

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the  
Continued Membership  
of

Gates Capital Corporation (BD #29582)

Notice Pursuant to  
Rule 19h-1  
Securities Exchange Act  
of 1934

SD-2203

**Date: November 21, 2018**

**I. Introduction**

On May 17, 2018, Gates Capital Corporation (“Gates,” or the “Firm”) submitted a Membership Continuance Application (“MC-400A” or the “Application”) to FINRA’s Department of Registration and Disclosure (“RAD”).<sup>1</sup> The Application seeks to permit the Firm, which is a FINRA member subject to a statutory disqualification, to continue its membership with FINRA. A hearing was not held in this matter; rather, pursuant to FINRA Rule 9523(b), FINRA’s Department of Member Regulation (“Member Regulation” or the “Department”) is filing this Notice pursuant to Rule 19h-1 of the Securities Exchange Act of 1934 (“Exchange Act”).

**II. The Statutorily Disqualifying Event**

Gates is subject to statutory disqualification, as defined in Exchange Act Section 15(b)(4)(E), incorporated by reference in Exchange Act Section 3(a)(39)(F), as a result of an Acceptance, Waiver and Consent (“AWC”) it entered into with FINRA on May 4, 2018, pursuant to which Gates consented to a finding that it failed to supervise a registered representative in its employ, John C. Fitzgerald (“Fitzgerald”), who willfully violated Municipal Securities Rulemaking Board (“MSRB”) Rules G-17 and G-23.<sup>2</sup>

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<sup>1</sup> See MC-400A, attached as Exhibit 1. See also the Record (“R.”) that was compiled by RAD and provided to the parties and FINRA’s Office of General Counsel on May 31, 2018, pursuant to FINRA Procedural Rule 9524(a)(3).

<sup>2</sup> See R. at FINRA00081.

More specifically, in late March or early April 2013, a California municipality (“Municipality”) retained Fitzgerald to advise it on options for refinancing its outstanding bonds. Then, in August 2013, the Municipality engaged Fitzgerald’s firm, Fitzgerald Public Finance (“FPF”), a division of Gates,<sup>3</sup> to serve as lead banker to underwrite a bond offering the Municipality effected to implement Fitzgerald’s earlier advice.<sup>4</sup> Subsequently, and shortly before the refinancing transaction closed, Gates provided a letter to the Municipality indicating that it and Fitzgerald intended to serve as underwriter and not as a financial advisor or municipal advisor.<sup>5</sup> During this time, Fitzgerald’s supervisor failed to review Fitzgerald’s proposals or supporting documents prior to Fitzgerald providing them to the Municipality, and did not review minutes from Fitzgerald’s presentation to the Municipality’s city council. As a result, FINRA found that Gates failed to reasonably supervise Fitzgerald and that Fitzgerald willfully violated MSRB Rule G-23, which prohibits municipal securities dealers that act as financial advisors on an issuance of municipal securities from simultaneously acting as an underwriter in the course of the same issuance.<sup>6</sup> FINRA also found that Gates violated MSRB Rule G-17, which requires dealers to clearly identify themselves in writing as underwriters of an issue from the earliest stages of their relationship with the issuer.<sup>7</sup>

In addition, FINRA found that Gates violated: MSRB Rule G-8, which requires firms to maintain records of all non-cash compensation; MSRB Rule G-9, which requires firms to preserve the records to be maintained by Rule G-8; and MSRB Rule G-27, which requires firms, among other things, to establish and maintain a system to supervise the municipal activities of each registered representative and associated person of the firm that is reasonably designed to achieve compliance with applicable securities laws and

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<sup>3</sup> FINRA00074 – FINRA00076. The Municipality’s engagement letter, dated August 14, 2013, referred to FPF as “financing team member” and “placement agent” in connection with the refinancing.

<sup>4</sup> FINRA00074 – FINRA00075. Fitzgerald represented to the Municipality in an email that his proposed refinancing strategy would be “in the best interest of the [Municipality].”

<sup>5</sup> FINRA00075 – FINRA00076.

<sup>6</sup> FINRA00073, FINRA00076.

