SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 89121 / June 22, 2020

Admin. Proc. File No. 3-18637

In the Matter of the Application of

GREGORY ACOSTA

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 a determination that he is subject to a statutory disqualification. *Held*, the Commission has jurisdiction to review the determination, and the determination is *set aside.*

APPEARANCES:

Richard D'Amura, D'Amura & Zaidman, PLLC, for Gregory Acosta.

Alan Lawhead and *Michael M. Smith* for FINRA.

Appeal filed: August 13, 2018
Last brief received: May 21, 2019

Gregory Acosta, formerly associated with Kestra Investment Services, LLC, a FINRA member firm, appeals from FINRA action notifying Kestra that Acosta is subject to a "statutory disqualification" under Section 3(a)(39) of the Securities Exchange Act of 1934.[1] FINRA notified Kestra that, as a result of the disqualification, Acosta could not continue to associate with Kestra unless the firm "request[ed] and receive[d]" FINRA's approval.[2] Following the filing of his appeal, we directed the parties to submit briefs that addressed our jurisdiction to consider the matter, as well as the merits of the appeal.[3] Having considered the parties' briefs, we hold that because FINRA's action effectively bars Acosta from associating with any FINRA member we have jurisdiction under Exchange Act Section 19(d).[4] We further hold that FINRA's action must be set aside pursuant to Exchange Act Section 19(f).[5]

I. BACKGROUND

A. Acosta settled a proceeding with the California Department of Insurance.

On January 10, 2018, the California Department of Insurance issued an "Accusation" against Acosta and Diamond Bar Executive Benefits Programs & Insurance Services, Inc. ("EBP"), a financial services company. The Accusation alleged that Acosta, EBP's president, took out a $750,000 life insurance policy in the name of an elderly customer (the "Customer") and named EBP as the beneficiary without the Customer's knowledge. The Accusation also alleged that the Customer had been a "business associate" and "client" of Acosta's "for numerous years"; that Acosta had a substantial loan from the Customer that "provided a lower interest rate compared to any lender" yet "a better rate of return for" the Customer; and that Acosta was making monthly payments on the loan and paying premiums on the life insurance policy. According to the Accusation, when investigators interviewed the Customer he "could not recall details [on] the loan" or the policy, which were issued "10 years ago."

The Accusation asserted that based on these allegations "Respondents are subject to discipline . . . for violations of Sections 1668(i) and (j)" of the California Insurance Code. Those sections authorize the California Insurance Commissioner to "deny an application for any license" if "[t]he applicant has previously engaged in a fraudulent practice or act or has conducted any business in a dishonest manner" or if "[t]he applicant has shown incompetency or untrustworthiness in the conduct of any business, or has by commission of a wrongful act or

---

1 15 U.S.C. § 78c(a)(39).

2 *See generally Nicholas Savva*, Exchange Act Release No. 72485, 2014 WL 2887272 (Jun. 26, 2014) (providing background regarding statutory disqualifications and FINRA eligibility proceedings through the MC-400 membership continuance application process).

3 *See Gregory Acosta*, Exchange Act Release No. 84165, 2018 WL 4404615 (Sept. 17, 2018); *Gregory Acosta*, Exchange Act Release No. 85257, 2019 WL 1056550 (Mar. 6, 2019).

4 15 U.S.C. § 78s(d).

5 15 U.S.C. § 78s(f).

practice in the course of any business exposed the public or those dealing with him or her to the danger of loss."[6] The Accusation also asserted "that Respondents' actions are violations of California Insurance Code sections 1668.1(a) and (b)." Those sections provide that "cause to suspend or revoke any permanent license" includes the "induce[ment]" of a client "to cosign or make a loan . . . to the licensee" or "to make the licensee . . . a beneficiary of a life insurance policy."[7] The Accusation cited provisions that permitted the California Insurance Commissioner to revoke Respondents' licenses and issue restricted licenses on any ground for which an application could be denied under Section 1668 or suspended or revoked under Section 1668.1.[8]

In response to the Accusation, Acosta denied that his relationship with the Customer was fraudulent. Acosta submitted declarations from the Customer's family members, attorney, and certified public accountant, which purported to show that the Customer and his family were long-time friends and associates of Acosta; that the Customer had lent money to Acosta and his wife over the years; and that the loan at issue was secured by the building that the loan was financing. All declarants attested that the Customer was aware of and consented to the loan and the life insurance policy at the time. As the Accusation noted, however, when California investigators interviewed the Customer he indicated that he was 87 years old, his "memory was not very good," and he could not recall the details of the loans or whether he had consented to EBP being a beneficiary on a life insurance policy in his name.

