

December 20, 2010

Robert W. Cook  
Director  
Division of Trading and Markets  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

**RE: File No. SR-FINRA-2010-056 (the “Proposed Rule Change”), Comment Letter,  
Request for Immediate Notification of Any Order Approving the Proposed Rule  
Change, and Request for Meeting.**

Dear Mr. Cook:

I have previously written to you regarding FINRA’s legal and regulatory deficiencies.<sup>1</sup> Additionally, I have corresponded with senior members of your staff regarding FINRA’s deficiencies<sup>2</sup> and the petition for FINRA rulemaking submitted by the Alliance for Economic Stability, Inc. (“AES”), dated January 4, 2010. See File No. 4-591. Your staff has made clear that the Division of Trading and Markets (“DTM”) is responsible for evaluating the AES petition. To date, AES has received no correspondence or notice from DTM concerning action taken related to the AES petition for rulemaking.

Please find attached a comment letter dated December 20, 2010 that I submitted on File No. SR-FINRA-2010-056 and Exchange Act Release No. 34-63316, which concern FINRA’s proposed rule change to adopt FINRA Rule 1113 and to amend the FINRA Rule 9520 series.

As the comment letter makes clear, FINRA’s stated motivation for the Proposed Rule Change is disingenuous. The Proposed Rule Change arose in direct response to applications submitted to FINRA by Asensio & Company, Inc. (“ACO”): a new member application (“NMA”) and concurrent membership continuance application (“MC-400”). FINRA’s Board of Governors voted for the Proposed Rule Change prior to ACO’s NMA and MC-400 having been adjudicated. As such, FINRA’s actual motivation for the Proposed Rule Change is improper. This motivation consists of seeking to foreclose all meaningful review of grievances of disqualified individuals,

---

<sup>1</sup> See letter dated January 4, 2010. This letter, along with two others, was accepted as an application for review pursuant to Commission Rule of Practice 420, resulting in Administrative Proceeding File No. 3-13733 and Exchange Act Release Nos. 62315 and 62645.

<sup>2</sup> See letters to James Eastman, Chief Counsel, Division of Trading and Markets, dated June 16, July 21, September 1, October 28, November 18, and December 9, 2009; and letters from Mr. Eastman to Mr. Asensio dated July 23 and November 17, 2009. See also letter from Joseph Furey, Assistant Chief Counsel, Division of Trading and Markets, to Mr. Asensio dated September 9, 2010.

Mr. Robert Cook  
December 20, 2010  
Page 2 of 2

even where, as in my case, a person is subject to a FINRA bar sanction that is unwarranted in law and unjustified in fact.

FINRA has failed to establish a basis for the necessity of the Proposed Rule Change, and has not taken into account obvious due process concerns, as set forth in the comment letter.

DTM, pursuant to its delegated authority, should deny the Proposed Rule Change, especially in view of FINRA's evident improper and unstated motive for the Proposed Rule Change.

I request that DTM provide me with immediate notification of any order approving the Proposed Rule Change pursuant to delegated authority. If such an order is issued, I intend to seek Commission review as a party aggrieved and an unacknowledged party in such action.

I believe that you or a member of your staff should meet with me to discuss the Proposed Rule Change, the AES rulemaking petition, and remedies at the Commission for FINRA's deficiencies and my statutory disqualification.

The AES petition for rulemaking has gone unaddressed by DTM for approximately one year. The AES petition sought to ameliorate FINRA's deficiencies. The Proposed Rule Change, by contrast, is seeking to eliminate avenues for individuals to have FINRA's deficiencies corrected. I believe that it was wrongful for you to issue the Notice of Proposed Rulemaking without acknowledging and giving consideration of my case.

To date, I have sought relief from the Commission and its staff in numerous ways, and none has resulted in meaningful review or potential relief from FINRA's deficiencies and misconduct in my case. Aside from the administrative proceeding, which was dismissed on procedural grounds, and the AES petition for rulemaking, which has gone unaddressed for one year, I have separately sought action by DTM, the Office of Compliance Inspections and Examinations, the Division of Enforcement, and the Office of General Counsel. These actions are aside from current proceedings before FINRA and the U.S. Court of Appeals, neither of which are likely to result in effective relief.

Please advise me as soon as possible of whether you or a member of your staff will meet with me to discuss these concerns, and please provide me with immediate notice of any order by DTM pursuant to delegated authority approving the Proposed Rule Change.

Sincerely,



Manuel P. Asensio

Enclosure

cc: Allison Reid, Associate District Director, FINRA  
Lorraine Lee, Statutory Disqualification Analyst, FINRA

This shall serve as comment upon File No. SR-2010-056 in response to Exchange Act Release No. 34-63316: Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 1113 and to Amend the FINRA Rule 9520 Series , dated November 15, 2010 (the "Proposed Rule Change").

As a preliminary matter, the Proposed Rule Change is a direct result of a new member application ("NMA") filed by Asensio & Company, Inc. ("ACO") and concurrent membership continuance application ("MC-400") filed on behalf of Manuel P. Asensio. ACO's applications were filed on June 17 and June 28, 2010, respectively. FINRA announced that its Board of Governors voted to seek the Proposed Rule Change three months later in a letter to member firms dated September 28, 2010. FINRA's Board thus improperly sought to change the rules impacting ACO's applications while adjudication of such applications was ongoing. FINRA moreover may seek to use an approval of the FINRA Proposed Rule Change in subsequent appellate litigation arising from ACO's applications. Therefore, FINRA's motivation for seeking the Proposed Rule Change as stated in FINRA's filing with the Commission is disingenuous and improper.

Examining the substance of the Proposed Rule Change, FINRA has failed to establish the necessity of amending its rules and has failed entirely to address due process concerns, which outweigh any basis for the Proposed Rule Change. FINRA's stated basis for the Proposed Rule Change is comprised of general remarks on the nature of applicants for membership and statutory disqualification. FINRA does not establish that its current rules are inadequate to allow FINRA deny an NMA and concurrent MC-400 where a statutory disqualification presents a significant concern. Thus, FINRA has failed to establish the necessity of the Proposed Rule Change. In fact, FINRA's current rules grant FINRA authority to deny an NMA on the basis of a statutory disqualification and to deny an MC-400 on the basis of the disqualified individual proposing to associate with a new member.

The only apparent motivation for FINRA seeking this rule change is to foreclose all access to the joint NMA and MC-400 process for disqualified individuals and to foreclose all review of any arguments and grievances presented by such individuals. The MC-400 process is the only procedure available for a disqualified individual to seek relief from a FINRA sanction, absent such sanction being overturned on appeal, which can only be made in an extremely narrow timeframe. There are no other procedures at FINRA, at the Commission, or in the courts. When an MC-400 is submitted by an operating member firm, the MC-400 is controlled by the firm rather than the disqualified individual. Therefore, the disqualified individual is restricted from speaking what grievances and arguments he or she may have. For the disqualified individual to start a firm to submit a joint NMA and MC-400 is the only process by which a disqualified individual may seek relief where the individual's speech is not restricted.

An individual subject to a FINRA sanction has incurred a deprivation of property and livelihood by a private party. For the same private party to be able to allowed government-protected authority to foreclose all meaningful review of such individual's grievances and attempts to seek relief runs contrary to the most basic ideas of constitutional due process.

As a practical matter, the Commission should consider the extent to which its scheme of administrative procedures both at FINRA and at the Commission may be challenged by approval of the Proposed Rule Change. The courts do not require exhaustion of administrative remedies where an agency procedures have been rendered futile or would foreclose all meaningful judicial review. See *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

For the reasons set forth above, the Commission should deny the Proposed Rule Change.

**This filing is being made in pursuit to comments we received from office of the secretary of u.s. securities & exchange commission and in addition to certain past communications pertaining to file no. sr-finra-2010-056 had with the directors of the commission's office of compliance inspections and examinations and division of trading and markets in the year proceeding FINRA's filing.** Attached are a copies of selected certain correspondence and court filings pertaining to File No. SR-FINRA-2010-056. The letters include one to Director of Trading and Markets giving the division notice of ACO's intention to file a NMA and MC-400.

This comment letter is being simultaneously filed with FIRNA with ACO's applications.

Please be advised that this comment letter may be used in a current proceeding before the U.S. Court of Appeals.

January 4, 2010

Robert W. Cook  
Director  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

**Re: Notice of Filing of FINRA rules proposals addressing deficiencies discovered in the SEC's examination of FINRA's actions against Manuel P. Asensio, and incorporation of this filing in my petition and request to discuss process.**

Dear Director Cook:

I have a pending Rule 430 Petition for the SEC to use its "extensive powers to modify, reverse and enjoin disciplinary actions by [FINRA]"<sup>1</sup> in order to either a.) Cancel my bar and/or MC 400 denial, or b.) Allow me to file a new member application.

The Petition is based on FINRA's denial of my post-MC 400 review and petition and the new evidence and public comment introduced during that review, FINRA's responses to certain inquiries, and the SEC's comments on those responses.

Neither you nor any member of your staff has spoken to me since the FINRA Review process commenced on October 2008. An application for review by the Commission of your decision in this matter is to be filed after the date I receive notice of the action. I have not received such notice or any information on how you would like to proceed.

This post-MC 400 denial review process was extensive and has exhausted the FINRA process. It included a meeting with Vice Chairman Stephen Luparello and Daniel Sibears, Executive Vice President of the Department of Member Regulation on July 14, 2009 at FINRA's New York office, and a follow up conference call with Mr. Sibears, William Jannace, Managing Director of Member Regulation and Lorraine Lee, Statutory Disqualification Analyst, concerning the rule deficiencies, bad faith and unacceptable biases of FINRA's staff that led the staff to bar me, deny my appeal, reject ISI's readmission application, deny ISI's appeal of this rejection, and the denial

---

<sup>1</sup> United States Court of Appeals, First Circuit. Gerald R. SWIRSKY, Plaintiff, Appellant, v. NATIONAL ASSOCIATION OF SECURITIES DEALERS, Defendant, Appellee. No. 97-1038. Heard July 30, 1997. Decided Aug. 28, 1997

of the only MC 400 process that I was allowed: the post MC 400 denial review, examination and request for guidance and right to file an MC 400 as part of new member application. FINRA did not allow any process for me to participate independently or object to its decision denying my right to independently apply to become a member.<sup>2</sup>

FINRA argued that it was powerless to correct the deficiencies that allowed its actions against me, which as I wrote to the SEC's Chairperson "are unwarranted in law and without justification in fact and are the result of unacceptable bias and rule deficiencies that violate the Exchange Act," and which I believe show that "the same biases and deficiencies that allowed FINRA to harm investors and markets in my case exemplify FINRA's regulatory failures that are a root cause of the current economic crisis."

FINRA acknowledged that only the SEC could now act in case. I have provided a copy of the proposed rules to FINRA and confirmed that the process with them is exhausted.

"[FINRA] is subject to extensive, ongoing oversight and control by the SEC. *See United States v. NASD*, 422 U.S. 694, 700-01 n. 6, 95 S. Ct. 2427, 2434 n. 6, 45 L.Ed.2d 486 (1975) The Exchange Act "authorizes the SEC to exercise a significant oversight function over the rules and activities of [FINRA]." With few exceptions, the SEC must approve all rules, policies, practices, and interpretations before they are implemented. 15 U.S.C. § 78s (b) (1). Consistent with the requirements of the Exchange Act, the SEC may abrogate or add rules as it deems necessary. 15 U.S.C. § 78s (b) (3)"<sup>1</sup>

In the same case the Court wrote that the SEC reviews [FINRA's NAC] final orders de novo 15 U.S.C. § 78s(d). The SEC can affirm or modify any sanction, or remand [FINRA] for further proceedings 15 U.S.C. § 78s(e); is empowered to seek an injunction in district court if [FINRA] "is engaged or is about to engage in acts or practices constituting a violation" of the securities laws 15 U.S.C. § 78u(d); may censure or impose limitations upon the activities, functions and operations" of self-regulatory organizations (such as [FINRA]) that violate the Exchange Act, the rules thereunder, or its own 15 U.S.C. § 78s(h)(1); can abrogate or add rules as it deems necessary 15 U.S.C. § 78s(b)(3); and may remove any officer or director of a self-regulatory organization from office if he or she is found to have violated the rules or abused his or her position 15 U.S.C. § 78s(g)(2).

The U. S. Court of Appeals has written that even if it is unsettling, it is not uncommon in administrative law for a case to be heard by an agency known to be against the complaint. See *Portela-Gonzalez*, 109 F.3d at 78-80 where a plaintiff was required to pursue her claim to "the final rung of the administrative ladder," despite the fact that she had been rebuffed at all prior stages. Also see *McCarthy*, 503 U.S. at 148, 112 S.Ct. at 1088 (citing *Houghton v. Shafer*, 392 U.S. 639, 640, 88 S.Ct. 2119, 2120, 20 L.Ed.2d 1319 (1968), where administrative review

---

<sup>2</sup> I have provided a copy of the complete record that includes the post-MC 400 denial review and FINRA's final procedural and administrative decisions failures in this review but have not be provided with any notice of a certification of record.

procedure *culminated* with the Attorney General, who had already expressed his views on the merits.

“The doctrine of exhaustion of remedies is stated starkly in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-64, 82 L.Ed. 638 (1938), where the Supreme Court noted the “long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” (footnote omitted). The central purpose of this doctrine is “the avoidance of premature interruption of the administrative process.” *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969). See *Portela-Gonzalez v. Secretary of the Navy*, 109 F.3d 74, 79 (1st Cir.1997) (“Insisting on exhaustion forces parties to take administrative proceedings seriously, allows administrative agencies an opportunity to correct their own errors, and potentially avoids the need for judicial involvement altogether.”\*63); *Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770, 774 (1st Cir.1981) (stating that “the doctrine serves interests of accuracy, efficiency, agency autonomy and judicial economy.”).”

In the same case, the Court ruled that the “comprehensiveness of the review procedure suggests that the doctrine of exhaustion of administrative remedies should be applied to prevent circumvention of established procedures.”

At no time have you given any indication that you are inclined to initiate an investigation at FINRA of this matter. On the contrary where you have been advised that the FINRA Review uncovered vague and unfair rules, or lack of rules, you defended the status quo and FINRA's actions against me, and refused to engage in new rule making to address the issue or give me explanations or guidance.

At numerous times during the last ten year period that I exposed dozens of stock frauds that resulted from misconduct by FINRA executives and its staff and by FINRA members that FINRA executives and staff failed to investigate, I have contacted the SEC and the SEC never showed any interest in entering the dispute on investors' or my own behalf.

In fact, in the case of the Hemispherx Biopharma, Inc.'s stock fraud Congress actually intervened after the SEC officially refused to act and caused regulatory changes that remedied the SEC's failure.

The SEC supported FINRA's recent lobbying efforts<sup>3</sup> to gain control over the nation's financial advisors despite FINRA's regulatory failures in Stanford, Madoff and the mortgage crisis.

The SEC was also silent when FINRA served it with a self-generated report that falsely found it bore NO responsibility for these failures. All of this leaves little doubt that you have no intention of addressing FINRA's deficiencies much less "modify, reverse and enjoin" its actions against me.

---

<sup>3</sup> I was part of the opposition that was successful in causing the House to eliminate the SEC's right to delegate this power to FINRA from the reform bill.

It is also clear in your Division's Chief Counsel's November 17, 2009 letter written in response to the FINRA Review and my petitions that you believe that FINRA can act without guidance or reasonable specific explanations. This acceptance of informality and flexibility is no legal justification for allowing actions that are unwarranted in law and without justification in fact, and that violate the Exchange Act and that grant the virtual right to FINRA do as it wishes in my case without justification.<sup>4</sup>

The SEC has successfully overcome an initial loss in its defense of FINRA's imposition in the PAZ case (involving an enforcement action and not a denial of an MC 400) of unqualified bar sanctions for a Rule 8210 *failure-to-respond-in-any-manner* violation that initially did not meet the standard of sanctions serving a remedial rather than punitive purpose.<sup>5</sup>

In the SEC's second decision in the Paz case the Commission has argued that an unqualified bar sanction actually meets the remedial standard by remedying a perceived likelihood of some unknown future harm to investors.

The Commission stated, "To ensure the continued strength of the self-regulatory system, members and their associated persons who *fail to respond in any manner* to Rule 8210 requests should be barred (or expelled) unless there are mitigating factors sufficient to rebut the *presumption that such violators present too great a risk to the markets and investors to be permitted to remain in the securities industry*. Because we conclude that removing those who present such a risk is necessary to further 'the Exchange Act's basic purpose of protecting public investors,' a bar (or expulsion) in such circumstances – a complete failure to respond and no mitigation – has a remedial, and not a punitive, purpose."<sup>6</sup>

This part of the SEC's Order reveals an example of the conflicts between the Exchange Act and SEC's policy of allowing FINRA to operate with vague and incomplete rules, which the SEC then relies upon in order to defend decisions that are unwarranted in law and without justification in fact. Unfortunately, the above argument was not settled by the U.S. Court of Appeals' review of this decision.

---

<sup>4</sup> In the Swirsky case cited here the court wrote that Congress believed that self-regulation would provide the system with "the expertise and intimate familiarity with complex securities operations which members of the industry can bring to bear on regulatory problems, and the informality and flexibility of self-regulatory procedures." S.Doc. No. 93-13, 93rd Cong., 1st Sess. 149 (1973). In this case, there is no "complex securities operation" and flexibility and informality are being used to act against investor's interest.

<sup>5</sup> In *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940), the Court of Appeals found that the Act "authorizes [the Commission to order] expulsion not as a penalty but as a means of protecting investors.... The purpose of the order is remedial, not penal."

