BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In The Matter of The Continued Association of Mitchell T. Toland as a General Securities Representative with Hallmark Investments, Inc.	Notice Pursuant to Section 19(d) Securities Exchange Act of 1934 SD-1812 February 19, 2014

I. Introduction

On December 2, 2009, Hallmark Investments, Inc. ("the Firm"), submitted a Membership Continuance Application ("MC-400" or "the Application") to FINRA's Department of Registration and Disclosure. The Application seeks to permit Mitchell T. Toland ("Toland"), a person subject to a statutory disqualification, to continue to associate with the Firm as a general securities representative. On October 17, 2013, a subcommittee ("Hearing Panel") of FINRA's Statutory Disqualification Committee held a telephonic hearing on the matter. Lorraine Lee-Stepney, Ann-Marie Mason, Esq., and Bernard Canepa, Esq., appeared on behalf of FINRA's Department of Member Regulation ("Member Regulation"). As described in more detail below, Toland, his proposed primary supervisor, Michael Burns ("Burns"), and Toland's counsel did not attend the hearing.

For the reasons explained below, we deny the Firm's Application.[1]

[1] Pursuant to FINRA Rule 9524(a)(10), the Hearing Panel submitted its written recommendation to the Statutory Disqualification Committee. In turn, the Statutory Disqualification Committee considered the Hearing Panel's recommendation and presented a written recommendation to the National Adjudicatory Council ("NAC").

II. Procedural History

In February 2011, Member Regulation recommended that the Chairperson of the Statutory Disqualification Committee, acting on behalf of the NAC, approve Toland's proposed continued association with the Firm pursuant to FINRA Rule 9523.[2] The Chairperson rejected Member Regulation's recommendation in March 2011 because: (1) the Firm's president, owner, and proposed backup supervisor at the time, Steven Dash ("Dash"), had disciplinary history (including a two-month suspension), numerous customer complaints filed against him, and had recently filed for bankruptcy; (2) Toland's proposed primary supervisor, Burns, supervised 15 other registered representatives and served as the Firm's chief compliance officer; and (3) FINRA staff raised concerns in connection with the Firm's ongoing 2010 cycle examination, including whether registered individuals conducted business at the Firm while suspended.[3]

The Firm subsequently sought approval of the Application pursuant to FINRA Rule 9524, and a hearing in this matter was scheduled for November 10, 2011. Several weeks prior to this hearing, however, Toland's proposed backup supervisor received a Wells notice. The Firm and Member Regulation thus agreed to postpone the hearing to allow the Firm to find a more suitable backup supervisor.

In March 2012, the Firm informed Member Regulation that it had hired Michael Kleiner ("Kleiner") to serve as Toland's backup supervisor. Kleiner, however, was not registered as a general securities principal. Member Regulation therefore agreed to allow Kleiner time to qualify as a principal before rescheduling this matter for a hearing. After Kleiner eventually qualified as a principal in January 2013, FINRA's Office of General Counsel provided notice that the hearing would take place on June 5, 2013. The hearing was subsequently moved to August 15, 2013.[4]

On July 22, 2013, Toland's counsel requested an adjournment of the August 15 hearing because he unexpectedly needed to assist his daughter's move to college. This request was granted, over Member Regulation's objection, and the hearing was rescheduled for October 17, 2013.

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[2] FINRA Rule 9523(a) provides that, with respect to certain statutorily disqualifying events, the Chairperson of the Statutory Disqualification Committee, acting on behalf of the NAC, may accept or reject the recommendation of Member Regulation to approve an application where the parties have consented to a supervisory plan. As described below, Member Regulation now recommends that the Application be denied. *See infra* Part VI.

[3] Member Regulation represents that it informed the Firm why the Chairperson rejected the Application.

[4] Toland's counsel asserts, and nothing in the record contradicts, that he had not been consulted by Member Regulation prior to setting the June 5 hearing date and was unavailable on that date.

On October 2, 2013, Toland's counsel requested another postponement of the hearing in this matter. Counsel explained that Toland's elderly mother had been diagnosed with cancer and would be undergoing treatments two to three times per week. Counsel further explained that Toland was her sole caretaker and that he should not be "compelled to abandon his mother at this critical juncture." Member Regulation opposed any continuance, but indicated that it was willing to conduct the hearing in New York or New Jersey, where Toland resides. On October 4, 2013, the Hearing Panel declined to postpone the hearing, but agreed that, under the circumstances, it would move the location of the hearing as a reasonable accommodation to Toland.[5] By letter dated October 15, 2013, Toland's counsel informed the Hearing Panel that Toland was unable to attend the hearing in New York and "has been deprived of due process." FINRA's Office of General Counsel subsequently advised the parties that the hearing would occur as scheduled, albeit by telephone, on October 17, 2013. Member Regulation participated in the telephonic hearing.[6] Toland, Toland's proposed primary supervisor, and Toland's counsel did not.

