

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 51949 / June 30, 2005

Admin. Proc. File No. 3-11733

In the Matter of the Application of

LARRY A. SAYLOR  
c/o Daniel S. Newman  
Broad and Cassel  
Miami Center, 30th Floor  
201 South Biscayne Boulevard  
Miami, FL 33131

For Review of Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - REVIEW OF ASSOCIATION  
ACTION

Jurisdiction to Review Action of Association

Associated person of member firm sought Commission review of association's determination to deny motion to vacate a 1972 order imposing a bar from association with a member firm as a principal. Held, the matter is not subject to Commission review because association's determination does not constitute any of the actions subject to review under the Securities Exchange Act of 1934. Application for review is therefore dismissed.

APPEARANCES:

Daniel S. Newman and Heather Siegel, of Broad and Cassel, for Larry A. Saylor.

Marc Menchel, Alan Lawhead, and Shirley H. Weiss, for NASD.

Appeal filed: November 4, 2004  
Last brief received: April 27, 2005

## I.

Larry A. Saylor seeks review of a September 2004 NASD decision to deny Saylor's Motion to Vacate Order Imposing Principal Bar (the "Motion"). Saylor petitioned NASD to vacate the portion of a 1972 order in which NASD barred Saylor from associating with a member firm as a principal, based on NASD's findings that Saylor was a cause of violations of NASD and Commission rules by the member firm with which he had been associated as a principal. Saylor argues that the principal bar was an unnecessarily harsh sanction and that it imposed an undue burden on competition. Saylor contends that the NASD denial of the Motion effectively bars him from association with a member firm as a principal and, thus, is subject to Commission jurisdiction. Saylor further argues that "extraordinary circumstances" warrant Commission review. NASD argues that its action in denying the Motion does not fall within any of the categories of self-regulatory organization ("SRO") actions that the Commission is statutorily permitted to review and that Saylor's appeal should be dismissed for lack of jurisdiction. Our findings are based on an independent review of the record.

## II.

Saylor was admitted to NASD membership in July 1970. Shortly thereafter, along with a partner, Saylor formed NASD member firm SPS & Co., Inc. (the "Firm"). Saylor was registered as a principal with the Firm.

During an examination of the Firm conducted by NASD in August 1970, NASD obtained information that led it to file a complaint against the Firm, Saylor, and his partner. After a hearing, NASD's District Business Conduct Committee No. 7 ("DBCC") issued an August 1971 decision, in which the DBCC found that the Firm had committed violations of NASD and Commission Rules, that Saylor and his partner were causes of these violations, and that the conduct of Saylor and his partner was inconsistent with just and equitable principles of trade.

The DBCC found that the Firm had failed to time stamp sales memoranda, in violation of Securities Act Rule 17a-3. <sup>1/</sup> The DBCC decision found that the Firm had failed to establish and maintain appropriate written supervisory procedures. The DBCC decision also found that the Firm had failed to comply with rules with respect to the prompt receipt and delivery of securities, by executing sell orders for customers while the securities being sold were not in the Firm's possession or in the customer's account at the time of execution and no written assurance of the delivery of the securities was received by the Firm. In addition, the DBCC found that the Firm had failed to cancel or liquidate purchase transactions in the absence of full cash payment within seven days, in violation of the Federal Reserve Board's Regulation T and had committed violations of NASD's markup policy in sales to customers of the shares of a single company.

The DBCC censured the Firm and suspended it from membership for thirty days, and the DBCC also censured Saylor and his partner and ordered that their registrations "be suspended for

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<sup>1/</sup> 17 C.F.R. § 240.17a-3.

a period of 30 days." The Firm, Saylor, and his partner appealed the DBCC's decision to NASD's Board of Governors, which upheld the DBCC's decision in its entirety in an October 1972 decision, but added a permanent bar from association as principals with NASD member firms for both Saylor and his partner. <sup>2/</sup> The Board of Governors explained its determination to add the principal bar by stating that it found that "the pervasive and serious nature of the violations warrant the imposition of more severe sanctions" and that "respondents were either totally ignorant of the Association's Rules of Fair Practice or consciously chose to ignore their application and, in any event, such conduct cannot be tolerated in registered principals." In filing this appeal seeking that the principal bar be vacated, Saylor does not dispute that he was a cause of the Firm's violations underlying the imposition of the principal bar in 1972. Saylor simply claims that the principal bar was an excessive and undue penalty for his conduct.