Acosta asserts that, after submitting his declarations, he negotiated and agreed to a Stipulation and Waiver ("Stipulation") with the California Department of Insurance to resolve the Accusation.[9] As part of the Stipulation, Acosta and EBP:

> Without admitting or denying the allegations contained in [the] Accusation, . . . acknowledge[d] that, if proven to be true and correct, the facts alleged in [the] Accusation are grounds for the discipline, by the Insurance Commissioner of the State of California, of Respondent's licenses and licensing rights, pursuant to the provisions of the Insurance Code of the State of California referred to in [the] Accusation.

Acosta and EBP also consented to have the California Insurance Commissioner revoke their licenses and licensing rights, and in lieu thereof issue restricted licenses and licensing rights for

---

6 Cal. Ins. Code § 1668(i)-(j).

7 *Id.* § 1668.1(a)-(b).

8 *See id*. §§ 1738, 1738.5, 1739, 1742.

9 Acosta attached various documents related to the settlement with his pleadings. Under Rule of Practice 452, we may allow the submission of additional evidence if we find that it is "material and that there were reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. § 201.452. The attachments meet this standard, and we admit them.

five years under certain terms. They also agreed to within 30 days "come into compliance with California Insurance Code section 1668.1," which prohibits a licensee from inducing a client to make a loan to the licensee or naming the licensee as the beneficiary of a life insurance policy.[10] On May 21, 2018, the California Insurance Commissioner entered an order (the "California Order") adopting the terms of the Stipulation, which it incorporated by reference.

B. FINRA determined that Acosta is subject to a statutory disqualification.

FINRA became aware of the California Order in June 2018, when Kestra disclosed it via an amendment to Acosta's Uniform Application for Securities Industry Registration (Form U4). Kestra initially reported that it was not a "final order based on any violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct." But FINRA disagreed and, on July 13, 2018, its Department of Member Regulation sent Kestra a letter (the "SD Notice") stating that the California Order made Acosta statutorily disqualified under the Exchange Act. The SD Notice, which a FINRA Regulatory Review Analyst sent, stated that "FINRA has determined that Gregory Acosta, a person associated with your firm, is subject to a disqualification as defined in Section 3(a)(39)" of the Exchange Act.[11] The SD Notice further stated that "[t]he disqualification arises from the [California] Order" which revoked or restricted his licenses "based on a violation of Section 1668(i) of the California Insurance Code, a law or regulation that prohibits fraudulent, manipulative, or deceptive conduct."

The SD Notice stated that "[g]enerally, no person who is, or who becomes, subject to a disqualification shall associate, or continue association, with a FINRA member unless the member requests and receives written approval from FINRA . . . referred to as the Membership Continuation process." That process is initiated by an affected firm filing an MC-400 application with FINRA. The SD Notice directed that, if Kestra did not initiate the MC-400 application process, it "should immediately terminate its association with [Acosta], and notify FINRA in writing . . . of the termination by August 1, 2018."

Kestra declined to submit the MC-400 application and, in accordance with FINRA's instruction, terminated Acosta's association with the firm.[12] Acosta's counsel communicated with FINRA's Associate Director of Regulatory Review by exchanging documents and raising grounds for why the California Order was not based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive conduct. FINRA staff ultimately adhered to

---

10 *See* Cal. Ins. Code § 1668.1(a), (b).

11 *See* 15 U.S.C. § 78c(a)(39); FINRA By-Laws, Art. III, § 3(b).