III. The Statutorily Disqualifying Event

Toland is statutorily disqualified due to a FINRA Order Accepting Offer of Settlement dated September 22, 2009 (the "2009 Order"), finding that Toland willfully failed to disclose material information on his Uniform Application for Securities Industry Registration or Transfer ("Form U4").[7] Specifically, Toland failed to disclose that he filed for bankruptcy in October

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[5] FINRA staff also reached out to applicant's counsel for a convenient start time on October 17, 2013.

[6] Although FINRA's Office of General Counsel advised the parties, in a letter dated August 5, 2013, that any proposed exhibits and witness lists must be filed and served no later than October 3, 2013, neither the Firm nor Toland submitted any proposed exhibits in support of the Application. *See also* FINRA Rule 9524(a)(3)(B) (providing that the parties shall exchange and file exhibit and witness lists not less than 10 business-days before the hearing).

[7] Section 3(a)(39)(F) of the Securities Exchange Act of 1934 ("Exchange Act") provides that a person is subject to statutory disqualification if he has willfully made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization.

2005.[8] FINRA suspended Toland in all capacities for 45 days and fined him $5,000. Toland served the suspension and paid the fine in full.

Toland's statement filed in support of the Application explained that he filed a bankruptcy petition on October 12, 2005, and, on that same date, submitted his initial Form U4 to the Firm. Toland stated that, "[b]ecause of the simultaneous occurrence of these two events, and the stress that was attendant to [filing for bankruptcy], I did not think to change the information on the U-4 (which had been filled out just a couple of days earlier.)" Toland further stated that, although he subsequently amended his Form U4, he did not thoroughly review the form to properly reflect his bankruptcy filing. At a June 2008 investigative interview conducted by FINRA in connection with Toland's failure to disclose his bankruptcy filing, Toland testified that he did not know he had to disclose a bankruptcy filing, or any liens and judgments filed against him, on his Form U4. He further testified that, "If I knew I had to [disclose bankruptcy filings and liens], I would have done it, and that's what I can say, not even a question. . . . [I]f I did know that [the bankruptcy] had to be on [the Form U4], I absolutely would have taken care of it properly. . . I will try and be the best I can."[9]

IV. Background Information

A. Toland

1. Employment History

Toland first registered in the securities industry as a general securities representative in June 1990. He also passed the uniform securities agent state law examination in July 1990.

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[8] Question 14.K(1) of Form U4 asks, "Within the past 10 years have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?" Article V, Section 2(c) of FINRA's By-Laws requires that an associated person keep his Form U4 current at all times and to update information on the Form U4 within 30 days. Toland updated his Form U4 to reflect the bankruptcy filing in April 2008.

[9] It appears that Toland also failed to disclose two arbitration awards entered against him, although FINRA did not allege any violations in connection with those failures. During Toland's investigative interview, FINRA staff directed Toland to Question 14.M on the Form U4, which asks, "Do you have any unsatisfied judgments or liens against you?" Toland stated that he didn't properly read the question when he filled out his Form U4 and apologized for the oversight.

Toland was associated with 15 different firms between February 1990 and October 2005. He has been associated with the Firm since October 2005.[10]

Toland also serves as a consultant to Hallmark Holdings Investment Corp. ("Hallmark Holdings"), an investment-related holding company that is the Firm's parent company.[11] He is also an employee of Rushmore Consulting Group, LLC, where he developed the company's communications systems and continues to service them.

2. Arbitration Awards and Customer Complaints

Toland has had two arbitration awards entered against him.[12] In September 2005, a FINRA Dispute Resolution arbitration panel awarded Toland's former firm compensatory damages of $101,750, plus interest, attorneys' fees, and costs. The firm alleged that Toland breached three promissory notes he executed in connection with forgivable loans.

In January 2005, a FINRA Dispute Resolution arbitration panel awarded Toland's former employing firm compensatory damages of $29,300, plus interest. The firm alleged that Toland breached a promissory note that he executed in connection with a forgivable loan and defamed his employer.

Five customers have filed complaints against Toland. In July 1998, a customer filed a complaint against Toland alleging unauthorized trading, unauthorized use of margin, and unsuitable recommendations. FINRA's Central Registration Depository ("CRD"®) indicates that no further action was taken in connection with this matter.

In March 1995, a customer filed a complaint against Toland alleging that the customer's account declined more than $100,000, without any specific allegations of wrongdoing. Toland's employing firm reviewed the complaint and found it to be without merit.

In January 1993, a customer filed a complaint against Toland alleging mismanagement of his account. The customer alleged damages of $17,838. Toland's employing firm reviewed the complaint and found it to be without merit.

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[10] FINRA has interpreted Article III, Section 3(c) of FINRA's By-Laws to permit individuals who become statutorily disqualified while they are employed to continue working pending the outcome of the statutory disqualification process. Toland became statutorily disqualified upon entry of the 2009 Order while employed at the Firm, and he has continued to work at the Firm during this proceeding.