<sup>7</sup> FINRA00073 – FINRA00074, FINRA00076. The intent of MSRB Rule G-17 disclosures is to provide an issuer with clarity throughout all substantive stages of a financing regarding the roles of its professionals, including timely notice to the issuer as to the existence of any conflicts of interest on the part of an underwriter. A dealer that clearly identifies itself in writing as an underwriter and not as a financial advisor from the earliest stage of its relationship with the issuer with respect to that issue will be considered to be “acting as an underwriter” under Rule G-23(b) with respect to that issue. *See also* FINRA00045 – FINRA00046.

regulations, including applicable MSRB rules.<sup>8</sup> These violations stemmed from FINRA's findings that, between April 2013 and May 2015, Fitzgerald used an outside email account which was not hosted or captured by the Firm's email servers to conduct his municipal securities business, and used personal funds to entertain municipal securities customers without the Firm's approval or documentation of such activities.<sup>9</sup> Additionally, Fitzgerald allowed an unregistered family member to work on municipal securities transactions without Firm supervision, including even the determination as to whether the functions performed by this person required registration with the Firm.<sup>10</sup>

Finally, FINRA found that Gates violated MSRB Rule G-27 due to its failure to enforce adequate written supervisory procedures regarding principal reviews of cross trades and fair pricing for municipal securities, because its procedures did not reasonably specify how or when such reviews were to be conducted.<sup>11</sup>

Gates consented to the imposition of a censure, a \$125,000 fine, and a number of undertakings which require it to hire an independent consultant to review the adequacy of its policies, systems and procedures relating to: making timely disclosure, where required, of its role as underwriter in connection with municipal bond transactions; ensuring that its registered representatives do not use outside email accounts to conduct Firm business; supervising the Firm's municipal securities business to ensure that all individuals acting on behalf of Gates are identified and properly registered; creating and maintaining books and records in connection with the municipal securities business expenses of its registered representatives; and reviewing cross trades and fair pricing for municipal securities.<sup>12</sup>

A number of these undertakings will continue for two years from the date of the AWC.

### **III. Background Information of the Firm**

Gates is based in New York, NY, and has been a member of FINRA (f/k/a NASD) since

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

<sup>9</sup> FINRA00077 – FINRA00079.

<sup>10</sup> FINRA00078.

<sup>11</sup> *Id.* at FINRA00044, FINRA00052.

<sup>12</sup> *Id.* at FINRA00052 – FINRA00055. The Firm paid the fine in full on May 18, 2018. *See* the Central Registration Depository ("CRD").

1992.<sup>13</sup> According to CRD, the Firm has 3 branch offices, 1 of which is an Office of Supervisory Jurisdiction, and it employs 11 registered representatives, 6 of whom are also registered principals.<sup>14</sup> The Firm currently employs two statutorily disqualified individuals, both of whom have MC-400 applications pending with FINRA.<sup>15</sup>

The Firm is approved to engage in the following businesses: broker or dealer retailing corporate equity securities over-the-counter; broker or dealer selling corporate debt securities; underwriter or selling group participant (corporate securities other than mutual funds); U.S. government securities dealer; U.S. government securities broker; municipal securities dealer; municipal securities broker; and private placement of securities.<sup>16</sup> Gates is also a member of the MSRB.

#### A. Routine Examinations of Gates

FINRA's most recent cycle examination of Gates concluded in January 2018 and resulted in a Cautionary Action for exceptions related to various rule violations including: payments of transaction-based compensation made to an unregistered corporate entity; failure to enforce its written supervisory procedures that address the review and disclosure of outside business activities of its registered representatives; failure to document and memorialize the testing of its supervisory controls; deficiencies related to the designation and inspection of its branch and non-branch locations; failure to ensure that reportable events were timely disclosed on its registered representatives' Form U4s; failure to timely file an Official Statement for a municipal underwriting; failure to timely update its municipal advisor registration; failure to make its MSRB Rule G-17 underwriter disclosures; and failure adopt adequate written procedures to comply with the Municipal Advisor Rule.<sup>17</sup> Additionally, FINRA determined to take no further action for

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<sup>13</sup> See R. at FINRA00067.

<sup>14</sup> See CRD. This information is current as of August 2, 2018.

<sup>15</sup> James D. Casey ("Casey") and Youngwhi Kim ("Kim") are also subject to statutory disqualification as a result of the AWC. FINRA found that Casey failed to reasonably supervise Fitzgerald's municipal securities activities, fined him \$5,000, and suspended him in all principal capacities for six months, which will end on December 3, 2018. See R. at FINRA00044, FINRA00052. Casey paid his fine in full on May 18, 2018. See CRD. FINRA found that Kim failed both to maintain certain books and records relating to Fitzgerald's municipal securities business expenses and to review Fitzgerald's email. FINRA fined Kim \$5,000 and suspended him in all principal capacities with exception of his Series 27 license for four months, which concluded on October 3, 2018. See R. at FINRA00044, FINRA00052. Kim paid his fine in full on May 15, 2018. See CRD.

<sup>16</sup> *Supra* at Notes 5 and 6.