<sup>6</sup> SEC Rel. No. 57656 / April 11, 2008, Admin. Proc. File No. 3-22852, *In the Matter of the Application of Paz Securities, Inc. and Joseph Mizrachi For Review of Disciplinary Action Taken by NASD, Reconsideration of Sanctions Pursuant to Remand.*

While the SEC prevailed in a review of the decision, the Court based its decision on matters that were specific to the respondent's petition and those were entirely distinct from those referred to in the above statement. The Court didn't affirm the presumption claim or the standard used to apply such a presumption.<sup>7</sup>

Equally important, the above avoids addressing the fundamental contradiction that a supposedly remedial purpose can be served by permanently excluding an individual from the securities industry based on a perceived likelihood that an event that has not actually occurred would occur in the future and that such an event would cause an investor harm, again a harm that had not even been alleged to have occurred, much less actually occurred and been considered in the case.

FINRA's inherent and case-specific bias, rule deficiencies, vagueness, lack of explanation, bad faith in the investigation, and my diligent attention to its request, that included production that I was advised by counsel satisfied the FINRA 8210 request, and many other mitigating circumstances, differentiate my particular alleged "in part" 8210 violation that occurred in an entity that FINRA has admitted was not in its jurisdiction from those in PAZ. However, that the case is cited here shows that your interest lay in denying my petition.

Nonetheless, as futile as it appears, I must comply with the doctrine of exhaustion of administrative remedies at the SEC before I proceed to the U.S. Court of Appeals.

Today Alliance of Economic Stability, Inc., a non-profit engaged in monitoring and examining the government investigation of the causes of the crisis, and its legislative and administrative responses, filed FINRA rule proposals with the SEC.

In the same case cited here, the court wrote that the "Ultimate review by the court of appeals ensures that constitutional or statutory errors will not go unremedied." *First Jersey Securities, Inc.*, 605 F.2d at 696. *See SEC v. Waco Financial, Inc.*, 751 F.2d 831, 833 (6th Cir.1985)

The FINRA Review and our exchange have provided no remedy to my bar or the lack of procedures available to me. The FINRA Review and decision, and the SEC comments thereon, created new issues and evidence. I can file an MC 400 independently. I cannot file a new member application. I cannot, now after the post MC 400 review, appeal to the SEC. I cannot count on the SEC causing FINRA to change its rules, which would not directly remedy my situation.

You must not use your designated administrative power to deny my petition simply finding that I did not appeal my bar or the MC 400 denial to the SEC. This would ignore all the new evidence

---

<sup>7</sup> US Court of Appeals, DC Cir, May 29, 2009. No. 08-1188, PAZ SECURITIES, INC. AND JOSEPH MIZRACHI, PETITIONERS v. SECURITIES AND EXCHANGE COMMISSION, RESPONDENT  
On Petition for Review of an Order of the Securities & Exchange Commission

Mr. Cook  
January 4, 2010  
Page 6 of 7

and public comment, FINRA decisions, and SEC comments made during the post MC 400 denial period and the rule and procedural deficiencies discovered that pertain to FINRA's bad acts.

And it would not remedy the harm done to investors and the market by my FINRA bar and denial of my MC 400, and would not solve the procedural deficiencies that prevent me from having any personal standing, as an individual or through an entity controlled by me, before FINRA.

Most importantly, it would allow FINRA to continue to operate with its existing ability to take and defend actions that violate the Exchange Act and that are unwarranted in law and without justification in fact.

In such a ruling the SEC would then be claiming that I have no right to have any of my post-MC 400 discovery and new evidence heard and that my grievances that have never been found to be warranted in law or justified in fact can only be adjudicated under law by my finding an employer and having him file his own application independently of me and entirely out of my control and by convincing and then negotiating a method to include my grievances in his application. This is not a reasonable or possible remedy. It is simply not possible. No FINRA member would allow an statutorily disqualified individual to completely control an application to FINRA.

As a matter of law, FINRA asserts immunity. At the same time SEC-approved FINRA rules and procedures deny my right to prosecute my claims or conduct discovery throughout the entire proceedings.

In addition, the SEC allows FINRA to operate without a principles-basis or sufficient codification and guidelines to prevent vague and even unreasonable findings that are not justified in fact, or rules granting my standing.

A decision by the SEC to ignore the post-MC 400 review, my standing as an investor advocate, FINRA's inherent bias and errors and omissions of fact in a "capital punishment" case that narrowly focuses on whether or not I previously appealed my bar or ISI's MC 400 denial to the SEC, would be a far greater offense than FINRA's self-serving focus on a disputed, highly irregular and questionable, and above all else admitted to be inconsequential, alleged "in part" 8210 violation to bar based on a warning to investors about a criminal charged Medicaid stock fraud that was published by an entity that FINRA admitted fell outside its jurisdiction.

Such a decision would also violate the Exchange Act and not allow a full judicial review of these important regulatory matters to all investors and the markets.

In the interest of saving the Commission's administrative time, and making the judicial review as productive to the regulatory process as possible, I believe it is appropriate that you include a review of the attached new rule filing in your action as it pertains to my case.

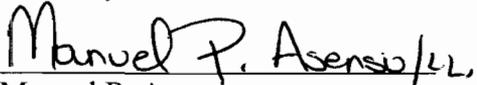
Mr. Cook  
January 4, 2010  
Page 7 of 7

I do not understand why no one from your Division or the Commission has communicated with me at all on this matter.

I enclose a letter to Chairperson Mary Shapiro asking for her recusal.

I will agree to consider any procedure you suggest. Thank you.

Sincerely,

  
Manuel P. Asensio

cc: Elizabeth Murphy, Secretary

David M. Becker, General Counsel  
Office of General Counsel

Robert Khuzami, Director  
Division of Enforcement

James Eastman, Chief Counsel  
Division of Trading and Markets

Enclosure



UNITED STATES  
**SECURITIES AND EXCHANGE COMMISSION**

100 F Street, N.E.  
Washington, D.C. 20549

OFFICE OF  
THE SECRETARY

January 26, 2010

**By FAX and U.S. Mail**

Mr. Manuel P. Asensio  
Mill Rock Investment Advisors  
747 Third Avenue  
25<sup>th</sup> Floor  
New York, NY 10017

Re: Rulemaking Petition File No. 4-591

Dear Mr. Asensio:

This letter acknowledges receipt by this office on January 4, 2010, (by e-mail) of your letter dated January 4, 2010, requesting that the Commission conduct rulemaking to require FINRA to propose new rules aimed at improving provisions for investor protection in FINRA rules.

The petition has been assigned the above-noted file number and has been referred to the appropriate division of the Commission. This office will notify you of any pertinent action taken by the Commission.

Sincerely,

*Elizabeth M. Murphy*

Elizabeth M. Murphy  
Secretary

**AMY WALLER APOSTOL**

1111 Oronoco Street #230  
Alexandria, VA 22314  
(312) 342-6487  
amyapostol@gmail.com

---

Ms. Allison Reid  
Associate District Director  
Financial Regulatory Authority  
New York District Office  
One Liberty Plaza  
New York, NY 10006

Ms. Lorraine Lee  
FINRA Statutory Disqualification Administrator  
9509 Key West Avenue  
Rockville, MD 20850

RE: Definition of FINRA's Legal and Regulatory Deficiencies to be used in the Asensio & Company, Inc. New Member Application ("NMA") submitted to FINRA on June 17, 2010, and the related Membership Continuance Application ("MC-400") for Manuel P. Asensio ("Applicant"), this NMA and MC-400 being referred to herein as the "Present Proceeding."

Dear Ms. Lee and Ms. Reid:

In review of the record, described below, we have established a definition to encompass our use of the term "FINRA's Legal and Regulatory Deficiencies" and wish to provide you with that information at this time. The following is a description in its entirety of FINRA's legal and regulatory deficiencies applicable to the NMA and MC-400 as the "FINRA's Legal and Regulatory Deficiencies."

The record established by Applicant prior to the Present Proceeding shows evidence of, and potential for, FINRA taking wrongful retaliatory action against a person, such as Applicant, who exposes misconduct by FINRA or by prominent FINRA member firms (such person being a "Whistleblower"), or who otherwise counters the private interests of FINRA and FINRA's executives. Applicant's status as a Whistleblower is especially pronounced given his unique short-selling-focused activities as a FINRA member and his work exposing FINRA's Vice Chairman's exploitation of the AMEX's regulatory deficiencies, which led to his being charged by the SEC.

Such retaliatory action is in contravention of FINRA's rules and by-laws and the Securities Exchange Act of 1934 ("Act"). Moreover, such conduct by FINRA violates the U.S. Constitution to the extent that FINRA can deprive and has deprived individuals of property and livelihood without due process of law and without being subject to direct and substantive oversight by government.

The record established by Applicant includes correspondence surrounding and giving rise to SEC Administrative Proceeding File No. 3-13733 (the "SEC Proceeding"), which correspondence includes letters from members of Congress, FINRA and SEC responses to these, and written expert opinions.

The record established by Applicant also includes the official record of the SEC Proceeding and the record of Applicant's submissions to the SEC following the Order dated June 17, 2010, which submissions, in part, gave rise to the Order dated August 4, 2010.

FINRA's ability to take wrongful retaliatory action is allowed by:

- conflicts-of-interest among FINRA executives, prompted by, without limitation, such executives being paid multi-million-dollar salaries, having a direct sizeable financial interest to adhere to the interests of the largest FINRA member firms over the public interest, and by FINRA executives being allowed to be employed by a FINRA member firm while it is under investigation and directly after leaving FINRA and then being allowed to immediately return to FINRA;
- a lack of procedural safeguards on the conflicted FINRA executives exercising improper influence on FINRA staff, allowing for biased and prejudicial action by FINRA staff;
- a lack of procedural standards for the protection of Whistleblowers;
- a lack of codified standards for the imposition of unqualified bar sanctions and for adjudications of MC-400s, allowing FINRA to perpetrate what the Supreme Court has called "unreasoned decisionmaking";
- FINRA's failure to follow standards of due process, despite FINRA having a statutory mandate to enforce securities laws and despite FINRA's ability to deprive individuals of property and livelihood;
- FINRA's salaries and budget superiority over the SEC, as evidence in the SEC's OIG report on Madoff, and the resulting deference and "considerable discretion" afforded to FINRA by the SEC, particularly in matters of enforcement, disciplinary action, and MC-400 adjudication, and in turn, the discretion afforded to SEC review of FINRA actions by the US Court of Appeals;
- the "absolute immunity" from civil action advocated by the SEC and thereafter granted to FINRA and FINRA executives by federal courts, even in cases entailing obvious wrong-doing by FINRA executives;
- the lack of effective government oversight of FINRA, including the government's inability to appoint or remove FINRA executives and lack of government oversight of FINRA's investment activities and expenditures on lobbying and advertising.

Together, this record is referred to in the Applicant's Present Proceeding as "FINRA's Legal and Regulatory Deficiencies."

Sincerely,



Amy Waller Apostol, Esq.  
Legal Counsel for Manuel P. Asensio

Cc: William Jannace, Managing Member, Member Regulation  
Cindy Foster, Office of the Ombudsman



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC 20549

DIVISION OF  
TRADING AND MARKETS

September 9, 2010

Mr. Manuel P. Asensio  
Mill Rock Investment Advisors  
747 Third Avenue, 25th Floor  
New York, NY 10017

RE: Recent Inquiries

Mr. Asensio,

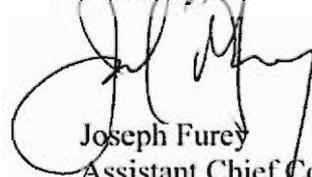
I understand you have placed calls to Jim Eastman to request information regarding the Division's referral of your correspondence to the Commission's Office of Compliance Inspections and Examinations ("OCIE"). In addition, I understand that you have emailed inquiries to OCIE to request information regarding OCIE's investigation of FINRA's alleged regulatory deficiencies in which you also discuss alleged FINRA rule deficiencies identified in the AES filing. As our referral of your complaints is separate and distinct from the AES petition for rulemaking, I think it is important to clarify how the Commission is dealing with each.

The Division of Trading and Markets referred your correspondence to OCIE in November of 2009 for its consideration during compliance inspections of FINRA and its member firms. The Petition for Rulemaking submitted to the Commission by the Alliance for Economic Stability ("AES") in January of 2010 is being handled by the Division of Trading and Markets.

The compliance inspections conducted by the Commission and its staff are nonpublic, so OCIE will not be able to inform you of the actions they take based upon your information. However, OCIE may wish to speak with you to gather additional information regarding your statements. If so, they will contact you directly. If you have any follow-up questions for OCIE, please contact its Chief Counsel, John Walsh, at: [walshj@sec.gov](mailto:walshj@sec.gov).

The Division of Trading and Markets is presently considering the AES Petition for Rulemaking. Following submission of the staff's recommendation to the Commission, AES will be notified of any action taken by the Commission. If you have any further questions regarding this matter, please contact me at: [fureyj@sec.gov](mailto:fureyj@sec.gov).

Sincerely,



Joseph Furey  
Assistant Chief Counsel

cc: John Walsh  
Chief Counsel, OCIE

**Asensio & Company, Inc.**  
747 Third Avenue, 25<sup>th</sup> Floor  
New York, NY 10017

November 6, 2010

Board of Governors  
FINRA  
C/o Marcia E. Asquith, Corporate Secretary  
1735 K Street, NW  
Washington, D.C. 20006

Dear Members of the Board of Governors:

I write regarding FINRA's proposed rule change filed with the Securities and Exchange Commission ("SEC") on November 1, 2010 under File No. SR-2010-056, concerning changes to FINRA rules on New Member Applications ("NMA") and Eligibility Proceedings ("MC-400") "to restrict new member applicants' and certain members' association with disqualified persons." The vote of FINRA's Board of Governors to approve this rule change was noticed in a letter to FINRA member firms dated September 28, 2010, which primarily concerned the Board's concurrent action to deny most measures approved by a majority of FINRA members to improve the transparency of FINRA, including on the issue of whether FINRA made materially misleading statements to the persons FINRA regulates.

The vote of the Board on the NMA and MC-400 rule changes is egregiously improper, in both procedural and substantive terms. It is also a gross abuse of administrative discretion contravening FINRA's statutory mandate of serving investor protection and the public interest.

As you are undoubtedly aware, I filed an NMA and MC-400 application with FINRA in June of this year,<sup>1</sup> and I am an individual subject to statutory disqualification based upon a FINRA sanction. Thus, approximately three months after I filed these applications, you voted to summarily disallow such applications, prior to my applications having been adjudicated. At the same time that the Board voted upon the proposed rule amendments, the FINRA staff purportedly responsible for evaluating my applications denied me access to the process and refused to answer basic questions. The staff handling my MC-400 application refused even to acknowledge receipt of the application.

---

<sup>1</sup> Before filing such applications, I confirmed with FINRA staff that FINRA rules allowed for an NMA and MC-400 application to be filed and processed concurrently. In the summer of 2009 at a meeting arranged by FINRA's Chairman, Richard Ketchum, I met with FINRA's Vice Chairman, its Executive Vice President of Member Regulation and its Ombudsman. At this meeting and on several conference calls after the meeting I presented my plans for filing an MC-400 application in conjunction with an NMA where I would be the sole shareholder and officer after the conclusion of several processes that I was engaged in with SEC's staff of the actions that FINRA has taken against me, which ultimately led to the SEC issuing two orders that I am presently appealing to the U.S. Court of Appeals.

The relevant FINRA sanction involved no investor harm, no allegation of improper sales practices or financial irregularities, and no allegation of illegal activity. Rather, it solely involved FINRA's discretionary assertion of its own jurisdiction.<sup>2</sup> Notably in my case, I took well-publicized actions to protect investors against the interests of FINRA, especially with its ownership of the AMEX, and prominent FINRA members that victimized investors, which actions raise substantial questions of whether the FINRA sanction imposed upon me was a retaliatory action.

As I am sure you are also aware, I have lately taken action to seek remedy from FINRA's wrongful action against me and to spur greater scrutiny and improved oversight of FINRA. These actions include proceedings before the SEC, the US Court of Appeals, and FINRA, as well as legislative advocacy and general efforts to raise public awareness of FINRA's history of victimizing investors, including the price-fixing scandal of the 1990's, FINRA executives' involvement in regulatory abuses at the AMEX, FINRA executives' advocacy of keeping derivatives unregulated, FINRA's direct and overt failures in the Madoff and Stanford Ponzi schemes, and FINRA's general failure to protect investors and the public in connection with the financial crisis.<sup>3</sup>

My present applications before FINRA are a means of seeking remedy and advocating better oversight of FINRA where there is apparently no other agency or judicial forum available to do so. I would prefer that this were not the case. While FINRA is empowered by law to deprive an individual of property and livelihood, FINRA is not required, under current law and judicial precedent, to assure that an individual receives a hearing before a fair and unbiased decision-maker, in accordance with the common standard for due process of law.

The Board's action ensures that my present applications before FINRA will not receive a fair and unbiased treatment. FINRA staff purportedly responsible for evaluating the applications would have been directly biased by the Board voting to disallow all similar applications in the future, assuming it were the case, as FINRA represents, that FINRA staff are restricted from ex parte communications with senior FINRA officials. Given the Board's action and the irregularities of the staff's actions with my applications, however, it would appear that such rules have little force and effect. Find attached a letter highlighting irregular involvement of senior FINRA officials in the present applications.

The Board's action improperly forecloses an avenue for any meaningful review of FINRA actions, especially where there is an issue of wrongful conduct by FINRA staff or officials. The SEC has asserted that an exhaustion of administrative remedies requirement should apply to

---

<sup>2</sup> The record in my case contains legal opinions that FINRA did not have subject or personal jurisdiction to conduct the proceeding that led to the bar sanction, that the bar was for many reasons unwarranted in law and unjustified in fact, and that FINRA's targeting of me arose from FINRA's legal and regulatory deficiencies.

<sup>3</sup> The Alliance for Economic Stability, Inc., a non-profit, has published a detailed report describing FINRA's abuses and failures with respect to investor protection arising from FINRA's conflicts of interest. The report is available at <http://www.eally.org>.