[11] Member Regulation represents that it asked for additional information concerning Toland's activities at Hallmark Holdings, but it did not receive any response.

[12] Toland did not pay either arbitration award, as he received a bankruptcy discharge of these debts. *See infra* Part IV.A.3.

In December 1992, customers filed a complaint against Toland alleging unauthorized transactions. The matter was settled for $1,000.

In November 1992, a customer filed a complaint against Toland alleging an unauthorized transaction. The matter was settled for $2,500. CRD does not indicate whether Toland contributed personally to this settlement.[13]

3. Bankruptcy

On October 12, 2005, Toland filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York. Toland received a discharge of his debts in April 2006.

4. Additional Judgments and Liens

Member Regulation asserts that in February 2013, subsequent to the rejection of its initial recommendation to approve the Application, it discovered that Toland had failed to disclose numerous outstanding judgments and liens totaling more than $490,000. The record shows that these judgments and liens consist of the following: (1) a tax lien in the amount of $28,004 filed by New Jersey in January 2008; (2) a tax warrant in the amount of $15,965 filed by New York in December 2008; (3) a tax warrant in the amount of $10,140 filed by New York in September 2010; (4) a tax warrant in the amount of $731 filed by New York in November 2010; (5) a judgment in the amount of $22,951 obtained by Columbia Grammar & Preparatory School in February 2011; (6) a judgment in the amount of $614 obtained by Midland Funding LLC in July 2011;[14] (7) four federal tax liens totaling $386,838 filed by the IRS in May 2012 (for tax years 2003 through 2010);[15] and (8) a federal tax lien in the amount of $25,000 filed by the IRS in June 2012 (for tax year 2011).

After Member Regulation brought the undisclosed liens to Toland's attention, he eventually disclosed on his Form U4 certain of these liens on July 11, 2013, although he has not yet disclosed the three tax warrants filed by New York State. FINRA is currently conducting a cause examination regarding Toland's failure to disclose these judgments and liens.

The record shows no other disciplinary or regulatory proceedings, complaints, or arbitrations against Toland.

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[13] A prior employing firm reported three additional complaints involving Toland. From September 1999 through July 2001, the firm received three written customer complaints alleging that Toland failed to follow instructions or engaged in unauthorized trading. The firm resolved one of these complaints with the complaining customer. The record does not indicate how the firm resolved the other two complaints.

[14] Although Toland provided evidence that he paid this judgment in July 2013, he did not disclose it on his Form U4 when it was outstanding.

[15] These four liens were subsequently consolidated into a single lien.

B. The Firm

The Firm is based in New York City, and it has been a FINRA member since September 2005. It currently employs three registered principals, six registered representatives, and eight other individuals. Dash is the Firm's president and founder.

1. Regulatory Actions

In January 2013, the Firm entered into a Letter of Acceptance, Waiver and Consent ("AWC") with FINRA for violations of Exchange Act Rules 15c3-1 and 17a-11, FINRA Rule 2010, and NASD Rule 3010. Without admitting or denying the allegations, the Firm consented to findings that it failed to establish a reasonable supervisory system and procedures for retaining and reviewing email and conducted a securities business without sufficient net capital for three months in 2010. As a result, FINRA censured the Firm and fined it $15,000.

In January 2013, the Firm, Dash, Burns, and another individual at the Firm, Stephen Zipkin ("Zipkin"), executed a Consent Agreement with the Indiana Securities Division. Indiana alleged that: (1) Zipkin conducted business in the state without being registered; (2) Dash made an untrue statement of material fact to a customer by representing that he, and not Zipkin, was the customer's broker; (3) Zipkin made false statements to Indiana Securities Division staff that he did not contact a customer; and (4) the Firm and Burns failed to properly supervise its agents. Without admitting or denying the allegations, the Firm and the named individuals agreed to pay, jointly and severally, $20,000 in restitution to the customer and a $10,000 civil penalty. Further, Dash agreed to withdraw his registration in the state and not reapply for reinstatement until December 31, 2013. The Firm did not disclose this matter on its Uniform Application for Broker-Dealer Registration ("Form BD"), and Dash did not disclose the matter on his Form U4.

In February 2009, FINRA accepted an Offer of Settlement from the Firm and Dash. The Offer of Settlement found that the Firm and Dash violated NASD Rules 1017(a) and 2110 and IM-1000-1 in connection with the Firm's membership application, which was incomplete or inaccurate so as to be misleading, and that they failed to file an application to approve a change in the Firm's ownership. FINRA fined the Firm $15,000, censured it, and suspended Dash in all capacities for two months.[16]

2. Routine Examinations

The Firm's 2012 examination is pending.

