

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54711 / November 6, 2006

Admin. Proc. File No. 3-12094

In the Matter of the Application of

MAY CAPITAL GROUP, LLC

and

MELVIN ROKEACH

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For Review of Action Taken by

NASD

ORDER DENYING MOTION FOR RECONSIDERATION

I.

On May 12, 2006, we issued an opinion (the "May 12, 2006 Opinion") remanding to NASD an application by May Capital Group, LLC ("May Capital"), an NASD member firm, seeking permission for Melvin Rokeach, an individual subject to a statutory disqualification, to continue to associate with May Capital despite his statutory disqualification. ^{1/} Rokeach's disqualification stemmed from his failure to disclose a felony conviction on a Form U-4 application for securities industry registration and his misrepresentation of that conviction as a misdemeanor on an amendment to that form. After accepting Rokeach's submission of a Letter of Acceptance, Waiver, and Consent ("AWC"), NASD imposed a six-month suspension on Rokeach for this misconduct. Rokeach sought to associate with May Capital after serving his suspension. NASD denied the application, and Rokeach appealed that denial to the Commission.

^{1/} May Capital Group, LLC and Melvin Rokeach, Securities Exchange Act Rel. No. 53796 (May 12, 2006), __ SEC Docket __.

We remanded the matter to NASD on the ground that we were unable to determine whether, as required by Section 19(f) of the Securities Exchange Act of 1934, 2/ NASD's denial of the membership continuance application was consistent with the purposes of the Exchange Act. In its denial, NASD stated explicitly that it did not conduct its evaluation of the membership continuance application in accordance with the principles articulated in our decision in Paul Edward Van Dusen. 3/ We had held previously that those principles applied where the Commission imposed a suspension or bar with a right to reapply for the misconduct underlying a statutory disqualification and the disqualified individual subsequently applied to reenter the industry. 4/ The May 12, 2006 Opinion found that those principles also applied where, as here, NASD itself imposed the suspension or bar with a right to reapply for the misconduct underlying a statutory disqualification and the statutorily-disqualified individual subsequently applied to reenter the industry. 5/ The May 12, 2006 Opinion also noted that we could not determine whether, as required by the principles articulated in Van Dusen and its progeny, "enough new information was brought to NASD's attention to allow it to consider the conduct underlying the [statutory disqualification] as forming a significant pattern with Rokeach's other misconduct." 6/ Our opinion found that it was "thus appropriate to remand the matter to NASD for its reconsideration." 7/ NASD now seeks reconsideration of that opinion.

II.

We review NASD's motion to reconsider under Rule 470 of our Rules of Practice. 8/ Rule 470 permits us to reconsider our decisions in exceptional cases. 9/ The remedy is intended to correct manifest errors of law or fact or to permit the presentation of newly discovered

2/ 15 U.S.C. § 78s(f).

3/ 47 S.E.C. 668 (1981).

4/ See May Capital, __ SEC Docket at __ (citing Van Dusen, 47 S.E.C. at 671 and Reuben D. Peters, Exchange Act Rel. No. 49819 (June 7, 2004), 82 SEC Docket 3959, 3968).

5/ Id. at __.

6/ Id. at __. We noted further that NASD did not address whether considering Rokeach's termination by Park Avenue Securities, LLC, the NASD member firm with whom Rokeach associated before May Capital, was consistent with Van Dusen. For example, NASD did not address specifically enough whether Park Avenue's supervisory experience with Rokeach had any relevance to the supervisory procedures proposed by May Capital.

7/ Id. at __.

8/ 17 C.F.R. § 201.470.

9/ Reuben D. Peters, Order Denying Motion for Reconsideration, Exchange Act Rel. No. 51237 (Feb. 22, 2005), 84 SEC Docket 3497, 3498 (citing the comment to Rule 470).

evidence. ^{10/} NASD argues that our opinion "commit[ted] two critical errors" of law that should be corrected on reconsideration. As discussed below, NASD's motion provides no basis for reconsidering the May 12, 2006 Opinion.