12 FINRA states that, "[h]ad Kestra filed an MC-400, the firm could have continued associating with Acosta throughout the Membership Continuance process."

its earlier determination that Acosta was statutorily disqualified. Acosta then initiated this proceeding by filing an application for review with the Commission.[13]

II. Analysis

Exchange Act Section 19(d) authorizes the Commission to review certain actions taken by a self-regulatory organization ("SRO") such as FINRA. Section 19(e) and Section 19(f) provide the standards governing that review. As discussed above, we ordered the parties to brief the issue of our jurisdiction over Acosta's appeal as well as the merits of that appeal. Acosta argued that we have jurisdiction under Section 19(d) and that FINRA's action should be set aside on the merits. FINRA argued that we lack jurisdiction under Section 19(d) and that in any case its action should not be set aside. We conclude that we have jurisdiction under Section 19(d) to review FINRA's determination that Acosta is subject to a statutory disqualification, and that FINRA's determination must be set aside under Section 19(f).

A. We have jurisdiction over Acosta's application for review.

1. We have jurisdiction to review FINRA's determination that Acosta is subject to a statutory disqualification because that determination effectively bars Acosta from becoming associated with a FINRA member firm.

Exchange Act Section 19(d)(2) provides that we may review SRO action that "bars any person from becoming associated with a member."[14] We have held previously that "SRO action having the effect of 'barring' an individual from association with the SRO's members—whether the individual is formally barred or not—is reviewable under Section 19(d)."[15] FINRA's determination that Acosta is subject to a statutory disqualification has this effect.

---

[13] Acosta separately filed a complaint against FINRA in federal district court seeking injunctive and declaratory relief. The court has stayed that case pending "resolution of the SEC proceedings." *Acosta v. FINRA*, No. 2:18-cv-7432-R-KS (C.D. Cal. Nov. 2, 2018), ECF No. 27. Acosta did not seek to stay FINRA's determination of a statutory disqualification pending his appeal to the Commission. *See* 17 C.F.R. § 201.401(d). Although he subsequently requested that the Commission expedite its consideration of his appeal, he failed to provide a basis for his request for expedited consideration. In any case, that request is now moot.

[14] *See* 15 U.S.C. § 78s(d)(2). Section 19(d)(2) provides three other jurisdictional bases for Commission review of SRO action: if the action prohibits or limits any person in respect to access to services offered by the SRO or a member; if it imposes a final disciplinary sanction on a member of the SRO or an associated person; or if it denies membership or participation to the applicant. *See id*. In light of our disposition, we need not address whether FINRA's determination is reviewable under any of these other jurisdictional prongs.

[15] *Lawrence Gage*, Exchange Act Release No. 54600, 2006 WL 2987058, at *5 (Oct. 13, 2006) (discussing authority in which the Commission has so held).

Exchange Act Section 15A(g)(2) provides that FINRA may "bar from becoming associated with a member any person, who is subject to a statutory disqualification."[16] Section 3 of Article III of FINRA's By-Laws provides that "no person shall become associated with a member, continue to be associated with a member, or transfer association to another member . . . if such person is or becomes subject to a disqualification under Section 4."[17] Section 4 provides that a "person is subject to a 'disqualification' with respect to membership, or association with a member, if such person is subject to any 'statutory disqualification' as such term is defined in Section 3(a)(39) of the [Exchange] Act."[18] Accordingly, FINRA's determination that Acosta is subject to a statutory disqualification "as defined in Section 3(a)(39)" effectively bars him from associating with a FINRA member firm and is therefore reviewable under Section 19(d).

Our precedent is consistent with this conclusion. In *Richard T. Sullivan,* we found jurisdiction to review SRO action revoking an associated person's registrations as a result of his failure to pay fines assessed in an earlier disciplinary proceeding because that action "effectively bar[red] the applicant from association with a member firm."[19] Similarly, in *Frank R. Rubba*, we found jurisdiction to review SRO action where the SRO conditioned applicant's request to reenter the securities industry on his requalifying by examination because the SRO had "effectively barred Rubba from applying for association with any NASD member until he satisfies the requalification requirement."[20] In neither case did the SRO impose a "bar"; rather, the SRO's action had the effect of preventing the applicant from associating with a member firm. As in *Sullivan* and *Rubba*, FINRA's determination that Acosta is subject to a statutory disqualification prevents him from associating with a FINRA member firm and is reviewable.