FINRA, though it is not expressly conferred upon FINRA by law. This means that someone with a complaint against FINRA must first bring such complaint to FINRA for adjudication. The SEC, in turn, accords FINRA a high level of deference in reviewing FINRA's decisions. The US Court of Appeals in reviewing SEC decisions, in turn, accords the SEC substantial deference under a US Supreme Court precedent that "makes judicial review of administrative orders a hopeless formality for the litigant, even where granted to him by Congress" and "reduces the judicial process in such cases to a mere feint."<sup>4</sup>

With the Board's action, an individual will now only have the opportunity to seek remedy of wrongful FINRA action through an MC-400 controlled by an existing FINRA member firm. The practical implication of this is that an individual seeking remedy will not be able to have claims heard as he sees fit. He will only be able to seek remedy through a process in which only others can speak for him. Prior to the Board's action the MC-400 process was already injurious and rendered futile by FINRA's lack of definitive standards for MC-400 adjudication.<sup>5</sup>

The Board's motive for seeking this rule change seems inadequate except as a litigation tool specific to my case. An NMA and MC-400 application filed in conjunction is not a situation often encountered by FINRA. The rule change appears superfluous as a practical matter. My case has shown that FINRA staff can manipulate procedures under current FINRA rules to foreclose review of an MC-400 application and deny an NMA strictly on the basis of an existing statutory disqualification. My case has also shown that FINRA staff can do this without notice or explanation, despite prior notice of the filing and an indication from FINRA staff that the NMA and MC-400 application would be processed concurrently, and despite the fact that FINRA rules currently indicate that an MC-400 can be adjudicated concurrently with an NMA. The current wording of FINRA rule 9521 provides that the sponsor of an MC-400 can be an "applicant for membership" and not strictly a member with an NMA already approved. It is precisely this wording that the proposed rule change would delete.

I am suggesting explicitly that you have approved and filed the proposed rule change in order to apply it retroactively to an appeal of my current NMA, which would necessarily argue that FINRA did not act consistently with its own rules in foreclosing review of my MC-400 application. A FINRA rule change appears, conveniently for FINRA, to avoid any judicial review. The Exchange Act provides that SEC approval of SRO rule changes shall not be deemed to be SEC rulemaking, which is subject to direct judicial review for persons adversely affected by the SEC rulemaking, under the Exchange Act. Yet FINRA could apply the same rulemaking to foreclose review in any appeal action.

This suggestion imputes to the Board improper actions of bias, prejudgment, ex parte communications, and abuse of regulatory discretion for the purpose of denying an individual just

---

<sup>4</sup> See Dissenting Opinion in Supreme Court case *SEC v. Chenery Corp.*, 332 U.S. 194 (1946).

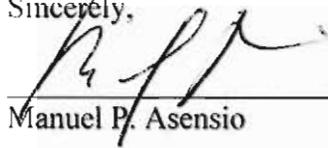
<sup>5</sup> The MC-400 process is injurious insofar as it requires an applicant to solicit a member firm to propose to employ him and to file an application on his behalf or to form a new member firm, and then to go through an extensive examination process. Substantial funds and time must be expended by an applicant, and the MC-400 can be denied on any discretionary interpretation, as FINRA has no definitive standards and is afforded considerable discretion for adjudication of MC-400s.

and proper review of his grievances. However, I am afraid that any frank assessment of the facts in my case and the Board's motives necessarily leads to this conclusion. FINRA staff's actions in my case and the Board's action both function to foreclose review on a procedural basis. These actions were undertaken covertly and at the same time.

Therefore, I urge you to conduct an investigation into communications and actions between Board members and staff surrounding this proposed rule change to establish evidence of improper conduct and communication among the 18 staff members involved in the decision to deny Asensio & Company, Inc. access to FINRA's MC-400 process. I also request that you provide me with a record of your findings in such investigation and all records of the Board's deliberations related to propose rule change file no. SR-2010-056.

Please be advised that this letter and any response to it may be used in current and future judicial and agency proceedings, as well as legislative advocacy.

Sincerely,



---

Manuel P. Asensio

Enclosure

Cc: Commissioners, U.S. Securities and Exchange Commission

Members of the Judiciary Committees of the U.S. House of Representatives and U.S. Senate

Members of the Committee on Oversight and Government Reform, U.S. House of Representatives

Members of the Financial Services Committee, U.S. House of Representatives

Members of the Committee on Banking, Housing and Urban Affairs, U.S. Senate

**AMY WALLER APOSTOL**

1111 Oronoco Street #230  
Alexandria, VA 22314  
(312) 342-6487  
amyapostol@gmail.com

---

September 8, 2010

Marc Menchel  
Executive Vice President and  
General Counsel for Regulation  
FINRA  
1735 K Street, NW  
Washington, D.C. 20006

Dear Mr. Menchel:

As you are aware, I have been retained by Asensio & Company, Inc. ("ACO") in relation to the New Member Application ("NMA") filed by ACO and the related Membership Continuance Application ("MC-400") filed by ACO on behalf of Mr. Manuel P. Asensio. While you have repeatedly stated in e-mails both to Mr. Asensio and myself that matters open to discussion with the Office of General Counsel ("OGC") are "closed," and that no further responses will be made by OGC, my client has substantive concerns regarding your statements about the procedures to be followed in FINRA's evaluation of the NMA and MC-400 in this case. Specifically, Mr. Asensio is concerned that certain of your statements conflict with prior statements made by FINRA staff handling the NMA. I will here attempt to clarify these concerns in order to allow you or other FINRA staff to address considerations of potential procedural defects and make available an interlocutory review.

As a preliminary matter, I note that I have reviewed two documents created by FINRA pertaining to the availability of the MC-400 process to Mr. Asensio. This includes a letter from Mr. Daniel M. Sibears, Executive Vice President, Member Regulation Programs, FINRA, to Senator Kirsten M. Gillibrand, dated July 15, 2009, in which Mr. Sibears stated, "Importantly, Mr. Asensio is not precluded from seeking to have a firm file another MC-400 Application on his behalf... Should another Application be filed, it would be reviewed and processed pursuant to standard operating procedures." I am also in receipt of an opposition motion<sup>1</sup> dated March 8, 2010 filed by FINRA in U.S. Securities and Exchange Commission ("SEC") Administrative Proceeding File No. 3-13733, in which FINRA stated, "Unlike other statutorily disqualified individuals who have filed multiple statutory disqualification applications with the NAC,

---

<sup>1</sup> Opposition of FINRA to (1) Asensio's Motion for Determination that FINRA's American Stock Exchange Ownership Evidences a Conflict of Interest, (2) Asensio's Motion for Determination of Fact that the Applicant's Securities-Related Work Aided the Public Interest and Investor Protection, (3) Asensio's Motion to Extend 30 Day Period in Rule 420, and (4) Asensio's Motion for Review under Commission Rule of Practice 430, dated March 8, 2010, filed in Securities and Exchange Commission Administrative Proceeding File No. 3-13733.

Asensio has only filed one such application... Consequently, Asensio has not exhausted FINRA's statutory disqualification application process."

As you are aware, Mr. Asensio has made numerous inquiries regarding procedure with the FINRA staff handling the NMA and MC-400, as well as staff at the OGC. Mr. Asensio maintains that the NMA staff, specifically Ms. Allison Reid, Associate District Director, initially advised his consultants, B/D Compliance Associates, Inc., that the NMA and MC-400 evaluations would be conducted concurrently or in tandem.

In a letter from Mr. Guy Calo, Principal Examiner, FINRA, to Mr. Asensio dated July 19, 2010, such letter constituting the initial request for information related to the NMA, Mr. Calo made the following request: "Please advise Staff whether the Applicant has successfully completed the MC-400 (Membership Continuance Application) proceedings and has been approved to associate with the Applicant, Asensio & Co, [sic] Inc. If the Applicant has not completed the MC-400 process, advise Staff as to the current status of such proceeding." Mr. Calo's request rests on the idea that the MC-400 process could be completed concurrently with the NMA process, or that the MC-400 could even be completed prior to the NMA.

However, in a letter from Ms. Reid to Mr. Asensio dated August 5, 2010, Ms. Reid stated simply, "Given, however, Asensio & Co.'s pending NMA, a determination on such MC-400 Application would be made upon conclusion of the NMA process" [emphasis added]. Ms. Reid did not offer an explanation for this decision on the procedural ordering of the respective NMA and MC-400 evaluations.

Thereafter, Mr. Asensio received responses from yourself and Ms. Terri Reicher of the OGC addressing in part the same issue of ordering. In particular, in an email to Mr. Asensio dated August 19, 2010, Ms. Reicher stated, "Logic dictates that you cannot associate with a member firm until that firm actually is a FINRA member, [sic] therefore, that firm must first successfully complete the MAP process. Only then can you go through the MC-400 process to try to associate with the member firm" [emphasis added]. Ms. Reicher also stated, "I urge you to re-read the very detailed email response sent to you by Marc Menchel, FINRA Executive Vice President and General Counsel for Regulation. Mr. Menchel has provided the clearest possible response to your communications." However, this email from you to Mr. Asensio dated August 19, 2010, to which Ms. Reicher apparently referred, did not address the issue of the ordering of evaluation of the NMA and MC-400.

In a separate chain of correspondence, Ms. Cindy Foster, Vice President and Ombudsman, FINRA, in an email to Mr. Asensio dated August 24, 2010, wrote:

"It, first, is our understanding that you are frustrated that the review of your MC-400 has been postponed until a decision on the New Member Application (NMA) you have filed has been rendered... Because you have elected to apply for readmission to the securities industry by associating with an entity that is just applying for membership, it makes sense to this office that your MC-400 application will not be reviewed until a decision on the NMA has been made" [emphasis added].

The emails written by you in this matter apparently neglected the ordering issue until you wrote an email to me, copying Mr. Asensio, dated September 3, 2010, in which you stated:

“First, Member Regulation must determine whether ACO may become a member; since your client seeks to re-associate with an entity not yet a member, the MC-400 cannot be considered before there is a member with which to re-associate. Bundled within the MAP determination is the fact that ACO would, upon entry to membership, be associated with a statutory disqualified person (Mr. Asensio) making that entity immediately subject to statutory disqualification as a matter of black letter law, not interpretation.”

In summary, the staff handling the NMA initially made statements indicating that the MC-400 process could be conducted *prior to, concurrently with, or in tandem with* the NMA process. An NMA staff-person then made a statement without explanation that the MC-400 process would be conducted upon conclusion of the NMA process. An OGC staff-person then gave an explanation of this ordering (MC-400 after NMA) appealing to “*Logic*” [emphasis added]. FINRA’s Ombudsman then gave Mr. Asensio an explanation of this ordering that was remarkably similar to that of the OGC, referring to “*sense*” [emphasis added]. Finally, you reiterated this same explanation, adding an allusion to “*black letter law, not interpretation*” [emphasis added]. The section of the statute you referenced with this allusion [Securities Exchange Act Section 3(a)(39)(E)] pertains simply to the definition of “statutory disqualification,” not to the ordering of an MC-400 filed in conjunction with an NMA.

My client believes that the record as summarized above shows that the OGC has caused the NMA staff to change its procedures in order to foreclose substantive review of issues raised in both his NMA and MC-400.

For my part, I note that the record of FINRA staff’s communications, along with the treatment of the ordering issue in those communications, appears irregular. There are demonstrable conflicting statements. It was not the staff handling the NMA that made an explanation of a decision on the ordering issue. Rather, it was staff from two outside offices, which are stated to be uninvolved in the NMA and MC-400 processes. These explanations referred to “Logic” and “sense” rather than to precise and explicit provisions of FINRA Rules or related Notices. I respectfully submit that FINRA is obliged under law to abide by its own rules, rather than the logic or sense apparent to any particular FINRA staff-person, in evaluating any particular application. It appears that there is a substantial basis to conclude that there are procedural defects in FINRA’s ordering decision in this case.

I also note that while FINRA Rule 9522 contemplates the filing of a MC-400 by an “applicant for membership under NASD Rule 1013,” I have found no provision of the FINRA Rule 9520 series governing MC-400s or the NASD Rule 1010 series governing NMAs indicating that the NMA must be decided prior to evaluation of the MC-400, or that otherwise restricts the MC-400 from being evaluated concurrently with the NMA. Indeed, FINRA Rule 9521 defines the term “sponsoring member” for the purpose of the MC-400 being “the member or applicant

for membership pursuant to NASD Rule 1013.” Under this definition, the sponsor of an MC-400 is not restricted to being only a firm that has been fully admitted to membership.

Notably, FINRA Rule 9522 indicates that an applicant for membership must file an MC-400 within 10 days of receipt of a notice from FINRA staff stating that an individual associated with the applicant is subject to statutory disqualification. Based upon your interpretation, one would expect that FINRA Rule 9522 would simply state that the MC-400 must be filed upon conclusion of the NMA process in the case of an applicant for membership which has associated with it an individual subject to statutory disqualification.

Moreover, ACO maintains that it never received a notice as contemplated in Rule 9522. FINRA staff is required under this rule to deliver a notice when it “has reason to believe that a disqualification exists.” Despite not receiving such notice following the filing of ACO’s NMA on June 17, 2010, Mr. Asensio nonetheless proceeded to file an MC-400. In accordance with the instructions on the MC-400 form, Mr. Asensio sent a completed MC-400 to the attention of the SD Group. An original signed copy of the MC-400 was delivered to FINRA via FedEx on July 1, 2010. A digital copy of the same MC-400 was also sent to the SD Group on June 28, 2010. Staff of the SD Group did not initiate any contact regarding the filed MC-400. In a letter dated August 13, 2010, nearly six weeks after the original signed MC-400 was delivered to the SD Group, Mr. Chris Dragos of FINRA’s Registration and Disclosure Department (“RAD”) advised that he had only received the digital copy of the MC-400 and stated that Mr. Asensio had failed to file an “original signed and completed MC-400 Application.” I am advised that on August 19, 2010, Mr. Dragos was told by telephone that an original, signed MC-400 was indeed served upon the SD Group. In the absence of further communication from RAD or the SD Group, ACO’s officer re-executed the MC-400, which was edited to reflect intervening events, and caused the second original signed MC-400 to be served upon RAD on September 2, 2010 via FedEx. ACO has received no communication from RAD or the SD Group since that date.

Thus, there is a substantial basis to conclude that there are procedural defects in FINRA’s handling of the MC-400. Specifically, FINRA failed to provide a formal notice as described in FINRA Rule 9522, and SD Group staff apparently mishandled the original MC-400 delivered to it on July 1, 2010.

My client believes that the procedural defects discussed above deserve interlocutory review. Mr. Asensio has written to Ms. Florence Harmon, Deputy Secretary of the SEC, requesting an interlocutory review by the SEC of FINRA’s ordering decision. Ms. Harmon has indicated that the SEC is not empowered to conduct a review absent a formal decision by FINRA’s National Adjudicatory Council (“NAC”). ACO is therefore requesting an interlocutory review by the NAC of procedural defects in the ordering decision and the handling of the MC-400, in the absence of a written confirmation that FINRA will be conducting a substantive, merits-based review of both the NMA and MC-400.

We would appreciate any clarification you can offer on the inconsistencies and procedural defects discussed above. Please advise ACO or myself as soon as possible as to whether FINRA will make available a written confirmation or an interlocutory review as requested above.

Sincerely,



Amy Waller Apostol

cc: Allison Reid, Associate District Director  
Guy Calo, Principal Examiner  
Lorraine Lee, Statutory Disqualification Administrator

**Attachments:**

**Exhibit 1:** Letter from Dan Sibears, Executive Vice President, Member Regulation Programs, FINRA, to Senator Kirsten Gillibrand dated July 15, 2009, and transmittal letter from Senator Kirsten Gillibrand to Manuel Asensio dated July 22, 2009.

**Exhibit 2:** Opposition of FINRA to (1) Asensio's Motion for Determination that FINRA's American Stock Exchange Ownership Evidences a Conflict of Interest, (2) Asensio's Motion for Determination of Fact that the Applicant's Securities-Related Work Aided the Public Interest and Investor Protection, (3) Asensio's Motion to Extend 30 Day Period in Rule 420, and (4) Asensio's Motion for Review under Commission Rule of Practice 430, dated March 8, 2010, filed in Securities and Exchange Commission Administrative Proceeding File No. 3-13733.

**Exhibit 3:** Letter from Guy Calo, Principal Examiner, FINRA, to Asensio & Company, Inc., dated July 19, 2010.

**Exhibit 4:** Letter from Allison Reid, Associate District Director, FINRA, to Asensio & Company, Inc., dated August 5, 2010.

**Exhibit 5:** Email from Terri Reicher, Associate General Counsel, FINRA to Manuel Asensio, dated August 19, 2010.

**Exhibit 6:** Email from Cindy Foster, Ombudsman, FINRA to Manuel Asensio, dated August 24, 2010.

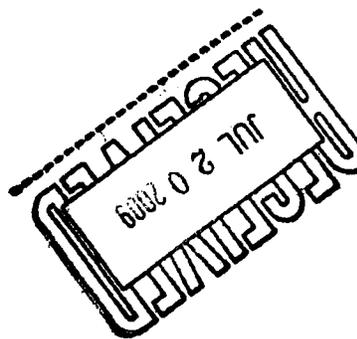
**Exhibit 7:** Email from Marc Menchel, General Counsel for Regulation, FINRA, to Manuel Asensio, dated August 19, 2010.

**Exhibit 8:** Email from Marc Menchel, General Counsel for Regulation, FINRA, to Amy Apostol, Esq., dated September 3, 2010

**Exhibit 9:** Letter from Chris Dragos, Manager of Regulatory Review, FINRA, to Asensio & Company, Inc. dated August 13, 2010.