Saylor asserts that "from approximately one year after the entry of the bar to the present," he has been continuously employed in the securities industry in a non-principal capacity. Saylor filed the Motion in July 2004, nearly thirty-two years after the NASD Board of Governors' decision. Without a hearing, an NASD Review Subcommittee, acting pursuant to Article V, Section 5.11 of NASD's By-Laws, denied the Motion in a one-sentence decision issued in September 2004, which did not set forth the reasoning behind its determination. Saylor then filed his petition for review of NASD's denial of the Motion with the Commission on November 4, 2004.

### III.

Our authority to review an action of an SRO, including NASD, is governed by Section 19(d) of the Exchange Act. <sup>3/</sup> That provision authorizes Commission review of an SRO action that:

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- <sup>2/</sup> Saylor appears to have been in the hospital at the time of the DBCC hearing and was unable to appear at the hearing. However, Saylor did attend and gave testimony at the hearing before the NASD Board of Governors.
- <sup>3/</sup> 15 U.S.C. § 78s(d).

In addition to arguing that we have jurisdiction to review his appeal under Exchange Act Section 19(d), Saylor argues that we have jurisdiction to review this matter under Exchange Act Section 19(f) because he contends that the NASD denial of the Motion imposes an undue burden on competition.

Section 19(f) does not provide the basis for Commission jurisdiction over SRO actions. Instead, it specifies the standard pursuant to which the Commission reviews particular SRO actions (those in which an SRO has denied membership to any individual, barred an individual from association with a member firm, or denied access to services offered by the SRO to any individual) over which the Commission has jurisdiction pursuant to Section 19(d). Unless an appeal meets the threshold requirement for jurisdiction under Section 19(d), the standard of review under Section 19(f) is not an issue.

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 access to services offered by such organization or member thereof; or iv) bars any person from becoming associated with a member.

We conclude that Saylor's appeal does not fall within the categories set forth in Section 19(d).

Our decision in Lance E. Van Alstyne is controlling here. <sup>4/</sup> In that case, NASD had denied respondent's motion to set aside a default decision imposing sanctions after the respondent failed to appeal the default decision within fifteen days, as required under NASD rules. In dismissing the petition for review, we found that NASD's denial of the motion to set aside its default decision did not itself impose any disciplinary action. We found:

[r]ather, [NASD] merely denied a motion collateral to an underlying disciplinary action in which Van Alstyne already had been sanctioned. The fact that Van Alstyne may have been affected adversely by [NASD's] denial does not transform the denial into a reviewable NASD order. <sup>5/</sup>

As was the case in Van Alstyne, NASD's denial of Saylor's Motion to vacate NASD's thirty-two year old principal bar is collateral to the underlying disciplinary action in which Saylor has already been sanctioned. In denying Saylor's Motion, NASD did not employ its disciplinary procedures, did not make a determination that Saylor had violated a statute or rule, and did not impose a final disciplinary sanction. <sup>6/</sup> These actions and determinations were made in the NASD Board of Governors' 1972 decision, which Saylor did not appeal in a timely fashion. Saylor acknowledges that he was aware of the imposition of the principal bar immediately after the NASD Board of Governors' decision imposing it, and he nevertheless took no action to appeal its imposition until over thirty years later. Saylor does not explain his failure to appeal NASD's imposition of the principal bar prior to 2004. <sup>7/</sup>

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<sup>4/</sup> Lance E. Van Alstyne, 53 S.E.C. 1093 (1998).

