

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 62645 / August 4, 2010

Admin. Proc. File No. 3-13733

In the Matter of the Application of

MANUEL P. ASENSIO  
c/o Mill Rock Investment Advisors  
747 Third Avenue, 25<sup>th</sup> Floor  
New York, NY 10017

For Review of Disciplinary Action Taken by

FINRA

ORDER DENYING  
MOTION FOR  
RECONSIDERATION

I.

On June 17, 2010, we issued an order ("June 17 Order") granting NASD's<sup>1</sup> motion to dismiss the application for review filed by Manuel P. Asensio, formerly a registered representative associated with Asensio Brokerage Services, Inc. ("ABSI" or the "Firm"), a former NASD member firm, of a 2006 NASD decision barring him from association with any NASD member (the "2006 Bar Decision") and a 2008 FINRA denial of an application for him to associate with another member firm (the "2008 Eligibility Denial Decision"). We found that Asensio failed to appeal these decisions until well after the applicable thirty-day deadlines.<sup>2</sup> The June 17 Order also rejected numerous motions and requests filed by Asensio. On June 24, 2010,

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<sup>1</sup> On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517.

<sup>2</sup> *Manuel P. Asensio*, Securities Exchange Act Rel. No. 62315 (June 17, 2010), \_\_\_ SEC Docket \_\_\_\_.

Asensio filed a motion for reconsideration of the June 17 Order and amended that motion on July 7, 2010.

## II.

We consider Asensio's motion under Rule 470 of the Commission's Rules of Practice.<sup>3</sup> The "exceptional remedy" of a motion for reconsideration is designed to correct manifest errors of law or fact, or to permit the presentation of newly discovered evidence.<sup>4</sup> Applicants may not use motions for reconsideration to reiterate arguments previously made or to cite authority previously available. Moreover, we will accept only such additional evidence that "the movant could not have known about or adduced before entry of the order subject to the motion for reconsideration."<sup>5</sup> Asensio's motion does not meet this standard.

In general, Asensio's motion restates arguments made in his previous motions and responses and considered by us in the June 17 Order. We will not readdress those matters here. However, his motion raises some points that we briefly address.

### 1. Appointments Clause Contention

In the June 17 Order, we rejected Asensio's contention that FINRA's sanction regimen violates the Appointments Clause of the U.S. Constitution, noting, as Asensio himself pointed out, that FINRA "executives and board are not appointed by the U.S. President, nor are they appointed by any other governmental body." Asensio now maintains that we "fundamentally mischaracterized" his argument. He asserts that the:

imposition and ongoing administration of [his] bar sanction . . . including  
FINRA's denial of [his] MC-400 and any future denial of a MC-400 submitted by

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<sup>3</sup> 17 C.F.R. § 201.470. The Comment to Rule 470 states that "[a] motion for reconsideration is intended to be an exceptional remedy." Exchange Act Rel. No. 35833 (Jan. 9, 1995), 59 SEC Docket 1546, 1588.

<sup>4</sup> *John Gardner Black*, Investors Advisers Rel. No. 3040 (June 18, 2010), \_\_ SEC Docket \_\_\_\_, \_\_\_\_; *Mitchell M. Maynard*, Investment Advisers Rel. No. 2901 (July 16, 2009), 96 SEC Docket 18728, 18729; *Perpetual Sec., Inc.*, Exchange Act Rel. No. 56962 (Dec. 13, 2007), 92 SEC Docket 472, 473. See also *KPMG Peat Marwick LLP*, Order Denying Request for Reconsideration, 55 S.E.C. 1, 3 n.7 (2001) (specifying that efficiency and fairness concerns embodied in federal court practice of rejecting motions for reconsideration unless correction of manifest errors of law or fact or presentation of newly discovered evidence is sought "likewise inform our review of motions for reconsideration under Rule 470").

<sup>5</sup> *Perpetual Sec., Inc.*, 92 SEC Docket at 473 (quoting *Feeley & Wilcox Asset Mgmt. Corp.*, 56 S.E.C. 1264, 1269 n.18 (2003)).