The cases that FINRA cites in support of its argument that we lack jurisdiction here are inapposite. FINRA cites *Joseph Dillon & Co*.,[21] where we held that we lacked jurisdiction to review an SRO's determination to deny a firm's request for an exemption from a rule that applied to all member firms.[22] Although the firm argued that the determination effectively

---

16 15 U.S.C. § 78*o*-3(g)(2).

17 FINRA By-Laws, Art. III, § 3(b).

18 *Id.* § 4.

19 *Richard T. Sullivan*, Exchange Act Release No. 40671, 1998 WL 786943, at *3 (Nov. 12, 1998).

20 *Frank R. Rubba*, Exchange Act Release No. 40238, 1998 WL 404640, at *2 (July 21, 1998).

21 *Joseph Dillon & Co.*, Exchange Act Release No. 43523, 2000 WL 1664016 (Nov. 6, 2000).

22 *See id.* at *1, *4 (discussing the lack of jurisdiction to review NASD's determination not to exempt a firm from the requirement that it have special supervisory procedures if it employed a certain number of persons that had previously been associated with a "disciplined firm").

barred persons from associating with the firm because the firm could not comply with the rule, we recognized that "this is true of every rule violation involving any NASD member, i.e., any member firm's failure to comply with NASD rules jeopardizes its membership and potentially inhibits the ability of registered persons to associate with that firm."[23] And "[w]hatever the consequences to the Firm of the exemption denial, it [did] not constitute a bar of [the firm's] registered representatives because they will remain free to associate with other firms."[24] Unlike those representatives, Acosta is not free to begin a new association with any member firm unless he first persuades a member firm to sponsor him in a MC-400 application that FINRA approves.

FINRA also cites *Interactive Brokers*,[25] where we refused to consider a hearing panel's determination in connection with a membership continuance application that the associated person at issue was subject to a statutory disqualification.[26] But unlike here, the firm had already filed a membership continuance application. We noted that "denials of a firm's application to retain its membership if it employs a statutorily disqualified person are reviewable by the Commission" but also that FINRA had "not yet made a final determination to deny" the membership continuance application. Our holding in the case was that, having filed a membership continuance application, the firm could not yet obtain Commission review of a hearing panel's ruling regarding that application because FINRA provided for further review of the application. We had no occasion to consider whether the Commission has jurisdiction to review a determination by FINRA's staff that a person is subject to a statutory disqualification in the absence of a membership continuance application having been filed.

FINRA relies further on *WD Clearing, LLC*,[27] where we held that we lacked jurisdiction to review a member firm's withdrawal of its application for approval of a change in ownership.[28] The member firm's withdrawal of the application "was precipitated by FINRA's warning" to the member firm "of a potential impediment to FINRA's approval" of the application—a disciplinary action involving a person associated with the member firm's proposed buyer.[29] We held that FINRA's warning did not "constitute a final decision or an official FINRA action" on

---

23 *Id.* at *3.

24 *Id.*

25 *Interactive Brokers LLC*, Exchange Act Release No. 80164, 2017 WL 1035745 (Mar. 6, 2017).

26 *Id.* at *2-3.

27 *WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 WL 5245244 (Sept. 9, 2015).

28 *Id.* at *1.

29 *Id.* at *1, *2-3.

the application, and that the selling party was free to proceed with the application process.[30] FINRA argues that, here, the SD Notice did not terminate Acosta, and that Acosta remains free to find a firm to sponsor his membership continuance application. But, in this case, Acosta is seeking review of the SD Notice, and FINRA did not provide a procedure for any such review. The SD Notice was a final and official FINRA determination that Acosta is subject to a statutory disqualification. In *WD Clearing*, we also rejected the claim that the firm's representatives were "effectively barred" from associating with a FINRA member due to interim restrictions that had been imposed during FINRA's consideration of the application because the restrictions did not preclude associational status with any FINRA member firm.[31] In contrast, that is the effect here—where FINRA has determined that a person is subject to a statutory disqualification.