<sup>5/</sup> Accord Joseph Dillon & Co., Inc., 54 S.E.C. 960, 964 n.8 (2000) (citing Van Alstyne, 53 S.E.C. at 1098, and Tague Sec. Corp., 47 S.E.C. 743 (1982)); Morgan Stanley & Co., 53 S.E.C. 379, 383 (1997).

<sup>6/</sup> See, e.g., Tague Sec. Corp., 47 S.E.C. at 745 (finding no Commission jurisdiction to review Philadelphia Stock Exchange action requiring member firm to make adjustments in certain options trades, in part due to the fact that Exchange did not impose disciplinary sanctions on member firm); see also Morgan Stanley, 53 S.E.C. at 383 (declining to review an NASD exemption denial involving the operation of Municipal Securities Rulemaking Board Rule G-37, where we concluded that NASD's action in denying the exemption from the Rule was not disciplinary in nature because it did not involve a "determination of wrongdoing" and that the exemption denial itself did not impose member firm's prohibition from engaging in municipal securities business).

<sup>7/</sup> See Van Alstyne, 53 S.E.C. at 1099. As discussed in greater detail below, we find that

We also conclude that NASD's action does not constitute a denial of membership or participation. Here, NASD denied an untimely motion to set aside an NASD decision. In Van Alstyne, we found that NASD's similar denial did not deny or condition Van Alstyne's membership or participation in NASD, and did not limit or prohibit Van Alstyne's access to NASD services or bar him from becoming associated with a member of NASD. <sup>8/</sup> Here, NASD's action in denying the Motion did not bar Saylor from becoming associated with a member firm as a principal. <sup>9/</sup>

NASD's denial of Saylor's Motion has no bearing on Saylor's NASD membership status, which is unaffected by NASD's determination. NASD did not impose any condition or restriction on Saylor's NASD membership or his ability to participate as an NASD member, but merely denied Saylor's Motion, which was collateral to a final decision issued over thirty years earlier. Notwithstanding NASD's denial of the Motion, Saylor can participate as an NASD member and can associate with any member firm in any capacity other than as a principal. <sup>10/</sup>

Moreover, Saylor has not availed himself of the NASD eligibility process that provides him with a method to petition NASD for re-association as a principal. Under Exchange Act

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Saylor has not made the necessary showing of "extraordinary circumstances." See also id., 53 S.E.C. at 1098 n.13 (citing William T. Banning, 50 S.E.C. 415 (1990), a case in which we found that we lacked jurisdiction to review NASD's denial of a motion for a late appeal where the default decision was mailed to respondent at his last known address in NASD's records and was returned as unclaimed or refused).

<sup>8/</sup> Van Alstyne, 53 S.E.C. at 1098; see also Morgan Stanley, 53 S.E.C. at 384.

<sup>9/</sup> Saylor cites our decisions in Frank R. Rubba, 53 S.E.C. 670 (1998), and Exchange Services Inc., 48 S.E.C. 210 (1985), in support of his argument that the Commission has jurisdiction to review NASD's action under this category of SRO action specified in Section 19(d) because, he claims, NASD's action "effectively" bars him from association as a principal. In those cases, we found that NASD's denials of requests for exemptions from examination requirements for persons seeking to become associated with member firms were within our jurisdiction under Section 19(d) because the exemption denials had the effect of barring those persons from becoming associated with those firms. However, in Rubba, we specifically noted, "We take no position on the general question of whether the determinations of self-regulatory organizations relating to requests for a waiver or an exemption from an NASD rule are also reviewable." Rubba. 53 S.E.C. at 673 n.5. In Exchange Services, jurisdiction was not addressed as such in our opinion. Furthermore, in Exchange Services, the firm requested Commission review of an NASD decision to deny an exemption that the firm had the right to request pursuant to a provision in NASD's By-Laws. See Exchange Services, 48 S.E.C. at 212 n.8. NASD's denial of the Motion here involved no such issues.

<sup>10/</sup> In addition, NASD's action in denying the Motion does not constitute a denial of access to services offered by NASD because it has no impact on Saylor's access to any such service. See Van Alstyne, 53 S.E.C. at 1098; Morgan Stanley, 53 S.E.C. at 384.