[Asensio], including the anticipated denial of a MC-400 presently filed with FINRA by [Asensio] in conjunction with a New Member Application . . . is unlawful as an unconstitutional exercise of power reserved to the executive branch of government by a private party not subject to the direct control of the executive branch, specifically since the creation of FINRA in 2007 and specifically in the circumstances of [Asensio]'s case, where [he] violated no law, where [his] work benefitted investors, and where [he] was denied the right to his livelihood by a private entity that does not even purport to adhere to the most basic due process standards.

Asensio also contends that NASD's and FINRA's actions violate the Appointments Clause because FINRA:

exercises federal executive power in administering certain laws and regulations governing interstate commerce, specifically in deciding who may or may not be allowed to partake in interstate commerce, yet FINRA's executives are not appointed by the U.S. President, nor are they appointed by any other governmental body [and] [a]s such, FINRA unlawfully usurps power reserved to the executive branch insofar as FINRA exercises such power without FINRA executives being appointed by the President or by any other government body or official [internal quotations omitted].

Asensio further states that:

[t]he President has no authority to remove, supervise, or control FINRA executives, even as FINRA exercises power of the executive branch, including decisions to strip individuals or property or livelihood and to exercise discretion over who may be allowed to partake in an entire industry comprising a substantial portion of interstate commerce.

Contrary to Asensio's assertions, FINRA is not exercising federal executive power. FINRA is registered under, and operates subject to, Section 15A of the Exchange Act.<sup>6</sup> Section 15A, as the U.S. Supreme Court has noted, "supplements the Securities and Exchange Commission's regulation of the over-the-counter markets by providing a system of cooperative self-regulation through voluntary associations of brokers and dealers."<sup>7</sup> The Court stated that section 15A "authorizes [these voluntary associations] to promulgate rules designed to prevent fraudulent and manipulative practices; to promote equitable principles of trade; to safeguard against unreasonable profits and charges; and generally to protect investors and the public

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<sup>6</sup> 15 U.S.C. § 78o-3.

<sup>7</sup> *United States v. NASD*, 422 U.S. 694, 700 n.6 (1975) (statutory citations omitted).

interest."<sup>8</sup> However, although Section 15A authorizes the SEC to exercise a "significant oversight function" over the rules and activities of the registered associations,<sup>9</sup> self-regulatory organizations, such as FINRA, are not "Government-created, Government-appointed entit[ies],"<sup>10</sup> and therefore do not "unlawfully usurp power reserved to the executive branch," as Asensio contends.

## 2. Claim that Commission Failed to Provide Notice of NASD-NYSE Consolidation

Asensio asserts that, although the NASD-NYSE consolidation that created FINRA caused "changes in the regulatory regime that directly and adversely affect [him]," we "did not provide [him with] notice of such changes." Asensio contends that we "did not notify [him] that the NYSE and the AMEX, owned by the NYSE, would have membership applications processed by FINRA and the impact this would have on [Asensio] seeking remedy for his bar sanction." Asensio also maintains that we "did not notify [him] that NASDAQ and exchanges owned by NASDAQ would surreptitiously have membership applications processed by FINRA, by directing applicants to send applications to NASDAQ at FINRA's address."

However, the proposed consolidation of NASD and NYSE was widely publicized when it was announced in November 2006.<sup>11</sup> The terms and provisions of the proposed consolidation were published and publicly available.<sup>12</sup> Our approval of the consolidation was publicly

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Board*, \_\_\_ US \_\_\_\_, \_\_\_\_, 130 S.Ct. 3138, 3147 (2010) (contrasting "expansive powers" granted to the Public Company Accounting Oversight Board with the more limited powers granted to self-regulatory organizations). Asensio's citation to the *Free Enterprise Fund* litigation in support of his arguments ignores these distinctions between self-regulatory organizations and the Public Company Accounting Oversight Board; *Free Enterprise Fund* is not relevant here.

<sup>11</sup> *See, e.g.*, NASD and NYSE Group Announce Plan to Consolidate Regulation of Securities Firms (Nov. 28, 2006), at <http://www.finra.org/Newsroom/NewsReleases/2006/P017973>; NASD and NYSE Group Announce Plan to Consolidate Regulation of Securities Firms (Nov. 28, 2006), at <http://www.nyse.com/press/1164625606086.html>; Statement by SEC Chairman Cox at News Conference on Self Regulation Consolidation (Nov. 28, 2006), at <http://www.sec.gov/news/press/2006/2006-195.htm>.