<sup>17</sup> Examination Disposition Letter, Examination Report, and Gates' Response, 2017 Cycle Examination of

findings related to Gates' failure to make filings with the MSRB for certain municipal private placement transactions, and its failure to disclose certain municipal securities transactions.<sup>18</sup>

FINRA's previous cycle examination of the Firm concluded in July 2016 and resulted in a referral to FINRA's Department of Enforcement ("Enforcement") for exceptions related to Gates' supervision, registration, municipal primary activities, and municipal securities secondary trading.<sup>19</sup> The Enforcement referral resulted in the AWC that triggered Gates' statutory disqualification.

#### B. Regulatory Actions against Gates

Apart from the AWC, Gates has not been the subject of any regulatory actions during the previous two years.

##### *Relevant Regulatory History*

In November 2014, FINRA accepted an AWC from Gates for failing to timely submit accurate information concerning variable-rate demand obligations to the MSRB, and for failing to adopt written supervisory procedures reasonably designed to ensure compliance with MSRB rules.<sup>20</sup> The Firm was censured and fined \$25,000.

#### C. Prior Rule 19h-1 Notices

No prior 19h-1 notices have been filed on behalf of Gates.

### **IV. The Firm's Proposed Continued Membership with FINRA and Proposed Supervisory Plan**

The Firm seeks to continue its membership in FINRA notwithstanding the AWC that

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Gate Capital Corporation, Examination No. 20170524671 (March 21, 2018) (attached as Exhibit 2).

<sup>18</sup> *Id.*

<sup>19</sup> Exam Disposition Letter, 2015 Municipal Examination of Gates Capital Corporation, Examination No. 20150433610 (July 21, 2016) (attached as Exhibit 3). The Department notes that no Examination Report was generated in connection with this exam due to the Enforcement referral which resulted in the AWC which triggered the Firm's statutory disqualification.

<sup>20</sup> AWC No. 20130352500-01 (Nov. 17, 2014) (attached as Exhibit 4).

triggered its statutory disqualification. As noted above, FINRA required the Firm to comply with numerous undertakings to remedy the violations outlined in the AWC, with which the Firm is in the process of complying. Indeed, Gates engaged an Independent Consultant (“I.C.”) to conduct a comprehensive review of the Firm’s policies, systems, training and procedures (collectively, the Firm’s “controls”) related to the violative conduct in the AWC. The I.C. is required to submit a written report to FINRA by December 24, 2018 which summarizes the scope of its review, evaluates of the adequacy of the Firm’s controls, and sets forth recommendations for additional or modified controls tailored to prevent future violations of the nature of those in the AWC.<sup>21</sup>

To supplement the ongoing corrective actions, Gates has agreed to the following plan of supervision (the “Supervisory Plan” or the “Plan”):<sup>22</sup>

1. Comply with the undertakings specified in the AWC;
2. Maintain copies of all policies and procedures adopted in connection with the I.C.’s recommendations in a segregated file, for ease of review during any statutory disqualification examination;
3. Certify to the Firm’s compliance department on a quarterly basis that the Firm and its representatives are in compliance with MSRB Rule G-17, attaching copies of all “G-17 letters” issued during the previous quarter. The Firm shall maintain copies of all quarterly certifications, associated “G-17 letters,” and any follow-up correspondence with and between the compliance department relating to the quarterly certifications in a segregated file for ease of review by FINRA staff during any statutory disqualification examination;
4. Certify to the Firm’s compliance department on a quarterly basis that the Firm and its representatives are in compliance with MSRB Rule G-23 and that they are not simultaneously functioning in the dual roles of municipal underwriter

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<sup>21</sup> See Emails from Daniel Gardner, Senior Counsel, FINRA Enforcement, to Nicholas Vitalo, of FINRA, dated August 3, 2018, October 3, 2018, and October 23, 2018, wherein updates are provided on Gates’ progress on the undertakings. Specifically, that Enforcement granted multiple extensions to the deadline by which Gates was required to hire an independent consultant, and by which the independent consultant must submit its written report addressing the adequacy of the Firm’s policies, systems, procedures and training relating to various aspects of Gates’ municipal securities business. See also Emails from Kevin Koplin (counsel for the Firm), to Nicholas Vitalo, of FINRA, dated November 12, 2018, and November 13, 2018, wherein updates are provided on the progress the Firm has made on the undertakings (attached together as Exhibit 5).

<sup>22</sup> See Letter dated November 12, 2018 from Nicholas Vitalo of FINRA to Kevin Koplin, Counsel for the Firm, seeking the Firm’s written consent to the Supervisory Plan (attached as Exhibit 6).

and financial advisor with regards to the same offering. In connection with the certifications, the Firm shall include a list detailing its underwriting and advisory clients for the quarter, and include copies of all associated advisory or underwriting agreements executed during that particular calendar quarter. The Firm shall maintain copies of all quarterly certifications, the associated advisory or underwriting agreements, as well as any follow-up correspondence with and between the compliance department related to any of the same in a segregated file for ease of review by FINRA staff during any statutory disqualification examination; and

5. Seek written approval from Member Regulation prior to changing any provision of the Plan.

Subsequent to an approval of the Firm's continued membership in FINRA notwithstanding its statutory disqualification, FINRA will utilize its examination and surveillance processes to monitor the Firm's compliance with the standards prescribed by FINRA Rule 9523. Specifically, FINRA will examine the Firm to review its implementation of the agreed upon Supervisory Plan.

