BEFORE THE SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of
Manuel P. Asensio
For Review of Action Made
Pursuant to Delegated Authority
by the Division of Trading and Markets.

PETITION FOR REVIEW OF ACTION MADE PURSUANT TO DELEGATED AUTHORITY

Manuel P. Asensio ("Petitioner") hereby petitions the Commission for review of an action made pursuant to delegated authority pursuant to Rule 430 of the Commission's Rules of Practice, 17 C.F.R. § 201.430. On February 25, 2011, Petitioner provided notice of intention to petition for review in compliance with Rule 430(b)(1). Petitioner is a party aggrieved by the Order Approving a Proposed Rule Change to Adopt FINRA Rule 1113 (Restriction Pertaining to New Member Applications) and to Amend the FINRA Rule 9520 Series (Eligibility Proceedings), (the "Order"), dated February 18, 2011,[1] such Order being made by the Commission's Division of Trading and Markets pursuant to delegated authority. 17 C.F.R. 200.30(a)(12). Petitioner requests that the Commission conduct a review of the Order and the proposed rule change[2] upon which it is based, set aside the Order, and disapprove FINRA's proposed rule change.

The Commission should review the Order in view of certain constitutional questions and the provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), as further explained

[1] File No. SR-FINRA-2010-056, Exchange Act Release No. 63933 (Feb. 18, 2011), 76 FR 10629 (Feb. 25, 2011).

[2] *See* Notice of Filing of Proposed Rule Change, File No. SR-FINRA-2010-056, Exchange Act Release No. 63316 (Nov. 15, 2010), 75 FR 71166 (Nov. 22, 2010).

below.

Background:

Petitioner submitted a comment letter following issuance of the Notice of Proposed Rulemaking. Petitioner also wrote a letter dated December 20, 2010 to the Director of the Division of Trading and Markets on the proposed rule change. The Order references both such letters. Petitioner's letters set forth the basis for Petitioner being a party aggrieved by the Order.

Petitioner organized a firm to apply for FINRA membership through FINRA's New Membership Application ("NMA") process and to concurrently apply to allow Petitioner to associate with the firm through FINRA's Membership Continuance Application ("MC-400") process. FINRA's Board of Governors voted to seek, and FINRA then made filings for, the proposed rule change effected in the Order, all while adjudication of Petitioner's NMA and MC-400 were on-going.

Approval of Petitioner's NMA and MC-400 together would constitute an effective remedy for Petitioner being subject to statutory disqualification as the result of a FINRA sanction barring Petitioner from association with any FINRA-member firm. Approval of the MC-400 would allow Petitioner to associate notwithstanding a statutory disqualification. While approval of the MC-400 would not constitute a *de jure* remedy for the statutory disqualification, it would provide a *de facto* remedy. Neither the Exchange Act nor FINRA rules provide for a procedure other than the MC-400 as a means to seek remedy of a statutory disqualification arising from a FINRA bar sanction, other than through direct appeal of the disciplinary sanction, which can only be initiated within 30 days of a FINRA decision that gives rise to a statutory disqualification.

Unless the Order is set aside, Petitioner will only be able to seek *de facto* remedy of the bar

sanction through an MC-400 sponsored by an existing member firm.[3] This would restrict Petitioner's speech in the effort to remedy the statutory disqualification. Petitioner would not be able to set forth as he sees fit the reasons why his association should be allowed. Rather, the MC-400 and its contents would be controlled by the member firm acting as sponsor of the application. Petitioner has been through this process.[4] The Order thus makes the process of seeking relief more prohibitive. Petitioner must solicit FINRA member firms to find a firm willing to employ him and willing to undergo the arduous MC-400 process on Petitioner's behalf.

In becoming subject to statutory disqualification, Petitioner was deprived of property and livelihood by a private party. The private party, FINRA, is encouraged by law to make such deprivation under its sole discretion.[5]

In imposing a bar sanction upon Petitioner, FINRA noted that the absence of investor harm was "irrelevant" to the decision of whether to impose a bar sanction, stating that the "harm in such instances, as here, is to the self-regulatory process and to investors' confidence in that process."[6]

Issues to Be Reviewed and Reasons Why Review Is Appropriate:

The Commission should conduct a review to determine the extent to which the Order is

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[3] Assuming that Petitioner does not obtain relief from his current NMA and MC-400.

[4] *See* Decision of FINRA's National Adjudicatory Council No. SD-1702 (Aug. 12, 2008).

[5] *See* Exchange Act Section 15A(b)(7), 15 U.S.C. § 78o-3(b)(7), and Exchange Act Section 15A(g)(2), 15 U.S.C. § 78o-3(g)(2). See also Exchange Act Section 15A(g)(3)(C), 15 U.S.C. § 78o-3(g)(3)(C), which has particular relevance to Petitioner's case.