On January 24, 2012, and in connection with an examination of the Firm in July 2011, the SEC identified deficiencies and weaknesses regarding the Firm's compliance with the federal

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[16] In March 2013, FINRA also accepted a Minor Rule Violation Letter from the Firm for violating Exchange Act Rule 17a-5(d) by filing its audited financial statements eight days late. FINRA fined the Firm $2,500.

securities laws and FINRA rules. The SEC found that, among other things, the Firm failed to establish written supervisory procedures ("WSPs") related to the review of customer accounts that received large amounts of penny stocks and registered representatives' use of outside email accounts. The SEC also found evidence of excessive trading and unsuitable recommendations in 17 customer accounts, two of which belonged to Toland's customers. The commissions and markups or markdowns earned by Toland on these two customer accounts totaled approximately $178,000 (which comprised approximately 72% of Toland's total commissions during the 16-month review period). The Firm responded in writing and asserted that the "larger commissions reflected the more intrinsic value added to management of their accounts." The Firm also asserted that the customers' objectives for the accounts at issue changed from balanced/conservative growth to speculation (and thus the trading was allegedly consistent with the customers' objectives).

In June 2011, FINRA issued the Firm a Cautionary Action. FINRA cited the Firm for the following deficiencies: filing inaccurate FOCUS reports; failing to comply with net capital requirements; charging customers excessive commissions; and failing to timely file Form U4 amendments (including for Toland's disclosure of the 2009 Order). FINRA also cited the Firm for failing to ensure that Toland and Dash did not engage in activities requiring registration while they were suspended. Specifically, the Firm's trade blotter disclosed 16 trades under Toland's registered representative code and 76 under Dash's code while both were suspended. The Firm responded that other registered representatives used Toland's and Dash's codes to perform trades for Toland's and Dash's customers while they were suspended and neither Toland nor Dash received any compensation for the trades.

In February 2010, FINRA issued the Firm a Cautionary Action. The Cautionary Action cited the Firm for the following deficiencies: failing to retain signed copies of Forms U4 for two newly hired employees; failing to provide a copy of Uniform Termination Notices for Securities Industry Registration to two terminated employees; failing to update its Form BD to reflect Dash's suspension; failing to implement supervisory procedures for performing Office of Foreign Assets Control checks on new customer accounts; and failing to properly record assets and liabilities. The Firm responded in writing and stated that it had corrected the noted deficiencies.

3. Arbitrations and Customer Complaints

In February 2012, a claimant filed an arbitration claim against the Firm, which alleged that the Firm charged her unreasonable commissions. The claimant sought $2,500 in damages. The Firm settled the claim for $4,500.

In December 2010, a claimant filed an arbitration claim against the Firm, Dash, and Burns. The claimant alleged that the recommendation of securities issued by Hallmark Holdings was unsuitable. The customer also alleged fraud, misrepresentation, self-dealing, and a failure to supervise. A FINRA Dispute Resolution arbitration panel denied the customer's claims. The arbitration panel, however, ordered that the respondents pay the claimant $75,000 (jointly and severally) as a sanction for failing to produce documents.

In December 2008, a claimant filed an arbitration claim against the Firm, which alleged, among other things, that it traded excessively in the customer's account and failed to supervise. The claimant sought $70,000 in damages, and the Firm settled the claim for $20,000.

In November 2008, a claimant filed an arbitration claim against the Firm, Dash, and Zipkin. The claimant alleged that respondents made unsuitable recommendations and engaged in excessive trading. The claimant sought $157,000 in damages. The Firm settled the claim for $50,000, and Dash and Zipkin each paid an additional $7,500 to the claimant to settle the claim.

Finally, the record shows that in January 2008 a customer complained of unauthorized trading in his account. The record does not indicate whether this claim has been resolved.

The record shows no additional complaints, disciplinary proceedings, or arbitrations against the Firm.

V. Toland's Proposed Business Activities and Supervision

The Firm proposes to continue to employ Toland in its New York City office as a general securities representative, and it will continue to compensate Toland on a commission basis.

The Firm further proposes that Burns, who serves as the Firm's chief compliance officer, supervise Toland. Burns has been with the Firm since September 2005. He first registered as a general securities representative in November 1998, and he passed the uniform securities agent state law examination in December 1998. Burns qualified as a general securities principal in November 2004, as a registered options principal in May 2005, and as a municipal securities principal in July 2005. Prior to registering with the Firm, Burns was employed by three other firms since 1998.

Other than the Indiana action and December 2010 arbitration described in Part IV.B above, the record shows no additional complaints, disciplinary proceedings, or arbitrations against Burns.

The Firm submitted the following proposed heightened plan of supervision:[17]

1. The written supervisory procedures for the Firm will be amended to state that Burns is the primary supervisor responsible for Toland;

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[17] The items that are denoted by an asterisk are heightened supervisory conditions for Toland and are not standard operating procedures of the Firm.