2. The determination that Acosta is subject to a disqualification is reviewable notwithstanding the availability of the membership continuance application process.

FINRA does not dispute that we have jurisdiction to review action which effectively bars an associated person from associating with a FINRA member firm. Nor does it dispute that the SD Notice precluded Acosta from associating with a member firm absent the filing of an MC-400 application on his behalf or the issuance of a stay of the statutory disqualification determination. But FINRA argues that Acosta cannot appeal from the SD Notice because it is merely "FINRA's initial action" on Acosta's disqualified status and he has an "administrative remedy . . . through the Membership Continuance process"; in FINRA's view, Acosta may appeal to the Commission only if a member submits an MC-400 application on Acosta's behalf seeking to associate with Acosta despite his disqualification and FINRA denies the application.

FINRA's By-Laws do not support its position. As discussed above, its By-Laws provide that a person subject to a statutory disqualification may not associate with a member firm, but they do not require such a prohibition only if FINRA denies an MC-400 application submitted on the person's behalf.[32] Rather, the By-Laws provide that statutorily disqualified persons are ineligible to "continue to be associated with a member"; that "no member shall be continued in membership, if any person associated with it is ineligible to be an associated person"; and that any such "member that is ineligible for continuance in membership may file with the Board an application requesting relief from the ineligibility . . . on its own behalf and on behalf of a current or prospective associated person."[33] The fact that a member firm may seek permission to associate with a statutorily disqualified individual—and that FINRA may approve that relief—

---

30 *Id.* at 4.

31 *Id*. at *5.

32 *See* http://www.finra.org/industry/general-information-finras-eligibility-requirements ("Generally speaking, a person who is subject to disqualification may not associate with a FINRA member in any capacity unless and until approved in an Eligibility Proceeding.").

33 FINRA By-Laws, Art. III, § 3(b) & (d).

does not mean that FINRA's determination that the individual is subject to a statutory disqualification is any less of a bar from associating with a member firm.[34]

Accepting FINRA's argument would mean that individuals who could not persuade a member firm to file an MC-400 application on their behalf would be unable to appeal FINRA's determination that they are subject to a statutory disqualification. FINRA acknowledges that "no individual has access to" the MC-400 process and that "there is no similar process open to individuals like Acosta." We believe that because an SD Notice effectively bars an individual from associating with a FINRA member firm we have jurisdiction over an appeal of that notice.

To be sure, we agree with longstanding precedent that "aggrieved members of SROs must fully exhaust the remedies *made available* by those organizations before seeking Commission review."[35] As discussed above, we have held that a firm may not appeal a hearing panel's ruling regarding a statutory disqualification in a membership continuance proceeding to the Commission because FINRA provides for further review of the membership continuance application by its National Adjudicatory Council and possibly its Board of Governors.[36] But FINRA provides no formal process for Acosta to challenge the prerequisite that—as a result of its staff's determination that he is subject to a statutory disqualification—he must get a member firm to file a membership continuance application on his behalf in the first place (which he may be unable to do). Under the circumstances, there are no administrative remedies available to Acosta that he has failed to exhaust, and he is challenging FINRA's final action.

FINRA further argues that "[a] significant benefit of requiring statutorily disqualified persons to undergo the Membership Continuance process is that, should FINRA elect to approve an application, FINRA can require that the firm implement and administer a stringent plan of supervision over the disqualified person." We agree that the MC-400 application process serves important policy objectives by ensuring that any future association of a statutorily disqualified person is in the public interest. Indeed, we have cited such objectives in denying requests to vacate bars because, by retaining a bar, regulatory authorities retain the ability to monitor and

---

34 *Cf. Matthew D. Sample*, Exchange Act Release No. 75893, 2015 WL 5305992, at *3 & n.17 (Sept. 10, 2015) (providing that Commission Rule of Practice 193, which "provides a process by which barred individuals can apply to the Commission for consent to become associated with an entity that is not a member of an SRO," does not "provide for modification of bars, which remain in effect even after consent to associate is granted").

