

Patricia Albrecht
Assistant General Counsel

Direct: (202) 728-8026
Fax: (202) 728-8264

February 4, 2011

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR-FINRA-2010-056 – Response to Comments

Dear Ms. Murphy:

On November 1, 2010, FINRA filed with the Securities and Exchange Commission (“SEC” or “Commission”) SR-FINRA-2010-056,¹ a proposed rule change to restrict new member applicants’ and certain members’ association with disqualified persons as detailed in the proposing release and further below. The proposed rule change was published for comment in the Federal Register on November 15, 2010. The Commission received two comment letters in response to the proposal.² This letter responds to those comments.

Proposed Rule Change

The proposed rule change would adopt new FINRA Rule 1113 (Restriction Pertaining to New Member Applications) to provide that FINRA shall reject an application for membership (new membership application or “NMA”) in which either the applicant or an associated person, as defined in Article I of the FINRA By-Laws,³ of the applicant is subject to a statutory disqualification, as defined in Article III, Section 4 of the FINRA By-Laws.⁴ Additionally, the

¹ See Securities Exchange Act Release No. 63181 (October 26, 2010), 75 FR 71166 (November 15, 2010) (Notice of Filing of SR-FINRA-2010-056) (“Proposing Release”). The comment period closed on December 13, 2010.

² Letter from the Board of Directors of ASG Securities, Inc. and Michael Scillia, Chairman, ASG Securities, Inc. (“ASG Securities”) (December 13, 2010); letter from Manuel P. Asensio-Garcia (“Asensio”) (December 20, 2010).

³ See FINRA By-Laws, Article I (rr) (definition of “person associated with a member” or “associated person of a member”).

⁴ Article III, Section 4 of the FINRA By-Laws incorporates the definition of “statutory disqualification” as that term is defined in Exchange Act Section 3(a)(39). See 15 U.S.C. 78c(a)(39).

proposed rule change would amend the FINRA Rule 9520 Series (Eligibility Proceedings) to, among other things, clarify that a new member applicant is not eligible to sponsor an application for relief where itself or a proposed associated person is subject to a disqualification.⁵ The general purpose of the proposed rule filing is to address FINRA's concerns about the ability of new member applicants to supervise adequately a statutorily disqualified person given such applicants' general lack of prior operating or supervisory history that would indicate the necessary experience to supervise disqualified persons.⁶

Comments Received

One commenter, Asensio, opposed the proposal on several grounds. First, Asensio stated his belief that the proposed rule change was an improper attempt to adversely impact an NMA filed by Asensio & Company, Inc. ("ACO") and concurrent MC-400 application filed by ACO on Asensio's behalf. This argument is incorrect. The proposed rule change is a separate policy-driven proceeding based on the premise that a new member applicant should enter FINRA membership free of the supervisory and operating concerns raised by association with a statutorily disqualified person or being itself subject to a statutory disqualification. FINRA further notes that the proposed rule change would apply only to NMAs and applications for relief from a statutory disqualification filed on or after the effective date of the proposed rule change and, consequently, would not impact any applications pending before such effective date.

Asensio also stated his belief that the proposed rule change was unnecessary as FINRA's current rules already provide authority to deny an NMA on the basis of a statutory disqualification and to deny an MC-400 application on the basis of the disqualified person proposing to associate with a new member. However, given the public policy interests underlying the proposed rule change's objective to promote initiation of FINRA membership free of statutory disqualification concerns, FINRA believes that it would be pointless and an indefensible use of regulatory resources to consider an NMA or MC-400 application that the proposed rule change would preclude at the outset.

⁵ The FINRA Rule 9520 Series sets forth procedures for a person to become or remain associated with a member, notwithstanding the existence of a statutory disqualification, and for a current member or person associated with a member to obtain relief from the eligibility or qualification requirements of the FINRA By-Laws and rules ("eligibility proceedings"). A member (or new member applicant) seeking to associate with a person subject to a disqualification must seek approval from FINRA by filing a Form MC-400 application, pursuant to the FINRA Rule 9520 Series. Members (and new member applicants) that are themselves subject to a disqualification that wish to obtain relief from the eligibility requirements are required to submit a Form MC-400A application.

⁶ The proposed rule change also would amend the definition of "sponsoring member" to preclude any member from sponsoring the association or continued association of a disqualified person to be admitted, readmitted, or permitted to continue in association that is directly or indirectly a beneficial owner of more than five percent of the sponsoring member. The SEC did not receive any comments on this proposed amendment.

Lastly, Asensio objected to the proposal on the premise that it would effectively foreclose a disqualified person from seeking relief from any sanctions imposed by FINRA via the eligibility proceedings, which he contended is the only avenue for seeking relief outside of an appeal. Asensio also argued that, to effectively use the eligibility proceedings for this purpose, a disqualified person must be able to create a new member applicant to be his sponsor in the eligibility proceedings; otherwise he cannot present his arguments for relief free from possible restrictions that could be imposed by a member sponsor. FINRA's eligibility proceedings, however, are not the appropriate forum for reviewing sanctions imposed in a formal disciplinary action brought by FINRA.⁷ Indeed, Asensio's contention that a respondent has a right to seek relief from adjudicated sanctions outside the chain of appeal is wrong as a matter of FINRA rules and federal law. Accordingly, FINRA considers Asensio's objections to be without merit.⁸

The second commenter, ASG Securities, did not oppose the proposed rule change but requested that FINRA amend the proposal to address issues outside of the scope of the proposal. Specifically, the commenter requested that FINRA amend the proposed rule change to (1) extend from 10 business days to 20 business days the period in FINRA Rule 9522(a)(3) (Notice Regarding an Associated Person) during which a member may file a Form MC-400A application for itself and an associated person upon receiving a disqualification notice from FINRA staff; and (2) prohibit a disqualified person or entity from financing a member or providing or lending funds to an associated person for re-investment into a member. While FINRA does not intend to expand the proposal to address these additional issues at this time, FINRA regularly assesses its processes relating to statutorily disqualified persons and members and will consider whether to propose additional changes at a later date.

FINRA believes that the foregoing fully responds to the issues raised by the commenters to the rule filing. Please feel free to contact me at (202) 728-8026 if you have any questions.

Sincerely,



Patricia M. Albrecht

⁷ The correct procedure for an individual to challenge any FINRA-imposed sanctions is set forth in the FINRA Rule 9300 Series (Review of Disciplinary Proceeding By National Adjudicatory Council and FINRA Board; Application for SEC Review).

⁸ Asensio also described the foreclosure of sanction review through the eligibility proceedings as "contrary to the most basic ideals of constitutional due process." Because Asensio's primary argument fails, FINRA also considers this objection to lack merit.