**Exhibit 10:** Letter from Manuel Asensio to Florence Harmon, Deputy Secretary, Securities and Exchange Commission, dated August 19, 2010.

# **EXHIBIT 1**



Daniel M. Sibears  
Executive Vice President  
Member Regulation Programs

July 15, 2009

The Honorable Kirsten E. Gillibrand  
United States Senate  
780 Third Avenue, Suite 2601  
New York, New York 10017-2024  
Attn: Eric Hersey

Dear Senator Gillibrand:

We are in receipt of your letter dated June 4, 2009, in which you requested that FINRA provide clarification with respect to its Statutory Disqualification Program and Eligibility Proceedings, specifically as it relates to Manuel Asensio, a statutorily disqualified individual.

By way of background, the definition and provisions relating to statutory disqualification are found in Section 3(a)(39) of the Securities Exchange Act of 1934, and FINRA implements these provisions in its role as a self-regulatory organization ("SRO"). Among other things, Article III, Section 3 of FINRA's By-Laws provides that no firm shall continue in membership if it becomes subject to disqualification; and that no person shall be 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 disqualification. FINRA Rules 9520 through 9527 set forth procedures for a registered firm to sponsor the association of a person subject to disqualification, or for a firm to obtain approval to remain a member of the organization notwithstanding the existence of a disqualification. This process is referred to as FINRA's "Eligibility Proceedings." Generally, a statutorily disqualified person may not associate with a FINRA member in any capacity unless and until approved in an Eligibility Proceeding.

Mr. Asensio is statutorily disqualified from associating with a FINRA regulated firm based on a July 28, 2006 FINRA disciplinary action. Mr. Asensio and Asensio Brokerage Services Inc. ("ABS"), an entity over which Mr. Asensio exercised control, were found to have failed to respond to requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.<sup>1</sup> Rule 8210 is central to FINRA's

<sup>1</sup> National Adjudicatory Council Decision, in *Department of Enforcement, v. Asensio Brokerage Services, Inc., n/k/a/ Integral Services, Inc.* (CRD No. 31742) and *Manuel Peter Asensio* (CRD No. 1148811) (July 28, 2006).

Investor protection. Market integrity.

1735 K Street, NW  
Washington, DC  
20006-1506

t 202.728.6911  
f 202.728.8830  
dan.sibears@finra.org  
www.finra.org

000055

ability to perform its investor protection and market integrity mission, and Rule 2110 addresses just and equitable principles of trade and high standards of commercial honor.

In addition to the Rule 8210 and Rule 2110 violations, ABS and Mr. Asensio ("the Respondents") were found to have issued research reports that contained misleading information and failed to define the ratings and terms employed by the regulated firm in its rating system, in violation of NASD Rules 2711, 2711(h), 2210, and 2110.<sup>2</sup> These rules generally address, and aim to foster, objectivity and transparency in equity research by requiring clear, comprehensive and prominent disclosure of conflicts of interest in research reports by research analysts. Mr. Asensio was barred and ABS was fined \$20,000 for the research violations. In light of the bar, no additional sanctions, such as fines, were imposed on Mr. Asensio. Based on the referenced violations and resulting decision, Mr. Asensio is statutorily disqualified under the federal securities laws and FINRA rules, making it impermissible for him to be employed by a FINRA registered firm. This prohibition remains in effect unless a firm applies for the reassociation of Mr. Asensio and until such application is approved.

On September 12, 2007, ISI Capital, LLC ("ISI Capital") filed a Membership Continuance Application ("MC-400 Application" or "Application") with FINRA's Department of Registration and Disclosure ("RAD") seeking to permit the association of Mr. Asensio as a General Securities Representative.

FINRA staff assessed the Application and recommended to the FINRA Statutory Disqualification Committee<sup>3</sup> that the Application be denied. Once that recommendation was made, Mr. Asensio's application was referred for a hearing before a Statutory Disqualification Committee panel. The hearing was conducted on March 6, 2008. Mr. Asensio, his attorney, Marc Gottlieb, and representatives from ISI Capital were present at that hearing and made their case for approval of the application before the Statutory Disqualification Committee. Subsequently, on August 12, 2008, the Statutory Disqualification Committee, on behalf of FINRA's National Adjudicatory Council ("NAC")<sup>4</sup>, rendered a final decision denying ISI Capital's MC-400 Application to

---

<sup>2</sup> NASD Rule 2110 is now FINRA Rule 2010.

<sup>3</sup> The Statutory Disqualification Committee is currently comprised of representatives of six regulated firms. The members of the Committee are industry individuals and generally serve on the committee for a three year term. The Statutory Disqualification Committee, acting on the behalf of the National Adjudicatory Council, renders the final Statutory Disqualification decision of approval or denial.

<sup>4</sup> The National Adjudicatory Council is the FINRA committee that reviews initial decisions rendered in FINRA disciplinary and membership proceedings. The NAC is equally balanced between individuals who are in the securities business and non-industry representatives. Unless FINRA's Board of Governors decides to review the NAC's decision, that decision is FINRA's final action in the matter. A firm or individual can appeal FINRA's action to the SEC and then to a federal court.

employ Mr. Asensio.<sup>5</sup>

When the ISI Capital Application was denied, Mr. Asensio was informed that he could appeal the decision to the U.S. Securities and Exchange Commission ("SEC" or "the Commission"). He was further informed that, should he elect to appeal, he must file that appeal to the Commission within 30 days of the receipt of the FINRA decision. Mr. Asensio did not file an appeal with the SEC.

While virtually all statutory disqualification applications have unique features, there is uniformity of approach when assessing applications. The procedures related to FINRA's Statutory Disqualification process are codified in the FINRA rulebook. Briefly, the rules expressly state the procedures required for a person to become or remain associated with a firm, notwithstanding the existence of a statutory disqualification. As part of the initial process, the rules call for FINRA to specify the grounds for a statutory disqualification or ineligibility. The rules explain that an application must be filed regarding a disqualified person and discloses the time frames within which certain actions must be taken, as well as the consequences of failing to act. Further, the rules address the process surrounding the determination of an application, including hearing and appeal rights.

When conducting a review of a MC-400 application FINRA staff conducts an analysis of the application that takes into account:

- the nature and gravity of the disqualifying event;
- the length of time that has elapsed since the disqualifying event;
- whether any intervening misconduct has occurred;
- any other mitigating or aggravating circumstances that may exist;
- the precise nature of the securities-related activities proposed in the application; and
- the disciplinary history and industry experience of both the member firm and the person proposed by the firm to serve as the responsible supervisor of the disqualified person.

Notably, the decision to approve any MC-400 application rests with the National Adjudicatory Council and decisions may be appealed to the SEC.

Importantly, Mr. Asensio is not precluded from seeking to have a firm file another MC-400 Application on his behalf. FINRA has not received a further application since the filing of ISI Capital's Application to sponsor the association of Mr. Asensio. Should another Application be filed, it would be reviewed and processed pursuant to standard operating procedures.

---

<sup>5</sup> Redacted Denial Decision, # SD08003.

Kirsten E. Gillibrand  
July 15, 2009  
Page 4

For additional information regarding FINRA's Eligibility Proceedings, please see our Statutory Disqualification webpage *via* the following link:  
<http://www.finra.org/Industry/Enforcement/Adjudication/NAC/StatutoryDisqualification/Process/index.htm>.

Thank you for the opportunity to provide you with a description of FINRA's Statutory Disqualification program, as well as the facts and circumstances surrounding the ISI Capital application regarding Mr. Asensio. If you or your staff have any additional questions, please contact Julie Bauer at 202-728-8217.

Sincerely,



Daniel M. Sibears  
Executive Vice President  
Member Regulation Programs

000058

KIRSTEN E. GILLIBRAND

NEW YORK  
SENATOR

SUITE 2501  
780 THIRD AVENUE  
NEW YORK, NY 10017  
212-688-6262

COMMITTEES:  
ENVIRONMENT AND PUBLIC WORKS  
FOREIGN RELATIONS  
AGRICULTURE  
SPECIAL COMMITTEE ON AGING

# United States Senate

WASHINGTON, DC 20510-3205

July 22, 2009

Mr. Manuel P. Asensio  
Mill Rock  
Investment Advisors  
747 3rd Avenue, Floor 25  
New York, New York 10017

Dear Mr. Asensio:

Thank you for contacting my office with your matter. I have contacted the Financial Industry Regulatory Authority on your behalf – attached is the response to my inquiry. I hope this information will be of help to you.

Sincerely yours,



Kirsten E. Gillibrand

KEG/eh\_gat

# **EXHIBIT 2**



Financial Industry Regulatory Authority

Michael J. Garawski  
Associate General Counsel

Direct: (202) 728-8835  
Fax: (202) 728-8264

March 8, 2010

**VIA MESSENGER**

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Room 10915  
Washington, DC 20549

**RE: In the Matter of the Application of Manuel P. Asensio**  
**Administrative Proceeding No. 3-13733**

Dear Ms. Murphy:

Enclosed please find the original and three copies of the Opposition of FINRA to (1) Asensio's Motion for Determination That FINRA's American Stock Exchange Ownership Evidences a Conflict of Interest, (2) Asensio's Motion for Determination of Fact That the Applicant's Securities-Related Work Aided the Public Interest and Investor Protection, (3) Asensio's Motion to Extend 30 Day Period in Rule 420, and (4) Asensio's Motion for Review Under Commission Rule of Practice 430, in the above-captioned matter.

Please contact me at (202) 728-8835 if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael J. Garawski". The signature is fluid and cursive.

Michael J. Garawski

cc: Manuel P. Asensio  
Melanie Campbell

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C.**

In the Matter of the Application of  
  
Manuel P. Asensio  
  
for Review of Disciplinary Action Taken by  
  
NASD (n/k/a FINRA)  
  
and for Review of Denial of Registration by  
  
FINRA  
  
File No. 3-13733

**OPPOSITION OF FINRA TO (1) ASENSIO'S MOTION FOR DETERMINATION THAT  
FINRA'S AMERICAN STOCK EXCHANGE OWNERSHIP EVIDENCES A CONFLICT  
OF INTEREST, (2) ASENSIO'S MOTION FOR DETERMINATION OF FACT THAT  
THE APPLICANT'S SECURITIES-RELATED WORK AIDED THE PUBLIC  
INTEREST AND INVESTOR PROTECTION, (3) ASENSIO'S MOTION TO EXTEND  
30 DAY PERIOD IN RULE 420, AND (4) ASENSIO'S MOTION FOR REVIEW UNDER  
COMMISSION RULE OF PRACTICE 430**

Marc Menchel  
Executive Vice President  
and General Counsel

Alan Lawhead  
Vice President and  
Director – Appellate Group

Michael Garawski  
Associate General Counsel

FINRA  
1735 K Street N.W.  
Washington, DC 20006  
(202) 728-8835

Dated: March 8, 2010

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C.**

In the Matter of the Application of

Manuel P. Asensio

For Review of Disciplinary Action Taken by

NASD (n/k/a FINRA)

and for Review of Denial of Registration by

FINRA

File No. 3-13733

**OPPOSITION OF FINRA TO (1) ASENSIO'S MOTION FOR DETERMINATION THAT  
FINRA'S AMERICAN STOCK EXCHANGE OWNERSHIP EVIDENCES A CONFLICT  
OF INTEREST, (2) ASENSIO'S MOTION FOR DETERMINATION OF FACT THAT  
THE APPLICANT'S SECURITIES-RELATED WORK AIDED THE PUBLIC  
INTEREST AND INVESTOR PROTECTION, (3) ASENSIO'S MOTION TO EXTEND  
30 DAY PERIOD IN RULE 420, AND (4) ASENSIO'S MOTION FOR REVIEW UNDER  
COMMISSION RULE OF PRACTICE 430**

On February 26, 2010, Manuel P. Asensio ("Asensio") filed a "Motion for Determination that FINRA's American Stock Exchange Ownership Evidences a Conflict-of-Interest Towards the Applicant and Support Extraordinary Circumstances" ("2/26/2010 Motion"). On March 1, 2010, Asensio filed a "Motion for Determination of Fact that the Applicant's Securities-Related Work Aided the Public Interest and Investor Protection and that FINRA's MC400 Decision Evidences Bias" ("3/1/2010 Motion."). On March 3, 2010, Asensio filed two motions: "Motion to Extend 30 Day Period in Rule 420 Based on Extraordinary Circumstances Surrounding Jurisdictional Dispute and Settlement Offer" ("Motion to Extend 30-Day Period") and "Motion for Review Under Commission Rule of Practice 430 or in the Alternative in Support of a Merits-

Based Review Under Commission Rule of Practice 420 Based on a Showing of Extraordinary Circumstances" ("Rule 430 Motion"). Asensio's motions should be denied. In addition, FINRA submits that the parties have more than fully briefed the issue of Asensio's late appeal. FINRA will cease responding to Asensio's additional motions until the Commission orders additional briefing.

Yet again, the arguments that Asensio makes in these four motions are essentially merits-based challenges to FINRA's actions. For example, in the 2/26/2010 Motion, Asensio argues that: (1) FINRA was "swayed by bias and conflicts of interest" in investigating him, bringing an enforcement action against him, and denying his statutory disqualification application (2/26/2010 Mot. at 2 (¶3)); (2) that FINRA "made no means available for consideration of bias and conflict-of-interest issues and related discovery in the proceedings below (*id.* at 3 (¶7)); and (3) that "any evidenced instances of bias and conflicts of interest by FINRA is . . . a mitigating factor in [Asensio's] case" (*id.* at 3 (¶6)). Likewise, the 3/1/2010 Motion can be distilled to: (1) a direct challenge to the NAC's rejection of Asensio's argument in the statutory disqualification proceeding that "FINRA should permit [Asensio] to re-enter the securities industry because his past activities in securities analysis were of material value to the investing public's price discovery processes" (3/1/2010 Mot. at 3); and (2) an argument that the NAC's August 2008 statutory disqualification decision resulted from bias (*id.* at 5). In the Motion to Extend 30-Day Period, Asensio argues that, in the disciplinary proceeding, FINRA "fail[ed] to find facts in mitigation" and imposed an "excessive and disproportionate" sanction. Mot. to Extend 30-Day Period at 4, 5 (¶¶15, 16).

To the extent that Asensio intends these four motions to provide additional arguments in support of his opposition to FINRA's Motion to Dismiss—for which briefing is complete—the

motions would represent Asensio's *second* through *fifth* unauthorized surreplies. Just as FINRA argued in response to Asensio's *previous* unauthorized surreply, the four motions are procedurally improper and should be struck. See 2/22/2010 Opp. of FINRA to Asensio's Motion for Consideration of Extraordinary Circumstances at 2-3. In any event, as FINRA has already argued in these proceedings, merits-based challenges like the ones Asensio raises in the 2/26/2010 Motion, 3/1/2010 Motion, Motion to Extend 30-Day Period, and Rule 430 Motion do not present "extraordinary circumstances" warranting the acceptance of a late appeal. See, e.g., *Edward J. Jakubik*, Exchange Act Rel. No. 61541, slip op. at 8 (Feb. 18, 2010) (finding that merits-based challenges "fail[ ] to present the kind of circumstances required to justify an extension of the appeal deadline"). Rather, Asensio is required to explain why he filed his application for review substantially after the applicable appeal deadlines, despite the fact that he received timely notice of FINRA's actions. *Id.*

To the extent that Asensio intends the 2/26/2010 Motion and the 3/1/2010 Motion to provide further support to his pending Motion for a Determination of Fact ("2/2/2010 Motion for a Determination of Fact")—for which briefing is also complete—they also represent unauthorized surreplies.<sup>1</sup> In any event, these two motions are just as unpersuasive as that prior motion. Most importantly, Asensio's request to reach the merits of his appeal is procedurally premature. FINRA's motion to dismiss is pending, and the SEC has not ordered a briefing schedule. If and when the SEC accepts Asensio's substantially late appeal and orders briefing,

<sup>1</sup> Asensio's 2/26/2010 and 3/2/2010 Motions seek determinations of fact based, in part, on: (1) his alleged "work in uncovering securities violations" in connection with "oversight deficiencies at the AMEX from the period of 1998 to 2002"; (2) his alleged work concerning Winstar Communications, Inc. and Mr. Jack Grubman; (3) his alleged work concerning Dreyfus Corp; and (4) the fact that the American Stock Exchange was a subsidiary of NASD. See 2/26/2010 Mot. at 1, 4, 7 (¶¶1, 9 18, 20); 3/1/2010 Mot. at 1-2 (¶¶ a, b, e). Likewise, Asensio's February 2, 2010 motion sought a determination of fact based on the same general assertions. 2/2/2010 Mot. for Determination of Fact at 5-6, 8 (¶¶17, 18, 19, 22).

Asensio can raise merits-based challenges in his opening brief (provided, of course, that he does so in a manner that complies with the SEC Rules of Practice).

And to the extent that Asensio requests that the SEC “compel[ ] FINRA to produce any records of communication and correspondence by or between Mary Schapiro, Richard Ketchum, Salvatore Sodano, Richard Syron, and employees of FINRA mentioning the Applicant during the period of 1999 to the time of the Eastman Letter” (2/26/2010 Mot. at 3 (¶¶4, 5)), that request should be denied, for the same reasons why the SEC should reject Asensio’s previous request for discovery. *See* 2/18/2010 FINRA Mot. to Strike and Opp. of FINRA to Asensio’s Mot. for Fact Finding and to Compel Documents, at 4-5.<sup>2</sup>

In Asensio’s Rule 430 Motion, he argues that—after the NAC denied the statutory disqualification application of ISI Capital to allow Asensio to associate with the firm—he “exhausted FINRA’s procedural remedies” in an “attempt to gain FINRA’s approval to associate with ISI Capital.” Rule 430 Mot. at 4 (¶¶ 9-11). This is inaccurate in two respects. First Asensio did not exhaust the available remedy for a statutory disqualification denial, which is a timely appeal to the Commission.