A. NASD argues that we committed our first manifest error of law by "retroactively" applying the Van Dusen analysis to Rokeach's application. ^{11/} We disagree, however, that the May 12, 2006 Opinion implicates retroactivity concerns. Such concerns do not arise where an agency has not overruled or disavowed any controlling precedent upon which a party relied to its detriment. ^{12/} The question of retroactivity also does not arise where an agency has not "alter[ed] petitioners' existing rights or obligations" but rather has "merely clarified what those existing rights or obligations had always been." ^{13/} We had not previously considered whether the Van Dusen principles applied to the membership continuance applications of individuals whose statutory disqualifications resulted from NASD enforcement action. The May 12, 2006 Opinion, therefore, did not overrule or disavow any controlling precedent and did not alter NASD's existing rights or obligations; it merely clarified that those existing rights and obligations included applying the Van Dusen principles to Rokeach's membership continuance application. Therefore, the question of retroactivity does not arise here.

^{10/} Id. (citing KPMG Peat Marwick LLP, 55 S.E.C. 1, 3 n.7 (2001)).

^{11/} Although NASD "challenges the way in which the Commission has imposed these constraints (i.e., retroactive application through the adjudicatory process without the benefits and procedural safeguards provided by alternative methods such as notice-and-comment rulemaking)," it is "well-settled" that "'the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion.'" Cassell v. FCC, 154 F.3d 478, 486 (D.C. Cir. 1998) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974)); cf. SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (stating that "the choice made between proceeding by general rule or by individual, ad-hoc litigation is one that lies primarily in the informed discretion of the administrative agency"); see also E.F. Hutton & Co., 49 S.E.C. 829, 835 (1988) (stating that even a new interpretation of an existing rule that differs from prior interpretations may be announced through adjudication if the burden it imposes is outweighed by the danger of permitting a result inconsistent with a statutory design or legal and equitable principles).

^{12/} See Borden, Inc. v. NLRB, 19 F.3d 502, 510 (10th Cir. 1994); Farmers Tel. Co. v. FCC, 184 F.3d 1241, 1250 (10th Cir. 1999) (citing Borden).

^{13/} Farmers Tel. Co., 184 F.3d at 1250; cf. Orr v. Hawk, 156 F.3d 651, 654 (6th Cir. 1998) (stating that a rule simply "clarifying an unsettled or confusing area of the law . . . restates what the law according to the agency is and has always been" and is "no more retroactive in its operation than is a judicial determination construing and applying a statute").

Even if retroactivity concerns were implicated in this case, we find that we may apply the principles announced in our May 12, 2006 Opinion retroactively. In SEC v. Chenery Corp., ^{14/} the Supreme Court stated that "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." ^{15/} NASD contends that retroactive application of the May 12, 2006 Opinion "imposes substantial new burdens on NASD" by requiring that it "be bound by the Van Dusen framework in assessing [Rokeach's] application." However, the May 12, 2006 Opinion held that we could not find, as required by Section 19(f) of the Exchange Act, that NASD acted in a manner consistent with the purposes of the Exchange Act in denying the membership continuance application unless NASD applied the principles articulated in Van Dusen. ^{16/} Those principles prevent the unfairness that ordinarily would result from NASD denying a membership continuance application on the sole basis of misconduct as to which NASD had already determined the public interest requirements in imposing a suspension or bar with a right to reapply on which the time had run. ^{17/} Additionally, a practice by which "SROs, through denial of reentry applications, may, in effect, routinely extend those persons' bar from the securities industry beyond the period after which the settlement would allow them to reapply, based solely on the misconduct leading to the settlement," would cause "the incentive to settle [to] diminish markedly," undermining the "ability to settle cases in pursuance" of "anti-fraud and investor protection goals" that are also purposes of the Exchange Act. ^{18/} Our May 12, 2006 ruling requiring application of the Van Dusen framework is therefore consistent with the Chenery rationale disfavoring a result "contrary to a statutory design or to legal and equitable principles."