<sup>12</sup> *Id.*

disclosed,<sup>13</sup> as were the final terms and provisions of the approved consolidation.<sup>14</sup> Pursuant to the Federal Register Act, notice provided in the Federal Register is "deemed to have been given to all persons . . . when the notice is published in the Federal Register. . . ."<sup>15</sup>

### 3. Alleged Futility of Pursuing Bias Claims

Asensio claims that we "implied" that he "should have raised claims of FINRA's bias at the [FINRA National Adjudicatory Council ("NAC")], after such claims were dismissed by the lower FINRA body, the Hearing Panel." According to Asensio, we suggested that "FINRA would be arbiter of its own bias." He maintains that we have "apparently not considered the extent to which even raising a claim of bias before FINRA may predispose FINRA against the individual making such claim." Asensio concludes that we "failed to consider the futility of raising a bias claim before FINRA," and that, in such instances, "an exhaustion of administrative remedies is not required where the effort to seek administrative remedy would prove futile due to a biased administrative body."

We discussed at length in our June 17 Order that Asensio failed to establish the existence of extraordinary circumstances, as required by our Rule of Practice 420(b),<sup>16</sup> that would excuse the late filing of his appeals. Regarding Asensio's contention that it would have been futile to press his bias claims with the NAC, we note, again, that:

before the NAC on appeal of the Hearing Panel's bar decision, Asensio's counsel declined to challenge the Hearing Panel procedures and agreed that Asensio "had a full opportunity for a hearing." We also note that in both proceedings here, Asensio had notice, was permitted to present evidence, was able to examine witnesses, was given notice of the findings, and was informed of his appeal rights.

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<sup>13</sup> See, e.g., SEC Gives Regulatory Approval for NASD and NYSE Consolidation (July 26, 2007), at <http://www.sec.gov/news/press/2007/2007-151.htm>.

<sup>14</sup> See *Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes to Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc.*, Exchange Act Rel. No. 56145 (July 26, 2007), 91 SEC Docket 496, 72 Fed. Reg. 42,169 (Aug. 1, 2007); *Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to the Restated Certificate of Incorporation of National Association of Securities Dealers, Inc.*, Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517, 72 Fed. Reg. 42,190 (Aug. 1, 2007).

<sup>15</sup> 44 U.S.C. § 1508. Cf. *Joseph Abbondante*, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 218 (holding that general securities representative "had an obligation to know the NASD's rules").

<sup>16</sup> 17 C.F.R. § 420(b).

Moreover, during the appeal to the NAC in the 2006 disciplinary proceeding, his counsel declined to challenge the Hearing Panel's procedures and agreed that Asensio "had a full opportunity for a hearing."<sup>17</sup>

Moreover, Asensio has failed to show that raising the issue of bias in a timely appeal to us of the 2006 Bar Decision or the 2008 Eligibility Denial Decision would have been futile.

#### **4. Alleged Incorrect Factual Findings**

Asensio claims that the June 17 Order contained "mischaracterized or distorted factual findings," including purported misstatements about NASD's information requests that led to its disciplinary proceeding against him; distortions about Asensio's role in a congressional investigation of the American Stock Exchange; "[s]ystemic neglect" of Asensio's "large and unique record of exposing stock fraud;" "questionable assertion[s]" regarding Asensio's opportunities to conduct effective discovery during the NASD proceedings; inaccurate statements about Asensio's identification of other investigations NASD initiated against him; and misstatements about the number of pleadings in which he raised his contentions regarding the asserted Appointments Clause violations.

We do not agree that the facts were mischaracterized. However, the description of underlying facts found in the 2006 Bar Decision and the 2008 Eligibility Denial Decision were provided as background. Because the June 17 Order declined to accept jurisdiction to review Asensio's application for review, that order did not adjudicate those facts.

Accordingly, IT IS ORDERED that the motion for reconsideration filed by Manuel P. Asensio, be, and it hereby is, DENIED.<sup>18</sup>

By the Commission (Commissioners CASEY, AGUILAR, and PAREDES);  
Chairman SCHAPIRO and Commissioner WALTER not participating.

Elizabeth M. Murphy  
Secretary

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<sup>17</sup> *Asensio*, \_\_ SEC Docket at \_\_\_\_ (quotations in original).

<sup>18</sup> We have considered all of the contentions advanced by Asensio. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed in this order.