

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the Association
of
Scott Coy
as an
Investment Company Products and
Variable Contracts Limited Representative
with
Invicta Capital LLC

Notice Pursuant to
Section 19(d)
Securities Exchange Act
of 1934

SD-2195

March 15, 2019

I. Introduction

On April 13, 2018, Invicta Capital LLC (the “Firm” or “Invicta”) filed a Membership Continuance Application (the “Application”) with FINRA’s Department of Registration and Disclosure (“RAD”). The Application requests that FINRA permit Scott Coy, a person subject to a statutory disqualification, to associate with the Firm as an investment company products and variable contracts limited representative. On October 4, 2018, a subcommittee (“Hearing Panel”) of FINRA’s Statutory Disqualification Committee held a hearing on the matter. Coy appeared and testified at the hearing, accompanied by counsel, David Sobel, Esq. Coy’s proposed primary supervisor, Aimee Toth (“Toth”), also appeared and testified at the hearing. Ann-Marie Mason, Esq., Deon McNeil-Lambkin, Esq., and Lorraine Lee appeared on behalf of FINRA’s Department of Member Supervision (“Member Supervision”).

For the reasons explained below, we deny the Application.¹

¹ We have considered the entire record in this matter, including Coy’s September 25, 2018 written response to Member Supervision’s recommendation. 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. The Statutorily Disqualifying Event

Coy is statutorily disqualified due to FINRA's acceptance, on April 14, 2011, of a Letter of Acceptance, Waiver and Consent (the "Disqualifying AWC").² The Disqualifying AWC found that Coy engaged in private securities transactions without providing prior written notice to, or receiving approval from, his firm, in violation of NASD Rule 3040 and FINRA Rule 2010. Specifically, the Disqualifying AWC found that from August 2009 until February 2010, and in connection with two private offerings, Coy sold limited liability company interests totaling \$5.5 million to 30 investors. The Disqualifying AWC found that many of the investors were customers of Coy's firms, and that Coy received approximately \$327,250 in compensation in connection with the offerings. Pursuant to the Disqualifying AWC, FINRA barred Coy in all capacities.³

The Disqualifying AWC states that Coy's "[s]ubmission of this AWC is voluntary" and he certified that he "agreed to its provisions voluntarily; and that no offer, threat, inducement, or promise of any kind . . . has been made to induce me to submit it." It further provides that Coy specifically and voluntarily waived his right to, among other things, appeal to the NAC or Commission. Coy was represented by counsel in connection with the Disqualifying AWC, and he testified that his attorney strongly advised him not to agree to the terms of the Disqualifying AWC. Coy testified that he did so anyway because he did not have the funds to litigate the matter.

III. Factual Background

A. Coy

Coy first qualified as an investment company and variable contracts products limited representative in October 2000, and he requalified in this capacity in February 2017. He also passed the uniform securities agent state law examination and the investment advisers law examination in October 2010. Prior to entry of the Disqualifying AWC, Coy was associated with four member firms.

Subsequent to the Disqualifying AWC, Coy created Coy Capital Management, Inc. ("Coy Capital"), a registered investment adviser. Coy is the president and chief executive officer of

² Under FINRA's By-Laws, no person shall, without FINRA's approval, become associated with a member if such person is subject to any "statutory disqualification" as such term is defined in Section 3(a)(39) of the Securities Exchange Act of 1934 ("Exchange Act"). See FINRA By-Laws, Art. III, §§ 3, 4. Exchange Act Section 3(a)(39) defines "statutory disqualification" to include a bar or suspension from associating with a member of any self-regulatory association. See 15 U.S.C. 78c(a)(39)(A).

³ In January 2011, the Pennsylvania Securities Commission also sanctioned Coy in connection with the transactions underlying the Disqualifying AWC. It found that he effected the securities transactions without providing prior written notice to his member firm and without recording such transactions on the regular books and records of his firm. Pennsylvania ordered Coy to pay approximately \$18,000 in costs and assessments.

Coy Capital. He also serves as the president of SW Coy Consulting Inc., pursuant to which he provides real estate consulting services. Further, Coy is the owner, president, and chief executive officer of S.W. Coy Financial Inc., an entity engaged in the sale of fixed insurance products.

Since the Disqualifying AWC, Coy has sponsored securities offerings through Coy Capital, which Coy described as “one-off 506(b) offerings.” In connection with these offerings, Coy generally acts as the manager of a single-purpose limited liability company to raise funds from investors (including but not limited to customers of Coy Capital). In this role, Coy identifies apartment or townhouse complexes and finds investors to fund an entity to acquire, own, and operate them.