Second, Asensio has entirely made up the idea that writing letters about his statutory disqualification denial and having discussions about it with FINRA officers amounts to some sort of exhaustion of a non-existent post-denial process. FINRA’s rules contain no such post-denial process. Instead, FINRA’s rules describe only an application process. *See* FINRA Rules 9521-27 (setting forth procedures for a person to become associated with a member

---

<sup>2</sup> In that opposition, FINRA imprecisely represented that Asensio had counsel in the proceedings below. In fact, although Asensio was represented by counsel before the NAC in both the disciplinary and statutory disqualification proceedings, and counsel filed an application for review of the NAC’s disciplinary decision, followed by a withdrawal, Asensio proceeded pro se before the Hearing Panel.

notwithstanding a statutory disqualification, including the member filing an application, an evidentiary hearing, and a written decision from the National Adjudicatory Council). Moreover, Asensio talking about a potential, future statutory disqualification application—even with FINRA's Vice Chairman and Executive Vice President of Member Regulation—is not the same as a FINRA member filing an *actual* application. FINRA's Department of Member Regulation is merely a "party" in statutory disqualification proceedings. FINRA Rule 9120(x)(2); *see also* Rule 9524(a)(5) (noting that time limits may be altered with the "consent of all the Parties"). It is the NAC, not the Department of Member Regulation, that is the adjudicator. Unlike other statutorily disqualified individuals who have filed multiple statutory disqualification applications with the NAC, Asensio has only filed one such application. *See, e.g., Morton Kantrowitz*, Exchange Act Rel. No. 54278, 2006 SEC LEXIS 1784, at \*4 (Aug. 7, 2006) (observing that three NASD members had submitted statutory disqualification applications on behalf of the individual). Consequently, Asensio has not exhausted FINRA's statutory disqualification application process.

Finally, to the extent that Asensio is arguing that the letters and discussions about his statutory disqualification constitute extraordinary circumstances to allow a late appeal, he is incorrect. Asensio did not in fact exhaust an available process. Moreover, several of the policies supporting the requirement of timely appeals would be undermined, including having the lower adjudicator prepare a record and resolving the issues in the case in a written decision, if Asensio were allowed to appeal based on his claimed post-denial activities. In addition, Asensio's assertion of post-denial discovery and communications amounting to extraordinary circumstances would undoubtedly create an easy path for any denied applicants to extent their time to appeal for as long as they would like.

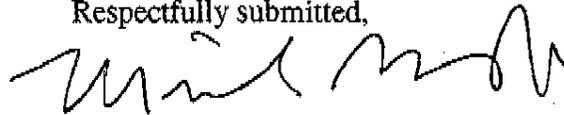
\*\*\*\*\*

Briefing on FINRA's Motion to Dismiss is complete. Counting every pleading that Asensio has filed since FINRA moved to dismiss his late appeal, these are Asensio's ninth, tenth, eleventh and twelfth pleadings. Although this blizzard of irrelevant paper shows no signs relenting, FINRA has fully argued its position. For these reasons, FINRA will not respond to any future filings of Asensio's containing arguments that he has either already made, or could have made in any of his numerous previous filings. FINRA will, however, fully respond and brief any issues that the Commission identifies in a briefing order to the parties.

In discussing his preference for poetry with structured lines, Robert Frost said: "Writing free verse is like playing tennis with the net down." The Commission should not reward Applicant for unilaterally taking the net down from this appeal.

For the reasons that FINRA has previously explained, the Commission should grant FINRA's Motion to Dismiss on the grounds that Asensio's appeal is untimely.

Respectfully submitted,



---

Michael Garawski  
Associate General Counsel  
FINRA  
1735 K Street, NW  
Washington, DC 20006  
(202) 728-8835

Dated: March 8, 2010

**CERTIFICATE OF SERVICE**

I, Michael Garawski, certify that on this 8th day of March 2010, I caused a copy of the foregoing opposition, in the matter of *Application for Review of Manuel P. Asensio*, Administrative Proceeding File No. 3-13733, to be served by messenger on:

Elizabeth M. Murphy, Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Room 10915  
Washington, D.C. 20549

and by facsimile and overnight delivery on:

Manuel P. Asensio  
Mill Rock Investment Advisors  
747 Third Ave., 25<sup>th</sup> Floor  
New York NY 10017  
(212) 702-8807

Service was made on the Commission by messenger and on the Applicant by facsimile and overnight delivery service due to the distance between the offices of FINRA and Applicant.



---

Michael Garawski  
Associate General Counsel  
FINRA  
1735 K Street, NW  
Washington, DC 20006  
(202) 728-8835

# **EXHIBIT 3**

July 19, 2010

***Via e-mail (admin@millrockllc.com)***

Manuel Asensio  
Asensio & Company, Inc.  
747 Third Avenue – 25<sup>th</sup> Floor  
New York, NY 10017

**RE: New Membership Application  
Asensio & Company, Inc.  
CRD No.: 151702 - Application No.: 20100232521**

Dear Mr. Asensio:

On June 16, 2010, the New York District Office (“Staff”) received the application of Asensio & Company, Inc. (the “Applicant”) for membership into FINRA. The application indicates that the Applicant wishes to conduct a mutual fund retailing business.

*Pursuant to NASD Rule 1013(a)(4), the Staff requires the information and/or documentation listed below, which must be incorporated into the applicable sections of the Form NMA, and electronically resubmitted. Kindly send the Staff an email ([Guy.Calo@finra.org](mailto:Guy.Calo@finra.org)) when the Form NMA has been resubmitted.*

### **Section 3 – Personnel**

1. Pursuant to NASD Rule 1014(b)(1), in reviewing an application for membership, the Department or Member Regulation of FINRA (the “Department” or “Staff”) is required to consider whether the Applicant and its Associated Persons meet each of the standards in Rule 1014(a). Where the Department determines that the Applicant or its Associated Persons are the subject of any of the events set forth in Rule 1014(a)(3)(A) and (C) through (E), a presumption exists that the application would be denied.

In the instant application, Staff notes that Central Registration Depository (“CRD”) indicates that the Applicant’s sole principal, Manuel Asensio, is the subject of five (5) Regulatory Actions which fall within NASD Rule 1014(a)(3)(A), (C) and (E) (Please see table below). Therefore, as of the filing of this application, the Applicant’s application is presumed to be denied, unless the Applicant can overcome the rebuttable presumption of denial.

Disclosure Type	Occurrence No.	Event Date	Disposition
Regulatory Action	93914	5/23/1994	Fine/Censure
Regulatory Action	303217	10/13/1998	Fine/Censure
Regulatory Action	972914	7/3/2000	Fine/Censure
Regulatory Action	1179963	2/06/2004	Permanent Bar
Regulatory Action	1422988	9/13/2007	Denial

Therefore, provide Staff with a detailed written explanation of why, notwithstanding the existence of the regulatory events reflected in Mr. Asensio's record, the instant application should not be denied.

***A response to this question may be uploaded directly to Section III of Form NMA.***

2. Please advise Staff whether the Applicant has successfully completed the MC-400 (Membership Continuance Application) proceedings and has been approved to associate with the Applicant, Asensio & Co, Inc. If the Applicant has not completed the MC-400 process, advise Staff as to the current status of such proceeding.
3. The Applicant has indicated that Manuel Asensio will be the sole principal. CRD indicates that a testing window has been opened for Mr. Asensio to sit for the Series 7, 24, 27 and 63. Please advise Staff as to the exact dates that Mr. Asensio plans on taking each of these exams.

***A response to this question, as well as all other questions requesting information in a written response format, may be incorporated into a single document and uploaded directly to Section I, Subsection A or Form NMA.***

4. The Applicant has indicated that in the event Mr. Asensio cannot perform his duties as the Applicant's sole principal, Carrie Wisniewski (CRD 1463513) would assume the supervisory role. Please provide a copy of any agreement, executed or in draft form, which details the terms of this arrangement.

***A response may be uploaded directly to Section I, Subsection A of Form NMA.***

5. Please provide a resume that includes a detailed description of Carrie Wisniewski's professional background as it relates to her capacity to act as a supervisor and sole general securities principal of the Applicant's proposed mutual fund retail business. In the interest of efficiency, you may also populate the attached table:

Employer	Dates of Employment	Title and responsibilities

***A resume and table may be uploaded directly to Section I, Subsection A for Form NMA.***

6. Provide Staff with a detailed resume for Lorena Llivichuzca.

***A resume may be uploaded directly to Section 1, Subsection A for Form NMA.***

#### **Section 4 – Funding**

7. The Applicant has represented that its fixed expenses for the first 12 months of operation would amount to \$39,436.00. The Applicant's current net capital and excess net capital, as provided in the computation provided by the Applicant, are \$193.06 and (\$4,806.94), respectively.

Rule 1014(a)(7) requires Staff to determine whether the Applicant is capable of maintaining a level of net capital in excess of the minimum net capital requirements set forth in SEC Rule 15c3-1 adequate to support the Applicant's intended business operations on a continuing basis, based on information filed under Rule 1013(b)(5). Rule 1014(a)(7) further provides that Staff may impose a reasonably determined higher net capital requirement for the initiation of operations after considering the amount of net capital sufficient to avoid early warning level reporting requirements, such as SEC Rule 17a-11, and the amount of capital necessary to meet expenses net of revenues for at least twelve months, based on reliable projections agreed to by the Applicant and the Department. Therefore, the Applicant is required to infuse additional capital into its account to satisfy both the twelve-month threshold amount and SEC Rule 17a-11.

8. The Applicant has represented that Lorena Llivichuzca made an initial contribution of \$5,000.00 to the Applicant on 8/20/2009. In light of Ms. Llivichuzca's capital contribution, please advise Staff as to what role, if any, she will have with the Applicant, including whether she will be a shareholder, officer or otherwise involved with the Applicant.

***A response to this question, as well as all other questions requesting information in a written response format, may be incorporated into a single document and uploaded directly to Section I, Subsection A or Form NMA.***

9. Please advise Staff whether Lorena Llivichuzca is affiliated, in any way, with Mill Rock Investment Advisors, Inc.

***A response to this question, as well as all other questions requesting information in a written response format, may be incorporated into a single document and uploaded directly to Section I, Subsection A or Form NMA.***

#### **Section 5 – Contractual and Business Arrangements**

10. Staff notes that the Applicant has provided a copy of its application for fidelity bond coverage. Please provide a copy of the Applicant's fidelity bond.

***A fidelity bond may be uploaded directly to Section V of Form NMA.***

11. The Applicant has represented that it will avail itself of outside compliance consultants to assist in the daily operation of the Applicant. Please provide (1) a detailed description of the services which will be outsourced; (2) copies of any agreements governing these relationships; and (3) a detailed description of how the Applicant will comply with the provisions of Notice to Members 05-48 on outsourcing.

***A copy of the contracts or agreements may be uploaded directly to Section I, Subsection A of Form NMA.***

12. The Applicant has represented that it will enter into an expense sharing agreement with Mill Rock Investment Advisors, Inc. for certain services delineated within said agreement, pursuant to Notice to Members 03-63. Please note that upon entering into an expense-sharing agreement and annually thereafter, as of the broker/dealer's fiscal year-end, the broker/dealer has to obtain evidence that the third-party has adequate resources independent of the broker/dealer to pay the costs incurred by the broker/dealer. Therefore, please provide evidence of Mill Rock Investment Advisors, Inc.'s financial wherewithal to pay for the services outlined in the expense sharing agreement (i.e., audited financial statements, recent bank statements, etc.).

***A copy of the contracts or agreements may be uploaded directly to Section IV, Subsection H of Form NMA.***

13. Staff notes that the Indirect Expense chart listed on page 6 of the expense sharing agreement submitted by the Applicant provides that Mill Rock Investment Advisors, Inc. will pay for, among other things, "Personnel - Managerial (salaries & benefits)." Please advise Staff whether this language contemplates that Mill Rock Investment Advisors, Inc. will act as a paymaster, that will later be reimbursed by the Applicant; or whether this language directs Mill Rock Investment Advisors, Inc. to pay for the salaries of personnel, without reimbursement from the Applicant.

***A response to this question, as well as all other questions requesting information in a written response format, may be incorporated into a single document and uploaded directly to Section I, Subsection A or Form NMA.***

*As a reminder, please be sure to submit fingerprint cards for each person applying for registration. If an applicant fails to submit a fingerprint card within 30 days after FINRA receives the electronic Form U4, the person's registration will be deemed inactive.*

*Please ensure that the Applicant amends its Form BD to correct any deficiencies noted.*

For your information, Rule 1013(a)(5) establishes time frames for the consideration of an application. In this regard, applicants must respond to an initial District Office request for information within 60 days after service of such initial request. Any subsequent District Office requests must be responded to within 30 days. Failure to comply with these or other time frames contained in relevant rules, or failure to respond fully to staff's requests, may result in a lapse of the application. Furthermore, NASD Rule 1014 requires that the membership application process be completed within 180 days from the applicant's filing of the membership application. It is therefore imperative that complete, timely responses be made to District Office requests for information, and that the District Office be made aware of any special time constraints or unique considerations your Applicant may have relative to the membership application process.

**Please note that this application will be denied if the Applicant fails to overcome the rebuttable presumption of Rule 1014(b), or fails to meet any of the standards in Rule 1014(a). Please also note that there is no presumption of approval that attaches to Staff's questions and the Firm's responses thereto during the New Member Application process.**

**A revised Form NMA responding to this request for information is due no later than September 17, 2010.**

Questions regarding your application or the application process may be directed to the undersigned at 212-858-4087.

Very truly yours,

*Guy Calo*

Guy Calo  
Principal Examiner

# **EXHIBIT 4**



August 5, 2010

**Via Commercial Courier (Tracking # 8705-1334-4661)**

Mr. Manuel P. Asensio  
President  
Asensio & Company, Inc.  
747 Third Avenue, 25<sup>th</sup> Floor  
New York, NY 10017

RE: Asensio & Company, Inc. ("Asensio & Co.")

Dear Mr. Asensio:

This letter responds to your July 14, 2010 letter to Allison Reid, as well as your July 26, 2010 to Allison Reid and Lorraine Lee. In your July 14 letter, you inquired into: "[H]ow FINRA will proceed with consideration of the NMA and MC-400" filings. In your letter of July 26, 2010 you requested "[N]otice in advance of the membership interview of whether [Mr. Calo] or any other FINRA staff-person evaluating [Asensio & Co.'s] NMA has had any communications with other FINRA staff-persons who were involved in the Proceeding."

An application for FINRA membership ("NMA"), including that filed by Asensio & Co., is evaluated pursuant to the criteria in NASD Rule 1014 ("Standards"). FINRA's Department of Member Regulation staff ("Staff") assesses applications against each of the NASD Rule 1014 Standards. Failure to meet one or more of the Standards in NASD Rule 1014, or failure to overcome the rebuttable presumption of denial in NASD Rule 1014(b), provide grounds for denial of an application.

As explained in Mr. Calo's information request letter of July 19, 2010, the Staff is evaluating Asensio & Co.'s NMA in accordance with NASD Rule 1014. This evaluation includes consideration of events reported into the Central Registration Depository for Manuel Asensio that trigger the rebuttable presumption of denial in NASD Rule 1014(b). These events include those that resulted in a bar against Manuel Asensio, from which relief is being sought pursuant to a Membership Continuance Application ("MC-400 Application").

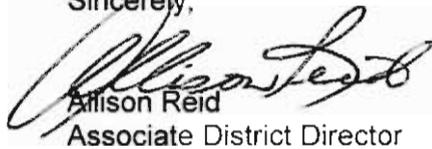
Regarding the Membership Interview ("Interview") for Asensio & Co., pursuant to standard operating procedure you will be notified of the scheduling for the Interview, including the date, time, location, and representatives of the Applicant who are required to attend. Additional information concerning the Interview will follow at a later date.

With respect to the statutory disqualification process and Asensio & Co.'s submission of an MC-400 Application on behalf of Manuel Asensio; you requested, in your

Mr. Manuel Asensio  
August 5, 2010  
Page 2 of 2

correspondence of July 26, 2010, that "Ms. Lee advise me of whether the MC-400 filed in conjunction with [Asensio & Co.'s] NMA will be processed by her or by some other FINRA employee, and that Ms. Lee or such other employee acknowledge receipt of the MC-400 filed in conjunction with [Asensio & Co's] NMA." FINRA has received Asensio & Co.'s intent to file an MC-400 Application. Pursuant to FINRA Rule 9521(b)(1) an MC-400 Application must be filed with FINRA's Department of Registration and Disclosure. Given, however, Asensio & Co.'s pending NMA, a determination on such MC-400 Application would be made upon conclusion of the NMA process.

Sincerely,



Allison Reid  
Associate District Director

cc: Lorraine Lee, Manager, Statutory Disqualification Program, FINRA  
Guy Calo, Principal Examiner, FINRA

# **EXHIBIT 5**

---

**From:** Reicher, Terri [mailto:Terri.Reicher@finra.org]

**Sent:** Thursday, August 19, 2010 12:20 PM

**To:** Manuel P. Asensio-Garcia

**Subject:** RE: Final Decision on a.) Scope of Review, b.) process and c.) compliance with deadline under 1014(c)(3) pertaining to MC-400 decision.

