

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 85257 / March 6, 2019

Admin. Proc. File No. 3-18637

In the Matter of the Application of

GREGORY ACOSTA

For Review of Action Taken by

FINRA

ORDER REQUESTING ADDITIONAL BRIEFING

Gregory Acosta appeals a determination by FINRA that he is subject to a statutory disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934. On September 17, 2018, we issued an order directing the parties to address the sole procedural “issue of whether the Commission has jurisdiction over this appeal pursuant to [Exchange Act] Section 19(d)(2).¹ Based on the parties’ submissions thus far, it appears that supplemental briefing on the issues raised by Acosta would “significantly aid the decisional process.”²

Background

On July 13, 2018, a FINRA “Regulatory Review Analyst” notified FINRA member firm Kestra Investment Services, LLC, that Acosta, then one of its associated persons, was disqualified as a result of an order entered against him by the California Insurance Commissioner (the “California Order”), pursuant to FINRA Rule 9522(a)(1). The California Department of Insurance had alleged in an “Accusation” that Acosta took out a life insurance policy in the name of an elderly customer and named himself the beneficiary, and that Acosta also obtained a substantial loan from the customer. The Department of Insurance’s administrative complaint alleged that this conduct “violat[ed] . . . California Insurance Code sections 1668.1(a) and (b),” and also alleged that Acosta was “subject to discipline pursuant to California Insurance Code sections 785, 1738, 1738.5, 1739, 1742 for violations of Sections 1668(i) and (j).”

¹ *Gregory Acosta*, Exchange Act Release No. 84165, 2018 WL 4404615, at *2 (Sept. 17, 2018).

² 17 C.F.R. § 201.421(b).

On May 21, 2018, the California Order was issued based on Acosta's execution of a Stipulation and Waiver in which, "[w]ithout admitting or denying the [Department's] allegations . . . , [he] acknowledge[d] that, if proven to be true and correct, the facts alleged . . . are grounds for the discipline" by the California Insurance Commissioner "of [Acosta's] licenses and licensing rights, pursuant to the provisions of the Insurance Code of the State of California referred to in [the] Accusation." Acosta agreed that the California Insurance Commissioner would revoke his licenses and licensing rights, "and in lieu thereof, issue . . . restricted licenses for 5 years upon [specified] terms and conditions," including an agreement to "come into compliance with California Insurance Code section 1668.1."³

FINRA's notice to Kestra stated that Acosta's disqualification arose because the California Order was "based on a violation of Section 1668(i) of the California Insurance Code, a law or regulation that prohibits fraudulent, manipulative, or deceptive conduct." FINRA's notice also informed Kestra that, "[g]enerally, no person who is . . . subject to a statutory disqualification shall associate . . . with a FINRA member unless the member requests and receives written approval from FINRA [through] the Membership Continuance process" which involves the filing of an MC-400 Application by the member on behalf of a disqualified person.

Acosta states that Kestra "declined to submit the MC-400 application and in accordance with FINRA's instruction terminated ACOSTA's association with the firm." According to Acosta, he "attempted to resolve these issues with FINRA's Regulatory Review staff and with FINRA's Chief Legal Officer," but FINRA staff refused to alter its position that he was statutorily disqualified. Acosta then initiated this proceeding by filing an application for review with the Commission under Exchange Act Section 19(d) and Commission Rule of Practice 420.⁴ He also filed a complaint against FINRA in federal district court seeking injunctive and declaratory relief, which the court stayed pending "resolution of the SEC proceedings."⁵

Analysis

The September 17, 2018 briefing order directed the parties to brief the issue of jurisdiction generally. Upon consideration of the briefs filed, we believe that additional briefing would be helpful to the Commission.

We have therefore determined that the parties should have the opportunity to file additional briefs regarding relevant substantive and procedural matters. The parties should address, among other matters relevant to the issue of jurisdiction, the following issues:

³ *Gregory Acosta and Diamond Bar Executive Benefit Programs & Insurance Services, Inc.*, File No. LA 2015 00490-AP (Cal. Ins. Comm'r May 21, 2018).

⁴ 15 U.S.C. § 78s(d); 17 C.F.R. § 201.420.

⁵ *Acosta v. FINRA*, No. 2:18-cv-7432-R-KS (C.D. Cal. Nov. 2, 2018), ECF No. 27.

- Exchange Act Section 19(d) includes among matters subject to Commission review any action by FINRA “bar[ring] any person from becoming associated with a member” or “prohibit[ing] or limit[ing] any person in respect to access to services offered by [FINRA] or [a] member thereof.”⁶ Did FINRA’s notice to Kestra constitute an action barring Acosta from becoming associated with a member?⁷ Did FINRA’s notice prohibit or limit him in respect to access to services offered by FINRA or by a member?⁸
- Given that the membership continuance application process requires the participation of a sponsoring firm, and Kestra apparently declined such participation,

⁶ 15 U.S.C. § 78s(d)(1)-(2).