The case law since Chenery further supports the May 12, 2006 Opinion. Those cases hold that, "[a]s a general principle, new rules announced in agency adjudications may be applied retroactively absent any 'manifest injustice.'" ^{19/} In determining if manifest injustice exists, a

^{14/} 332 U.S. 194 (1947).

^{15/} Id. at 203.

^{16/} May Capital, __ SEC Docket at __.

^{17/} Id. at __.

^{18/} Id. at __; Harry M. Richardson, Exchange Act Rel. No. 51236 (Feb. 22, 2005), 2005 SEC LEXIS 414, at *18.

^{19/} See, e.g., Consol. Freightways v. NLRB, 892 F.2d 1052, 1058 (D.C. Cir. 1989) (quoting Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1081 (D.C. Cir. 1987)).

basic distinction has emerged "between (1) new applications of law, clarifications, and additions" and (2) "substitution of new law for old law that was reasonably clear." 20/

"[R]etroactivity in the former case is natural, normal, and necessary, a corollary of an agency's authority to develop policy through case-by-case adjudication" In contrast, the latter situation "may give rise to questions of fairness, [rendering it] necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule." Consequently, "retroactivity is appropriate when the agency's ruling represents a new policy for a new situation, rather than being a departure from a clear prior policy." 21/

As noted above, prior to our May 12, 2006 Opinion, we had not announced a specific policy for the membership continuance applications of statutorily-disqualified individuals whose statutory disqualifications resulted from NASD enforcement action. The May 12, 2006 Opinion, therefore, constituted a new application of law and policy for a situation new to Commission consideration. No one's settled expectations based on reliance on any other rule were disrupted. As such, the May 12, 2006 Opinion may be applied retroactively. 22/

NASD's attempts to establish a clear prior Commission policy or controlling precedent from which the May 12, 2006 Opinion departed are unavailing. Although NASD asserts that "the Commission stated that Van Dusen did not apply to such cases," it provides no citation for this assertion, and we have never made such a holding. NASD also contends that we had previously indicated that the principles articulated in Van Dusen would not apply to Rokeach's application because we stated in Harry M. Richardson 23/ that, "[w]here an initial public interest determination was made by an entity other than the Commission, different considerations may

20/ Farmers Tel. Co., 184 F.3d at 1251 (quoting Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).

21/ Id. (alterations in original) (quoting Williams Natural Gas, 3 F.3d. at 1554).

22/ Cf. Williams Natural Gas, 3 F.3d at 1554 (finding that the "present case falls squarely within our precedents authorizing retroactivity for agency rules that do not represent a shift from a 'clear prior policy'" because "FERC simply did not have a policy" prior to its decision establishing the rule at issue and consequently that rule "may be fairly characterized as a 'new rule for a new situation'" that "may be retroactively applied"); Marshall E. Melton, Investment Advisers Act Rel. No. 2151 (July 25, 2003), 80 SEC Docket 2812, 2814, 2822 (stating that the case "presented us with the opportunity to review and reconsider [our] traditional approach" to the disciplinary consequences of consent antifraud injunctions and announcing a "refined and expanded policy" "for future cases").

23/ Exchange Act Rel. No. 51236 (Feb. 22, 2005), 2005 SEC LEXIS 414.

apply." 24/ We do not believe our statement constituted a preexisting rule, on which NASD could rely, that Van Dusen would not apply to NASD's consideration of a membership continuance application where the statutory disqualification resulted from NASD, rather than Commission, enforcement action. As noted in the May 12, 2006 Opinion, this statement referred not to whether NASD was bound by its own prior public interest determination but to "our belief that NASD might not be bound by the initial public interest determination of another self-regulatory organization." 25/ We therefore reject NASD's contention that "the rule announced in [the May 12, 2006 Opinion] departs abruptly from previous Commission decisions."