Mr. Asensio-Garcia:

Mr. Callery is out of the office, and your emails were referred to me for response. I have reviewed the email string, as well as some past correspondence between you and Mr. Callery. You raise a number of points (very confusingly), but they boil down to the following:

1. You still dispute the FINRA disciplinary decision against you, which you refer to below as “the unwarranted bar sanction.” That decision became final back in 2006 when you withdrew your appeal at the Securities and Exchange Commission. In late 2009, you did try to appeal the decision to the SEC, which dismissed the appeal. You have appealed that decision to the U.S. Court of Appeals for the Eleventh Circuit, and that court, not FINRA, will make any determinations about the merit of your appeal. In the meantime, the decision has rendered you statutorily disqualified from the securities industry since 2006—and your appeal to the 11<sup>th</sup> Circuit does not change that status.
2. You have chosen to try to re-enter the securities industry by associating with a securities firm that is applying for membership in FINRA. Logic dictates that you cannot associate with a member firm until that firm actually is a FINRA member, therefore, that firm must first successfully complete the MAP process. Only then can you go through the MC-400 process to try to associate with the member firm. The rules apply to you in precisely the same way that they apply to anyone else in your situation, and your attempts to contact more and more people at FINRA will not change that. I urge you to re-read the very detailed email response sent to you by Marc Menchel, FINRA Executive Vice President and General Counsel for Regulation. Mr. Menchel has provided the clearest possible response to your communications.

Neither I nor Mr. Callery (nor most of the FINRA staff on your email list) are involved in the MAP or MC-400 processes, and nobody at FINRA has any involvement with your 11<sup>th</sup>

Circuit appeal of the SEC's decision in your disciplinary case. Deluging us and other FINRA staff with emails, phone calls and other communications will not speed the MAP or MC-400 process, and is more likely to slow them down. If you are serious about pursuing these processes, you must stop the barrage of extraneous communications. Please consider this email to respond to any future communications from you to me or Mr. Callery concerning the matters raised in your email. You will receive no further response.

Very truly yours,

Terri L. Reicher  
Associate Vice President  
Associate General Counsel  
FINRA  
1735 K Street, N.W.  
Washington, DC 20006

---

**From:** Manuel P. Asensio-Garcia [mailto:[mpa@millrockllc.com](mailto:mpa@millrockllc.com)]

**Sent:** Thursday, August 19, 2010 10:25 AM

**To:** Reicher, Terri

**Cc:** 'harmonf@sec.gov'; Menchel, Marc; Anthony Sarver; Lorena Llivichuzca; Lee, Lorraine; Jannace, William; Sibears, Dan; Reid, Allison; Calo, Guy; Foster, Cindy; McDonald, Joe; Pena, Ursula

**Subject:** FW: Final Decision on a.) Scope of Review, b.) process and c.) compliance with deadline under 1014(c)(3) pertaining to MC-400 decision.

Dear Mr. Grant:

Ivory, of your office assistant, instructed me to use Terri's email for you. I await your response to my first email below.

FINRA must show its position on issues of law and process. The lack of communication and focus on unrelated matters is device that FINRA used to create the unwarranted bar sanction. It would serve no purpose of mine, or investors or the public, for me to ignore FIRNA's conduct.

Please feel free to call me at any time.

Thank you.

# **EXHIBIT 6**

**From:** Foster, Cindy [mailto:Cindy.Foster@finra.org]  
**Sent:** Tuesday, August 24, 2010 11:34 AM  
**To:** Manuel P. Asensio-Garcia  
**Subject:** Response from Office of the Ombudsman

Dear Mr. Asensio:

This email is in response to the numerous calls, messages and emails you have made to, left for or sent to the Ombudsman's Office during the past several weeks and reiterates much of our discussion on August 24, 2009. During these various communications, as well as the litany of communications made to this Office during 2009, you have raised four primary issues with the Office of the Ombudsman. This letter will address each issue separately.

### **Request for a Formal Investigation and Written Report**

In several of your communications to or with the Office of the Ombudsman, you have requested that a formal investigation be conducted and that a written report of findings and recommendations be issued. As I have explained to you previously, the Ombudsman's Office is an informal mechanism whose primary objective is to be an advocate for fair processes and fair administration. We are glad that you contacted us to voice your concerns about operations, enforcement, or other FINRA activities or staff, but the reach and scope of this office is far more limited than what you have requested.

Despite some of your arguments to the contrary, the Ombudsman's Office is not part of FINRA's management structure and therefore does not make policy, make management decisions or conduct formal investigations. Nor does the Ombudsman's Office have the authority to solve every problem. The Ombudsman's Office was created in response to a recommendation from the NASD Select Committee on Structure and Governance and ratified by the Board of Governors Audit Committee, as an alternative channel of communication—complementing, but not replacing—FINRA's comprehensive program of formal resolution channels that include adjudication and dispute resolution. The Ombudsman's Office will help you identify options, make sure they are available to you, and help you to use them most effectively. As is consistent with our routine practices, in the event that the Ombudsman's Office finds evidence that FINRA processes are unfair or administered in an unfair manner, it will report its findings directly to executive management and the Audit Committee of FINRA's Board of Governors.

As a designated neutral, the Ombudsman's Office also will not represent or act as an advocate for any person in a dispute with the organization, and will not take sides on any issues brought to its attention. The Ombudsman's Office promotes fair processes and the fair administration of such processes, and considers the interests and concerns of all parties to a situation. And this is exactly what we consistently have done in your case. You have raised several different issues, each of which is addressed in greater detail below. We have reviewed them from a procedural standpoint, but we do not have the authority to conduct a formal investigation or impose ourselves into the adjudication or decision-making process itself.

Additional information about the scope of this office can be found on FINRA's website at <http://www.finra.org/web/groups/corporate/@corp/@about/@ombud/documents/corporate/p118763.pdf>.

### **Investigation Involving and Sanctions Against You Individually**

The second issue raised involves the decision issued by a Hearing Panel and affirmed in part by the National Adjudicatory Council (NAC), which resulted in the sanction of a bar issued against you. You repeatedly have asked this office to review the basis of FINRA staff's investigation against you and the sanctions imposed against you. Every time you reach out to the Ombudsman's Office, your list of complaints against the organization, its officers and its staff grows. The Ombudsman's Office, however, does not arbitrate or adjudicate matters, nor does the Ombudsman's Office have the authority to overturn decisions made in these established forums. The decision and resulting sanctions against you became final four years ago when you withdrew your appeal to the Securities and Exchange Commission (the SEC or the Commission).

Despite the fact you withdrew what had been a timely appeal to the SEC, we are aware that you filed an application for review of the order barring you from association with any FINRA member, as well as FINRA's subsequent denial of an application for you to associate with another member firm. The Commission dismissed your appeals because they were untimely as they were filed more than three years after you initially were sanctioned and more than a year after FINRA denied your application to associate with another firm. In reaching this decision, the Commission determined that there was no merit in your arguments attempting to justify your late-filed appeals. Your motion for reconsideration under Rule 470 of the Commission's Rules of Practice also was denied. It is our understanding that you have since appealed the SEC's decision to the U.S. Court of Appeals for the Eleventh Circuit, and that court, not FINRA, will make any determinations about the merits of your attempt to file a late appeal. The Ombudsman's Office does not have the authority to influence or overturn decisions made in any of these forums.

### **New Member Application and Form MC-400 Eligibility Proceedings**

The third issue you have raised with the Ombudsman's Office relates to your New Member Application and MC-400 Filing submitted to FINRA. It, first, is our understanding that you are frustrated that the review of your MC-400 filing has been postponed until a decision on the New Member Application (NMA) you have filed has been rendered. Although persons subject to disqualification may request permission to enter or remain in the securities industry, it is this office's understanding that such person, pursuant to Procedural Rules 9520-9527, must be sponsored by a member firm. Because you have elected to apply for readmission to the securities industry by associating with an entity that is just applying for membership, it makes sense to this office that your MC-400 application will not be reviewed until a decision on the NMA has been made. The Ombudsman's Office will not impose itself into this process.

Second, you repeatedly have requested specific guidance about the criteria used in evaluating NMAs and MC-400 filings and have complained that FINRA staff has failed to respond to such requests. Yet a review of the record reflects that FINRA staff explained in its letter dated August 5, 2010, that an application for FINRA membership is and will be evaluated against the criteria set forth in NASD Rule 1014. Please refer to Rule 1014 for those specific standards, as well as the other rules in the 1000 series for the timelines established for processing a New Member Application.

### **Allegations of Potentially Illegal or Unethical Activity by FINRA Member Firms**

The fourth issue you have raised in your communications with this office have related to alleged misconduct by firms or individuals subject to FINRA regulation. As noted above, the Ombudsman's Office is an informal resource. FINRA already has many programs and procedures in place for solving problems, resolving disputes, handling complaints and addressing concerns. The Office is not intended to replace already existing FINRA processes or programs. Where established procedures currently exist regarding the application of rules, policies, procedures or interpretation, the Office will direct the complaint to the appropriate department and monitor the outcome, if necessary. In accordance with this practice and policy, we have referred each complaint you have raised identifying potentially violative conduct by member firms to the Office of the Whistleblower. Please note that FINRA will refer any whistleblower tips that fall outside its jurisdictional reach to the appropriate regulatory or law enforcement agencies.

It is FINRA's longstanding policy not to comment publicly about examinations, investigations or enforcement actions that are contemplated or underway against members firms or its associated persons. This policy also applies to the source of a tip or complaint. We, therefore, are unable to provide you with any updates or status reports related to the complaints you raised with the Ombudsman's Office. As we discussed on August 24, 2009, and during other conversations, final resolution with regards to complaints brought to the Office of the Whistleblower might not be reached for several months, at which time, a public statement may or may not be made, depending on the circumstances.

\* \* \* \* \*

**Please consider this as a final response to any future communications from you to the Ombudsman's Office concerning these and any related-matters.**

Cindy Foster  
Vice President & Ombudsman  
FINRA  
240.386.6266 (office)  
202.459.3178 (mobile)  
[cindy.foster@finra.org](mailto:cindy.foster@finra.org)

Confidentiality Notice: This email, including attachments, may include non-public, proprietary, confidential or legally privileged information. If you are not an intended recipient or an authorized agent of an intended recipient, you are hereby notified that any dissemination, distribution or copying of the information contained in or transmitted with this e-mail is unauthorized and strictly prohibited. If you have received this email in error, please notify the sender by replying to this message and permanently delete this e-mail, its attachments, and any copies of it immediately. You should not retain, copy or use this e-mail or any attachment for any purpose, nor disclose all or any part of the contents to any other person. Thank you

# **EXHIBIT 7**

---

**From:** Menchel, Marc [mailto:Marc.Menchel@finra.org]

**Sent:** Thursday, August 19, 2010 8:42 AM

**To:** Manuel P. Asensio-Garcia

**Cc:** Reid, Allison; Lee, Lorraine; Jannace, William; Foster, Cindy; Anthony Sarver; Sibears, Dan; Lawhead, Alan

**Subject:** RE: Final Decision on a.) Scope of Review, b.) process and c.) compliance with deadline under 1014(c)(3) pertaining to MC-400 decision.

Dear Mr. Asensio:

Your email misstates the NMA and MC-400 process and your actions in frustrating that process.

FACT:

You have chosen to apply for readmission to association with a member, which you must do because you are subject to a bar, which in turn makes you subject to a statutory disqualification under the federal securities laws and our rules. Unfortunately, since your application is tied to an entity not yet a member with FINRA, the order of functions is that first we must decide that new membership application (NMA) and then determine the MC-400 application. There are standards for both processes found in a combination of rules, federal law and litigated decisions in these matters.

FACT:

You have chosen to literally inundate Member Regulation with reams of documents that do not further NMA. Rather you have chosen to re-litigate in your documents the disciplinary decision that led to your bar, which the SEC recently decided not to revisit as a matter of discretion once the time to appeal the decision had already lapsed. This tactic has frustrated your own NMA because these documents are being reviewed to see if they contain relevant information needed to evaluate the NMA. The passage of time is due solely to your actions.

FACT:

It is your misguided view that your allegations concerning the bar are inextricably tied to any further FINRA decision on your NMA or MC-400. This is because in your view the bar is evidence of malice and bias against you by FINRA. Perhaps that is an unremarkable view by any disciplined person, but you chose not to timely appeal the decision to the SEC and the SEC, after receiving these allegations, chose not to grant discretionary further review to final SRO disciplinary action. At this juncture the matter is legally closed and will not be considered by FINRA in any other applications you make to FINRA. Simply put, these allegations have no further relevance irrespective of your assertion to the contrary. To the extent you rely on them in your applications, it simply confuses the applications, or worse, renders those applications deficient because you have not addressed relevant matters to the applications. A claim that FINRA is acting without due speed when you frustrate the application process naturally lacks any merit.

FACT:

We do not know what the outcome of the MAP and MC-400 will be, and we may never know if you do not first complete the MAP application in a manner confined to the relevant information, but your assumption in your email of denial and appeal to the NAC as adding "unfair delay" is an argument that stands procedure on its head. By that reasoning all denials are unfair because they leave applicants with appeal to the NAC; consequently the only way to avoid this manifest unfairness is to approve all applications. I have no doubt you understand the specious nature of that reasoning.

FACT:

FINRA has demonstrated no bias or malice against you. FINRA does consider all MC-400 applications and has allowed persons subject to a statutory disqualification to re-associate with a member. The hurdle with respect to all persons who have been barred is very high because a bar is the strictest sanction applied in the most egregious circumstances. MAP applications that have been denied by Member Regulation have in the past either been remanded back to Member Regulation for further consideration or overturned by the NAC.

The strategy and tactics being applied in your applications is not lost on us, but I can only assure you that they will not be entertained by FINRA. Rather, we will handle those applications in the appropriate manner and in light of the relevant information. To the extent your actions frustrate that process, you will be left with the sole responsibility for any impact on the resulting drag on our ability to act as timely as we might if your responses were confined to the relevant information.

Sincerely,

Marc menchel

---

**From:** Manuel P. Asensio-Garcia [mailto:[mpa@millrockllc.com](mailto:mpa@millrockllc.com)]

**Sent:** Wednesday, August 18, 2010 7:03 PM

**To:** Menchel, Marc; Lawhead, Alan

**Cc:** Reid, Allison; Lee, Lorraine; Jannace, William; Foster, Cindy; Anthony Sarver; Sibears, Dan

**Subject:** Final Decision on a.) Scope of Review, b.) process and c.) compliance with deadline under 1014(c)(3) pertaining to MC-400 decision.

August 18, 2010

Dear Mr. Callery:

We have spoken to the SEC's appeal division concerning a stay of the court's review of its decisions pending FINRA's decisions on ACO's NMA and MC-400.

I was directed to speak to the deputy secty who has instructed me on how to initiate the process. I believe that the SEC will agree to consider our request and grant it. A denial would be reviewed by the court. Things are not going well between me and FINRA. In fact we aren't being attended to and decisions are as expected going against us. Most importantly, FINRA's has not stated if it will review and make decisions that the SEC stated we had not brought before FIRNA earlier, and which FINRA's Office of General Counsel has said in its SEC filings saw no reason why it should conduct such a review.

It is important for us to communicate to the commission in our request for a stay on FINRA's conduct towards us. The lack of communications on these top level matters central to the applications show our futility presumption to be reasonable and well grounded.

We believe that FINRA is now required to make a determination on its review as a result of our NMA and MC 400 filings. Our initial request for a response to this matter was first made June 28<sup>th</sup>. We have also made a filing of the pending issues that FINRA must decide with Ms. Foster's office.

Ms. Reid has advised us on August 18, 2010 that the decision on the MC 400 will not be made until after the NMA decision is rendered. This creates a circular process where FINRA can deny the NMA I will be forced to appeal to the NAC and the SEC,

and possibly the appeals court, still be required to file an MC 400 many years after even if I succeed with an appeal. This is not only unfair but is also not covered under FINRA's rules.

**I note that FINRA's NAC took a year and half to decide the bar.**

In this regard, finra has not provided us with a rule concerning the consolidation of the SD review part of the NMA and MC400 applications or whether it intends to hear this case twice, once in the nma under 1014a's standards and again mc400 [where finra's lacks standards is an issue], and whether it agrees that it is required to comply with requirement under 1014(c)(3) to decide both the NMA and MC 400 by December 15, 2010. Again it would be unfair to

Absent a response, in order to rebut a possible "show of good cause" objection to our written request to FINRA's Board to require a final decision by December 15, 2010, we will file a response to FINRA's initial request for additional this week.

An appeal to the subcommittee[s] and the NAC decision[s] will unfairly add to the delay. So we would like to agree on how FINRA's SD and NMA staff will issue their decisions to allow for a fair and prompt NAC review. Given that this matter has been under litigation since 2004 and the pending reviews at the SEC and U.S. Court of Appeals we believe we are entitle to a prompt and expeditious final decision.

We have offered to accept a denial of both application on an expedited basis, based on our presumption (absent any indication to the contrary, of which there has been none) that FINRA's Legal and Regulatory Deficiencies (as defined) make the applications futile.

FINRA prefer to refuse to make this decision and provide me with a prompt notice, perhaps we should agree to have our differences heard by the commission. Given FINRA lack of communications I respectfully request a the close of business, Tuesday, August 24<sup>th</sup>.

I am available to everyone at FINRA at all times. Thank you.

Confidentiality Notice: This email, including attachments, may include non-public, proprietary, confidential or legally privileged information. If you are not an intended recipient or an authorized agent of an intended recipient, you are hereby notified that any dissemination, distribution or copying of the information contained in or transmitted with this e-mail is unauthorized and strictly prohibited. If you have received this email in error, please notify the sender by replying to this message and permanently delete this e-mail, its attachments, and any copies of it immediately. You should not retain, copy or use this e-mail or any attachment for any purpose, nor disclose all or any part of the contents to any other person. Thank you

# **EXHIBIT 8**

---

**From:** Menchel, Marc [mailto:Marc.Menchel@finra.org]

**Sent:** Friday, September 03, 2010 11:10 AM

**To:** Amy Apostol

**Cc:** Lawhead, Alan; Sibears, Dan; Calo, Guy; Reid, Allison; Manuel P. Asensio-Garcia

**Subject:** RE: Manuel Asensio NMA Application

Dear Ms. Apostol

We have reached an end in this matter. The reasoning relating to the bar is contained in the NAC decision in the matter and is no longer subject to discussion as it is a final determination absent an appellate court of competent jurisdiction deciding otherwise. As that has not happened as of the filing of the application for membership and for re-association with a member, it is a fact in the matter and not one open for further discovery, assertion and allegation or characterization of the sanction. Furthermore a person subject to a statutory disqualification, which status in this matter is a fact under the federal securities laws and not open to further discovery, assertion and allegation or characterization, may only seek to re-associate with a member. ACO is not a member, but, rather, a person seeking membership. Your client has chosen that course for the MC-400 petition, but it does not follow that it therefore devolves upon him the right to demand a process for conflating the MAP and MC-400 process.