## **V. Discussion**

After carefully reviewing the record in this matter, Member Regulation approves the Firm's request to continue its membership in FINRA, subject to the terms and conditions set forth herein.

In evaluating the Application, Member Regulation assessed whether the Firm has demonstrated that its continued membership is consistent with the public interest and does not create an unreasonable risk of harm to investors or the market.<sup>23</sup> Typically, factors that bear on Member Regulation's assessment include, among other things, the nature and gravity of the statutorily-disqualifying misconduct, the time elapsed since its occurrence, the restrictions imposed, the Firm's regulatory history, and whether there has been any intervening misconduct.

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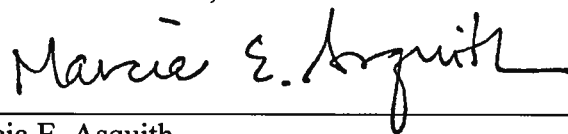
<sup>23</sup> See FINRA By-Laws, Art. III, Sec. (3)(d); See also *In the Matter of the Continued Membership of J.P. Morgan Securities, Inc.*, SD-1904, SD-1905, and SD-1984 (FINRA NAC 2014), quoting *Frank Kufrovich*, 55 S.E.C. 616, 624 (2002) (FINRA "may deny an application by a firm for association with a statutorily-disqualified individual if it determines that employment under the proposed plan would not be consistent with the public interest and the protection of investors"). Available at: [http://www.finra.org/sites/default/files/NAC%20Statutory%20Disqualification%20Decision%20SD1904\\_0\\_0\\_0\\_0\\_0.pdf](http://www.finra.org/sites/default/files/NAC%20Statutory%20Disqualification%20Decision%20SD1904_0_0_0_0_0.pdf). (last visited June 7, 2018).

Member Regulation notes that Gates' statutory disqualification stems from its failure to supervise Fitzgerald. Gates has attempted to remedy its misconduct by terminating Fitzgerald and is currently working with its consultant to refine its policies and procedures addressing its municipal securities business practices relating to disclosure of its role as underwriter, where required; maintenance of books and records; and supervision of trading and pricing activity.<sup>24</sup>

Further, Member Regulation recognizes that, beyond ordering the undertakings described above and imposing a censure and fine, FINRA did not expel, suspend, or otherwise limit the Firm's securities activities. Additionally, the Firm represents that it is currently in compliance with the terms of the AWC's undertakings.<sup>25</sup> When combined with the proposed Supervisory Plan, it appears as though the Firm's continued membership in FINRA is consistent with the public interest and does not create an unreasonable risk of harm to investors or the markets.

Member Regulation is satisfied, based on the foregoing and on the Firm's representations made pursuant to the Supervisory Plan that the Firm should be permitted to continue its membership in FINRA. Accordingly, Member Regulation approves the Firm's Application to continue its membership with FINRA as set forth herein. The Firm is also a member of one other SRO. In conformity with the provisions of Rule 19h-1 of the Exchange Act, the continued membership of the Firm will become effective within 30 days of the receipt of this notice by the Commission, unless otherwise notified by the Commission.

On Behalf of FINRA,



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Marcia E. Asquith  
Executive Vice President and Corporate Secretary

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<sup>24</sup> See Exhibit 1 at FINRA00091; See also Exhibit 5.

<sup>25</sup> See Exhibit 5.



**Exhibit List**

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1. MC-400A of Gates.
2. Examination Disposition Letter, Examination Report, and Gates' Response, 2017 Cycle Examination of Gate Capital Corporation, Examination No. 20170524671 (March 21, 2018).
3. Exam Disposition Letter, 2015 Municipal Examination of Gates Capital Corporation, Examination No. 20150433610 (July 21, 2016).
4. AWC No. 20130352500-01 (November 17, 2014).
5. Emails from Daniel Gardner (Senior Counsel, Enforcement), to Nicholas Vitalo, of FINRA, dated August 3, 2018, October 3, 2018, and October 20, 2018, respectively; and Emails from Kevin Koplun (counsel for the Firm), to Nicholas Vitalo, of FINRA, dated November 12, 2018 and November 13, 2018.
6. Gates Consent to Plan of Supervision, dated November 14, 2018.