Section 3(a)(39), <sup>11/</sup> Saylor is subject to a "statutory disqualification" as a result of the principal bar. Under Exchange Act Rule 19h-1, <sup>12/</sup> and NASD Rule 9522, a person subject to a statutory disqualification seeking to be associated with a member firm must enter into specified eligibility proceedings before he or she can be associated with a member firm in the capacity in which such person has been disqualified. Saylor seeks to avoid such proceedings by requesting that the principal bar be vacated. Saylor argues that, as a practical matter, member firms "seek to hire individuals without any disqualifications" and that "his employment opportunities have become limited as a result thereof." <sup>13/</sup> However, we previously have refused to consider arguments on appeal from applicants who failed to avail themselves of an SRO's procedures. <sup>14/</sup>

Saylor alternatively argues that, even if we determine that we lack jurisdiction to consider his appeal of NASD's denial of the Motion under Section 19(d) of the Exchange Act, we nevertheless should consider his petition as a late-filed appeal of the original sanction because of the "extraordinary circumstances" of his case. <sup>15/</sup> Saylor claims that the "extraordinary circumstances" of his case are the "manifest injustice" of his case and his assertion that "he has incurred substantial harm as a result thereof."

We held in Van Alstyne that, "in the interests of finality," only under extraordinary circumstances will we authorize the filing of a late appeal under Section 19(d)(1). In that case, we held that such extraordinary circumstances did not exist even though the record indicated that Van Alstyne had moved away from the mailing addresses contained in NASD's records and may not have been aware of the default decision against him during the period in which he was required to file his appeal. <sup>16/</sup> Saylor's thirty-two year delay in filing an appeal of NASD action

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<sup>11/</sup> 15 U.S.C. § 78c(a)(39).

<sup>12/</sup> 17 C.F.R. § 240.19h-1.

<sup>13/</sup> Saylor asserts that "member firms are not willing to take on [the] responsibility" of sponsoring the statutory disqualification applications of associated persons who seek principal status. Saylor states that one of his employer firms refused to sponsor a statutory disqualification application he wished to pursue "because they did not want to undertake the additional supervisory responsibilities that accompany the hiring of an employee who is subject to a disqualification." The record indicates that Saylor has not filed a statutory disqualification application.

<sup>14/</sup> See MFS Securities Corp., Exchange Act Rel. No. 47626 (Apr. 3, 2003), 79 SEC Docket 3612, 3623. Saylor points to his clean disciplinary record since the imposition of the principal bar and his improved knowledge of Commission and NASD rules during the thirty-two years since the principal bar was imposed. He adds that he has won a number of professional and community service awards. These are all factors that could be appropriately considered within the framework of NASD's eligibility proceedings.

<sup>15/</sup> Saylor cites David L. Turnipseed, 48 S.E.C. 689 (1987), for the proposition that we can grant jurisdiction in extraordinary circumstances. However, in that case, we exercised our discretionary authority to accept a petition for review filed twenty days late, where the basis for the petition, and for our findings on review, was that NASD had not applied its rules consistently with the purposes of the Exchange Act. There is no basis for such a finding here.

taken after a proceeding in which he participated, and of which he admits being apprised

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16/ See Van Alstyne, 53 S.E.C. at 1095-96.

immediately, is even less compelling than Van Alstyne's situation. We see no basis for departing from that precedent here. 17/

Under the circumstances, we have determined to dismiss Saylor's appeal.

An appropriate order will issue. 18/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, CAMPOS and ATKINS).

Jonathan G. Katz

Secretary

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17/ Accord Joseph Dillon, 54 S.E.C. at 963 n.5.

18/ 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 APPLICATION FOR REVIEW OF ACTION OF REGISTERED  
SECURITIES ASSOCIATION

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

ORDERED that Larry A. Saylor's petition for review be, and it hereby is, dismissed.

By the Commission.

Jonathan G. Katz  
Secretary