2. If Burns is to be on vacation or out of the office, Kleiner will act as Toland's interim supervisor;[18]

3. If neither Burns nor Kleiner are able to be in the office for greater than two days, then Toland is not permitted to be in the office;

*4. Toland will not maintain any discretionary accounts;

*5. Toland will not act in a supervisory capacity;

6. Toland will be supervised by Burns in the home office located at 6 East 39th Street, Suite 500, New York, NY 10016, which is an OSJ;

7. Burns will review and pre-approve each securities account, prior to the opening of the account by Toland. Account paperwork will be documented as approved with a date and signature and maintained at the Firm's home office. The paperwork will be segregated for ease of review during any statutory disqualification examination;

8. Toland will not be permitted to accept any funds or securities from a client;

9. Toland will have no involvement with or access to the Firm's funds;

10. For the purposes of client communication, Toland will only be allowed to use an email account that is held at the Firm, with all emails being filtered through the Firm's email system; if Toland receives a client communication in his personal email account, then he will immediately forward it to the Firm;

11. Burns will review Toland's incoming written correspondence (which would include email communications) upon its arrival and will review outgoing correspondence before it is sent. With respect to email communications, this condition will not include any email communication that would prevent best execution of any trade; however, such communication would be subject to

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[18] Kleiner originally qualified as a general securities representative, and passed the uniform securities agent state law exam, in August 1993. Kleiner left the securities industry in 2001, during which time he was unemployed for approximately five years. When he was employed, he worked as a customer service representative, phone technician, and crew leader for the U.S. Census Bureau. Kleiner associated with the Firm in October 2011, requalified as a general securities representative in December 2011, and again passed the uniform securities agent state law exam in February 2012. He qualified as a general securities principal in January 2013. The record shows that four customers have filed complaints against Kleiner from August 1997 through October 2000. CRD indicates that Kleiner's firms denied three of the complaints. The record does not indicate how the fourth complaint was resolved. Other than these complaints, the record shows no criminal, disciplinary or regulatory proceedings, complaints, or arbitrations against Kleiner.

post-use review. Burns will keep a written record evidencing review and approval of all of Toland's correspondence;

12. Burns will intermittently monitor 10% of Toland's conversations on a monthly basis and will keep a written record documenting such monitoring. The written record will be kept segregated for ease of review during any statutory disqualification examination;

13. Burns will observe Toland's work activities and will review any records Toland generates;

*14. Burns will review and approve Toland's order tickets before they are executed; Burns or his designee will evidence his/her review by initialing the order ticket;

*15. Burns will randomly review 10% of Toland's client files on a monthly basis. Burns will indicate the findings of his review in a memo, which will be kept segregated for ease of review;

16. Toland must disclose to Burns in writing, prior to any outside sales activity, the time, place, and objective of any planned sales activity. Additionally, on a weekly basis, Toland must disclose to Burns, in writing, the details related to such outside sales activity. The disclosure must contain Toland's activity log, phone call log, appointment log, and a to-do list. Burns will retain all such documentation segregated for ease of review in a readily available location;

17. All complaints pertaining to Toland, whether verbal or written, will be immediately referred to Burns for review, and then to the Compliance Department. Burns will prepare a memorandum to the files as to what measures he took to investigate the merits of the complaint (e.g., contact with the customer and the resolution of the matter) and he will document the outcome of the customer complaint. Documents pertaining to complaints will be kept segregated for ease of review;

*18. For the duration of Toland's statutory disqualification, Hallmark must obtain prior approval from FINRA Member Regulation if it wishes to change Toland's responsible supervisor from Burns to another person; and

*19. Burns must certify quarterly (March 31st, June 30th, September 30th, and December 31st) to the Compliance Department of the Firm that he and Toland are in compliance with all of the above conditions of heightened supervision to be accorded Toland. Burns will document his performance of these special supervisory procedures by preparing and signing Compliance Checklists created by the Firm.

VI. Member Regulation's Recommendation

Member Regulation recommends that the Application be denied because, in its view: (1) Toland engaged in intervening misconduct by failing to disclose numerous outstanding judgments and liens, and such misconduct is similar to the misconduct underlying the 2009 Order; (2) recent examination findings and disciplinary actions against the Firm and its officers demonstrate an unwillingness or inability to comply with disclosure rules and be forthright with regulators and customers; and (3) the Firm and its proposed supervisors are unable to adequately supervise Toland, and the proposed backup supervisor lacks the necessary experience to supervise Toland.

VII. Discussion

We have carefully considered the entire record in this matter. Based on this record, and pursuant to the SEC's controlling decisions in this area, we deny the Firm's Application to continue to employ Toland as a general securities representative.

A. The Legal Standards

We recognize that, in connection with the 2009 Order, FINRA's Department of Enforcement ("Enforcement") weighed the gravity of Toland's failure to disclose his bankruptcy filing when it approved the Settlement Order in September 2009. Enforcement concluded that a 45-day suspension and $5,000 fine were appropriate sanctions for Toland's misconduct. Toland served this suspension and has paid the fine in full. In such circumstances, the SEC has instructed FINRA to evaluate a statutory disqualification application pursuant to the standards enunciated in the SEC's decisions in *Paul Van Dusen*, 47 S.E.C. 668 (1981), and *Arthur H. Ross*, 50 S.E.C. 1082 (1992). *See May Capital Group, LLC* (hereinafter "*Rokeach*"), Exchange Act Rel. No. 53796, 2006 SEC LEXIS 1068, at *21 (May 12, 2006) (holding that FINRA must apply *Van Dusen* standards to the membership continuance applications of statutorily disqualified individuals whose disqualifications resulted from FINRA enforcement action).