To the contrary, the course charted by Mr. Asensio means a certain order of operations must ensue. First, Member Regulation must determine whether ACO may become a member; since your client seeks to re-associate with an entity not yet a member, the MC-400 cannot be considered before there is a member with which to re-associate. Bundled within the MAP determination is the fact that ACO would, upon entry to membership, be associated with a statutory disqualified person (Mr. Asensio) making that entity immediately subject to statutory disqualification as a matter of black letter law, not interpretation. *See* Securities Exchange Act Section 3(a)(39)(E), stating, in substance, that person is subject to statutory disqualification for membership in a self-regulatory association (SRO) if that person has associated with him any other person who has been barred from membership. You are free in your application to argue about the law and these facts, but those arguments do not present you with unique rights to re-litigate facts that are matters of final SRO determination and which are no longer subject to appeal (if they were subject to appeal, it would of course follow that such appeal would need to be resolved before such final matters of SRO determination were subject to any modification). Once it is determined whether or not ACO may be admitted to membership then the MC-400 application can be determined. This is obviously the case because until there is a member with which to re-associate, the application for re-admission fails on its face because the applicant is not seeking re-admission with a member, a necessary element of the application.

It is understandable that in response to these clear explanations of law and process, the tactic being employed in response are vague accusations of lack of process and prejudice rather than substantive law and rules. But employing this tactic does not disguise that it is without merit nor does it confer upon the regulator the obligation to respond to every argument that, at the end of the day, amounts to no more than a ruse.

This last response is extended to you as a courtesy because of your recent appearance in these matters as counsel. But it is our last response. You may choose to respond or not respond further within the MAP/MC-400 process but we have not and will not credit your arguments that our rules, process, determination of the status of Mr. Asensio as barred, failure to examine the statutory disqualification, or failure to iteratively respond to erroneous and random matters of further discovery, assertion and allegation (as to process or substance) or characterization of the sanction has frustrated your ability to comply with either the MAP or MC-400 process.

Sincerely,

Marc Menchel

---

**From:** Amy Apostol [REDACTED]  
**Sent:** Thursday, September 02, 2010 7:00 PM  
**To:** Menchel, Marc  
**Cc:** Lawhead, Alan; Sibears, Dan; Calo, Guy; Reid, Allison; Manuel P. Asensio-Garcia  
**Subject:** Re: Manuel Asensio NMA Application

Mr. Menchel:

Thank you kindly for your prompt response to yesterday's letter. Attached is formal correspondence in reply.

Sincerely,

Amy Waller Apostol

On Thu, Sep 2, 2010 at 2:29 PM, Menchel, Marc <[Marc.Menchel@finra.org](mailto:Marc.Menchel@finra.org)> wrote:

Dear Ms. Apostol

This is in response to your letter to me of September 1, 2010 regarding the above captioned matter on behalf of your client Manuel Asensio. I will not bother with your statements of collateral conversations and other matters as stated in your letter. As many statements from your client has contained irrelevant accusations, misstatements of facts, erroneous conclusions of procedure, regulatory rules and applicable law, it serves no purpose to forensically respond to most of the points in your letters or attempt to adduce the accuracy of conversations you believe to be represented. I will simply state that there is a record in respect of an NMA application and it would help if your client would simply respond to the open questions in that process. Ms. Reid wrote to Mr. Asensio by email on September 1, 2010 referencing open items for response by Mr. Asensio from FINRA staff's July 19<sup>th</sup> letter.

I understand from your letter that you take the position that the ability of your client to respond further in NMA is compromised because FINRA will not entertain further discussion about the nature, basis or legitimacy of Mr. Asensio's status of having been barred in a disciplinary proceeding and, as a result, being subject to a statutory disqualification. In essence you seek to re-litigate the bar as part of the NMA application and/or consolidate the MC-400 application.

I have written to Mr. Asensio on all these matters in the past, but he has apparently chosen to ignore that response. I attach that response to this email for your consideration. It is our position on these matters and irrespective of how often you or your client write to disparate offices within FINRA, it remains our position. We consider those matters closed, it is abundantly clear that without any basis in rule or law your client does not, but we nevertheless expect that the NMA process should move forward because an applicant does not devolve to himself the power to dictate the process and substance of making demands and baseless or irrelevant claims. Rather, it the regulator who must ultimately apply it rules, processes and procedures in the consideration of an application. FINRA does not view the points in your letter as setting forth any defect in FINRA's handling of the NMA application or any deviation from the proper standards or procedures applicable to any NMA application and you are misguided if you believe that we will alter the NMA standards or procedures as a result of your letter and the repetitive other correspondence and phone calls to FINRA presumably placed for the same effect.

Sincerely,

# **EXHIBIT 9**



August 13, 2010

Via Certified Mail/Return Receipt Requested

Asensio & Company, Inc.  
Attn: Manuel Asensio  
747 Third Avenue, 25th Floor  
New York, New York 10017

Re: Membership Continuance Application (MC-400)  
Manuel Asensio, CRD # 1148811

Dear Mr. Asensio,

Financial Industry Regulatory Authority's (FINRA) Registration and Disclosure department is in receipt of an MC-400 application submitted on your behalf via email as a result of your disqualification as defined in Section 3(a)(39) of the Securities Exchange Act of 1934. The disqualification arises from both a FINRA Bar (CAF030067) and subsequent Denial (SD-1702).

The application is deficient in that it failed to include:

1. An original signed and completed MC-400 Application; and
2. A written authorization for FINRA to deduct the non-refundable MC-400 processing fee of \$1,500, and if required, the eligibility hearing fee of \$2,500 from the firm's CRD Daily Account. Please note your account does not contain the necessary funds at this time. For information on how to fund your CRD Daily Account by check, wire transfer or E-Pay, please visit our web site or contact the Gateway Call Center at 301-590-6500.

FINRA cannot initiate eligibility proceedings pursuant to FINRA Rule 9522 until it receives the above referenced documents. If you have any questions regarding the above information, please contact me at (240) 386-5440.

Sincerely,

Chris Dragos  
Manager, Regulatory Review  
Registration and Disclosure  
FINRA

cc: Hans L. Reich, Regional Director  
FINRA, District #10 - New York

Lorraine Lee, Manager, Statutory Disqualification  
FINRA, Member Regulation

# **EXHIBIT 10**

Manuel P. Asensio  
747 Third Avenue, 25<sup>th</sup> Floor  
New York, New York 10017

August 19, 2010

Florence Harmon  
Deputy Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20547

Dear Ms. Harmon:

Thank you for speaking with me yesterday.

Further to our discussion, I would like to move the Commission to agree a stay proceedings at the U.S. Court of Appeals for the Eleventh Circuit for review of the Commission's Orders in Administrative Proceeding File No. 3-13733 ("SEC Proceeding"), pending the outcome of current proceedings at FINRA and any necessary subsequent review by the SEC.

I have caused an entity, Asensio & Company, Inc., to file a New Member Application ("NMA") and a Membership Continuance Application ("MC-400") on my behalf in order gain readmission to FINRA and to seek relief for my grievances with my FINRA bar sanction. I would like to stay the proceeding at the Court of Appeals pending the outcome of the NMA and MC-400. The issues adjudicated will be substantially, if not completely, the same as those presented in the SEC Proceeding. Also, in the event that FINRA approves the NMA and MC-400, the appeal of the SEC Proceeding will be unnecessary. Thus, I believe it is in the interest of preserving Commission and judicial resources to stay the appeal proceeding.

I would like to advise the Commission of my intent to seek a stay of the appeal, and to determine if the Commission would agree with a stay, prior to my filing a formal motion with the Court. Please advise me of whether this letter will suffice that purpose, or whether I should undertake some other process or procedure.

Since our conversation I received notice of two FINRA decisions that require the Commission's attention. (See attached correspondence.) In the first decision, FINRA has advised me that the NMA will be adjudicated prior to the MC-400. If the NMA is denied, the MC-400 will not be adjudicated. This has the potential to cause a very protracted multi-year process for receiving a determination on my membership application and any subsequent review by the Commission or Court of Appeals. For example, according to FINRA, if FINRA were to deny my NMA, and upon review by the Commission or Court of Appeals, FINRA's determination were reversed or remanded leading to approval of the NMA, then I would begin the MC-400 process at FINRA and may need to seek separate review of FINRA's determination on that application. FINRA's proposed process would require two hearings and two decisions under two different sets of standards adjudicating the same case. Notwithstanding the fact that FINRA has no rules that

Ms. Harmon  
August 19, 2010  
Page 2 of 2

have been approved by the Commission that allow this process. from my experience with FINRA proceedings, I believe this process could take as much as six years. I believe it is in the interest of a fair and orderly administration of FINRA's membership application process, and consistent with the public interest, for FINRA to evaluate the NMA and MC-400 concurrently.

FINRA's Member Regulation and Office of General Counsel have explicitly refused to engage in discussions to consider alternatives to the process it has envisioned, i.e. the consecutive evaluation of the NMA and MC-400. The Commission's Dismissal Order notes the availability of FINRA's membership process allowing for the adjudication of my grievances. I therefore would like to move the Commission for an order to address my grievances with FINRA's lack of rules and interpretation, in this instance, apart from seeking Commission review of FINRA's final determination on the NMA, followed by a separate review years later of the same case after FINRA's final determination on the MC-400.

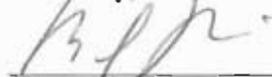
In the second decision, Marc Manchel, FINRA's Executive Vice President and General Counsel for Member Regulation, states in the attached email that "the SEC recently decided not to revisit [the bar sanction and MC-400 denial] as a matter of discretion once the time to appeal the decision had already lapsed....At this juncture [this] matter is legally closed and will not be considered by FINRA in any other applications you make to FINRA. Simply put, these allegations have no further relevance irrespective of your assertion to the contrary. To the extent you rely on them in your applications, it simply confuses the applications, or worse, renders those applications deficient because you have not addressed relevant matters to the applications." FINRA also used this interpretation of the Order in its objection to my reconsideration motion, which was disallowed by the Commission. Thus FINRA has announced its decision to ignore all of the argument that the SEC refused to review based in part of the existence of a process at FINRA for adjudicating my grievances.

These are FINRA staff decisions with the force of NAC decisions. Furthermore, FINRA has no process for me to obtain a NAC decision on these to matter that I can bring to the Commission. Finally, they were both made by the members of FINRA's staff that the NAC exclusively would rely upon to make its own supposed determination.

These two FINRA decisions shows that FINRA has refused to review the merit of the case that the Commission dismissed in part under that premise that FINRA has a process that allows for the review it refuse to conduct. This plainly necessitates a Commission decision.

I very much appreciate your assistance with these matters.

Sincerely,



Manuel P. Asensio

cc: T. Grant Callery  
Executive Vice President and General Counsel



evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate.

The evidence sought to be adduced pertains to matters considered by the SEC in the proceedings below, specifically a separate proceeding before the Financial Industry Regulatory Authority, Inc. (“FINRA”), the adequacy of FINRA and SEC procedures to grant the relief sought by Petitioner, and the futility of proceedings at FINRA, arising from FINRA’s bias against Petitioner and the considerable discretion afforded to FINRA by the SEC.

The evidence sought to be adduced establishes that FINRA is biased against Petitioner, at both the highest level, that of FINRA’s Board of Governors and Office of General Counsel, and at a lower level, that of FINRA staff responsible for adjudication of membership and eligibility applications. The evidence also establishes that any proceeding before FINRA for Petitioner to seek relief from a bar sanction imposed by FINRA is and will be futile, even where subject to SEC review – a conclusion based upon FINRA having shown such a strong and pervasive bias and malicious intent against Petitioner. In this case, the SEC and FINRA together have each evidenced a willingness and disposition to manipulate rules, procedures, and statutory requirements in order to harass and otherwise discourage Petitioner by

denying him access to membership procedures and merits-based review, while also insisting that Petitioner must subject himself to FINRA and SEC proceedings to seek relief and denying him the right to seek relief in court.

Petitioner repeatedly raised the issue of futility in pleadings before the SEC. The SEC declined to address futility substantively in the orders in this case. The necessity of the Court taking action in this case hinges on the futility for Petitioner of FINRA proceedings and SEC review of FINRA proceedings, especially where the SEC has demonstrated a disposition to manipulate its procedures to deny merits-based review and create circuitous and futile procedures for Petitioner to seek relief.

The evidence in the Exhibits could not be adduced previously because it arose after the SEC entered the orders that are the subject of the instant petition for review. Nonetheless, the evidence pertains directly to a proceeding and issues considered and by the SEC. The SEC should reasonably have reached a different conclusion based on this evidence. Petitioner sought a separate SEC review of the FINRA actions, but the SEC has refused to conduct a review.

For these reasons, as further explained below, the Court should allow Petitioner to adduce the evidence in the attached Exhibits. In the event the Court grants leave to adduce additional evidence, the Court should remand this case to the

SEC in accordance with the provisions of 15 U.S.C. § 78y(a)(5) with instructions to conduct a merits-based review of the relevant FINRA decisions together with the new evidence, based upon the SEC having failed to adequately consider issues raised below, especially futility, by not allowing briefing, which is necessary for any fair proceeding to determine if FINRA's procedures were used in a way that is counter to its statutory purpose and unfair to Petitioner.

**Factual Background:**

On August 20, 2010, Petitioner filed two Petitions for Review with this Court, seeking review of two final orders of the SEC, an Order Granting Motion to Dismiss Application for Review,<sup>1</sup> dated June 17, 2010, and an Order Denying Motion for Reconsideration,<sup>2</sup> dated August 4, 2010, both such orders relating to SEC review of two decisions by FINRA. On November 15, 2010, Petitioner filed with the Court a Motion to Consolidate Petitions for Review, which the Court granted.

FINRA is a self-regulatory organization (“SRO”) as defined in Section 3(a)(26) of the Exchange Act, 15 U.S.C. § 78c(a)(26), and registered securities

---

<sup>1</sup> Exchange Act Release No. 62315.

<sup>2</sup> Exchange Act Release No. 62645.

association under Section 15A of the Exchange Act, 15 U.S.C. 78o-3.<sup>3</sup>

Petitioner was associated with FINRA member broker-dealer firms from 1982 to 2003. From 1993 to 2003, Petitioner was the principal and control person of a unique FINRA member firm (II, Vol. 2, Doc. 184). Petitioner specialized in short-selling research, trading, and advocacy of investor protection, including against the American Stock Exchange (“AMEX”), then owned by FINRA (II, Vol. 2, Doc. 172). In the course of these activities, Petitioner exposed numerous instances of outright stock fraud, the actions of major broker-dealer firms to support such stock fraud, and the regulatory deficiencies that enabled such stock fraud. Petitioner’s securities activities caused controversy, attracted significant attention from the press, and attracted investigative attention from FINRA. FINRA’s investigations of Petitioner included interactions with FINRA’s highest level executives who were adversely affected by Petitioner’s pro-investor work that was directly counter to their financial interests.

Petitioner is subject to a bar sanction imposed by FINRA under a decision of

---

<sup>3</sup> In July 2007, FINRA was formed through the merger of the National Association of Securities Dealers, Inc. (“NASD”) and the regulatory arm of the NYSE Group, Inc. For clarity, the name FINRA is used throughout this motion in reference to both FINRA and NASD, except in reference to rules still designated NASD rules.

FINRA's National Adjudicatory Council ("NAC") dated July 28, 2006.<sup>4</sup> The NAC barred the Petitioner from associating with any member firm, based upon a finding that Petitioner violated FINRA Rule 8210, which obligates FINRA members and associated persons to respond to requests for information by FINRA staff. The bar sanction did not proceed from any alleged infraction that was the subject of the investigation, nor from any alleged investor harm. The investigation and disciplinary proceeding underlying the NAC decision commenced in 2003. The FINRA bar sanction renders Petitioner subject to "statutory disqualification" under 15 U.S.C. § 78c(a)(39)(A).

In September 2007, a FINRA member firm filed a membership continuance application ("MC-400") on behalf of Petitioner, seeking for FINRA to allow Petitioner to associate with the firm notwithstanding Petitioner's statutory disqualification. By decision dated August 12, 2008,<sup>5</sup> the NAC denied the MC-400, concluding that "it is not in the public interest, and would create an unreasonable risk of harm to the market or investors" for Petitioner to become associated with a FINRA member firm, despite the facts surrounding Petitioner's work having substantially aided investor protection (II, Vol. 2, Doc. 174) and

---

<sup>4</sup> Decision No. CAF030067 (I, Vol. 4, Doc. 127, p. 2709).

<sup>5</sup> Decision No. SD-1702 (the "2008 MC-400 Decision"), (I, Vol. 6, Doc. 144, p. 3693).

Petitioner not having been the subject of a customer complaint throughout his career.

In January 2010, the SEC determined to accept certain letters from Petitioner to SEC staff as an application for review of both FINRA decisions pursuant to 15 U.S.C. § 78s(d) and Rule 420 of the SEC's Rules of Practice, 17 C.F.R. § 201.420 ("Rule 420"), (II, Vol. 1, Doc. 145). The letters did not request a Rule 420 review. The SEC thus created an unasked-for proceeding. The letters-deemed-to-be-an-application included statements that FINRA's "deficiencies negate the purpose of any appeal [i.e., Rule 420 review] in [Petitioner's] case" (II, Vol. 1, Doc. 145(a), p. 4).