35 *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004) (emphasis added).

36 *Interactive Brokers LLC*, Exchange Act Release No. 80164, 2017 WL 1035745, at *2 (Mar. 6, 2017).

approve or reject the arrangements governing any future association by the barred individual.[37] But the membership continuance application process is available only to individuals who can persuade a FINRA member firm to sponsor an application on their behalf. The fact that the membership continuance process for individuals who are subject to a statutory disqualification serves important objectives does not mean that FINRA's determination that an individual is subject to a statutory disqualification and thus must go through that process is itself unreviewable. The fact that such a determination acts as a bar means that it is reviewable.

Although we hold here that FINRA's SD Notices are reviewable under Exchange Act Section 19(d)(2), we reiterate the important role that disqualification plays in ensuring that persons who come within the statutory parameters for disqualification are monitored effectively and prevented from returning to the industry absent a finding that such association would be in the public interest. Our jurisdiction to review SD Notices does not alter the fact that they prohibit such persons from associating with member firms as of the time stated in the notice unless a firm sponsors an MC-400 application on their behalf, or unless the SD Notice is directly challenged by the person subject to it and, in connection with that challenge, a stay of the SD Notice is granted. And whether a firm files an MC-400 application either immediately upon receipt of the SD Notice or after an associated person unsuccessfully appeals an SD Notice to the Commission, the applicant firm would in either case still have the burden of establishing that, despite the disqualification, it is in the public interest to permit the requested association.[38]

3. Neither the record in this case nor the ability of firms to terminate employees regardless of an SD Notice establishes that we lack jurisdiction to review FINRA's determination that Acosta is subject to a statutory disqualification.

FINRA argues that we should not find jurisdiction because "[t]he record here is markedly incomplete when compared to the record created in statutory disqualification applications," that a "fully developed record [would] facilitate appellate review," and that its absence here "underscores FINRA's argument that the Commission lacks jurisdiction." But FINRA's determination in the SD Notice that Acosta is subject to a statutory disqualification is a question

---

[37] *See, e.g., Salim B. Lewis*, Exchange Act Release No. 51817, 2005 WL 1384087, at *4 & n.39 (June 10, 2005) (noting that, while the Commission "may permit barred individuals to re-enter the industry if . . . re-entry would not harm the public interest . . . [t]he bar remains in place" and the Commission "retains its continuing control over such barred individuals' activities."); *see also Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 WL 183600, at *11 (Apr. 5, 1999) (stating that permanently barred individual's employment status remains subject to Commission review so long as bar remains in effect even if the individual re-enters the securities industry by showing that such limited re-entry is consistent with public interest), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000).

[38] *See* Exchange Act Section 15A(g)(2), 15 U.S.C. § 78*o*-3(g)(2); *see also Savva*, 2014 WL 2887272, at *14 (explaining that "the burden rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested employment").

of law. It is unclear what else beside the California Order and the Stipulation it references—the documents upon which FINRA staff based its determination—would bear on our review of that issue. FINRA does not explain how a more developed record would illuminate the issues raised by Acosta's appeal, which appear to have been adequately addressed by the documents attached to the parties' pleadings. And to the extent that there was some omitted factual matter that would "facilitate appellate review," FINRA chose not to seek to adduce additional evidence.[39]

We note further that there is no basis for comparing the record on review of an SD Notice with the record that would be before us on review of the denial of a membership continuance application. The issue on review of an SD Notice is whether FINRA determined correctly that the individual is subject to a statutory disqualification and therefore effectively barred from associating with a FINRA member firm. That issue may be relevant on review of the denial of a membership continuance application, but a membership continuance application also involves the issue of whether a person who is subject to a statutory disqualification should be permitted to associate with a member firm despite the disqualification.[40] The applicant must show that "it is in the public interest to permit the requested employment."[41] As a result, the record on review of the denial of an MC-400 application would be very different than would be the record on review of an SD Notice. FINRA does not explain why our authority to review the determination in an SD Notice that a person is subject to a statutory disqualification should depend on a person's ability to find a member firm willing to submit a membership continuance application on its behalf.