Van Dusen and *Rokeach* provide that in situations where an individual's misconduct has already been addressed by the SEC or FINRA, and certain sanctions have been imposed for such misconduct, FINRA should not consider the individual's underlying misconduct when it evaluates a statutory disqualification application. The SEC stated that when the period of time specified in the sanction has passed, in the absence of "new information reflecting adversely on [the applicant's] ability to function in his proposed employment in a manner consonant with the public interest," it is inconsistent with the remedial purposes of the Exchange Act and unfair to deny an application for re-entry. *Van Dusen*, 47 S.E.C. at 671.

The SEC also noted in *Van Dusen,* however, that an applicant's re-entry is not "to be granted automatically" after the expiration of a given time period. *Id.* Instead, the SEC instructed FINRA to consider other factors, such as: (1) "other misconduct in which the applicant may have engaged"; (2) "the nature and disciplinary history of the prospective employer"; and (3) "the supervision to be accorded the applicant." *Id.* Further, in *Ross*, the SEC established a narrow exception to the rule that FINRA confine its analysis to "new information." 50 S.E.C. at 1085. The SEC stated that FINRA could consider the conduct underlying a

disqualifying order if an applicant's later misconduct was so similar that it formed a "significant pattern." *Id.* n.10.

B. Application of the *Van Dusen* Standards

After applying the *Van Dusen* standards to this matter, we deny the Firm's Application to continue to employ Toland as a general securities representative. Applicant had the burden to demonstrate that, "despite the disqualification, it is in the public interest to permit the requested employment." *See Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992). Applicant did not file any exhibits or other documentation to support its Application and failed to appear at the hearing. Applicant failed to satisfy its burden.[19]

Regardless, based upon our independent review of the record in this matter, we find that the Application should be denied because Toland's continued association with the Firm would create an unreasonable risk of harm to the market or investors. Toland engaged in serious intervening misconduct, which is identical to the misconduct underlying the disqualifying settlement order. We further find that the Firm has a troubling disciplinary and regulatory history, particularly with respect to disclosure issues, and that the Firm has not demonstrated it can properly supervise a statutorily disqualified individual such as Toland. Consequently, we deny the Application.

1. Toland's Intervening Misconduct

Toland has continued to engage in misconduct subsequent to his disqualifying event. The record shows that, from early 2008 until July 2013, Toland failed to disclose on his Form U4 numerous judgments and liens totaling more than $490,000. Given that Toland's failure to disclose his personal bankruptcy in October 2005 led to a suspension, fine, and ultimately these proceedings, we are troubled and perplexed by Toland's repeated and continuing failures to disclose judgments and liens on his Form U4.[20] This is particularly true given that, in June 2008, FINRA staff questioned Toland on his failure to disclose his bankruptcy and two arbitration awards, and expressly referenced, and asked Toland about, Question 14.M of Form U4 during that investigative interview. Toland testified that he did not properly read the question, apologized for the "oversight," and stated that "if [he] could change it again . . . [he] would put down "yes." Moreover, even when Toland finally updated his Form U4 in July 2013, he did not include all judgments and liens filed against him, omitting three tax warrants filed by New York

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[19] At the hearing, Member Regulation moved for a default denial of the Application. Although we find that applicant has not satisfied its burden of proof, under the circumstances, we decline to grant Member Regulation's motion and deny the Application on its merits.

[20] The record shows that Toland knew about certain of these undisclosed liens. For example, Toland's counsel informed Member Regulation in July 2013 that Toland had been making payments to Columbia Grammar & Preparatory School for two years, had been making payments on the New Jersey tax lien but had stopped, and had satisfied the $614 judgment against him.

State. Neither Toland nor the Firm have updated Toland's Form U4 to reflect the New York State tax warrants, even after being advised of these continuing disclosure failures by Member Regulation.

Toland, as a registered representative, was responsible for knowing the rules of the securities industry and for timely updating his Form U4. *See, e.g., Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993) ("Every person submitting registration documents [to FINRA] has the obligation to ensure that the information printed therein is true and accurate."), *aff'd*, 40 F.3d 1240 (3d Cir. 1994) (table). The SEC has emphasized that Form U4 "is critical to the effectiveness of the screening process used to determine who may enter (and remain in) the industry. It ultimately serves as a means of protecting the investing public." *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *25-26 (Nov. 9, 2012) (holding that representative's failure to disclose numerous judgments, liens, and bankruptcy filings violated FINRA's rules). A registered representative's financial problems "raise concerns about whether [he] could responsibly manage his own financial affairs, and ultimately cast doubt on his ability to provide trustworthy financial advice and services to investors relying on him to act on their behalf as a securities industry professional." *Id.* at *32.