[6] *See* Decision of FINRA's National Adjudicatory Council, *Dep't of Enforcement v. Asensio*, Complaint No. CAF030067 (July 28, 2006) at 20 (citing *Dep't of Enforcement v. Dieffenbach*, Complaint No. C06020003, 2004 NASD Discip. LEXIS 10, at *40 (NAC July 30, 2004), *aff'd in relevant part*, *Michael A. Rooms*, 2005 SEC LEXIS 728, *aff'd*, *Rooms v. SEC*, No. 05-9531, 2006 U.S. App. LEXIS 6513 (10th Cir. Mar. 14, 2006)).

consistent with the U.S. Constitution and the Exchange Act. While Petitioner raised constitutional questions in his comment letters, these questions went unaddressed in the Orders. The Division of Trading and Markets found that the proposed rule change was consistent with the Exchange Act, but the Order did not address instances where a person is rendered subject to statutory disqualification, not for investor harm, but for supposed harm to the "self-regulatory process."

In terms of constitutional issues, the Commission should review whether the Order impinges upon due process of law and freedom of speech within the context of due process rights.

As a general matter, FINRA is empowered and encouraged by law to impose sanctions that deprive individuals of livelihood and property. Such deprivation occurs without notice and an opportunity for hearing before a governmental adjudicator, or before any decision-maker that may be presumed to be fair and impartial *per se*. Specifically, FINRA can impose a sanction barring an individual from associating with any member firm, where such sanction is presumed to be permanent until the individual subject to the sanction might be allowed by FINRA to associate with a member firm notwithstanding the bar sanction.

Because FINRA is the only "national securities association" under Section 15A of the Exchange Act, a FINRA bar sanction has the force and effect of a ban from the entire brokerage industry. The Commission encouraged expansion of FINRA's authority with the creation of FINRA from NASD and the NYSE regulatory division. A FINRA bar sanction demonstrably has negative collateral effects upon all business endeavors undertaken by an individual subject to such a sanction, especially endeavors in the financial sector.

Review of a FINRA sanction by a government body is only performed upon the individual injured by the sanction seeking Commission review within 30 days of notice of the sanction, and

such review is not necessarily a review *de novo*. If the sanctioned individual does not seek review within those 30 days, the individual's only opportunity for obtaining a *de facto* remedy of the sanction is through the MC-400.

In this situation, the law empowering FINRA to deprive individuals of livelihood and property necessarily raises questions of violations of due process of law. The issue for the Commission to consider with the Order is whether the Commission's action to approve FINRA's proposed rule change itself violates due process of law, especially for situations involving a FINRA bar sanction.

An individual subject to a FINRA bar sanction has been deprived of livelihood by a private party, where the private party is empowered and encouraged by law and under Commission oversight to effect such deprivation. Under FINRA's proposed rule change, a barred individual could not form a firm to apply for FINRA membership, or own a portion of the equity of a firm applying for FINRA membership. This entails that an individual could not seek relief from a FINRA bar sanction through an MC-400 where the individual would be able to control statements made in the MC-400 or a related proceeding. The individual who has incurred a deprivation of livelihood would have his speech restricted in any effort to seek relief from such deprivation. Furthermore, the individual would not have the opportunity to seek relief except through the consent of certain private third parties, *i.e.* operating FINRA member firms that might be willing to sponsor an MC-400.

Subtending this is the question of whether the law that empowers and encourages FINRA to impose bar sanctions that are presumed to be permanent violates constitutional due process, and whether the Order aggravates this violation. The Exchange Act does not require that a FINRA bar sanction be subject to review or reexamination after any given period of time, or that a FINRA

bar sanction be subject to any automatic governmental review. Therefore, a FINRA is empowered by law to impose presumptively permanent bar sanctions. Any attempt to have such sanction redressed is subject FINRA's discretion. With the Order, FINRA has, with Commission approval, widened its discretion to foreclose relief.

The Order does not address due process explicitly, though Petitioner raised due process concerns in comment letters. To the extent the Order addresses related concerns, it simply reiterates the position of FINRA, expressed in a rebuttal comment letter dated February 4, 2011. The Order summarizes FINRA's position, stating that the MC-400 is "not the appropriate forum for reviewing sanctions" and that "the correct process for an individual to challenge any FINRA-imposed sanctions is set forth in the FINRA Rule 9300 Series." Order at 6. Neither the Order nor FINRA's letter elaborates on what the "correct" avenue for relief may be if appeal is not sought within 30 days of FINRA's sanction, or how FINRA can render a decision upon an MC-400 without reviewing a sanction.

As a basis for approving the proposed rule change, the Order cites the provisions of Section 15A(b)(6) of the Exchange Act, which requires FINRA rules to be consistent with investor protection and the public interest. Petitioner submits that it is not in the public interest for FINRA to be given absolute discretion in restricting review of FINRA's own actions to deprive individuals of property and livelihood.

Finally, the Order does not address FINRA's impropriety in seeking the proposed rule change in direct response to an NMA and MC-400 submitted by a firm formed by Petitioner, while adjudication of such applications by FINRA staff was not yet concluded. While FINRA asserted that its action of filing the proposed rule change was a "separate policy-driven proceeding," FINRA did not address the overtly prejudicial effect of such proceeding on Petitioner's

applications while adjudication of the applications was not yet complete. The Order did not include any findings as to the alleged impropriety in FINRA's actions.

A review of the Order and the related proposed rule change by the Commission is appropriate in order to give adequate consideration to the issues addressed above.

Conclusion:

For the reasons set forth above, Petitioner requests that the Commission conduct a review of the Order and FINRA's proposed rule change in light of the issues raised herein, set aside the Order, and reject FINRA's proposed rule change.

Respectfully submitted,

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