FINRA also suggests that allowing an appeal of FINRA's determination that a person is subject to a statutory disqualification could lead to the unequal treatment of similarly situated persons. FINRA states that an associated person who is terminated by his firm without FINRA's involvement, after the firm learns or determines that the individual had become subject to a statutory disqualification, would not be able to challenge the termination under Section 19(d). But Section 19(d) authorizes the Commission to review final actions taken by SROs; nothing in the statute authorizes the Commission to review the decision of a member firm to terminate a particular individual.

B. The determination that Acosta is subject to a statutory disqualification must be set aside.

Under Exchange Act Section 19(f), we review FINRA action barring a person from associating with a member firm 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

---

39 *See supra* note 9.

40 *Bruce M. Zipper*, Exchange Act Release No. 84334, 2018 WL 4727001, at *9 (Oct. 1, 2018).

41 *Id.*

rules are, and were applied in a manner, consistent with the Exchange Act's purposes.[42] We find that the specific grounds for FINRA's action do not exist in fact, and therefore set aside FINRA's action without considering the remaining Section 19(f) elements.

As discussed above, FINRA's By-Laws state that "[a] person is subject to a 'disqualification' with respect to . . . association with a member[] if such person is subject to any 'statutory disqualification' as such term is defined in [Exchange Act] Section 3(a)(39)."[43] Under Exchange Act Section 3(a)(39)(F) and one of the provisions that section cross-references, Exchange Act Section 15(b)(4)(H)(ii), a person is statutorily disqualified if such person is subject to any final order of a state insurance commission that is "based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct."[44] We disagree with FINRA's position that the California Order meets this definition.

Although the Accusation alleged that Acosta engaged in "fraudulent" or "dishonest" conduct, the California Order and the incorporated Stipulation do not resolve those allegations in a way that establishes that the state's final order was based on violations of a law or regulation prohibiting fraudulent, manipulative, or deceptive conduct. The Stipulation stated only that Acosta and EBP consented to have the California Insurance Commissioner revoke their licenses and licensing rights, that if proven to be true and correct the facts alleged in the Accusation would be grounds for this discipline, and that Acosta and EBP agreed to come into compliance with California Insurance Code section 1668.1. As discussed above, section 1668.1 does not discuss fraud. Section 1668(i), which discusses "engag[ing] in any fraudulent practice or act" and "conduct[ing] any business in a dishonest manner," was mentioned in the Accusation but not in the California Order or the Stipulation. Given the language the parties negotiated and agreed to in their settlement, we cannot find there was a basis in fact for the SD Notice's determination that Acosta was disciplined "based on a violation of . . . a law or regulation that prohibits fraudulent, manipulative, or deceptive conduct."

FINRA argues that the California Order satisfies the definition of a statutory disqualification because Acosta's licenses were revoked "based on the violations . . . alleged in the Accusation." In support, FINRA cites our decision in *Nicholas S. Savva*.[45] There, we rejected the applicant's argument that because he (like Acosta) had neither admitted nor denied the state's allegations the state's disciplinary action was not based on fraud.[46] We rejected this argument because the state "found" that the applicant engaged in unauthorized transactions,

---

42 15 U.S.C. § 78s(f). Section 19(f) also requires us to set aside FINRA's action if we find that the action imposes an undue burden on competition. *Id*. Acosta does not argue that, and in light of our disposition we do not address whether, FINRA's action imposes such a burden.

43 *See* FINRA By-Laws, Art. III, § 4.

44 15 U.S.C. §§ 78c(a)(39)(F), 78o(b)(4)(H)(ii).

45 *Savva*, 2014 WL 2887272.