We also reject any suggestion that NASD was entitled to rely on a policy of its own of not applying Van Dusen where the statutory disqualification resulted from NASD enforcement action. Any NASD policy cannot be imputed to the Commission. 26/ We had never held that Van Dusen would not apply to the membership continuance applications of statutorily-disqualified individuals whose disqualifications resulted from NASD enforcement action. NASD's "understanding" to the contrary derives, apparently, from its own interpretation of our prior cases applying the Van Dusen standards to disqualifications resulting from Commission enforcement action. NASD's situation is therefore "no different from that of other parties who act in reliance on their own . . . interpretation of a statute or regulation but later find out (via a court or agency decision) that their interpretation was wrong." 27/

B. NASD also argues that Rule 470 requires our reconsideration because we committed a second manifest error of law by applying Van Dusen to Rokeach's membership continuance application without a legal basis. Congress has made clear that NASD's regulatory authority is

24/ Id. at *8 n.14.

25/ May Capital, __ SEC Docket at __; see also Richardson, 2005 SEC LEXIS 414, at *8 n.14 (citing Arthur H. Ross, 50 S.E.C. 1082, 1085 n.13 (1992) (stating that "the NYSE's settlement of its disciplinary action should not bind the NASD in discharging its function of determining whether Ross is fit to re-enter the supervisory sphere"))).

26/ See Farmers Tel. Co., 184 F.3d at 1245-46, 1251-52 (rejecting suggestion that the interpretation of NECA, "an independent organization established by the FCC" which "consist[s] entirely of industry participants," "acts exclusively as an agent for its members," and lacks the "authority to perform any adjudicatory or governmental functions," "should somehow be imputed to the FCC as 'well-established' policy that was overruled by the FCC order" and thus finding "that the FCC's ruling did not represent a departure from clear prior policy").

27/ Id. at 1252.

subject to Commission oversight. ^{28/} We made the Van Dusen ruling in reviewing, under Exchange Act Section 19(f), NASD's denial of a membership continuance application. The Van Dusen framework proceeded from an interpretation of, and was crafted to ensure compliance with, the requirement under Exchange Act Section 19(f) that NASD's action be consistent with the purposes of the Exchange Act. ^{29/} This was the same legal basis upon which we acted here; our analysis did not depend, as NASD contends, on the terms or enforcement of the AWC or on Rokeach's testimony about what expectations he may have had from the settlement.

III.

NASD urges that reconsideration "will protect the investing public by allowing NASD to exclude as an associated person an individual who has made numerous misrepresentations to regulators and therefore has demonstrated that he is incapable of upholding the high standards of business ethics that NASD demands of associated persons." The May 12, 2006 Opinion in no way prevents NASD from denying a membership continuance application under appropriate circumstances. We required simply that NASD evaluate such an application in accordance with standards that ensure NASD, as it must, acts consistently with the purposes of the Exchange Act when denying an application. Although NASD argues that we should replace the May 12, 2006 Opinion "with an opinion that evaluates whether the NAC correctly concluded that Rokeach posed a risk of harm to the investing public," Section 19(f) of the Exchange Act does not permit us to uphold this conclusion unless we find that NASD acted consistently with the purposes of the Exchange Act. We remanded because we could not make this determination. We find that NASD's motion does not present the exceptional circumstances required for us to reconsider our earlier opinion.

Accordingly, IT IS ORDERED that the motion for reconsideration filed by NASD be, and it hereby is, DENIED.

By the Commission.

Nancy M. Morris
Secretary

^{28/} Richardson, 2005 SEC LEXIS 414, at *15 n.26 (citing S. Rep. No. 94-75, at 23).

^{29/} See id. at *15 ("NASD correctly states that the policy quoted by the Commission in Van Dusen . . . originally appeared in a release that dealt with applications for association that were directed to the Commission itself, not an SRO. By relying on that policy in Van Dusen, however, we clearly indicated our view that it also was relevant in SRO considerations of applications to associate.").