For years, Toland deprived customers and the investing public of material information concerning his financial difficulties and his ability to manage his own financial obligations. Toland's failures to disclose numerous judgments and liens after entry of the 2009 Order are simply inexcusable, run contrary to his remorseful testimony during the June 2008 investigative interview, and raise serious doubts that he is able, or willing, to comply with securities rules and regulations. We find that Toland's disclosure failures, including failing to disclose his 2005 bankruptcy, demonstrate a pattern of misconduct. *See Ross*, 50 S.E.C. at 1085. Regardless of the serious nature of Toland's original misconduct, his subsequent and repeated failures to disclose numerous outstanding liens and judgments during a four-year period are, on their own, sufficiently egregious to warrant denial of the Application.

2. The Firm's Troubling Disciplinary and Regulatory History

Pursuant to *Van Dusen* and its progeny, we also look to the nature and disciplinary history of the Firm. We find the Firm's disciplinary and regulatory history also warrant denial of the Application.

Similar to Toland, the Firm has a troubling history of failing to comply with FINRA's reporting and disclosure obligations. For instance, in February 2009, the Firm and Dash settled a FINRA action filed in connection with a misleading and inaccurate application to change the Firm's ownership. In February 2010, FINRA issued the Firm a Cautionary Action that cited it for, among other things, failing to update the Firm's Form BD to reflect that Dash had been suspended. Similarly, neither the Firm nor Dash disclosed the Indiana Consent Agreement on the Firm's Form BD or Dash's Form U4. That FINRA's 2011 Cautionary Action cited the Firm for failing to timely file Form U4 amendments, including for Toland's disclosure of the 2009 Order, does not instill confidence that the Firm can comply with FINRA's disclosure rules.

Moreover, in January 2013, the Firm consented to findings that it failed to establish a reasonable supervisory system and procedures for retaining and reviewing email, which are

important for the supervision of a statutorily disqualified individual such as Toland. Similarly, the Indiana Consent Agreement involved allegations that the Firm and Burns failed to adequately supervise an individual at the Firm. The SEC's 2012 examination report found that the Firm failed to establish WSPs related to reviewing customer accounts that receive penny stock and representatives use of email. The SEC also found evidence of excessive trading and unsuitable recommendations in two of Toland's customer accounts. In 2009, FINRA cited the Firm for failing to ensure that Toland and Dash did not engage in activities requiring registration while they were suspended, and the explanations provided by the Firm regarding the use of Toland's and Dash's registered representative codes while they were suspended raise additional questions and concerns.

The totality of the Firm's disciplinary and regulatory history is disconcerting and supports our conclusion that it is not capable of assuming the additional heavy burden of supervising a statutorily disqualified individual such as Toland.

3. The Proposed Plan and Supervisors Are Inadequate

We also consider that the Firm's supervision of Toland pursuant to its proposed plan does not meet the stringent standards required to approve the Application. *See Timothy P. Pedregon*, Exchange Act Release No. 61791, 2010 SEC LEXIS 1164, at *27 (Mar. 26, 2010) (holding that an applicant must establish that it will be able to adequately supervise a statutorily disqualified individual by imposing a stringent plan of heightened supervision); *Citadel Sec. Corp.*, 57 S.E.C. 502, 509-10 (2004) ("[I]n determining whether to permit the employment of a statutorily disqualified person, the quality of the supervision to be accorded that person is of utmost importance. We have made it clear that such persons must be subject to stringent oversight by supervisors who are fully qualified to implement the necessary controls.") (internal quotation omitted).

We are concerned that Burns, the Firm's chief compliance officer, does not have sufficient time to supervise a statutorily disqualified individual. The Application represents that Burns supervises 15 individuals at the Firm, and his position as the Firm's chief compliance officer may be time consuming.[21] *See Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *18-19 (July 17, 2009) (finding that FINRA reasonably questioned whether a proposed supervisor had sufficient time to supervise a statutorily disqualified individual when he already supervised nine other individuals). Our concerns are heightened given that the record shows Burns has served as the Firm's chief compliance officer since 2005, during which time the Firm's regulatory and disciplinary actions described herein occurred. Burns was also named in the Indiana action for failing to supervise.

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[21] Although the Application indicates that the Firm employed more registered representatives in December 2009 than it did in July 2013, Member Regulation asserts that Burns supervises every individual at the Firm. We further note that the Firm has been on notice since March 2011 that whether Burns has sufficient time to supervise Toland is a concern of the NAC. The record, however, does not show that the Firm has addressed this concern.