46 *Id.* at *3, 8-9.

made unsuitable recommendations, and "regularly used high pressure 'boiler room' tactics to sell securities."[47] We held that the "business practices" the state "found" the applicant to have engaged in were, "at a minimum, deceptive and violate[d] antifraud provisions . . . ."[48] Indeed, in a Uniform Disciplinary Action Reporting Form (Form U6) it filed with FINRA, the state expressly indicated that the order at issue was based on violations of laws or regulations that "prohibit fraudulent, manipulative, or deceptive conduct."[49] It appears, based on the parties' submissions, that California authorities have not made a similar filing regarding Acosta.

As in *Savva*, an applicant's statement that he neither admits nor denies the underlying allegations does not preclude a finding that the resulting order triggers a statutory disqualification. But to trigger a statutory disqualification under Exchange Act Sections 3(a)(39)(F) and 15(b)(4)(H)(ii), the provisions that FINRA invokes, it is not sufficient that the documents preceding the state's final order alleged "violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct." Rather, to trigger a statutory disqualification under those sections the state's "final order" must indicate, as did the order in *Savva*, that the order is "based on violations" of such provisions. Neither the California Order nor the Stipulation on which it was based do so.

FINRA points to Acosta's acknowledgement in the Stipulation that, "if proven to be true and correct, the facts alleged" in the Accusation would be "grounds for . . . discipline." But that statement does not mean that Acosta violated a provision of the California Insurance Code that prohibited fraudulent, manipulative, or deceptive conduct. Nor is the fact that Acosta accepted discipline sufficient to support that conclusion. The Accusation identified several potential violations—both fraud and non-fraud-based—for which California could discipline Acosta. Thus, Acosta's acceptance of discipline as part of his negotiated settlement does not dictate the conclusion that the California Order and the Stipulation were based on a fraud rather than a non-fraud violation. Neither the California Order nor the Stipulation on which it was based indicate that a fraud violation was the basis for the state's final order. And we reject FINRA's contention—offered without argument or citation to authority—that we should conclude that the California Order and the Stipulation were based on fraud because they lacked recitations "excluding" the Accusation's allegation of a fraud-based violation under Section 1668(i). That the California Order and the Stipulation do not explicitly exclude fraud-based violations does not establish that they are based on such violations.

FINRA further claims that, "[i]n the third and fourth paragraph of the Stipulation," Acosta "consents" to the sanctions "based on all of the violations" alleged in the Accusation—including the fraud-based allegation under Section 1668(i). But the referenced paragraphs do not support FINRA's claim. Instead, they contain a waiver by Acosta and EBP of their rights to a hearing and a consent to the license revocations and restrictions to which the parties had agreed as part of the settlement. They do not mention the Accusation's allegations. Paragraph six of the

---

47 *Id.*

48 *Id.* at *9.

49 *Id.* at *3 n.23.

Stipulation does reference one of the statutory provisions mentioned in the Accusation, but it is the non-fraud violation in 1668.1—not 1668(i)—with which Acosta and EBP expressly agreed to come into compliance within the succeeding 30 days.

III. Conclusion

We conclude that Acosta is entitled to Commission review of FINRA's SD Notice. We also conclude that the California Order and the Stipulation do not subject him to a statutory disqualification because they are not "based on" Acosta's violation of a law or regulation that prohibits fraudulent, manipulative, or deceptive conduct. Because the specific grounds for FINRA's determination that Acosta is subject to a statutory disqualification do not exist in fact, we set aside FINRA's determination that the California Order subjects Acosta to a statutory disqualification.

An appropriate order will issue.[50]

By the Commission (Chairman CLAYTON and Commissioners PEIRCE, ROISMAN, and LEE).

Vanessa A. Countryman
Secretary

By: Jill M. Peterson
Assistant Secretary

[50] 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. 89121 / June 22, 2020

Admin. Proc. File No. 3-18637

In the Matter of the Application of

GREGORY ACOSTA

For Review of Action Taken by

FINRA

ORDER SETTING ASIDE FINRA ACTION

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

ORDERED that FINRA's determination that Gregory Acosta is subject to statutory disqualification is hereby set aside.

By the Commission.

Vanessa A. Countryman
Secretary

By: Jill M. Peterson
Assistant Secretary