In the proceeding before the SEC, Petitioner advised the SEC that Petitioner had formed a firm, Asensio & Company, Inc., to apply for FINRA membership through a new member application ("NMA") and had caused such firm to file an MC-400 to allow Petitioner to associate (II, Vol. 3, Doc. 203). FINRA Rule 9522, governing the initiation of an MC-400 eligibility proceeding, obligates a member firm or an "applicant for membership under NASD Rule 1013," to initiate an MC-400 proceeding. NASD Rule 1013 governs the filing and content of an NMA. Petitioner submitted a finalized NMA to FINRA on June 17, 2010, and submitted a finalized MC-400 to FINRA on June 28, 2010.

Prior to the SEC proceeding, senior staff-persons from both the SEC and

FINRA referred to the MC-400 process as the only route available for Petitioner to seek relief from the FINRA bar sanction (II, Vol. I, Doc. 147(v), (w), and (ee)).

When Petitioner learned that FINRA rules actually contemplate the filing of an NMA in conjunction with an MC-400, where the applicant for membership acts as sponsor of the MC-400, Petitioner prepared and filed such applications with FINRA.

Thereafter, FINRA foreclosed access to the MC-400 process for Petitioner, terminating Petitioner's opportunity to object to FINRA use of the bar to deny him membership without review. FINRA took this action without giving any explicit acknowledgement of, or explanation for, such action. **Exhibit 1** contains a letter dated September 8, 2010 from counsel retained by Petitioner to FINRA discussing this and other procedural defects and irregularities in FINRA's handling of Petitioner's NMA and MC-400 by FINRA. The September 8 letter shows that FINRA staff handling the NMA did not provide guidance or explanation on the handling of the MC-400, except to say that the MC-400 would be evaluated "upon conclusion of the NMA process" without explanation. The letter also establishes that Petitioner did not receive any correspondence from FINRA's statutory disqualification group, the FINRA staff responsible for evaluation of the MC-400. Indeed, the statutory disqualification group failed to provide notice required of it in

FINRA Rule 9522.

The September 8 letter also indicates that Petitioner believed, based upon certain correspondence between FINRA executives and Petitioner, that FINRA's procedure foreclosing review of the MC-400 resulted from improper influence by certain FINRA executives on FINRA adjudicatory staff. The letter sought interlocutory review, which was denied by Marc Menchel of FINRA's Office of General Counsel in an email dated September 8, 2010. *See Exhibit 2.*

Three months after Petitioner filed an NMA in conjunction with an MC-400, and despite the fact that FINRA staff had not yet rendered decisions on either of the applications, FINRA's Board of Governors decided to amend FINRA's rules to preclude anyone from ever being allowed to file an NMA in conjunction an MC-400. *See* FINRA's public announcement dated September 28, 2010, from Richard Ketchum, FINRA's chairman and chief executive officer, contained in **Exhibit 3.**

FINRA then filed a proposed rule amendment with the SEC dated November 1, 2010 seeking changes to FINRA Rules on NMAs and MC-400s, and creating a new rule specifying that FINRA "shall reject an application for membership with FINRA pursuant to NASD Rule 1013 in which either the applicant or an associated person... is subject to a statutory disqualification." *See* Proposed Rule Change File No. SR-2010-056. The SEC issued a Notice of Filing of Proposed Rule Change on

November 15, 2010, Exchange Act Release No. 34-63316, substantially the same as FINRA's filing.

Petitioner sent a letter to the FINRA Board of Governors dated November 6, 2010. *See Exhibit 4.* Petitioner accused the Board of acting improperly, by voting to amend FINRA's rules in response to Petitioner's applications while adjudication of such applications was ongoing. Petitioner accused the Board of ensuring that Petitioner's applications will not receive fair and unbiased treatment. Petitioner also reasoned that the Board had the motive of seeking to use the rulemaking retroactively in appellate litigation on Petitioner's applications.

Petitioner sought review by the SEC surrounding both the action by FINRA staff in the handling of the applications and the action of FINRA's Board to amend FINRA's rules. The letter seeking such review is attached as **Exhibit 5**. Review was denied by the SEC's Office of the Secretary by email dated December 9, 2010, attached as **Exhibit 6**.

The decision of FINRA staff on Petitioner's NMA, dated December 14, 2010, is attached as **Exhibit 7**. FINRA denied the NMA on the basis that Petitioner "is the subject of disciplinary events and permanent bar which demonstrate that the [firm] and [Petitioner] do not satisfy NASD Rule 1014(a)(3)." *See Exhibit 7 at 2.*

FINRA states in the decision,

[Petitioner] is statutorily disqualified from associating with a member firm and FINRA will not, through the new membership application process, render a decision that is inconsistent with that Permanent Bar. Staff further notes that the NMA process is not the mechanism for redressing a decision rendered by a FINRA Hearing Panel, the NAC, or the SEC [footnotes omitted]. *Id.* at 2.

In FINRA's prior decisions in Petitioner's case, the word *permanent* was not used to describe Petitioner's bar sanction. The NMA decision also refers to Petitioner's "repeated failures to comply with federal securities laws." *Id.* at 5. Petitioner has never been the subject of an investigation, complaint, or proceeding related to any alleged violation of federal securities laws. The decision does not mention that FINRA's has a "mechanism" for redressing a decision rendered by a FINRA Hearing Panel, the NAC, or the SEC in the MC-400, or that FINRA foreclosed access to this process, contrary to the explanation of procedure FINRA staff gave Petitioner and his consultant prior to the filing.

**Argument:**

This case concerns the wrongful actions of a private regulator against an individual who aided investors by exposing stock fraud and by exposing misconduct by the same private regulator, FINRA, that harmed investors. FINRA pays its executives multi-million-dollar salaries and engages in for-profit activities, such as

FINRA's purchase and sell of the AMEX, that are central to the conflicts between FINRA and the Petitioner.

The Exhibits show that FINRA has improperly denied Petitioner a merits-based review of Petitioner's grievances with the FINRA bar sanction in a manner that will foreclose all meaningful review of such grievances in appellate administrative procedures. FINRA accomplished this through both rulemaking and unannounced adjudicatory actions. FINRA's actions illustrate that FINRA's procedures are futile for Petitioner, owing to FINRA's strong and pervasive bias and malicious intent against Petitioner, as illustrated clearly in the evidence sought to be adduced.

FINRA's actions are relevant to a review of the SEC's orders in this case because the SEC proceeding arose from Petitioner's complaints to SEC staff that FINRA and SEC procedures could not address Petitioner's grievances with the FINRA bar sanction, owing in part to the considerable discretion and deference afforded to FINRA by the SEC. The FINRA actions detailed in the Exhibits not only confirm the futility of FINRA procedures, but also show that FINRA will engage in procedural manipulations counter to its own rules, along with changing its rules in the midst of an adjudication, solely in order to improperly deny Petitioner a merits-based review.

The SEC similarly denied Petitioner a merits-based review and shown it has no interest in taking the Petitioner's grievances seriously. The SEC implied in the orders that Petitioner should raise arguments before FINRA prior to raising such arguments before the SEC. Separately, both SEC and FINRA staff referred Petitioner to FINRA's MC-400 process as a sole avenue for relief (II, Vol. I, Doc. 147(v), (w), and (ee)).

When Petitioner filed an MC-400, a merits-based review was foreclosed by FINRA's unannounced procedural manipulation to condition review of the MC-400 upon approval of the NMA. In the NMA decision, FINRA refused to examine many arguments and issues raised by Petitioner, noting that the NMA process was "not the mechanism" for such relief, all while FINRA foreclosed access to the only process, the MC-400, that could provide some relief. FINRA did not disclose its procedural decision in the NMA decision, foreclosing review of the procedural decision in any appeal to the SEC. Likewise, the Board's action to amend FINRA's rules is not discussed in the NMA decision. There is no separate administrative appeal procedure for review of the FINRA Board's rulemaking action. FINRA's actions have foreclosed all meaningful review. Petitioner made the SEC aware of these actions, yet the SEC has declined to conduct a review.

Petitioner is asking this Court to take action because procedural

manipulations by FINRA and the SEC have created a system to deny the Petitioner of a review and rendered administrative procedures futile in this case. Futility is especially demonstrated in the evidence sought to be adduced in the Exhibits. FINRA has shown that it will manipulate procedures under its own rules and change its rules in order to prevent Petitioner from obtaining a merits-based review of FINRA's actions against him. The SEC has also attempted to foreclose merits-based review through the creation and instigation of futile, circuitous proceedings and its dismissals.

After Petitioner went to the considerable expense of time and funds to prepare and file applications, both FINRA's Board and staff ensured that the applications would be denied regardless of their content. The SEC affords considerable discretion to FINRA in membership and eligibility determinations, as demonstrated in the proceeding below and as confirmed by SEC staff in the record. The SEC refused to review the actions of FINRA's Board in relation to Petitioner's applications and the procedural manipulations by FINRA staff. *See Exhibits 5 and 6.* The SEC has also refused to move forward in any way on a FINRA rule proposal submitted by Petitioner in January 2010 to address FINRA's deficiencies.

The SEC proceeding arose from Petitioner complaining to SEC staff, in part, that FINRA conducted its MC-400 process unfairly in Petitioner's case and that the

SEC appeal procedure was an ineffective remedy due to the considerable discretion afforded to FINRA by the SEC. In pleadings, Petitioner complained that the MC-400 process was futile for Petitioner due to FINRA's bias against Petitioner, the considerable discretion afforded to FINRA by the SEC, and FINRA's ability under its own rules to render decisions that comport with "unreasoned decisionmaking," which is evidenced in the 2008 MC-400 Decision (II, Vol. 2, Doc. 183). Petitioner also argued that the SEC should conduct a review because alternative avenues for relief (other than through FINRA's MC-400 process) are foreclosed, as FINRA has usurped membership decision-making for other SROs, and the SEC has allowed and encouraged this expansion of FINRA's authority (II, Vol. 3, Doc. 194).

The actions of FINRA related to Petitioner's applications demonstrate the futility described by Petitioner in the SEC proceeding. FINRA staff is willing to manipulate procedures under FINRA's rules, and the FINRA Board is willing to amend FINRA's rules – all solely in order to deny Petitioner access to the MC-400 process and the incumbent review of Petitioner's grievances and contentions that the bar sanction is unwarranted in law and unjustified in fact.

Under FINRA staff's procedural manipulation of conditioning evaluation of the MC-400 upon approval of the NMA, FINRA refused to review Petitioner's MC-400 and thereby denied the NMA without review of relevant facts and

arguments. The FINRA staff responsible for the MC-400 have refused even to acknowledge receipt of Petitioner's MC-400, despite it having been properly served *twice*. It is only the MC-400 that could give Petitioner some relief from the sanction. The Petitioner's NMA has been denied on the basis of a presumption of denial for an NMA where an associated individual is subject to statutory disqualification. Thus, any appeal of the NMA decision to FINRA's NAC or to the SEC will only address the question of the presumption of denial. It will not speak to whether Petitioner should be allowed to associate notwithstanding the statutory disqualification or provide a forum to address Petitioner's attacks upon the presumption, the bar sanction, or procedural defects. FINRA has shown in the 2008 MC-400 Decision that it will discard arguments against a sanction made in an MC-400 as a "collateral attack." Therefore, the administrative procedures approved by the SEC will not allow for a review of Petitioner's fitness to associate through the NMA, though FINRA rules as they exist should have allowed for such a review with the NMA and MC-400 being evaluated in tandem.

In an appeal to SEC of FINRA's NMA decision, Petitioner might seek to argue that FINRA should have evaluated the MC-400 under the requirements of FINRA's own rules, but the SEC will not be obliged to consider the merits of this issue since it was not addressed in the NMA denial.

Therefore, the futility of SEC proceedings to grant relief to Petitioner is fully demonstrated in the evidence sought to be adduced. The SEC did not substantially address the issue of futility in its orders in this case. In the Order Granting Motion to Dismiss, the SEC did not address futility whatsoever, while in the Order Denying Motion for Reconsideration, the SEC only considered the futility of raising bias claims before FINRA. Had the SEC considered the issue of futility fully in light of the evidence sought to be adduced, the SEC should reasonably have reached a difference conclusion on whether to conduct a review or make available other relief for Petitioner.

Under *McCarthy v. Madigan*, 503 U.S. 140 (1992), exhaustion of administrative remedies is not required where administrative procedures would be futile or where an administrative body is shown to be biased or has otherwise predetermined the issue before it. *McCarthy* also establishes that “exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself” and that “administrative procedures must not be used to harass or otherwise discourage those with legitimate claims” [internal quotation marks omitted]. *See also Patsy v. Florida International University*, 634 F.2d 900 (1981). The SEC has applied exhaustion doctrine to SRO procedures. *Barbara v. New York Stock Exch.*, 99 F.3d 49 (1996).

The SEC should have determined whether the futility of FINRA proceedings allowed for some alternative avenue for relief. It should particularly do so now that FINRA has demonstrated its bias and the futility of its procedures for Petitioner so clearly. With the SEC's apparent (but not explicitly stated) conclusion that extraordinary circumstances did not exist in Petitioner's case to justify a review, the SEC did not consider whether futility should be considered an extraordinary circumstance, nor did the SEC acknowledge that it has in the past construed "novel facts and legal issues" as extraordinary circumstances. *See MFS Secs. Corp.*, Exchange Act Release No. 47626 (2003).

FINRA's actions at the level of the staff and the Board illustrate that FINRA has predetermined the issue of whether Petitioner should be allowed to associate. FINRA has predetermined that Petitioner should not be allowed access to a merits-based review. Similarly, the SEC's suggestion that Petitioner seek relief through the MC-400 process illustrates SEC and FINRA procedures being used to harass and discourage Petitioner.

In view of the foregoing, the Court should grant leave to adduce the additional evidence in the Exhibits because the evidence is relevant to the SEC's orders and any review of this case. On the basis of 15 U.S.C. § 78y, the Court should remand this case to the SEC upon granting leave to adduce additional evidence with instructions

to conduct a merits-based review of all FINRA decisions in this case together with the action of FINRA's Board and related evidence sought to be adduced.

The SEC has demonstrated its own procedural manipulations in Petitioner's case. The SEC took the extraordinary step of creating an unrequested proceeding by accepting three letters as an application for review, despite Petitioner not having asked for a review in such letters, despite such letters reflecting a belief that an SEC review would be procedurally impossible due to the time constraints of Rule 420, and would be inadequate to address the issues in Petitioner's case. Petitioner proceeded with seeking a Rule 420 review in the absence of any other avenue to relief, as the Commission did not provide any correspondence or other communication indicating that another form of review could be available, despite Petitioner's requests. Petitioner continued to advocate for an alternative for of review, both with SEC staff and with the Commissioners themselves. The SEC used the orders in the proceeding it created to, in part, reiterate certain questionable assertions made by FINRA in its Motion to Dismiss, including that Petitioner lied under oath in a FINRA proceeding, which accusation is an unsubstantiated inference made by FINRA. This shows the SEC using a futile proceeding to harass and discourage Petitioner. Similarly, FINRA staff made the assertion in the NMA decision that Petitioner had shown "repeated failures to comply with federal

securities laws.” FINRA’s statement is simply not true. It is another instance of unwarranted harassment.

The SEC and FINRA have harassed and otherwise discouraged Petitioner from seeking relief for legitimate claims against a bar sanction that was imposed by a private party and that is unwarranted in law and unjustified in fact. The Court should not allow the SEC and FINRA to continue in such conduct.

\* \* \*

For the reasons set forth above, Petitioner moves the Court to grant leave to adduce additional evidence and to remand this case to the SEC with instructions to conduct a merits-based review of both FINRA decisions in this case together with the evidence sought to be adduced.

Respectfully submitted,



---

Manuel P. Asensio, *Pro Se*  
747 Third Avenue, 25<sup>th</sup> Floor  
New York, NY 10022  
(212) 702-8800

Dated: December 16, 2010

**U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

**Manuel P. Asensio v. SEC**

**Appeal No. 10-13811; 10-13784**

**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Alliance for Economic Stability, Inc.

Aguilar, Luis

Apostol, Amy Waller

Becker, David

Calo, Guy

Casey, Kathleen

Cook, Robert

Eastman, James

Financial Industry Regulatory Authority, Inc.

Garawski, Michael

Gottlieb, Marc

Ketchum, Richard

Lawhead, Alan

Lee, Lorraine

Luparello, Stephen

Matthews III, Leavy

Menchel, Marc

Mill Rock Advisors, Inc.

Paredes, Troy

Pasquerella, Jeffrey

Perkins, Andrew

Plotkin, Jeffrey

Punch, Colin

Reid, Allison

Schapiro, Mary

Sibears, Dan

Stovell, Leicester Bryce

Walter, Elisse

## CERTIFICATE OF SERVICE

I hereby certify that on 16<sup>th</sup> day of December, 2010, service of the foregoing Motion of Petitioner for Leave to Adduce Additional Evidence and for Remand to the Securities and Exchange Commission was affected by placing one (1) true and correct copies of the same in the United States mail postage prepaid, addressed to the following:

John W. Avery  
Securities and Exchange Commission  
100 F Street, N.E., Room 8030B  
Washington, DC 20549-8010

  
Manuel P. Asensio

## CERTIFICATE OF SERVICE

I also certify that on 16<sup>th</sup> day of December, 2010, I filed the Motion of Petitioner for Leave to Adduce Additional Evidence and for Remand by causing an original and three (3) copies of same to be delivered by Federal Express, to the Clerk, United States Court of Appeals for the Eleventh Circuit at the following address:

Mr. John Ley, Clerk  
U.S. Court of Appeals for the Eleventh Circuit  
56 Forsyth Street NW  
Atlanta Georgia 30303-3147

  
Manuel P. Asensio