Further, the record does not demonstrate that Kleiner, the proposed backup supervisor, is qualified. He only recently became licensed as a principal and re-entered the securities industry after a more than 10-year absence. The record does not show that he has any supervisory experience. *See Pedregon*, 2010 SEC LEXIS 1164, at *27-28 (finding troubling the assignment of an unqualified individual to serve as a backup supervisor).

We also find that the proposed supervisory plan is deficient. For instance, the proposed plan does not contain any provisions aimed at preventing Toland from future violations of FINRA's disclosure rules.[22] The proposed plan also appears to permit Toland to be in the office and conduct business for up to two days with neither supervisor present. Further, with respect to Burns' review of Toland's customer files on a random basis once per month (item 15), a more specific or targeted review (such that all of Toland's customer accounts would be reviewed over the course of a calendar year) may be more appropriate under the circumstances. Were we otherwise inclined to approve this Application, which we are not, we would have given the Firm an opportunity to submit a revised plan that cures these noted deficiencies. As we have explained, however, Toland's intervening misconduct, as well as the Firm's regulatory history and Toland's proposed supervisors, are highly problematic. These facts alone warrant denial of this Application.

4. The Hearing Panel Did Not Abuse its Discretion

Finally, Toland's counsel has asserted that the Hearing Panel deprived Toland of his due process rights by refusing to grant his request to postpone the October 17, 2013 hearing. We find that the Hearing Panel did not abuse its discretion when it conducted the hearing in this matter on the scheduled date and time and reject Toland's arguments to the contrary.

As an initial matter, constitutional due process requirements do not apply to FINRA procedures because FINRA is not a state actor. *See D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (stating that it is a well-settled principle that FINRA is not a governmental actor); *Charles C. Fawcett*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *13-14 (Nov. 8, 2007) (same). In determining the fairness of FINRA's proceedings, adjudicators have looked to whether the proceedings were conducted in accordance with FINRA's rules and whether FINRA implemented its procedures fairly. *See Robert J. Prager*, 58 S.E.C. 634, 662-63 (2005). The record establishes that FINRA's actions in processing this matter were fair and in accordance with its procedures.

FINRA Rule 9524(a)(2) provides that the Hearing Panel shall give the parties at least 14 business days' notice of any hearing. FINRA's Office of General Counsel notified the parties of the October 17, 2013 hearing on August 5, 2013, in accordance with its rules and procedures.

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[22] The Firm indicated in the Application that Toland would be required to review his Form U4 quarterly. This requirement, however, is not set forth in the proposed plan, and given Toland's repeated failures to disclose matters on his Form U4, we are not convinced that this provision would, on its own, be sufficient.

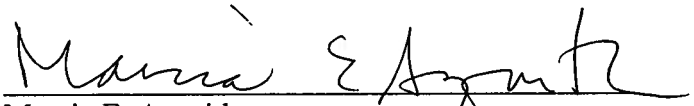
We also find that the Hearing Panel did not abuse its discretion by refusing to continue the October 17, 2013 hearing. FINRA Rule 9524(a)(5) provides that the Hearing Panel may postpone or adjourn any hearing. "In NASD proceedings, the trier of fact has broad discretion in determining whether to grant a request for a continuance." *Prager*, 58 S.E.C. 664; *Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 560 (1995) (rejecting applicants' argument that hearing panel improperly denied their request to continue hearing and stating that "the trier of fact has broad discretion in determining whether a request for continuance should be granted, based upon the particular facts and circumstances presented").

Under the circumstances, the Hearing Panel properly denied counsel's request for a continuance. The Firm filed the Application in December 2009, and the Subcommittee originally scheduled this matter for a hearing in November 2011. The parties agreed to continue the hearing on several occasions, and the Hearing Panel granted Toland's counsel's request to again postpone the hearing in August 2013, over Member Regulation's objection. Further, the Hearing Panel agreed to move the location of the hearing to accommodate Toland given the circumstances of his mother's illness, and it subsequently provided the parties with information to participate by telephone after applicant and Toland indicated that they would not participate in a hearing in New York. Toland, the Firm (through Burns or any other representative), and Toland's counsel did not participate in the telephonic hearing. Under these facts and circumstances, given that the Application had been pending for almost four years, the previously granted continuances of the hearing, the serious allegations of intervening and continuing misconduct by Toland, and Toland's continued employment in the securities industry while the Application has been pending, we find that the Hearing Panel properly denied applicant's request to postpone the October 17, 2013 hearing.[23]

VIII. Conclusion

In sum, we find that Toland's serious intervening misconduct, the Firm's disciplinary and regulatory history, and the Firm's inability to adequately supervise Toland pursuant to a stringent plan of supervision weigh heavily against approving the Application pursuant to Commission precedent. Accordingly, we find that it is not in the public interest, and would create an unreasonable risk of harm to the market or investors, for Toland to continue to associate with the Firm as a general securities representative. We therefore deny the Application.

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

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[23] We also note that neither Toland nor his counsel provided any proposed dates for a continued hearing, other than to suggest that Toland would be available once his mother's treatment had been completed in 18 weeks.