B. The Firm

As of the hearing, the Firm was based in Tarentum, Pennsylvania, and became a FINRA member in March 2018. Toth testified that in mid-September 2018, the Firm began the process to register as an investment adviser. Toth co-founded the Firm and serves as its managing director and chief compliance officer. She also holds a 47.5% ownership interest in the Firm. Toth testified that the Firm’s co-founder, Anthony Charles Hladek (“Hladek”), currently holds a 47.5% ownership interest, although she expects Hladek’s ownership interest to decrease significantly after additional registered representatives associate with the Firm and are offered ownership interests. UFFCO I LLC (“UFFCO”) currently holds a 5% ownership interest in the Firm.⁴

At the hearing, Toth testified that she formed the Firm as a contingency plan in the event that the member firm that she and Hladek were associated with, Trustmont Financial Group, Inc. (“Trustmont”), ceased operations because of an adverse ruling in a pending customer arbitration claim. Toth testified that she and Hladek felt obliged to Trustmont’s registered representatives to create the Firm so that they would have a member firm to transfer to “and [a] situation that they would be familiar with” if Trustmont went out of business. Trustmont eventually settled the arbitration claim and was able to remain net capital compliant, but Toth decided to continue with the new membership application process for the Firm and to sponsor Coy’s statutory disqualification application.⁵

Toth testified that she is currently “building [the Firm’s] infrastructure.” As of the hearing, the Firm did not have any revenue, had not conducted any securities business, and was

⁴ UFFCO is owned by Brian Uffleman (“Uffleman”). Uffleman is a customer of Coy Capital, and he holds an ownership interest with Coy in the general partner involved with a recent private offering conducted by Coy. Toth testified that Uffleman will have no control over the Firm or its operations.

⁵ In 2017, Trustmont filed an MC-400 application for Coy to associate with it notwithstanding his statutory disqualification. Trustmont later withdrew that application. Toth testified that Trustmont did so because although Member Supervision “mentioned” Coy’s permanent bar, it appeared to be more concerned with Trustmont’s regulatory history and informed Toth that it would recommend denial of Trustmont’s application based upon its history.

in the process of registering individuals. The Firm had registered two individuals (in addition to Toth and Hladek) as of the hearing. As of the hearing, the Firm was operating out of the basement of Toth's spouse's law office. Several weeks prior to the hearing, Toth represented that the Firm planned to move into space sublet from Coy Capital in Monroeville, Pennsylvania, in November or December 2018.⁶ Toth further represented that the Firm would sublet such space pursuant to "an oral understanding" with Coy Capital, pursuant to which it would not pay any rent until April 2019 and would then pay \$2,000 per month. At the hearing, Coy testified that a written lease between the Firm and Coy Capital "was in the works," although he stated that the Firm would be paying rent to Coy Capital once the Firm occupied the space.⁷

The Application stated that the Firm would engage in the sale of mutual funds, variable annuities, and private placements. Prior to the hearing, Toth further stated that the Firm would occupy "an institutional niche while serving as a managing broker dealer. Invicta's retail business will be ancillary to the institutional space." At the hearing, Toth testified that since filing the Application, the concept for the Firm had expanded. Consistent with this characterization, Toth testified that in or around late August 2018, approximately 20 registered representatives approached her about joining the Firm and that they will be joining the Firm in the near future. Toth stated that she "know[s] that it sounds like a little bit of a challenging undertaking while you are starting a new firm and you're going to start with 20 reps. I'm familiar with these reps." The additional representatives will be located throughout Pennsylvania and Ohio.

IV. Coy's Proposed Activities and the Firm's Proposal for his Heightened Supervision

A. Coy's Proposed Association with the Firm

The Firm requests that FINRA permit Coy to associate with it as an investment company and variable contracts products limited representative, with Coy selling mutual funds and variable annuities. The Firm proposes to compensate Coy on his sales of mutual funds and variable annuities through commissions.

In the Application, Coy stated that the Firm would also conduct due diligence and all sales on any future private offerings that Coy sponsors, and "the offering would be run through the books and records of [the Firm]." Similarly, prior to the hearing the Firm stated that it

⁶ As of the hearing, Coy testified that the Monroeville premises were being built out for Coy Capital and the Firm, and that Coy Capital would be moving into the premises in the next few months. FINRA's Central Registration Depository ("CRD"®) indicates that the Firm currently is located in Monroeville, Pennsylvania, which appears to be the same street address as Coy Capital.

⁷ Subsequent to Coy's testimony, Toth testified that "it is my intent to pay rent. I didn't when I was filing the initial FINRA application." She further testified that regardless of the outcome of this proceeding, the Firm was going to move into the premises sublet from Coy Capital. However, Toth later testified that if the Application was denied, she "may decide to keep running Invicta out of the basement of [her spouse's] law office. I believe I still have that option." Toth characterized the matter as "an evolving situation, an evolving process."

intended to act as the managing broker-dealer for private offerings sponsored by Coy and that it would conduct due diligence for these offerings.⁸ At the hearing, Toth testified that she and Coy have not discussed how he would be compensated in connection with private placements, although she hopes that the Firm will serve as the managing broker-dealer for such offerings. She further testified that because Coy will not be paid a commission on his private placement transactions, he does not currently need to be registered as a general securities representative or a direct participation programs limited representative.⁹ Toth stated that if Coy later registered in these capacities, Coy and the Firm will have discussions concerning whether Coy will receive commissions on his private placement transactions. Similarly, Coy testified that he and the Firm have not had discussions concerning how the Firm would be paid in connection with Coy's private placements.

B. Coy's Proposed Primary Supervisor

The Firm proposes that Toth will serve as Coy's primary supervisor. In addition to serving as the Firm's managing director and chief compliance officer, as of the hearing, Toth also served as Trustmont's chief compliance officer, its general counsel, and as the chief compliance officer for Trustmont's affiliated registered investment adviser.¹⁰ Toth has been previously associated with one other firm, worked as an enforcement attorney for the Pennsylvania Securities Commission from June 2001 to July 2004, and served as the Deputy Secretary for Securities with the Pennsylvania Department of Banking and Securities from October 2012 to June 2013.

Toth has been registered with the Firm since March 2017. She first registered as a general securities representative in January 2006 and as a general securities principal in March 2006. Toth also received a waiver for the uniform securities agent state law examination in November 2013.

The record shows one customer complaint against Toth. In June 2017, customers filed a complaint against Toth, Hladek, and Trustmont. The complaint alleged that Toth, Hladek, and Trustmont failed to supervise a registered representative, and the customers asserted \$750,000 in damages. Trustmont settled this complaint for \$375,000, with Toth and Hladek not personally contributing to this settlement. Toth testified that the misconduct alleged in the complaint

⁸ Toth testified that she and several third parties would be performing due diligence on Coy's private offerings and the Firm and these parties would enter into contracts for such services if the Application is approved.

⁹ We disagree with the suggestion that an individual's failure to receive commissions exempts him from FINRA registration requirements. *See* FINRA Rules 1220(b)(1), (2), and (8).

¹⁰ Toth testified that Trustmont was in the middle of a cycle examination and that she planned to terminate her roles with Trustmont once that examination was complete. Subsequent to the hearing, counsel represented that Toth had terminated her roles with Trustmont. Toth's Uniform Application for Securities Industry Registration or Transfer ("Form U4") also lists one outside business activity, Three Rivers Law Partners, for which she devotes approximately five hours per month.

occurred prior to her association with Trustmont and involved the sale of a variable annuity and REIT.

The record also shows that Toth personally filed for bankruptcy in April 1998 and filed a bankruptcy petition on behalf of a corporation in December 1999. CRD indicates another bankruptcy case was filed against Toth in November 2002, but that the case was dismissed after the creditor agreed to a settlement. The record shows no other disciplinary or regulatory proceedings, complaints, or arbitrations against Toth.

C. The Current Proposed Backup Supervisor

The Firm originally proposed that Hladek would serve as Coy's alternate proposed supervisor. However, at the hearing Toth informed the Hearing Panel that "plans change" and Lynette King would now serve as Coy's alternate proposed supervisor. Toth stated that she is "not losing a whole lot of sleep on alternate supervisors here" because as a start-up, Toth will not be away from the Firm very much.

King has been associated with the Firm since June 2018. She qualified as a general securities representative in January 1988 (and again in September 2008) and as a general securities principal in February 2013 (and received a waiver to act in such capacity in August 2018). King also passed the uniform securities state law examination in February 1988 and again in March 2011. Prior to joining the Firm, King was associated with 13 firms. CRD also shows that she is currently employed by ACA Compliance Group (an entity that the Firm proposes will conduct audits to ensure that it is complying with the terms of its heightened supervisory plan for Coy).

CRD shows no disciplinary or regulatory proceedings, complaints, or arbitrations against King.

D. The Firm's Proposed Heightened Supervisory Plan

The Firm submitted a proposed heightened supervisory plan with the Application. It provides:

1. Toth will supervise Coy. Toth does not directly supervise any other registrants. Coy and Toth will be located in the same branch office. Each week, Toth will schedule an onsite meeting with Coy to review that week's activity;
2. Coy will not maintain discretionary accounts with Invicta;
3. Coy will not act in any supervisory capacity;
4. Coy's brokerage business will be limited to the sale of mutual funds and variable annuities. Toth will review and pre-approve each securities account, prior to the opening of the account by Coy. Account paperwork will be documented as approved with a date and signature and maintained in Invicta's records;

5. Toth will review incoming written correspondence (which would include email communications) and will review outgoing correspondence before it is sent;
6. Toth will review and approve Coy's transactions before they are executed and evidence the review by initialing the documents;
7. Coy must disclose to Toth on a monthly basis details related to his outside sales activities;
8. If Toth is to be on vacation or out of the office for an extended period, [King] will act as Coy's interim supervisor;¹¹
9. All complaints pertaining to Coy, whether verbal or written, will be immediately referred to Toth for review. Toth will prepare a memorandum to the file as to what measures she took to investigate the merits of the complaint (e.g., contact with the customer) and the resolution of the matter. Documents pertaining to these complaints will be kept segregated for ease of review;
10. Invicta will contract with ACA Compliance Group to conduct quarterly unannounced audits of Coy's brokerage business;
11. Invicta must obtain prior approval from Member Supervision if it wishes to change Coy's responsible supervisor from Toth to another person;
12. Toth must certify quarterly (March 31st, June 30th, September 30th, and December 31st) to Invicta's Board of Directors that Toth and Coy are in compliance with all of the above conditions of heightened supervision to be accorded Coy; and
13. This supervisory plan will be in effect for two years.

V. Member Supervision's Recommendation

Member Supervision recommends that we deny the Application because, in its view: (1) the Disqualifying AWC permanently barred Coy from associating in any capacity with a FINRA firm, and the Firm has not shown that extraordinary circumstances exist to permit Coy's re-entry into the securities industry; (2) subsequent to the Disqualifying AWC, Coy acted as an unregistered broker-dealer in connection with private placement offerings, which constitutes serious intervening misconduct since the Disqualifying AWC; (3) the Firm, a new FINRA member with no operating history, lacks the necessary supervisory infrastructure to supervise a statutorily disqualified individual such as Coy; and (4) the Firm proposed an inadequate heightened supervisory plan and unsuitable supervisors.

¹¹ The Firm did not submit a revised heightened supervisory plan to reflect that it proposes that King will serve as Coy's alternate supervisor.

VI. Discussion

In evaluating the Application, we assess whether the Firm has demonstrated that the proposed association of Coy is in the public interest and does not create an unreasonable risk of harm to the market or investors. *See* FINRA By-Laws, Art. III, § 3(d) (providing that FINRA may approve the association of a statutorily disqualified person if such approval is consistent with the public interest and the protection of investors); *see also Frank Kufrovich*, 55 S.E.C. 616, 624 (2002) (holding that 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”).

In cases where FINRA has imposed an unqualified bar, the bar is “intended to prohibit completely a person’s ability to engage in any future securities business with any member firm, thus precluding re-entry into the securities industry absent extremely unusual circumstances.” *See In the Matter of the Continued Ass’n of Kimberly Springsteen Abbott*, SD-2132, slip op. at 9-10 (FINRA NAC May 24, 2018), http://www.finra.org/sites/default/files/NAC_SD-2132_Kimberly-Springsteen-Abbott_052418_0.pdf, *appeal docketed*, SEC Admin. Proceeding No. 3-18554 (June 21, 2018); *Ass’n of X*, Redacted Decision No. SD01016, slip op. at 4 (NASD NAC 2001), http://www.finra.org/sites/default/files/NAC_Ddecision/p012616_0.pdf. The Firm must therefore make an extremely strong showing for us to conclude that approving the Application serves the public interest. *Id.*; *Ass’n of X*, Redacted Decision No. SD11003, slip op. at 6 (FINRA NAC 2011), http://www.finra.org/sites/default/files/NACDecision/p126106_0_0.pdf [hereinafter “2011 NAC Decision”]; *see also Asensio & Co., Inc.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *17 n.22 (Dec. 20, 2012) (“we agree with FINRA that an individual who is statutorily disqualified as a result of a bar . . . must meet a highly demanding standard before being permitted to reenter the industry. . . . We also agree . . . that a FINRA-barred applicant is required to make an extremely strong showing to justify a finding that approval of an application for re-entry would serve the public interest.”).

We have carefully considered the entire record in this matter, and we find that the Firm has not met its burden and shown that extraordinary circumstances exist to permit Coy to associate with the Firm notwithstanding his bar. As explained below, the Disqualifying AWC involved serious misconduct and imposed an unqualified bar upon Coy, and the Firm has not demonstrated that it is able to stringently supervise Coy as a disqualified individual. Specifically, the Firm is currently not operational, is building out its infrastructure, and is in flux. These factors all raise serious concerns that the Firm will be able to stringently supervise Coy as a disqualified individual. Further, the Firm’s proposed heightened supervisory plan is deficient in numerous areas. We therefore deny the Application to permit Coy to associate with the Firm.¹²

¹² Because we deny the Application based upon the seriousness of the misconduct underlying the Disqualifying AWC (which imposed an unqualified bar upon Coy) and the Firm’s failure to show that it can stringently supervise Coy as a statutorily disqualified individual, we need not decide whether Coy acted as an unregistered broker-dealer, as alleged by Member Supervision.

A. Coy's Misconduct Was Serious and FINRA Barred him

We find that the seriousness of the misconduct underlying Coy's statutory disqualification, pursuant to which FINRA permanently barred him from the securities industry, supports denying the Application. See *Nicholas S. Savva and Hunter Scott Financial, LLC*, Exchange Act Release No. 72485, 2014 SEC LEXIS 2270, at *57 (June 26, 2014) (holding that FINRA properly considered that the consent order forming the basis of an individual's statutory disqualification stemmed from allegations of serious, securities-related misconduct when it denied application); 2011 NAC Decision, at 6 (denying application based upon seriousness of disqualifying event where individual agreed to a FINRA bar for improperly withholding adviser fees from investment adviser).

The Disqualifying AWC found that Coy engaged in selling away during a seven-month period, in connection with two private placement offerings. Thirty investors invested \$5.5 million in these two offerings, and many of them were customers of Coy's firms. The Disqualifying AWC also found that Coy received significant compensation (approximately \$327,250) in connection with the offerings. We find that the Disqualifying AWC involved serious, securities-related misconduct. See *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *14 (Nov. 8, 2006) ("We have held repeatedly that engaging in private securities transactions is a serious violation."); *Keith L. Mohn*, 54 S.E.C. 457, 467 (1999) ("We have made clear however that Rule 3040 is important. By prohibiting 'selling away' from the member with whom a registered representative is associated, Rule 3040 protects investors from the hazards of unmonitored sales, while protecting the member firm from exposure to loss and litigation."). In light of this serious misconduct, Coy voluntarily agreed to an unqualified bar to resolve the matter.

Coy and the Firm argue that compelling circumstances exist to permit Coy to associate with the Firm notwithstanding his permanent and unqualified bar, and that such circumstances demonstrate that the Firm has shown that approval of the Application is in the public interest. We disagree, and find that the Firm has not demonstrated that extremely unusual circumstances exist to permit Coy to associate with the Firm notwithstanding his permanent bar. For instance, Coy and the Firm argue that FINRA's Department of Enforcement ("Enforcement") took advantage of the fact that Coy allegedly lacked the funds to litigate, and suggest that the consequences of the Disqualifying AWC should be set aside to rectify an unjustly imposed permanent bar that Coy agreed to under duress. The record, however, demonstrates that the Disqualifying AWC is valid and enforceable.¹³ See, e.g., *Sargent v. Dep't of Health & Human*

¹³ The Application implies that Coy expended more than \$100,000 in legal fees in connection with the Disqualifying AWC, which rendered him unable to expend any additional funds to litigate the matters underlying the Disqualifying AWC. Coy's testimony, however, suggested that his interactions with FINRA regarding this matter prior to executing the Disqualifying AWC were limited. He stated that FINRA sent him a letter "that had approximately a page-and-a-half of questions about my activity with relation to these private placements," to which he responded. Coy further testified that one year later, FINRA sent him a second letter asking for the same information, which he again provided. Coy stated that he did not provide any on-the-record testimony, and that FINRA simply informed Coy's counsel that it would only resolve the matter if Coy agreed to a bar.

Servs., 229 F.3d 1088, 1091 (Fed. Cir. 2000) (“It is well-established that in order to set aside a settlement, an appellant must show that the agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake.”); *Brett Thomas Graham*, Exchange Act Release No. 84106, 2018 SEC LEXIS 2266, at *26 n.34 (Sept. 12, 2018) (“A bare allegation of coercion is not sufficient to set aside the parties’ settlement agreement. . . . Nor would duress be implied if the present settlement had been the result of a hard bargain.”). Coy was represented by counsel in connection with the Disqualifying AWC and, as Coy certified in the Disqualifying AWC, he agreed to its provisions voluntarily and “no offer, threat, inducement, or promise of any kind . . . has been made to induce me to submit it.” Moreover, Coy admittedly agreed to a permanent bar—and its consequences—against the advice of his counsel.

Coy and the Firm also argue that barring Coy for his misconduct was unnecessarily harsh when compared to other cases involving selling away and that we should use this proceeding to mitigate an unjust sanction. Coy, however, waived his right to challenge his sanction when he voluntarily agreed to the terms of the Disqualifying AWC. *See Bruce Zipper*, Exchange Act Release No. 81788, 2017 SEC LEXIS 3107, at *8 (Sept. 29, 2017) (finding that an appellate waiver in an otherwise valid FINRA Letter of Acceptance, Waiver and Consent is enforceable). Moreover, Coy’s arguments concerning the validity of his agreed-upon bar in this proceeding constitute an impermissible collateral attack upon the Disqualifying AWC. *See Robert J. Escobio*, Exchange Act Release No. 83501, 2018 SEC LEXIS 1512, at *30 (June 22, 2018) (finding that “[t]he NAC correctly adhered to [FINRA’s] long-standing policy of prohibiting collateral attacks on underlying disqualifying events”).¹⁴ For similar reasons, we reject Coy and the Firm’s arguments that Coy did not intend to violate FINRA’s rules, received poor guidance from his firms’ compliance departments, and that no customers lost money or complained about the transactions at issue. Coy waived his right to challenge his agreed-upon sanction, and, in any event, this is not the appropriate forum to litigate this matter.¹⁵ *See id.* Nor is the purpose of this

¹⁴ Coy and the Firm suggest that Enforcement’s failure to appear at the hearing in this eligibility proceeding to defend the bar imposed by the Disqualifying AWC, and Member Supervision’s alleged failure to consult Enforcement in connection with its denial recommendation, supports their argument that the bar is excessive. We disagree. Enforcement is not a party to an eligibility proceeding, and Member Supervision is under no obligation to consult with Enforcement in connection with its recommendation that an MC-400 application be denied. *See, e.g.*, FINRA Rule 9524(a)(4) (providing that “the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and, the Department of Member [Supervision], shall be entitled to be heard in person . . . and to submit any relevant evidence”).

¹⁵ Even assuming that Coy had not waived his right to challenge his agreed upon bar (which he did) and that this proceeding is the appropriate forum to raise such challenge (it is not), Coy’s arguments lack merit. *See, e.g., Alvin W. Gebhart, Jr.*, 58 S.E.C. 1133, 1166 (2006) (holding that scienter is not required for a selling away violation), *rev’d on other grounds*, 255 F. App’x 254 (9th Cir. 2007) *Thomas E. Warren, III*, 51 S.E.C. 1015, 1019 (1994) (rejecting applicant’s attempts to shift blame to others for misconduct), *aff’d*, 69 F.3d 549 (10th Cir. 1995); *Dep’t of Enforcement v. Craig*, Complaint No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *24 (FINRA NAC Dec. 27, 2007) (rejecting argument that the absence of disciplinary history and prior customer complaints deserved mitigation), *aff’d*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844 (Dec. 22, 2008); *cf. also* FINRA Sanction Guidelines (2018), at 14-15, http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf (providing that whether

forum to correct an allegedly unjust sanction and to provide “an equitable solution to an enforcement overreach,” particularly where Coy voluntarily agreed to such sanction against the advice of counsel.

In support of the Application, Coy and the Firm further assert that approving the Application would subject Coy to more stringent supervision than he would be subject to as an investment adviser and that FINRA would be able to exercise oversight over transactions that are not currently subject to its jurisdiction. These arguments do not show that extraordinary circumstances exist to permit Coy as a barred individual to associate with the Firm; indeed, Coy and the Firm’s rationale would apply to all similarly situated disqualified individuals who seek to reassociate with a FINRA member. For similar reasons, we reject Coy and the Firm’s argument that granting the Application would allow Coy to better serve his investment adviser customers. Coy’s existing investment adviser customers can obtain brokerage services from an individual other than Coy, particularly where Coy’s proposed brokerage services (mutual fund and variable annuities sales) are not uniquely within Coy’s province. *Cf. The Dratel Group, Inc.*, Exchange Act Release No. 72293, 2014 SEC LEXIS 1875, at *18 (June 2, 2014) (Order Denying Stay) (rejecting argument that customers’ lost access to applicant’s services is sufficient to demonstrate irreparable harm to third parties of enforcing bar against applicant). In any event, the standard in determining whether to approve the Application is not whether customers may receive ancillary benefits, but whether approval is in the public interest and does not create an unreasonable risk of harm to the market or investors. *See generally* 2011 NAC Decision, at 6 (“We find that the Sponsoring Firm has not made the strong showing necessary for our approval of its Application for X [a person who engaged in serious misconduct and on whom FINRA imposed an unqualified bar] to re-enter the securities industry and associate with a FINRA member firm.”).

Finally, Coy and the Firm argue that he has already been out of the industry for seven years and has conducted his advisory business in compliance with all applicable statutes and regulations since the Disqualifying AWC, which purportedly militate in favor of approving the Application. We find that these facts, even if true, do not constitute compelling circumstances sufficient to permit Coy to associate with the Firm notwithstanding his statutorily disqualifying permanent bar. *See, e.g., Victor Teicher*, Exchange Act Release No. 56744, 2007 SEC LEXIS 2565, at *7 (Nov. 5, 2007) (finding no compelling circumstances to modify unqualified bar and finding that the passage of nine years since imposition of the bar “is not unduly lengthy and, taken alone, does not weigh significantly in favor of relief”); *Ass’n of X*, Redacted Decision No. SD08004, slip op. at 8 (NASD NAC 2008), https://www.finra.org/sites/default/files/NACDecision/p117873_0.pdf (denying statutory disqualification application and finding that “insufficient time has elapsed for [the disqualified individual] to demonstrate his willingness or ability to operate responsibly in the securities industry” where he agreed to a FINRA bar five years prior); *Ass’n of X*, Redacted Decision No. SD99023 (NASD NAC 1999), https://www.finra.org/sites/default/files/NACDecision/p011593_0.pdf (denying statutory disqualification application where disqualifying settlement order imposing an unqualified FINRA bar was entered 16 years prior). Under the circumstances, the Firm has not made an

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respondent’s selling away activity resulted in customer harm is one of 13 factors to consider in assessing sanctions).

“extremely strong showing” for us to conclude that setting aside Coy’s unqualified bar is in the public interest. This is ample basis, standing alone, to deny the Application.

B. The Firm Has Not Demonstrated that It Can Stringently Supervise Coy

We also find, as an additional basis to deny the Application, that the Firm has not demonstrated that it can stringently supervise Coy as a statutorily disqualified individual. *See Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *17-18 (July 17, 2009) (holding that an applicant must establish that it will be able to stringently supervise a statutorily disqualified individual). We base this conclusion upon three factors.

First, we have concerns that the Firm is not currently positioned to stringently supervise Coy as a disqualified individual. As of the hearing, the Firm was not operational. Indeed, Toth was working on building out the Firm’s infrastructure to enable it to become operational. Toth’s testimony also made clear that the Firm’s business concept has “expanded” in the brief period since it filed the Application in April 2018, and that she expects to soon hire a relatively large number of registered representatives. Further underscoring the Firm’s unsettled state, at the hearing Toth informed the Hearing Panel and Member Supervision for the first time that King, not Hladek, would be serving as Coy’s proposed backup supervisor. She also testified that a member of her compliance team would be responsible for conducting branch office inspections related to the new hires, although she had not yet appointed anyone to do that. As a brand new member firm in the midst of becoming operational while simultaneously undergoing significant changes, the Firm is in a state of flux that is simply not conducive to providing a statutorily disqualified individual with stringent oversight.

Coy and the Firm counter that the newness of the Firm should have no bearing on whether to approve the Application. They assert that this is especially true given that Toth is qualified to supervise Coy. They also point to Member Supervision’s purported reason for recommending denial of Trustmont’s application to associate with Coy—that Trustmont had a problematic regulatory history—as evidence that Member Supervision’s concerns with the Firm’s lack of any operational history are without merit and that Member Supervision’s “target keeps moving.” Coy and the Firm, however, ignore the uncertainty surrounding most aspects of the Firm’s business and operations, and the impact that uncertainty may have on Coy’s supervision. And while we agree that Toth possesses the necessary experience and qualifications to supervise a statutorily disqualified individual, here she will be addressing numerous issues facing the Firm that will necessarily occupy her time and attention. Moreover, Member Supervision may raise issues and concerns in connection with each application to associate with a statutorily disqualified individual. Its alleged concerns with Trustmont and the application filed by that firm have no bearing on its reasons to recommend denial here, and have no bearing on our consideration of the Application.¹⁶

¹⁶ To the extent that Coy and the Firm argue that Member Supervision is biased against Coy, the record does not support such claim. In any event, the NAC—not Member Supervision—decides whether to approve the Application, and our review of the Application in connection with this proceeding cures any possible bias of Member Supervision staff. *See Donner Corp. Int’l*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334, *65-66 (Feb. 20, 2007).

Second, we share Member Supervision's concerns regarding the Firm renting office space from Coy Capital, which it appears to currently be doing. In the context of a statutorily disqualified individual, "stringent supervision free of any conflicts of interest" is crucial. *See Escobio*, 2018 SEC LEXIS 1512, at *21; *In the Matter of the Continued Ass'n of Ronald Berman with Axiom Capital Mgmt., Inc.*, SD-1997, slip op. at 17-18 (FINRA NAC Dec. 11, 2014), http://www.finra.org/sites/default/files/Berman%20SD-1997%20FINAL%2019%28d%29%20DECISION%2012%2011%2014_0_0_0_0_0_0_0_0_0.pdf. In this respect, the Firm's sublease of space from Coy Capital presents a potential conflict that has not been addressed. Amplifying our concerns, as of the hearing the lease was not in writing and Toth testified that it was her belief that although the Firm would occupy the premises beginning in late 2018, it would not begin to pay monthly rent to Coy Capital until April 2019. Under these circumstances, we are concerned that the Firm's status as a tenant of Coy's investment adviser may cloud its ability to independently supervise Coy.¹⁷

Third, we find that the Firm's proposed supervisory plan is inadequate. The plan fails to reflect the gravity of Coy's misconduct and the nature of his unqualified bar from the securities industry. *See Springsteen-Abbott*, SD-2132, slip op. at 14. Emblematic of this failure is the provision in the proposed plan providing that it will only be in place for two years. At the hearing, Toth downplayed this provision and suggested that all supervision at the Firm will be heightened. She stated that "[t]he way we are going to be operating, I don't care. It can be two years; it can be ten years. It's not going to change the way that I'm doing this." She also testified that "I don't even think he needs two years of heightened supervision. . . . I'm going to be providing the same supervision one way or another. I don't care if you call it heightened supervision or not."

Contrary to Toth's testimony, the language of the proposed heightened supervisory plan is of the utmost importance because it provides the specific framework for and details of Coy's supervision as a disqualified individual. *Cf. In the Matter of the Continued Membership of Windsor Street Capital, L.P.*, SD-2172, slip op. at 22 (FINRA NAC May 14, 2018), http://www.finra.org/sites/default/files/NAC_SD-2172_Windsor_051418_0_0.pdf (emphasizing, in the context of a firm's request to continue its FINRA membership notwithstanding its disqualification, that "a written plan serves as a safeguard to help ensure that the disqualified firm does not repeat the misconduct underlying the disqualifying event and generally complies with securities laws and regulations going forward. A written plan also provides FINRA examiners with concrete factors and benchmarks to help measure and assess a firm's compliance with securities laws and regulations if FINRA permits the firm to continue in membership."). It is also crucial that the Firm's proposed heightened supervisory plan contain provisions unique to Coy as a disqualified individual to govern his proposed association with the Firm, and that the plan's provisions are designed to help ensure that Coy is stringently supervised. The Firm's proposed supervisory plan, however, consists mainly of generic provisions, most of which are not unique to Coy and appear to be applicable to any of the Firm's registered representatives. *See Leslie Arouh*, Exchange Act Release No. 62898, 2010 SEC LEXIS 2977, at *38 (Sept. 13,

¹⁷ Member Supervision also raised concerns that Uffleman's ownership interest in the Firm, and his relationship as a customer and business partner of Coy, presented conflicts. The record, however, does not contain evidence sufficient to support these concerns.

2010) (finding proposed supervisory plan deficient where “[m]uch of what the plan required is no different from the supervision the Firm afforded to all employees”).

The proposed plan also lacks sufficient detail. *See Escobio*, 2018 SEC LEXIS 1512, at *24 (“We have previously found that supervisory plans that . . . lack[] detail are insufficient.”). For instance, the plan does not specify where Coy will be supervised, and although the plan provides that Toth will review incoming written correspondence, it does not specify when she will perform such review. This provision, like many others, also fails to provide for documentation of the Firm’s compliance with the plan. Similarly, although the plan provides for quarterly audits of Coy’s brokerage business by an independent consultant, it does not provide any specifics concerning what these audits will cover. We also note that it is unclear whether King is still affiliated with the proposed independent consultant, whether she will be involved in the quarterly audits, and if so, whether this provision affords any additional assurances that Coy will be stringently supervised. Similarly, although Toth testified that she and several third parties would be performing due diligence on Coy’s private placements, the proposed plan contains no details concerning the roles of those parties.

Moreover, other than a general provision providing that Coy will disclose his outside sales activities on a monthly basis, the plan does not contain any provision specifically seeking to prevent misconduct similar to the misconduct underlying his statutory disqualification. Finally, the provision in the proposed plan limiting Coy’s activities to the sale of mutual funds and variable annuities appears to be at odds with the Application and Coy’s testimony that he will be engaging in private placement activities through the Firm, even if he is not paid commissions for such activities.

At the hearing, Toth testified that the Firm would be agreeable to making additional changes to the proposed supervisory plan. We are required, however, to consider the proposed supervisory plan before us, not some hypothetical plan. *See Timothy P. Pedregon, Jr.*, Exchange Act Release No. 61791, 2010 SEC LEXIS 1164, at *28 (Mar. 26, 2010) (stating that a firm bears the burden of proposing an adequate supervisory plan and that FINRA was fully justified in requiring the firm to provide specifics concerning that plan before approving an application); *Emerson*, 2009 SEC LEXIS 2417, at *20 (rejecting argument that the applicants were willing to accept a supervisory agreement that would satisfy FINRA; “[d]rafting a supervisory plan . . . is neither the Commission’s nor FINRA’s role”).

For all of these reasons, we find that the Firm has failed to demonstrate that it can stringently supervise Coy as a statutorily disqualified individual.

VII. Conclusion

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 Coy to associate with the Firm. We therefore deny the Application.

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary