interactive Brokers notwithstanding the disqualification.

¹ See FINRA By-Laws, Article III, Sec. 3(b).

² FINRA By-Laws, Article III, Sec. 4.

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

⁴ Exchange Act Section 15(b)(4)(G)(iii), 15 U.S.C. § 78o(b)(4)(G)(iii).

⁵ See FINRA By-Laws, Art. III, Sec. 3(d) (explaining that a member "ineligible for continuance in membership may . . . request[] relief from the ineligibility . . . on its own behalf and on behalf of a current or prospective associated person," and that the Board of FINRA "may, in its discretion, approve the continuation in membership").

⁶ *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 WL 2887272, at *2 (June 26, 2014) (describing statutory disqualifications and FINRA's eligibility proceedings).

Interactive Brokers requested that FINRA’s Statutory Disqualification Committee (“SDC”) address the issue of whether the Austrian Order constituted a disqualification prior to conducting a full hearing on the membership continuance application. After granting this request and receiving pre-hearing briefs from both Interactive Brokers and FINRA’s Department of Member Regulation, the hearing panel decided that Chait was subject to a statutory disqualification; it scheduled a hearing on February 14, 2017, to consider the merits of Interactive Brokers’ membership continuance application.

Interactive Brokers appealed the hearing panel’s order to the Commission. The application for review stated that it was filed “to ensure that the issues raised [t]herein are preserved for appellate review in the event that the [hearing panel’s order] is deemed a final, appealable order.” FINRA contends that “the hearing panel’s determination to which applicants object does not qualify for Commission review.”

II. Analysis

Exchange Act Section 19(d) defines the Commission’s jurisdiction over applications for review of actions by self-regulatory organizations (“SROs”) such as FINRA. Section 19(d)(1) authorizes Commission review of an SRO action that:

- i) imposes any final disciplinary sanction on any member or person associated with a member; ii) denies membership or participation to any applicant; iii) prohibits or limits any person in respect to services offered by such organization or member thereof; or iv) bars any person from being associated with a member.⁷

We conclude that we do not have jurisdiction to consider Interactive Brokers’ application for review on any of these grounds, and we must therefore dismiss the proceeding.⁸

The hearing panel’s determination is not a decision “den[ying] membership or participation” to Interactive Brokers. As we have said, “[d]enials of a firm’s application to retain its membership if it employs a statutorily disqualified person are reviewable by the Commission.”⁹ But FINRA has not yet made a final determination to deny the membership continuance application under the terms of the proposed association. FINRA Rule 9524 states that in eligibility proceedings the hearing panel reviews the record, examines the parties’ briefs, and then “present[s] . . . a recommended decision” to the National Adjudicatory Council

⁷ See *Larry Saylor*, Exchange Act Release No. 51949, 2005 WL 1560275, at *2-3 (June 30, 2005) (citing 15 U.S.C. § 78s(d)).

⁸ *Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 WL 1902072, at *2 (Apr. 30, 2008).

⁹ *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at *1 n.4 (Apr. 18, 2013); see also, e.g., *Savva*, 2014 WL 2887272, at *1 (associated person may appeal FINRA decision denying firm’s membership continuance application).

("NAC").¹⁰ In turn, the NAC issues a final written decision only "[a]fter reviewing all matters presented in the request for relief, the [SDC]'s recommended decision, the public interest, and the protection of investors."¹¹ And the NAC's "decision . . . constitute[s] the final action of FINRA" only after the NAC provides it to FINRA's Board of Governors and no call for review is made within the period specified in FINRA Rule 9525.¹² FINRA has not yet decided whether to grant Interactive Brokers' membership continuance application and allow Chait to continue to associate with Interactive Brokers notwithstanding his disqualification. The NAC has not yet held its hearing, considered the issues, or presented a decision to the Board of Governors for review. Indeed, the hearing panel has neither held its own hearing nor recommended a decision to the NAC.¹³

The hearing panel also has not "prohibit[ed] or limit[ed] any person in respect to services offered by [FINRA] or [its] member[s]." The hearing panel's order scheduling a hearing does not qualify as a denial of access. Nor does the hearing panel's determination "bar[] any person from becoming associated with a member." Even assuming that the denial of a membership continuance application could be considered a bar from association, Interactive Brokers' membership continuance application has not yet been denied.

The hearing panel's determination is also not a final disciplinary sanction. We have distinguished our review of a disciplinary sanction from our review of the denial of a membership continuance application."¹⁴ In any case, the hearing panel's decision to hold a hearing on Interactive Brokers' membership continuance application is not final action.

¹⁰ FINRA Rule 9524(a)(10).

¹¹ FINRA Rule 9524(b)(1).

¹² FINRA Rule 9524(b)(3); FINRA Rule 9525(b).

¹³ *Cf.* FINRA Rule 9524(b)(3) (providing that a decision by the NAC "to deny . . . continued association shall be effective immediately").

¹⁴ *See Harry M. Richardson*, Exchange Act Release No. 51236, 2005 WL 424920, at *3-4 (Feb. 22, 2005) (distinguishing between the standards for reviewing disciplinary proceedings and those for reviewing applications to continue membership despite employment of a statutorily disqualified person); *cf. M. J. Cohen*, Exchange Act Release No. 17820, 1981 WL 38215, at *3 (May 28, 1981) (explaining the "misconception" that denying a membership continuance application "impos[es] a further penalty" on the disqualified person).

We therefore dismiss the appeal for lack of jurisdiction.¹⁵ In so doing, we express no view on the merits of the proceedings below. An appropriate order will issue¹⁶

By the Commission (Acting Chairman PIWOWAR and Commissioner STEIN).

Brent J. Fields
Secretary

¹⁵ Finally, our Rules of Practice do not authorize interlocutory review. Rule of Practice 400 provides for interlocutory review of a “hearing officer ruling.” 17 C.F.R. § 201.400(a). This language excludes SRO decisions, such as this one, from our authority to conduct interlocutory review. *Russell Simpson*, Exchange Act Release No. 40690, 1998 WL 801399, at *4 (Nov. 19, 1998).

¹⁶ 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
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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 Interactive Brokers LLC and Interactive Brokers Corp. be, and it hereby is, dismissed.

By the Commission.

Brent J. Fields
Secretary