⁷ Among other things, the parties should address the relevance, if any, of Commission decisions addressing when SRO action effectively bars a person from associating with a member. *Compare, e.g., Jon G. Symon*, Exchange Act Release No. 41285, 1999 WL 212709 (Apr. 14, 1999) (finding that denial of examination waiver “effectively barred” applicant thereby establishing Commission jurisdiction to consider appeal); *Richard T. Sullivan*, Exchange Act Release No. 40671, 1998 WL 786943 (Nov. 12, 1998) (finding jurisdiction because revocation of registrations in all capacities for failure to pay fines and costs effectively barred applicant), *with Joseph Dillon & Co.*, Exchange Act Release No. 43523, 2000 WL 1664016 (Nov. 6, 2000) (finding that denial of exemption from rule requiring that firm have special supervisory procedures did not constitute bar or otherwise provide jurisdictional basis for Commission review because, unlike in cases “where we have held that NASD action having the effect of barring an individual from association with all NASD members—whether the individual is barred or not—is reviewable under Section 19(d),” NASD’s action denying the firm an exemption did not limit the ability of Dillon’s employees “to associate with NASD members”).

⁸ The Commission has noted that “in those cases in which we have found a denial of access, an SRO had denied or limited the applicant’s ability to use one of the fundamentally important services offered by the SRO. The services at issue were not merely important to the applicant but were central to the function of the SRO.” *Sky Capital LLC*, Exchange Act Release No. 55828, 2007 WL 1559228, at *4 (May 30, 2007) (citation omitted). The parties should address the relevance, if any, of the Commission’s cases applying that standard. *Compare, e.g., Sec. Indus. and Fin. Mkts. Ass’n*, Exchange Act Release No. 72182, 2014 WL 1998525 (May 16, 2014) (holding that the Commission generally has jurisdiction to consider fee rule challenges as limitations on access); *Tower Trading*, Exchange Act Release No. 47537, 2003 WL 1339179 (Mar. 19, 2003) (finding jurisdiction based on SRO’s termination of member firm’s status as a market maker); *with Sky Capital LLC*, 2007 WL 1559228 (finding no jurisdiction to review SRO’s alleged failure to act on complaints referred to its ombudsman).

are there any other administrative remedies available to Acosta through FINRA to appeal the determination that he is subject to a statutory disqualification?⁹

In addition to these jurisdictional issues, the parties should address whether the California Order subjects Acosta to a statutory disqualification. The parties should address, among other matters relevant to the merits of Acosta's appeal, the following issues:

- In determining whether the California Order is “based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct” under Exchange Act Section 15(b)(4)(H)(ii) and thus subjects Acosta to statutory disqualification under Exchange Act Section 3(a)(39), what is the relevance, if any, of Acosta's assertions that he neither admitted nor denied the allegations at issue; that the California Order “does not refer to Section 1668(i) of the California Insurance Code”; and that the California Order “is not based on fraud” because [t]he only non-procedural statute referenced . . . is Section 1668.1 [which] is not a fraud based statute, and is entirely and completely separate and distinct from 1668(i)”?
- What is the relevance, if any, of the California Order's acknowledgment that “if proven to be true and correct, the facts alleged in [the] Accusation are grounds for the discipline, . . . pursuant to the provisions . . . referred to in [the] Accusation”?

Accordingly, IT IS ORDERED, pursuant to Rule of Practice 450(a),¹⁰ that the applicant file a brief addressing the issue of the Commission's jurisdiction and the merits of his appeal by April 5, 2019. FINRA shall file a response by May 6, 2019. Acosta may file a reply by May 20, 2019.¹¹ Pursuant to Rule 180(c) of the Rules of Practice, failure to file a brief may result in dismissal of this review proceeding.¹²

⁹ Cf. *Interactive Brokers LLC*, Exchange Act Release No. 80164, 2017 WL 1035745 (Mar. 6, 2017) (finding no jurisdiction to review interlocutory ruling as part of a membership continuance application that individual was subject to a statutory disqualification because it was not the SRO's final determination on the application). On November 20, 2018, FINRA submitted a declaration regarding the number of MC-400 membership continuance applications filed between 2015 and 2018 by firms seeking to continue association with statutorily disqualified persons. FINRA should provide similar statistics regarding the number of persons who were subject to Rule 9522 notices regarding their statutory disqualification status.

¹⁰ 17 C.F.R. § 201.450(a).

¹¹ As provided by Rule 450(a), no briefs in addition to those specified in this order may be filed without leave of the Commission. Attention is called to Rules of Practice 150–153, 17 C.F.R. § 201.150–153, with respect to form and service, and Rule of Practice 450(b) and (c), 17 C.F.R. §§ 201.450(b)–(c) with respect to content and length limitations. Requests for extensions of time to file briefs will be disfavored.

¹² 17 C.F.R. § 201.180(c).

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary