UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-5384, 88-1095

ADRIAN ANTONIU,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petitions for Review of Orders of
the Securities and Exchange Commission

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

The Securities and Exchange Commission does not request oral argument in this case because the briefs adequately address the relevant issues.

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the Securities and Exchange Commission acted within its discretion in determining that petitioner, who had been convicted of securities fraud based on his participation in an insider trading scheme, should be barred from association with any broker or dealer.

Citations: Kane v. SEC, No. 87-1080 (8th Cir. March 14, 1988) (to be reported at 842 F.2d 194)

Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)

2. Whether affirmance by this Court of a Commission order barring petitioner from association with any broker or dealer would moot petitioner's challenge to an earlier Commission order directing the National Association of Securities Dealers, Inc.

(NASD) to deny an application seeking his association with a particular broker-dealer.

Citation: North Dakota Rural Development Corp. v. Dept. of Labor, 819 F.2d 199 (8th Cir. 1987)

3. Whether, under the circumstances, the Commission properly exercised its discretion in determining to direct the NASD to deny that application.

Citations: First National Bank of Fayetteville v. Smith, 508 F.2d 1371 (8th Cir. 1974), cert. denied, 421 U.S. 930 (1975)

Board of Regents v. Roth, 408 U.S. 564 (1972)

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979)

INTRODUCTION

Petitioner, a securities industry professional, was convicted of insider trading. He (and subsequently his accomplices) stole market-sensitive information from their brokerage firms and used it to trade securities. The information, which emanated from firm clients, identified the targets of tender offers. In derogation of the interests of the firms that employed him, and of their clients, petitioner played a central role in this lucrative scheme for some four years. This notorious conspiracy was the subject of two appellate decisions, United States v. Newman, 664 F.2d 12 (2d Cir. 1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983).

One year after sentencing, petitioner sought approval of his reentry into the securities business. The Commission

(1) disapproved the proposed employment and, (2) following a Commission administrative proceeding, barred petitioner from association with any broker or dealer. Petitioner, who testified in the Commission proceeding that no one had ever been able to explain to his satisfaction whether he had committed a crime, argues that he has reformed and, on this basis, challenges the Commission's orders.

COUNTERSTATEMENT OF THE CASE

A. THE ORDERS UNDER REVIEW

Adrian Antoniu has petitioned this Court for review of two orders of the Securities and Exchange Commission. The first order, entered September 3, 1985, directed the National Association of Securities Dealers, Inc. ("NASD") to disapprove petitioner's proposed employment with a Minneapolis member firm (A1 R. 711-713) (Antoniu 1). 1/ The second order, entered December 3, 1987, barred him from association with any securities broker or dealer (A2 R. 1912-20) (Antoniu 2). Both orders were predicated on petitioner's criminal conviction for securities fraud.

B. BACKGROUND

1. Petitioner's conviction for securities fraud

In August 1972, petitioner joined the corporate finance department of Morgan Stanley & Co., a broker-dealer registered

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1/ "A1 R.____" refers to the record certified to this Court in No. 85-5384 (Antoniu 1). "A2 R.___" refers to the record certified to this Court in No. 88-1095 (Antoniu 2). "Br. ___" refers to petitioner's brief.

with the Commission (A1 R. 48, 322-23; A2 R. 1094, 1140-41). Shortly thereafter, he entered into a conspiracy with James N. Newman to trade securities surreptitiously on information he stole from Morgan Stanley (A1 R. 347-53; A2 R. 1179-85). Under the scheme, Antoniu informed Newman of non-public information about impending takeover bids by his employer's clients. Based on this market-sensitive information, Newman, a securities trader, purchased and sold securities, and the two of them divided the profits (A1 R. 351-66; A2 R. 1183-99). After Morgan Stanley asked Antoniu to resign (A1 R. 438; A2 R. 1291), petitioner enlisted an accomplice from Morgan Stanley's mergers and acquisitions department, E. Jacques Courtois, to provide client information on which to trade (A1 R. 441-42; A2 R. 1294-95). 2/

In May 1975, Antoniu joined the mergers and acquisitions department of another registered broker-dealer, Kuhn Loeb & Co. (A1 R. 47, 171; A2 R. 1, 9). In his new position, petitioner continued to play a major role in the conspiracy. Antoniu stole and relayed to Newman non-public information concerning potential take-over bids by Kuhn Loeb clients (A1 R. 456-65; A2 R. 1313-

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2/ Over the years, the number of participants in the scheme expanded (A1 R. 433, 486; A2 R. 1282, 1353), but the basic format remained the same. Upon receipt of the stolen non-public information, petitioner's confederates would purchase and hold the stock of the "target" company until the takeover was announced, then sell at a profit (see, e.g., A1 R. 183-187, 367-402; A2 R. 1183, 1200-35, 1687). Petitioner always shared in the profits (A1 R. 351, 582; A2 R. 1468).

23). 3/ In mid-1978, the scheme was discovered. Petitioner was dismissed from Kuhn Loeb (A1 R. 77; A2 R. 1014) and went to Italy (A1 R. 78; A2 R. 1015).

Two years later, on November 13, 1980, petitioner returned to the United States and, pursuant to a plea bargain, pled guilty in the United States District Court for the Southern District of New York to two counts of a criminal information for securities fraud in violation of Sections 10(b) and 32 of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 78ff, Rule 10b-5, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2 (A1 R. 17-40; A2 R. 1097-1102, 1106-24). 4/ On August 11, 1982, petitioner was convicted and sentenced to 39 months -- three months to be served in prison and 36 months on probation (A2 R. 1605). On March 31, 1983, this sentence was amended to a suspended sentence of 39 months,

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3/ During the course of his employment with the two broker-dealers, petitioner misappropriated non-public information concerning takeover bids for and negotiations for acquisitions of at least fourteen companies (A1 R. 353-569; A2 1185-1452; see also A2 R. 1690).

4/ The counts involved two representative transactions in which petitioner had passed to Newman material non-public information stolen from Morgan Stanley by Courtois, concerning impending acquisitions of Northrup King & Co. by Sandoz Seed Co., and of Deseret Pharmaceutical Co., Inc. by Warner-Lambert, Inc. (A1 R. 24-25, 39-40, 531-41; A2 R. 1101-02, 1113-14, 1401-23).

As part of the plea bargain, the U.S. Attorney's Office agreed not to criminally prosecute petitioner further for his participation in the insider-trading scheme (A1 R. 14-16; A2 R. 1103-05).

unsupervised probation for the same period of time, and a $5,000 fine (A1 R. 11-13; A2 R. 1606-13). 5/

In August 1984, M.H. Novick & Co., a registered broker-dealer firm located in Minneapolis, Minnesota (A1 R. 41; A2 R. 1047-54), filed an application with the NASD to employ petitioner to assist in structuring and financing mergers and acquisitions for the firm's clients (A1 R. 41-46; A2 R. 1087-96, 1088, 1091). It was this prospect of petitioner's return to employment with a broker-dealer firm that triggered the regulatory scrutiny culminating in the two orders under review.

2. Regulatory scheme involved

Under the Securities Exchange Act, the qualification standards for securities broker-dealers and their employees are enforced both by the Commission itself and by self-regulatory organizations (the NASD and the national securities exchanges) subject to Commission oversight. 6/

5/ Petitioner continued to reside in Italy until 1983, but traveled to the United States from time to time to testify before a grand jury concerning the conspiracy and in the Newman criminal trial (A1 R. 81-82; A2 R. 1002-3, 1691-92). The transcripts of this testimony are included in the record at A1 R. 133-702 and A2 R. 1125-1604.

6/ This approach is consistent with the overall design of the Act in which "[i]ndustry regulation and government regulation are not alternatives, but complementary components of the regulatory process." Report of the Senate Committee on Bankruptcy, Housing and Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 22 (1975). In addition to the Commission's own authority to enforce the securities laws and rules thereunder, the Act requires that the NASD enforce compliance with those laws, Commission rules and its own rules, by its members and associated persons. See

(continued...)

a. The Act enumerates certain circumstances or factors which may disqualify persons from association with an NASD member. 7/ These disqualifying factors, which include convictions for crimes involving securities, are the "primary barrier erected by the Congress to protect investors against the entry of undesirable persons into the broker-dealer business." 8/

Section 15A(g)(2), 15 U.S.C. 78o-3(g)(2), provides that where, as here, a person is subject to a statutory disqualification, 9/ the NASD may (and must, if the Commission so

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6/(...continued)
generally Section 15A(b)(1)-(11), 15 U.S.C. 78o-3(b)(1)-(11) and Section 19(h)(1)(B), 15 U.S.C. 78s(h)(1)(B).

7/ The terms "person associated with a member" or "associated person of a member" are defined by statute to include employees of such member. Section 3(a)(21), 15 U.S.C. 78c(a)(21). See also Rule 19h-1(a)(2), 17 C.F.R. 240.19h-1(a)(2).

8/ Wolfson, Phillips, and Russo, Regulation of Brokers, Dealers and Securities Markets, ¶ 1.01[1] p.1-6 (1977).

9/ A person is subject to a statutory disqualification under Section 3(a)(39), 15 U.S.C. 78c(a)(39), if such person has, among other things, been convicted of any felony as set forth in Section 15(b)(4)(B) of the Exchange Act, within ten years preceding the filing of an application to become associated with a member.

Section 15(b)(4)(B), 15 U.S.C. 78o(b)(4)(B), refers in pertinent part to a conviction "within ten years preceding the filing of any application * * * of any felony or misdemeanor which the Commission finds --

(i) involves the purchase or sale of any security, * * *; [or]

(ii) arises out of the conduct of the business of a broker [or] dealer * * *."

(continued...)

directs) bar him from becoming associated with a member firm which seeks to employ him. The section vests the NASD, subject to Commission oversight, with initial responsibility for determining whether a proposed employment of such a person is consistent with the public interest. In exercising this responsibility, the NASD requires members to apply for consent to employ a disqualified person 10/ and has established certain procedures governing the processing of such applications. 11/

9/(...continued)
Section 15(b)(4)(B), which relates to the Commission's authority to impose remedial sanctions, refers to a finding by the Commission. For purposes of determining whether a person seeking association with an NASD member is subject to a statutory disqualification under Section 15A(g)(2), the term "Commission" means the NASD. Section 15(b)(10), 15 U.S.C. 78o(b)(10).

10/ Promptly after receiving such an application the NASD is required to send preliminary notification to the Commission. Rule 19h-1(b), 17 C.F.R. 240.19h-1(b). This notification enables the Commission staff to make relevant information available to the NASD in time to permit its consideration in connection with the NASD's processing of the application. Exch. Act Rel. No. 17615 (Mar. 10, 1981), 22 SEC Docket 405, 410-11 (Mar. 24, 1981). See also Exch. Act Rel. No. 18278 (Nov. 20, 1981), 24 SEC Docket 45, 49 (Dec. 8, 1981). Such information exchange is consistent with the Commission's obligation to supervise the NASD. Rule 19h-1(c)(8) contemplates that such information will be made a part of the record. Id.

11/ Article I, Section 13 of the NASD Bylaws, NASD Manual (CCH) ¶ 1113, p.1067 (December 1984 Reprint). These Bylaws, which were subsequently consolidated in a Code of Procedure, provide for a hearing on the record if requested or if directed by the NASD, where the applicant member and the disqualified person may appear and be heard to demonstrate why the application should be granted. The NASD determination is by written decision, approving or disapproving the application, or imposing restrictions or limitations. See also Section 15A(h)(2), 15 U.S.C. 78o-3(h)(2) (estab-
(continued...)

Section 15A(g)(2), in turn, vests the Commission with broad discretion to review and overturn, if appropriate, a decision of the NASD to permit the employment. To facilitate the exercise of this oversight authority, the statute requires the NASD, if it grants the application, to file a notice with the Commission not less than thirty days prior to permitting the proposed association to become effective. 12/ Should the Commission determine that it is in the public interest not to permit the proposed association, as here, the agency directs the NASD to bar the disqualified person from becoming associated with the particular member.

b. Section 15(b)(6), 15 U.S.C. 78o(b)(6), directs the Commission itself to protect the public by instituting a proceeding against a person associated or seeking to become associated with a broker-dealer who, inter alia, has been convicted of a crime involving the purchase or sale of any security or which arises out of the conduct of the business of a broker or dealer. The section authorizes the Commission to impose remedial sanctions on such a person, including a bar from being associated with any broker or dealer. In a proceeding to

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11/(...continued)
lishing the procedural parameters for NASD denial proceedings). This brief cites to the Bylaws as they existed at the time of petitioner's hearing before the NASD committee.

12/ Commission Rule 19h-1, 17 C.F.R. 240.19h-1, establishes the review mechanism by which the Commission exercises this oversight authority.

determine whether a sanction is in the public interest, the respondent is entitled to an evidentiary hearing on the record before an Administrative Law Judge (Section 15(b)(6); Rules of Practice 11, 14(a), 16(f); 17 C.F.R. 201.11, 201.14(a), 201.16(f)), with de novo review by the Commission of the ALJ's initial decision (Rules 17, 18, 21(a); 17 C.F.R. 201.17, 201.18, 201.21(a)).

C. THE PROCEEDINGS BELOW

1. Self-regulatory proceedings

In August 1984, M.H. Novick & Co. submitted an application to the NASD seeking consent to employ petitioner (A1 R. 41-46). At the time, petitioner was still on probation for securities fraud. The application stated that petitioner would assist Novick's clients and prospective clients in financing and structuring mergers, acquisitions and divestitures (A1 R. 42) -- the same area of the securities business from which he had perpetrated the insider-trading scheme underlying his conviction.

Petitioner appeared with counsel at a hearing on the application before a committee of the NASD (see A1 R. 68-130). Conceding that his conviction for securities fraud rendered him subject to a statutory disqualification (A1 R. 73), petitioner testified personally (A1 R. 75-97) and presented character witnesses (A1 R. 98-110). Michael Novick, a principal of the applicant, testified with respect to petitioner's proposed

duties, and the manner and extent of proposed supervision (A1 R. 110-26).

On June 3, 1985, the Board of Governors of the NASD granted the application (A1 R. 2-6). The decision cited the hearing committee's favorable impression of petitioner's demeanor and the testimony of petitioner's former colleagues as to his "change of character," and concluded that Mr. Novick could provide effective and responsible supervision of petitioner's activities subject to certain conditions set forth in the decision (A1 R. 4-5). 13/

As required by Commission Rule 19h-1, the NASD's decision, together with the record of the proceedings, were forwarded to the Commission (A1 R. 1). On June 28, 1985, the Commission, pursuant to Rule 19h-1(a)(7), informed the NASD that it was extending the review period an additional sixty days (A1 R. 706). 14/

On September 3, 1985, the Commission issued an order directing the NASD to bar the proposed association (A1 R. 711-713). The Commission determined that the proposed terms of employment were not adequate to protect against a repetition of

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13/ Those conditions were: (1) that petitioner's activities be reviewed weekly; (2) that petitioner not open any customer accounts or accept any customer orders; (3) that petitioner maintain his account and any related accounts at the firm and obtain advance approval for all orders; (4) that petitioner's employment be terminated immediately if he violated any of the conditions of his probation; (5) that petitioner disclose to all clients the nature and fact of his conviction; and (6) that petitioner work in the same office as Mr. Novick (A1 R.5).

14/ See infra pp. 42-43.

the type of misconduct in which petitioner had previously engaged (A1 R. 712). In addition, the Commission stressed the egregious nature of petitioner's crime, the short time period that had elapsed between his judgment of conviction and the proposed employment, and the fact that he would remain on probation for an additional year (A1 R. 713). In the Commission's view, these factors were not outweighed by the letters and testimony of former colleagues attesting to petitioner's rehabilitation (A1 R. 712).

2. Commission remedial sanction

On September 19, 1985, the Commission issued an order for public proceedings pursuant to Sections 15(b) and 19(h) of the Exchange Act, 15 U.S.C. 78o(b) and 78s(h), to determine whether it was in the public interest to impose a remedial sanction on petitioner. 15/

After four days of evidentiary hearings (A2 R. 496-993), the ALJ rendered an extensive initial decision, concluding that petitioner should be barred from association with any broker or dealer (A2 R. 470-95). The ALJ discounted petitioner's evidence of rehabilitation (A2 R. 494), finding that petitioner had no "real understanding of the true nature of his crimes nor of the

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15/ The order as amended (A2 R. 139A-F, 540) alleged petitioner's employment history with registered broker-dealers Morgan Stanley and Kuhn Loeb, his guilty plea to two counts of securities fraud, and his sentencing and re-sentencing (A2 R. 1-3, 139B-C).

high ethical standards expected of those in the securities business." A2 R. 493; see also A2 R. 770-71.

Following briefing and oral argument, the Commission affirmed the ALJ's decision (A2 R. 1912-20). In so doing, the Commission rejected petitioner's numerous objections to its authority to bring the proceedings and claimed denials of due process. The Commission concluded, among other things, that: (1) petitioner was a person associated with a broker or dealer by virtue of his employment by Kuhn Loeb, and was seeking to become so associated, as demonstrated by the M.H. Novick application, thereby falling within the language of Section 15(b)(6) (A2 R. 1913-14); (2) petitioner's criminal conviction involved the purchase and sale of securities within the meaning of Section 15(b)(4)(B)(i) (A2 R. 1914, 1997-1102); and alternatively (3) petitioner's conviction arose from the conduct of a dealer's business within the meaning of Section 15(b)(4)(B)(ii) (A2 R. 1914-15). 16/

16/ In addition, the Commission rejected petitioner's contention that it had prejudged the issue in the Antoniu 2 proceedings by rendering a decision in Antoniu 1 (A2 R. 1915-16). And, since Commissioner Cox had recused himself from participation in the Antoniu 2 decision, the Commission did not reach the additional issue of whether he should have been disqualified from participation in that decision (A2 R. 1915). The Commission also rejected petitioner's claim that he was denied the opportunity to prove his allegations concerning the Commission staff's motivation and bias (A2 R. 1916-17). Further, the Commission concluded that the order for proceedings provided sufficient notice that Section 15(b)(4)(B)(ii) (conviction arising out of the conduct of a dealer's business) was a basis of the proceeding against him (A2 R. 1914-15) and that, in any

(continued...)

Finally, the Commission concluded that the public interest required that petitioner be barred from association with any broker or dealer (A2 R. 1916-19). The Commission based this determination on the protracted and complex nature of petitioner's trading scheme and his use of accomplices whom he recruited. The opinion pointed out that Antoniu's participation in the scheme "was not the product of impulse or attributable to a temporary lapse in judgment or ethics." A2 R. 1919. In this connection, the Commission emphasized the heavy dependence of the securities industry upon the integrity of its participants (A2 R. 1917-19).

SUMMARY OF ARGUMENT

1. The Commission in Antoniu 2 did not abuse its discretion in barring petitioner from association with any broker or dealer. The two counts of securities fraud to which Antoniu pled guilty -- a small part of an on-going insider-trading scheme -- alone justified the imposition of a bar. Petitioner's testimony reflected a lack of understanding of the seriousness or significance of his misconduct.

Section 15(b)(6) empowered the Commission to sanction petitioner who (1) was associated with a broker-dealer at the time of his misconduct, and (2) was a person seeking association with a broker-dealer as demonstrated by his active pursuit of

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16/(...continued)
event, petitioner had received timely notice of this charge (A2 R. 1915).

such association during the year prior to the institution of the proceeding. Moreover, petitioner's conviction for trading on non-public information stolen from a broker-dealer is an adequate basis for remedial sanctions. Petitioner's argument that his conviction, under Section 10(b) for fraud "in connection with" the purchase or sale of a security, did not "involve" the purchase or sale of any security under Section 15(b)(4)(B)(i) is, as the Commission concluded, patently wrong. The Commission's alternative conclusion -- that petitioner's conviction arose out of the conduct of the business of a broker-dealer -- is also well-founded.

The Commission's adjudication in Antoniu 2 was fair. Petitioner understood and was afforded a full opportunity to meet the charge that his conviction arose out of the conduct of a broker-dealer and to challenge the evidence of which official notice was taken. Neither the Commission's ruling in Antoniu 1, a factually-related case, nor any other ground urged by petitioner disqualified the agency from deciding Antoniu 2.

2. If the Court upholds the Commission's order barring petitioner from association with any broker-dealer in Antoniu 2, the petition for review of the more limited order in Antoniu 1 should be dismissed as moot. Petitioner would have no legally cognizable interest in the outcome of his challenge to the Commission's order directing the NASD to deny his employment with a particular broker-dealer.

3. In any event, the Court should decline petitioner's invitation to engraft extra-statutory procedural requirements upon Commission action or to substitute its judgment for that of the Commission in Antoniu 1. The Commission's determination -- a discretionary assessment of the uncontested facts and circumstances of petitioner's proposed employment in light of the public interest -- was manifestly reasonable. Moreover, the procedures afforded in connection with that determination satisfied any applicable statutory or constitutional requirements.

ARGUMENT

Petitioner's attack on the administrative procedures utilized by the Commission demonstrates a basic misapprehension both of the nature and of the purposes of the regulatory mechanisms utilized in these proceedings. A primary objective of the federal securities laws is the protection of the investing public and the national economy through the promotion of "a high standard of business ethics * * * in every facet of the securities industry." Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 315 (1985), quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87 (1963). Because "opportunities for dishonesty recur constantly," the maintenance of such standards is crucial. Arthur Lipper Corp., 46 S.E.C. 78,

101 n.71 (1975), modified, 547 F.2d 171 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978). 17/

To promote the honesty, integrity and competence of persons engaged in the securities business, 18/ Congress erected certain barriers designed to "eliminate from the securities business persons of doubtful integrity * * *." 19/ The potential barrier arising from the conviction for certain crimes -- including those committed by Antoniu -- reflects a Congressional judgment that a

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17/ Accord Archer v. SEC, 133 F.2d 795, 803 (8th Cir.), cert. denied, 319 U.S. 767 (1943); see Robert Blakeney Stevenson, Exch. Act Rel. No. 21672 (Jan. 18, 1985), 32 SEC Docket 502 (Feb. 5, 1985); Trenton H. Parker & Associates, Inc., Exch. Act Rel. No. 21655 (Jan. 14, 1985), 32 SEC Docket 423 (Jan. 29, 1985). As Congress has recognized, the necessity for such standards stems from the "complex nature of the securities markets, the reliance which the investing public necessarily places upon the competence and character of professionals in those markets, and the responsibilities which are assumed * * *." Report of the Committee on Banking and Currency to Accompany S. 1642, S. Rep. No. 379, 88th Cong., 1st Sess. 43 (1963).

18/ In a report concerning the securities industry, the Commission noted that "[o]f all the types of qualifications needed for the securities business, perhaps the most important * * * is that of character and integrity." Securities and Exchange Commission, Special Study of Securities Markets, H. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. 161 (1963) ("Special Study"). The Commission's Special Study evidenced concern with, among other things, the lack of comprehensive qualification standards governing securities industry personnel. Congress responded to these concerns by amending the Exchange Act in 1964 to strengthen the qualification standards. See S. Rep. No. 379, 88th Cong., 1st Sess. (1963).

19/ Special Study at 69.

person convicted of such an offense may well be unfit for a position in this sensitive and regulated industry. 20/

Affirmance of the Commission order in Antoniu 2, which barred petitioner from the securities industry, would moot the order in Antoniu 1, which disapproved his application for employment with a particular broker-dealer. Accordingly, this brief discusses the Antoniu 2 order first.

I. THE COMMISSION PROPERLY BARRED PETITIONER FROM ASSOCIATION WITH ANY BROKER OR DEALER BASED ON HIS CRIMINAL CONVICTION FOR SECURITIES FRAUD.

A. The Public Interest Is Served by the Sanction of a Bar Ordered by the Commission.

The Commission determined, on the basis of the administrative record, that it was in the public interest to bar petitioner from employment in the securities industry (A2 R. 1912-20). This sanction was fully warranted.

Because Congress entrusted the Commission with the protection of the investing public, "'the relation of remedy to [this] policy is peculiarly a matter for administrative competence'". American Power & Light Co. v. SEC, 329 U.S. 90, 112 (1946), quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). Accord, Brickner v. FDIC, 747 F.2d 1198, 1203 (8th Cir. 1984). The Commission's determination that a sanction is

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20/ See, e.g., S. Rep. No. 379, 88th Cong., 1st Sess. 45 (1963). Congress' conclusion is hardly a surprising or controversial one. The ability to engage in sensitive professions involving public trust is often conditioned upon certain standards of integrity and may be foreclosed on the basis of a wide range of criminal misconduct. See De Veau v. Braisted, 363 U.S. 144, 159 (1960).

appropriate may not be disturbed unless the reviewing court finds it "'unwarranted in law or * * * without justification in fact * * *.'" Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185-86 (1973), quoting American Power & Light Co. v. SEC, 329 U.S. at 112-13; Pagel, Inc. v. SEC, 803 F.2d 942, 947-48 (8th Cir. 1986). Accordingly, as this Court has stated, the Commission's determination to impose a particular sanction upon a member of the securities industry should not be reversed unless shown to constitute a gross abuse of discretion. Kane v. SEC, No. 87-1080, slip. op. at 13 (8th Cir. March 14, 1988) (to be reported at 842 F.2d 194).

In this case, there was no abuse of discretion. Although, as the Commission noted (A2 R. 1917), the two counts to which petitioner pled guilty would alone have been sufficient to justify the imposition of a bar, petitioner's own testimony in the trial of his co-conspirator Newman (A2 R. 1125-1604) demonstrated that that misconduct was part of a much broader fraudulent scheme (see, e.g., A2 R. 1179-1204, 1294-1303, 1365-66). Given the egregious nature of Antoniu's conduct in misappropriating confidential market-sensitive information for personal gain while employed in the securities industry, and the extent to which he recruited and involved others in the securities industry to participate in the scheme (A2 R. 1249-50,

1282, 1294, 1352-54), a bar from employment in the securities industry was well justified. 21/

As the Commission observed (A2 R. 1919), petitioner's own attitude with respect to his violations demonstrates that he should be excluded from the industry. The ALJ, who had an opportunity to observe petitioner's demeanor as a witness, found that he conveyed "the impression * * * of a person unwilling to recognize or admit to the enormity of his offenses" (A2 R. 491). 22/ Indeed, when asked if he pled guilty because he had committed a crime, Antoniu responded:

> "No. I pleaded guilty as part of a cooperation agreement to resolve this problem. Nobody at that time and since then has been able to clearly explain to me whether I

21/ The Commission has consistently pointed to the need to impose stringent sanctions upon those, like petitioner, whose "actions reflect a wholly callous disregard for those standards [set by the securities industry]." Richard W. Suter, Investment Advisers Act Rel. No. 886 (Oct. 17, 1983), 28 SEC Docket 1729, 1743 (Nov. 1, 1983), aff'd 774 F.2d 1166 (7th Cir. 1985).

22/ The ALJ noted that

> "on direct examination by his counsel, Antoniu voiced appropriate regrets for the shame and humiliation he experienced, using words that seemed well-rehearsed but which failed to ring true. But it was an entirely different Antoniu who responded on cross-examination. Then with a demeanor and tone of voice tinged at times with arrogance, he gave answers that suggested he thought of himself more as a victim of persecution than a convicted criminal * * *." A2 R. 491.

committed a crime and what the crime was * * * ." A2 R. 771. 23/

The record amply demonstrates that the Commission did not abuse its discretion in determining that petitioner, "whose demonstrated conduct falls so far below acceptable standards of honesty and trust" (A2 R. 1919), should be barred from association with any broker or dealer.

B. The Commission's Decision To Bar Petitioner from Association with Any Broker or Dealer Is Supported by Substantial Evidence and the Agency Proceeding Was Free from Prejudicial Error.

1. The Commission properly determined that petitioner was associated or seeking to become associated with a broker-dealer within the meaning of Section 15(b)(6).

When these proceedings were commenced, Section 15(b)(6) of the Exchange Act empowered the Commission to sanction "any person associated, or seeking to become associated, with a broker or dealer" assuming he met the other statutory criteria. Peti-

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23/ Petitioner argues (Br. 47) that the statements of the sentencing judge are "definitive" on the issue of his contrition. The views of the sentencing judge, expressed in the context of weighing petitioner's cooperation with the government in determining the severity of his sentence (A2 R. 1713), are not binding with respect to the Commission's determination of the separate issue of whether remedial sanctions should be imposed in the public interest. See generally A.J. White & Co. v. SEC, 556 F.2d 619, 624 (1st Cir.), cert. denied, 434 U.S. 969 (1977). In addition, contrary to petitioner's assertion (Br. 47), the Commission considered his cooperation with the government (A2 R. 1919), but found it entitled to little weight when balanced against the public interest in excluding him from the securities business.

tioner's argument (Br. 8-9) that he did not come within the quoted language is ill-founded.

At the time of the fraud that led to his conviction, petitioner was employed by Kuhn Loeb (A2 R. 1084, 1093), a firm registered with the Commission as a broker and dealer. Thus, there is no question that he was associated with a broker-dealer. 24/ Contrary to petitioner's argument (Br. 9), the statute did not require that he be associated with a broker-dealer on the date the administrative proceeding was initiated. This interpretation would create a regulatory loophole, enabling persons who perpetrate securities fraud while employed in the securities business to avoid administrative sanctions simply by leaving the business temporarily. See John Kilpatrick, Exch. Act Rel. No. 23251 (May 19, 1986), 35 SEC Docket 1231, 1239 (June 3, 1986).

The Commission has consistently interpreted Section 15(b)(6) as authorizing proceedings against persons who were associated with a broker or dealer at the time of their misconduct, regardless of their employment or status at the time of the administrative proceedings. 25/ In 1987, Congress expressly ratified

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24/ Petitioner admitted in his answer to the Commission's order for proceedings (A2 R. 1-2, 9) that from May 1975 through July 1978 he was employed in the mergers and acquisitions department of Kuhn Loeb and was a registered representative. Further, he admitted that, as disclosed by the Commission's public files, Kuhn Loeb was registered pursuant to Section 15(b) of the Exchange Act during all times relevant to this proceeding (A2 R. 1-2, 9).

25/ See, e.g., John Kilpatrick, Exch. Act Rel. No. 23251 (May 19, 1986), 35 SEC Docket 1231, 1238-39 (June 3, 1986); Don

(continued...)

this Commission construction of the statute in order to clarify its original intent. 26/ According to the accompanying Congressional report, "[it] would clearly be contrary to the purposes [of Section 15(b)(6) to] allow persons who had violated the federal securities laws to avoid administrative sanctions merely by leaving the business and stating that they were no longer associated with a broker-dealer * * * and were not seeking to become so associated." S. Rep. No. 105, 100th Cong., 1st Sess. 23 (1987). Under these circumstances, the Commission's consistent interpretation is entitled to deference. Lowell H. Listrom & Co. v. SEC, 803 F.2d 938, 941 (8th Cir. 1986) (agency interpretation "'should be followed unless there are compelling indications that it is wrong * * *'"), quoting Red Lion

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25/(...continued)
A. Williams, Exch. Act Rel. No. 21325 (Sept. 14, 1984), 31 SEC Docket 568 (Oct. 2, 1984); Robert Berkson, Exch. Act Rel. No. 16753 (Apr. 17, 1980), 19 SEC Docket 1231 (Apr. 29, 1980).

26/ In accordance with consistent Commission practice, the provision was amended to read in relevant part: "any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a broker or dealer * * *." Pub. L. No. 100-181, § 317(3), 101 STAT. 1249, 1256 (1987) (emphasis supplied). As stated in the explanatory report: "These amendments would codify the Commission's interpretation that it has jurisdiction [under Section 15(b)(6)] to bring administrative proceedings against persons who were associated with * * * a broker-dealer * * * at the time they committed an alleged violation of the federal securities laws, regardless of their current employment or association status." S. Rep. No. 105, 100th Cong., 1st Sess. 22 (1987).

Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). See also United States v. Clark, 454 U.S. 555, 565 (1982).

The Commission's conclusion (A2 R. 1914) that petitioner was "seeking to become associated" with a broker or dealer was also correct. As the Commission noted (A2 R. 1914), Antoniu had sought employment with Novick, a securities broker-dealer, and was pursuing official approval for this proposed employment (A2 R. 760-63, 789-94, 798-99, 1082-96). 27/ The language quoted above was not intended to create a loophole that would undermine the statute's effectiveness. Plainly, Section 15(b)(6) covers persons like Antoniu who have actively pursued employment in the securities industry within the year prior to the institution of the proceedings, regardless of whether they were seeking such employment on the precise date the proceedings were initiated (see Br. 11).

2. Petitioner's conviction for securities fraud involved the purchase or sale of securities.

One predicate for sanctioning an individual under Section 15(b)(6) is that the person was convicted of a crime enumerated in Section 15(b)(4)(B). The Commission correctly concluded that petitioner's conviction comes within two of the four enumerated categories -- a conviction that "involves the purchase or sale of any security" (subsection (i)); and a conviction that "arises

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27/ Contrary to petitioner's contention (Br. 9-11), the Commission cited the fact that he had sought appellate review in Antoniu 1 only as confirming that he had not abandoned his effort to become associated with a broker-dealer (A2 R. 1914), not as a basis for the proceeding.

out of the conduct of the business of a broker [or] dealer * * *" (subsection (ii)). 28/

Petitioner argues (Br. 4-7) that his conviction for securities fraud "in connection with the purchase or sale of a security" pursuant to Section 10(b) somehow fails to satisfy subsection (i). Not surprisingly, petitioner cites no legal authority in support of this proposition. 29/

As the Commission pointed out, petitioner's asserted distinction between the phrase "in connection with" and the word

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28/ Before this Court petitioner has not challenged the Commission's conclusion that his criminal conviction arose out of the conduct of a broker-dealer's business within the meaning of subsection (ii). See discussion infra at pp. 27-29.

29/ Petitioner also suggests (Br. 1, 7, n.1) that, because this Court (unlike the Second Circuit) has not expressly adopted "the misappropriation theory" as a basis for finding a violation of Section 10(b), it may treat the conviction as a nullity. Petitioner is precluded from launching this collateral attack on his conviction. Emich Motors v. General Motors, 340 U.S. 558, 568-69 (1951); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir.), cert. denied, 429 U.S. 855 (1976). Moreover, he erroneously states (Br. 7-8, n.1) that his conviction was based solely on his misappropriation of information. In fact, his securities fraud conviction under Section 10(b) of the Exchange Act and Rule 10b-5 entailed both misappropriation of information and the use of that information in connection with the purchase or sale of securities. See United States v. Carpenter, 791 F.2d 1024, 1032 (2d Cir. 1986), aff'd by an equally divided Court, 108 S. Ct. 316 (1987); SEC v. Materia, 745 F.2d 197, 203 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985); United States v. Newman, 664 F.2d 12, 18 (2d Cir. 1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983).

"involve" is without support in precedent or logic (A2 R. 1914). 30/ The Congressional intent in adopting Section 15(b)(4)(B) was to enable the Commission to exclude persons of doubtful integrity from the securities business (see supra pp. 17-18). Conviction for securities fraud is strong evidence that an individual is not worthy of the public trust placed in securities industry professionals. Consistent with the prophylactic purpose of Section 15(b), the word "involve" as used in subsection (i) is more inclusive than the language "in connection with" in Section 10(b). Subsection (i) is not limited to convictions for violations of Section 10(b), but permits the Commission to sanction persons convicted of a wide range of securities related offenses, both state and federal.

In any event, the crimes underlying petitioner's conviction plainly involved the purchase and sale of securities. Petitioner misappropriated and caused others to misappropriate material nonpublic information concerning take-over bids and negotiations for at least fourteen companies, and passed this information to his confederates, who purchased the stock of these target

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30/ The Supreme Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively but flexibly * * *.'" Herman & MacLean v. Huddleston, 459 U.S. 375, 386-87 (1983), quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963). The nexus requirement between the securities transactions and the fraud has been construed broadly. Superintendent of Insurance v. Bankers Life and Casualty Co., 404 U.S. 6 (1971).

companies (A2 R. 1098-1102, 1113-14, 1185-1452, 1690). 31/ The sole purpose of the complex arrangement underlying petitioner's conviction was to purchase securities before a takeover bid was announced and sell them at a profit after the bid became public (A2 R. 1098-1102). Unquestionably, the Commission's finding that petitioner's conviction involves the purchase or sale of securities is supported by substantial evidence. 32/

3. The record demonstrates that petitioner understood the issues and was afforded a full opportunity to meet the Commission's charges.

Petitioner argues that he did not receive timely notice (1) that the Division of Enforcement's theory of the case included the claim that his conviction arose out of the conduct of the business of a broker or dealer (subsection ii of Section 15(b)(4)(B)) (Br. 36-9), and (2) in connection therewith, that the ALJ would take official notice of public documents filed with the Commission by Morgan Stanley (Br. 39-41). 33/ To show a denial of due process, petitioner must demonstrate some specific

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31/ A conviction under Section 10(b) of the Exchange Act and Rule 10b-5 is an adequate predicate for discipline under Section 15(b) of the Exchange Act, regardless of whether the respondent himself purchased or sold the securities.

32/ Commission findings supported by substantial evidence are "conclusive." Section 25(a)(4), 15 U.S.C. 78y(a)(4). See Lowell H. Listrom & Co., Inc. v. SEC, 803 F.2d at 941; Capital Funds, Inc. v. SEC, 348 F.2d 582, 585 (8th Cir. 1965).

33/ If this Court finds that petitioner's conviction involved the purchase and sale of securities (subsection i), the Court need not address this argument, which relates to an alternative basis (subsection ii) for imposing sanctions (see discussion at pp. 24-27 supra).

prejudice flowing from the asserted lack of notice. Citizens State Bank of Marshfield, Mo. v. FDIC, 751 F.2d 209, 213 (8th Cir. 1984). Petitioner has not met this burden. Notably, petitioner points neither to any exculpatory evidence that he might have produced, nor to any additional defenses which he might have asserted had his claimed confusion as to the bases for the Commission's action been dispelled earlier. Nor does petitioner show how he would have cross-examined or defended any differently. 34/

Moreover, a respondent in an agency action receives due process "if the record shows that [he] understood the issues and was afforded a full opportunity to meet the charges." Citizens State Bank of Marshfield, Mo. v. FDIC, 751 F.2d at 213 (citing NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 350 (1938)). Petitioner here, who was represented by counsel, was afforded a full opportunity to address whether his conviction arose out of the conduct of the business of a broker or dealer.

34/ Petitioner asserts that "had he known that many allegations outside the two counts to which he pled guilty would be litigated, [he] would have defended himself differently" (Br. 38). However, the Commission's conclusion as to Sections 15(b)(4)(B)(i) and (ii) is based solely on these two counts (A2 R. 1914). Moreover, the Commission properly considered the circumstances relating to the overall scheme in assessing the public interest in imposing sanctions (A2 R. 1917-18). See order for proceedings (A2 R. 2).

The order for proceedings set forth the general statutory bases for the Commission's action. 35/ Although it did not cite any specific subsection, the order expressly referred to the facts that Antoniu's former employer, Morgan Stanley, was a broker-dealer registered with the Commission (A2 R. 1), and that petitioner's guilty plea and conviction related to securities transactions based on nonpublic information misappropriated from that employer (A2 R. 2, 139C). Thus, the allegations set forth in the order would support a conclusion that petitioner's conviction arose out of the conduct of business of a broker-dealer.

Any initial misunderstanding by petitioner as to the dual bases for the Commission's action was certainly remedied. As soon as petitioner alerted the ALJ that he had mistakenly assumed that subsection (i) (crimes involving securities transactions) was the only basis for the action (A2 R. 647-53), the ALJ directed the Division to file a "Theory of the Case" (A2 R. 653, 669; see also A2 R. 693-94). In that filing, the Division identified subsections (i) and (ii) (A2 R. 228-33). The ALJ adjourned the proceedings so that petitioner could consider whether he needed additional time to prepare his defense (A2 R.

35/ The order that initiated the Commission proceeding itself specified Sections 19(h) and 15(b)(6) of the Exchange Act as the statutory bases for the Commission proceeding (A2 R. 1-2). Section 15(b)(6), in turn, expressly incorporates the four categories of crimes enumerated in Section 15(b)(4)(B), including convictions arising out of the conduct of the business of a broker or dealer.

670-71, 711-15). Petitioner did not, however, ask for additional time. 36/

Likewise, petitioner was well aware of the Division's request that the ALJ take official notice of certain documents filed with the Commission by his former employer. In its proposed findings of fact (A2 R. 295-96), the Division asked the ALJ to take official notice of public documents filed by Morgan Stanley on forms 14D-1, showing that the firm was the dealer-manager for the transactions underlying petitioner's conviction. Notwithstanding ample opportunity to respond, 37/ petitioner did not challenge the substance of the pertinent proposed finding and made no attempt to "establish to the contrary," either in his responsive filing (A2 R. 403, 361-444) or at any time prior to the ALJ's initial decision (A2 R. 481, n.16). In any event, petitioner had already admitted that Morgan Stanley was a registered broker-dealer at the time of the transactions underlying his conviction (A2 R. 1, 9; see also A2 R. 530-31); thus,

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36/ At the time it filed the Theory of the Case, the Division had completed its direct case, consisting of public records concerning petitioner's criminal acts; petitioner had presented only two of his six witnesses.

37/ Rule 14(d) of the Commission's Rules of Practice (17 C.F.R. 201.14(d)) provides that "[i]f official notice is requested * * *, the parties, upon timely request, shall be afforded an opportunity to establish the contrary."

the evidence of which the ALJ took official notice was cumulative (see, e.g., A2 R. 1097, 1100-01, 1102). 38/

4. The Commission's adjudication in Antoniu 2 satisfied the "fair tribunal" requirements of due process.

Petitioner's argument that he was denied a fair tribunal in Antoniu 2 is without merit. Contrary to petitioner's contention (Br. 20-22), the fact that the Commission, in the exercise of its statutory functions, ruled against petitioner in Antoniu 1, a factually-related case, is no basis for disqualifying the agency from deciding Antoniu 2. See FTC v. Cement Institute, 333 U.S. 683, 702-3 (1948) (no violation of procedural due process when judge tries same case more than once and decides identical issues). See also Cato v. Collins, 539 F.2d 656, 662 (8th Cir. 1976).

Moreover, the Commission is not required to choose between exercising its statutory oversight role over NASD determinations and exercising its own statutory responsibility to protect the public. 39/ See Pangburn v. CAB, 311 F.2d 349, 355-58 (1st Cir.

38/ Even if there were any irregularities as to the taking of official notice, they did not result in prejudice to Antoniu. Thus, they would have been harmless error. See Chrysler Corp. v. FTC, 561 F.2d 357, 362-63 (D.C. Cir. 1977); Rokey v. Day & Zimmermann, Inc., 157 F.2d 734, 736 (8th Cir. 1946), cert. denied, 330 U.S. 842 (1947). See generally, Wright & Miller, Federal Practice and Procedure: Civil § 2885, pp. 282-3 (1973).

39/ The Exchange Act provides several parallel and compatible procedures, and the use of more than one avenue is appropriate in many circumstances. See, e.g., In re Fliederbaum and Mooradian, Exch. Act Rel. No. 15568 (Feb.

(continued...)

1962) (rejecting a similar due process challenge on the ground that it would disable the agency from protecting the public). The two proceedings here on review resolved different issues. Antoniu 1 dealt only with the narrow question of whether petitioner should be permitted to work for a particular employer under specified restrictions (A1 R. 711-13). Antoniu 2 involved the broader question of whether it is in the public interest to exclude him from the securities business. Only the Commission has authority to exclude malefactors from the industry generally. Congress has made no provision for substitute Commissioners or authorized any other agency to make the requisite findings and issue an appropriate order. If the Commission were disabled from proceeding against such persons, the victims would be the public investors. See A2 R. 1915-16. 40/

Petitioner did not overcome the "presumption of honesty and integrity in those serving as adjudicators" (Withrow v. Larkin, 421 U.S. 35, 47 (1975)), or make a prima facie case for disqualifying any of the Commissioners who decided Antoniu 2.

39/(...continued)
13, 1979), 16 SEC Docket 1105 (Feb. 27, 1979); Kamen & Company, 43 S.E.C. 97, 108 n.17 (1966); Lile & Co., Inc., 42 S.E.C. 664, 670 (1965).

40/ Indeed, the courts have recognized that, even if a majority of agency members are recused from participating in a particular case, the agency's obligation to discharge its statutory function may compel the recused agency members to participate. This doctrine has been labelled the "rule of necessity." See Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589, 594 (7th Cir. 1945). See also FTC v. Cement Institute, 333 U.S. at 701.

Commissioner Cox, who referred to petitioner in a speech prior to the decision in Antoniu 2, recused himself from participation in that decision (A2 R. 1915, n.10). 41/ Accordingly, the issue of his possible prejudgment or bias is moot. 42/ Moreover, two of the three Commissioners who decided Antoniu 2 were not even appointed to the Commission until after Commissioner Cox's speech. 43/ Indeed, only one Commissioner who had participated in Antoniu 1 also participated in Antoniu 2. 44/ Under the circumstances, the Commission properly excluded the affidavit

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41/ Contrary to petitioner's assertion (Br. 22), the transcript of Commissioner Cox's speech was neither offered nor admitted into evidence (A2 R. 570). The Division moved for its identification only because petitioner's counsel referred to it during trial (A2 R. 570).

42/ None of the cases that petitioner cites (Br. 23-26) involved the situation here. In re Murchison, 349 U.S. 133, 136 (1955) (trial by judge who earlier conducted secret "one-man grand jury" proceedings); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (direct pecuniary interest in outcome); Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 589-91 (D.C. Cir. 1970) and Texaco, Inc. v. FTC, 336 F.2d 754, 760 (D.C. Cir. 1964), vac'd on other grounds, 381 U.S. 739 (1965) (speech by participating adjudicator clearly indicating a decision as to pending matters); Amos Treat & Co. v. SEC, 306 F.2d 260, 266-67 (D.C. Cir. 1962) (prior involvement in investigation of charges); Gilligan Will & Co. v. SEC, 267 F.2d 461, 468-69 (2d Cir. 1959) (agency press release).

43/ Petitioner made no prima facie showing to support his suggestion (Br. 22) that the speech may have had an impact on the other Commissioners. See Withrow v. Larkin, 421 U.S. at 47.

44/ At the time of the Antoniu 1 ruling, the Commission had the following members: Chairman Shad, Commissioners Cox and Peters. The Antoniu 2 ruling was made by Commissioners Peters, Grundfest and Fleischman.

proffered by petitioner 45/ and denied his motion to depose the Commissioners. 46/

Finally, petitioner's theory that the Commission staff that prosecuted Antoniu 2 had prejudged the case and improperly had sent information to the NASD (Br. 22) does not vitiate the proceedings. The personal belief on the part of Commission staff member Jason Gettinger or other staff members that Antoniu should be excluded from the securities business did not disqualify them from prosecuting Antoniu 2 or the Commission from deciding it. See SEC v. Knopfler, 658 F.2d 25, 26 (2d Cir. 1981), cert. denied, 455 U.S. 908 (1982); cf. United States v. Richter, 603 F.2d 744, 748 (8th Cir. 1979). Likewise the fact that the Commission staff had communicated with the NASD staff (Br. v., 22) in connection with Antoniu 1 was not improper. Rule 19h-1(b), which required the NASD to send the Commission preliminary notification of receipt of Novick's application to employ petitioner, expressly contemplates contacts between the NASD

45/ Petitioner proffered an affidavit (Br. Add. F) by a "linguistics expert," which purports to demonstrate how a "disinterested observer" would interpret the Commission orders in these proceedings and Commissioner Cox's speech.

46/ San Francisco Mining Exchange v. SEC, 378 F.2d 162, 169-71 (9th Cir. 1967) (on mere allegation that Commission members had prejudged case, no error in denying application for subpoena of their testimony). Petitioner also objects (Br. 24-8) to the ALJ's comments (A2 R. 567) that the proper forum for the resolution of whether the Commission was disqualified is a federal district court. Contrary to petitioner's assertion, the ALJ denied on the merits his motion to disqualify the Commission after permitting petitioner to proffer evidence on the issue (A2 R. 563-69).

staff and the Commission staff during the NASD's consideration of such applications. 47/ In any event, those contacts and the Commission's staff opposition to petitioner's reemployment in the securities business were actions by the staff, not the Commissioners, who were the decision-makers. Thus, the Commission correctly excluded as irrelevant to its adjudication of Antoniu 2 petitioner's evidence proffered to show prior staff misconduct. 48/

II. THE COMMISSION'S BAR ORDER IN ANTONIU 2 RENDERS MOOT PETITIONER'S CHALLENGE TO ANTONIU 1.

If the Court upholds the Commission's order in Antoniu 2 barring petitioner from association with any broker or dealer, the petition for review in Antoniu 1, which denied his application to become associated with Novick, should be dismissed as moot. A court "has no jurisdiction to review the final decision of a federal administrative agency unless 'a litigant [has] suffered some actual injury that can be redressed by a favorable judicial decision.'" North Dakota Rural Development Corp. v. Dept. of Labor, 819 F.2d 199, 200 (8th Cir. 1987),

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47/ See supra n. 10.

48/ Petitioner erroneously claims (Br. 23) that the ALJ prevented Andrew Barnes, former Associate General Counsel of the NASD, from testifying concerning the staff's opposition to petitioner's reentry in the securities business and its "secret policy" of opposing applications by similarly situated persons for five years after their conviction (A2 R. 575-6, 666-69). For reasons not made clear in the record (A2 R. 658), Barnes did not appear to testify as scheduled. The ALJ rejected as irrelevant (A2 R. 855-56) Barnes' declaration (Br. Add. E), which petitioner offered in lieu of testimony.

quoting Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 70 (1983) (per curiam).

In this case, affirmance of the order barring petitioner from employment in the industry would render academic petitioner's challenge to the Commission's disapproval of his employment with a particular broker-dealer; he would have no legally cognizable interest in the outcome of that challenge. 49/ The Commission's decision in Antoniu 1 results in no additional "collateral consequences" that would give him a continuing stake in the resolution of the issues pertaining to that proceeding. See, e.g., Sibron v. New York, 392 U.S. 40, 50-8 (1968). 50/ Accordingly, if this Court affirms Antoniu 2, it should not reach the merits of petitioner's challenge to Antoniu 1.

49/ For example, petitioner argues generally that Rule 19h-1(a)(7) is "patently cruel and unfair" but does not identify any particularized harm to him that could be remedied by reversal of Antoniu 1 alone (Br. 20). Although petitioner gives as a reason for his petition for review in Antoniu 1 "the stigma and vocational burden coextensive with an administrative bar" (Br. 10), that alleged injury would not abate if only Antoniu 1 were reversed. Moreover, assuming there were some additional stigma, it would not constitute a legally cognizable interest. See North Dakota Rural Development Corp. v. Dept. of Labor, 819 F.2d at 200 (where it is impossible to redress a fundamental injury -- in that case, a bar from participation in a grant competition -- any stigma from the decision would be insufficient to prevent it from being moot).

50/ That petitioner challenges the constitutionality of Commission Rule 19h-1 does not alter this analysis. See Bishop v. Committee on Professional Ethics, 686 F.2d 1278, 1284 (8th Cir. 1982) (decision revoking attorney's license to practice law rendered moot his claims challenging constitutionality of disciplinary rules concerning content of lawyer advertising).

III. THE COMMISSION PROPERLY ORDERED THE NASD TO DISAPPROVE PETITIONER'S PROPOSED EMPLOYMENT WITH NOVICK.

A. The Commission's Order Was Rationally Based Upon the Facts and Circumstances Underlying Petitioner's Proposed Association.

Section 15A(g)(2) vests the Commission with broad discretion to review and overturn NASD determinations concerning proposed employment of disqualified persons by member firms. 51/ Thus, the Commission's action is subject to review under the "arbitrary and capricious" standard; 52/ that is, the Commission's action should be overturned only if "there is no rational basis for the action." Moore v. Custis, 736 F.2d 1260, 1262 (8th Cir. 1984). Petitioner must prove that the Commission's action was "'willful and unreasoning * * * without consideration and in disregard of the facts or circumstances of the case'" (id. quoting First National Bank of Fayetteville v. Smith, 508 F.2d 1371, 1376 (8th Cir. 1974), cert. denied, 421 U.S. 930 (1975)), a showing he has not made and cannot make.

In this case, the Commission disapproved petitioner's employment with Novick because it concluded that petitioner's past conduct, present situation and proposed circumstances of employment represented a danger to the investing public. 53/ This

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51/ See nn. 63, 64 infra.

52/ See INS v. Abudu, 108 S. Ct. 904, 914 (1988) (where procedural requirements for agency adjudication are not statutorily prescribed, decision is subject to review under abuse of discretion standard).

53/ Contrary to petitioner's assertions (Br. 28), the order in Antoniu 1 did not constitute a bar from association with all

(continued...)

determination is amply supported by the record. Petitioner's disqualification was predicated upon a recent conviction for criminal activity (A1 R. 11-13, 17-33) 54/ constituting the antithesis of the honest and ethical conduct essential for members of the securities profession. 55/ The Commission's conclusion that the terms of the proposed association did "not provide adequate protection against a repetition of [this] type of misconduct" (A1 R. 712) was well founded. Petitioner proposed to engage in the same area of the securities business (A1 R. 42) from which he had orchestrated the conspiracy to steal and trade on market-sensitive information. In the Commission's view, none of the proposed conditions of employment (see supra n. 13) would safeguard against a recurrence of such dishonest conduct. Under these circumstances, it was manifestly reasonable for the Commission to conclude that the proposed employment would be inimical to the public interest and protection of investors. 56/

53/(...continued)
industry members. By its explicit terms, it pertained only to petitioner's proposed association with Novick: "It is ORDERED that the * * * [NASD] be and hereby is, directed to bar Adrian Antoniu from becoming associated with the member firm" (A1 R. 713).

54/ The Commission relied in part on the "short-time period that ha[d] elapsed since [petitioner's] judgment of conviction and the fact that [he would] remain on probation for approximately one more year" (A1 R. 713; see A1 R. 11-13).

55/ United States v. Carpenter, 791 F.2d at 1030.

56/ Thus, petitioner's substantive due process arguments are without merit. While arbitrary or capricious governmental
(continued...)

B. The Procedures Employed in Antoniu 1 Comport with Statutory and Constitutional Requirements.

Petitioner's arguments that the process employed by the Commission in reaching its determination was in derogation of statute (Br. 12-20) and violated constitutionally cognizable rights (Br. 28-35), seriously misperceive the grant of authority embodied in the Exchange Act and implemented by rule and the constitutional principles governing the exercise of that authority.

1. The procedures employed in connection with Antoniu 1 comply with the statute.

As noted, Section 15A(g)(2) and Commission Rule 19h-1 contemplate that the NASD has initial responsibility for processing applications by its member firms seeking to employ persons subject to a statutory disqualification. The NASD by-laws then in effect provided that member firms that employ persons convicted of crimes enumerated in Section 15(b)(4)(B) may be denied continued membership in the organization 57/ and

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56/(...continued)
action may offend "'notions of fairness' generally embodied in the Due Process Clause," to come within this narrow principle, petitioner would have to show that the Commission's decision bore no rational connection to its legitimate interest in ensuring the fairness and integrity of the securities markets. See Harrah Independent School District v. Martin, 440 U.S. 194, 198 (1979).

The Commission's disapproval of petitioner's proposed employment is consistent with its determinations with respect to other similarly situated individuals. See e.g., In re Hibler, Exch. Act Rel. No. 22067 (May 23, 1985), 33 SEC Docket 205 (June 4, 1985).

57/ See Article I, Section 2(c) of the NASD Bylaws, NASD Manual (CCH) ¶ 1102, p. 1046 (December 1984 Reprint).

established procedures for members to apply for consent to employ such persons. See supra n. 11.

In accordance with these procedures, petitioner and Novick were afforded a hearing on the application before a committee of the NASD with ample opportunity to submit relevant material in support of the application. 58/ Based on the criminal information and judgment of conviction, 59/ the NASD found that petitioner was in fact subject to a statutory disqualification (A1 R. 70, 72). Since petitioner conceded the existence of such disqualification, 60/ the evidence he presented related largely to his character, rehabilitation and proposed supervision.

58/ Rule 19h-1(c) specifies what information the NASD must submit to the Commission and thus serves as a guide to the NASD's fact-gathering inquiry. Among other things, the notice must contain information pertaining to (a) the basis for any disqualification; (b) the date upon which it is proposed that association shall become effective; (c) the person's activities since the disqualifying event, the prospective business or employment in which the person plans to engage, the manner and extent of proposed supervision, the qualifications and disciplinary history of proposed supervisors and a completed copy of the person's application to be a registered representative; (d) a certified oral hearing record together with any exhibits or written submissions; and (e) a reference to all materials furnished by Commission staff and a statement of the NASD's views regarding such information.

59/ See Weiss, Registration and Regulation of Brokers and Dealers, Sec. 19-5, p. 208 (1965) ("A reference to the ... information and the judgment of conviction will readily disclose" whether a conviction under Section 15(b)(4)(B) exists). See also supra n. 9.

60/ Counsel for petitioner stated: "We are not here to reargue [the reasons for the statutory disqualification] or to collaterally attack them and we're not going to waste your time doing that" (A1 R. 73).

The NASD approved the employment and filed a notice with the Commission (including the NASD record) as required by Section 15A(g)(2) and Rule 19h-1 (A1 R. 1). 61/ Although Rule 19h-1(c)(9) and (g) permit interested persons to submit a brief and request an oral hearing, petitioner did not do so. 62/ The Commission reviewed the record, which consisted entirely of uncontested facts and, drawing very different inferences from those facts than had the NASD, concluded that it was in the public interest to disapprove the proposed application. 63/

61/ The notice that the NASD forwarded to the Commission consisted of the submissions of the NASD and the petitioner in support of the application (A1 R. 1-10, 41-67), the transcript of the NASD hearing (A1 R. 68-130) and the materials related to petitioner's criminal conviction (A1 R. 11-40), including his testimony in the trials of his confederates (A1 R. 133-702). Petitioner was aware that the latter category of materials was considered by the NASD and would therefore be reviewed by the Commission (see A1 72-73, 89). Petitioner supplemented the record by submitting to the Commission letters from his counsel describing his activities following the hearing before the NASD committee (A1 R. 704-705, 707-710).

62/ Rule 19h-1(c)(9) and (g) require that any brief or request for oral hearing or argument be submitted with the notice. Instead, more than one month after the NASD had filed the notice, petitioner, through counsel, requested the opportunity to submit a "response" ("preferably" in person) to any staff recommendation "inconsistent with the recommendation" of the NASD (A1 R. 707). In its order, the Commission denied this request, which it construed as seeking an oral argument (A1 R. 713).

63/ The statute specifically grants the Commission authority to disapprove an NASD determination in all instances involving proposed employments of persons subject to a disqualification. Petitioner's contention (Br. 13-15, 20) that Section 15A(g)(2) circumscribes the Commission's oversight authority based on the category of disqualification is incorrect.

These procedures provided petitioner with adequate opportunity to demonstrate that, notwithstanding his recent conviction for securities fraud, he should be employed by the applicant broker-dealer. The Commission's determination that he did not do so was a proper exercise of its discretion based on its assessment of the proposed employment and its own expertise and familiarity with the industry. Petitioner's argument that the Commission lacks the authority to "veto" the NASD's determination absent a full evidentiary hearing on review at the Commission level, in addition to the hearing at the NASD level (see, e.g., Br. 20), is simply wrong. 64/

There is also no merit to petitioner's argument (Br. 16-17) that the Commission's decision in Antoniu 1 was untimely. Section 15A(g)(2) specifies that the NASD shall give the Commission notice of a proposed employment "not less than 30 days" before it becomes effective. The section does not address when the Commission must exercise its disapproval. To clarify the timetable, the Commission promulgated Rule 19h-1(a)(7),

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64/ The statute does not specify the procedures to be employed by the Commission on such review. The absence of such a provision is significant in light of the express procedural requirements in other provisions of the Act. See, e.g., Section 19, 15 U.S.C. 78s. Moreover, contrary to petitioner's argument (Br. 32), nothing in the Administrative Procedure Act mandates a "trial type" hearing where, as here, the authorizing statute does not require any hearing whatsoever. See City of West Chicago, Ill. v. NRC, 701 F.2d 632 (7th Cir. 1983); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1260-1264 (9th Cir. 1977).

limiting its period of deliberation to ninety days. 65/ This provision does not represent an unauthorized usurpation of authority, but a determination by the Commission to cabin the open-ended authority conferred by the statute. 66/

2. Petitioner's constitutional attack on the Antoniu 1 procedures has no merit.

Petitioner's claim (e.g., Br. 30-35) that the absence of an evidentiary hearing before the Commission was a denial of due process does not withstand scrutiny. The constitutional requirements of procedural due process are flexible; and the fundamental inquiry is one of fairness in light of the interest sought to be protected. E.g., Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979); Mathews v. Eldridge, 424 U.S. 319, 332-35, 347-49 (1976).

Petitioner suggests that, as a result of the Commission's decision in Antoniu 1, he lost his employment and contract rights

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65/ Because the Commission attempts to conclude its review during the minimum thirty-day notice period, the rule is written in terms of extending the consideration an additional sixty days.

66/ The rule provides that during the extended period of deliberation, the Commission will not institute proceedings under Sections 15(b) or 15B nor direct the NASD to bar association. This provision was included so that a member firm or associated person would not be subject to sanction where the NASD deems it appropriate to permit a proposed association with a member firm during the 60-day period. Petitioner's assertion (e.g., Br. 32) that the rule recognizes a right to temporary employment during such period is mistaken. See Exch. Act Rel. No. 18278, supra at 51 (emphasizing that any temporary employment "would, of course, be required to terminate if the Commission determines to exercise its veto power * * *"). The rule merely exempts temporarily what might otherwise constitute a violation of applicable law. See, e.g., Section 15(b)(6).

with Novick (Br. 29), "his liberties to pursue his profession, considerable income, * * * [and] other opportunities to work in the securities business," 67/ (id.) and suffered damage to his reputation (id.). The record, however, is devoid of any facts which support the assertion that petitioner was employed by or had any enforceable employment contract with Novick (see Br. 29, 32). Although petitioner has, in the past, held himself out as an employee of Novick (see, e.g., A1 R. 64), in fact, at no time was he employed by Novick (A1 R. 93; A2 R. 832-33) nor was such employment contemplated absent the requisite approval (see A1 R. 131). Further, by its terms, the Commission's order in Antoniu 1 applied to only the proposed association with Novick. Thus, petitioner's assertion that the order in that case foreclosed all employment opportunities is specious. Finally, it is extremely doubtful that the Commission's order itself, based on petitioner's prior criminal conviction, occasioned any injury to his reputation.

A constitutionally cognizable interest must be founded upon more than an abstract need or desire or unilateral expectation.

67/ Petitioner also argues that the Commission's decision denied him the right to freely associate with any NASD member and that this denial violates the First Amendment. This argument is totally without merit. See, e.g., Roberts v. United States Jaycees, 468 U.S. 609 (1984) (constitutionally cognizable association connotes either intimate human relationships or associations for expressive purposes within the meaning of the First Amendment); Trade Waste Management Ass'n, Inc. v. Hughey, 780 F.2d 221, 238 (3rd Cir. 1985) (noting that pursuit of private economic interest has received less First Amendment protection than that afforded social or political associations).

See Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Petitioner's desire to be employed at Novick in the face of a statutory disqualification arising from a conviction for securities fraud is not constitutionally cognizable.

Even assuming petitioner could demonstrate such an interest in liberty or property as to trigger due process constraints, the courts have consistently refused to require agencies to engage in empty procedural gestures. Hearings serve little purpose in cases in which the facts are not in dispute, particularly where, as here, a statute vests broad discretion in the agency to render a decision "in the public interest" and sets forth no specific criteria which, if met, mandate a decision favorable to the affected individual. See, e.g., Coppenbarger v. FAA, 558 F.2d 836, 840 (7th Cir. 1977). See generally Mathews v. Eldridge, 424 U.S. at 343-347. The function of process lies in ensuring that a decision is made on the basis of proper and accurate facts. See Addington v. Texas, 441 U.S. 418, 425 (1979). In cases such as this, where a decision does not turn primarily on the determination of what occurred in the past but upon an assessment of the future implications of past conduct, the respondent is entitled to less procedural safeguards. See Greenholtz v. Nebraska Penal Inmates, 442 U.S. at 7. The proceedings in Antoniu 1 fully satisfy due process requirements.

CONCLUSION

For the foregoing reasons, the order of the Commission in Antoniu 2 should be affirmed and the petition for review in Antoniu 1 should be dismissed as moot.

Respectfully submitted,

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STATUTORY APPENDIX

Section 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. 78(c)(a)(39), provides:

(a) When used in this title, unless the context otherwise requires --

* * *

(39) A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person—

* * *

(E) has committed or omitted any act enumerated in subparagraph (D) or (E) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization,

Section 15(b)(4)(B) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(4)(B), provides:

> (4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—
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> * * *
>
> (B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds—
>
> (i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;
>
> (ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, or entity or person required to be registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.);
>
> (iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities; or
>
> (iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, United States Code.

Section 15(b)(6) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(6), provided (at all times pertinent to this case):

> (6) The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, or seeking to become associated, with a broker or dealer, or suspend for a period not exceeding twelve months or bar any such person from being associated with a broker or dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection, has been convicted of any offense specified in subparagraph (B) of said paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of said paragraph (4). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with a broker or dealer is in effect willfully to become, or to be, associated with a broker or dealer without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order.

Section 15A(g)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78o-3(g)(2), provides:

> (2) A registered securities association may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection of investors shall, deny membership to any registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. A registered securities association shall file notice with the Commission not less than thirty days prior to admitting any registered broker or dealer to membership or permitting any person to become associated with a member, if the association knew, or in the exercise of reasonable care should have known, that such broker or dealer or person was subject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 240.19h-1 under the Securities Exchange Act of 1934
17 C.F.R. 240.19h-1, provides:

§ 240.19h-1 Notice by a self-regulatory organization of proposed admission to or continuance in membership or participation or association with a member of any person subject to a statutory disqualification, and applications to the Commission for relief therefrom.

(a) *Notice of admission or continuance notwithstanding a statutory disqualification.* (1) Any self-regulatory organization proposing, conditionally or unconditionally, to admit to, or continue any person in, membership or participation or (in the case of a national securities exchange or registered securities association) association with a member, notwithstanding a statutory disqualification, as defined in section 3(a)(39) of the Act, with respect to such person, shall file a notice with the Commission of such proposed admission or continuance. If such disqualified person has not consented to the terms of such proposal, notice of the organization's action shall be filed pursuant to rule 19d-1 under the Act and not this rule.

(2) With respect to a person associated with a member of a national securities exchange or registered securities association, notices need be filed with the Commission pursuant to this rule only if such person:

(i) Controls such member, is a general partner or officer (or person occupying a similar status or performing similar functions) of such member, is an employee who, on behalf of such member, is engaged in securities advertising, public relations, research, sales, trading, or training or supervision of other employees who engage or propose to engage in such activities, except clerical and ministerial persons engaged in such activities, or is an employee with access to funds, securities or books and records, or

(ii) Is a broker or dealer not registered with the Commission, or controls such (unregistered) broker or dealer or is a general partner or officer (or person occupying a similar status or performing similar functions) of such broker or dealer.

* * *

(6) The notice requirements of sections 6(c)(2), 15A(g)(2), and 17A(b)(4)(A) of the Act concerning an action of a self-regulatory organization subject to one (or more) of such sections and this paragraph (a) shall be satisfied by a notice with respect to such action filed in accordance with paragraph (c) of this section.

(7) The Commission, by written notice to a self-regulatory organization on or before the thirtieth day after receipt of a notice under this Rule, may direct that such organization not admit to membership, participation, or association with a member any person who is subject to a statutory disqualification for a period not to exceed an additional 60 days beyond the initial 30 day notice period in order that the Commission may extend its consideration of the proposal; *Provided, however,* That during such extended period of consideration, the Commission will not direct the self-regulatory organization to bar the proposed admission to membership, participation or association with a member pursuant to section 6(c)(2), 15A(g)(2), or 17A(b)(4)(A) of the Act, and the Commission will not institute proceedings pursuant to section 15(b) or 15B of the Act on the basis of such disqualification if the self-regulatory organization has permitted the admission to membership, participation or association with a member, on a temporary basis, pending a final Commission determination.

(b) *Preliminary notifications.* Promptly after receiving an application for admission to, or continuance in, participation or membership in, or association with a member of, a self-regulatory organization which would be required to file with the Commission a notice thereof pursuant to paragraph (a) of this section if such admission or continuance is ultimately proposed by such organization, the organization shall file with the Commission a notification of such receipt. Such notification shall include, as appropriate:

(1) The date of such receipt;

(2) The names of the person subject to the statutory disqualification and the prospective employer concerned together with their respective last known places of residence or business

as reflected on the records of the organization;

(3) The basis for any such disqualification including (if based on a prior adjudication) a copy of the order or decision of the court, the Commission, or the self-regulatory organization which adjudicated the matter giving rise to the disqualification; and

(4) The capacity in which the person concerned is proposed to be employed.

(c) *Contents of notice of admission or continuance.* A notice filed with the Commission pursuant to paragraph (a) of this section shall contain the following, as appropriate:

(1) The name of the person concerned together with his last known place of residence or business as reflected on the records of the self-regulatory organization;

(2) The basis for any such disqualification from membership, participation or association including (if based on a prior adjudication) a copy of the order or decision of the court, the Commission or the self-regulatory organization which adjudicated the matter giving rise to such disqualification;

(3) In the case of an admission, the date upon which it is proposed by the organization that such membership, participation or association shall become effective, which shall be not less than 30 days from the date upon which the Commission receives the notice;

(4) A description by or on behalf of the person concerned of the activities engaged in by the person since the disqualification arose, the prospective business or employment in which the person plans to engage and the manner and extent of supervision to be exercised over and by such person. This description shall be accompanied by a written statement submitted to the self-regulatory organization by the proposed employer setting forth the terms and conditions of such employment and supervision. The description also shall include (i) the qualifications, experience and disciplinary records of the proposed supervisors of the person and their family relationship (if any) to that person; (ii) the findings and results of all examinations conducted, during the two years preceding the filing of the notice, by self-regulatory organizations of the main office of the proposed employer and of the branch office(s) in which the employment will occur or be subject to supervisory controls; (iii) a copy of a completed Form U-4 with respect to the proposed association of such person and a certification by the self-regulatory organization that such person is fully qualified under all applicable requirements to engage in the proposed activities; and (iv) the name and place of employment of any other associated person of the proposed employer who is subject to a statutory disqualification (other than a disqualification specified in paragraph (a)(3)(iii) of this section);

(5) If a hearing on the matter has been held by the organization, a certified record of the hearing together with copies of any exhibits introduced therein;

(6) All written submissions not included in a certified oral hearing record which were considered by the organization in its disposition of the matter;

(7) An identification of any other self-regulatory organization which has indicated its agreement with the terms and conditions of the proposed admission or continuance;

(8) All information furnished in writing to the self-regulatory organization by the staff of the Commission for consideration by the organization in its disposition of the matter or the incorporation by reference of such information, and a statement of the organization's views thereon; and

(9) Such other matters as the organization or person deems relevant.

If the notice contains assertions of material facts not a matter of record before the self-regulatory organization, such facts shall be sworn to by affidavit of the person or organization offering such facts for Commission consideration. The notice may be accompanied by a brief.

* * *

(g) Where it deems appropriate to do so, the Commission may determine whether to (1) direct, pursuant to section 6(c)(2), 15A(g)(2) or 17A(b)(4)(A) of the Act, that a proposed admission covered by a notice filed pursuant to paragraph (a) of this section shall be denied or an order barring a proposed association issued or (2) grant or deny an application filed pursuant to paragraph (d) of this section on the basis of the notice or application filed by the self-regulatory organization, the person subject to the disqualification, or other applicant (such as the proposed employer) on behalf of such person, without oral hearing. Any request for oral hearing or argument should be submitted with the notice or application.

(h) The Rules of Practice (17 CFR Part 201) shall apply to proceedings under this rule to the extent that they are not inconsistent with this rule.

(15 U.S.C. 78a *et seq.*, as amended by Pub. L. 94-29 (June 4, 1975) and by Pub. L. 98-38 (June 6, 1983), particularly secs. 11A, 15, 19 and 23 thereof (15 U.S.C. 78k-1, 78o, 78s and 78w))

[46 FR 58661, Dec. 3, 1981, as amended at 48 FR 53691, Nov. 29, 1983]

Article I, Section 2(c) of the NASD Bylaws (December 1984 reprint), provided:

> (c) In those cases where the Board of Governors deems it appropriate, no broker or dealer shall be admitted to or continued in membership in the Corporation if such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated,
>
> * * *
>
> (B) has been convicted within the ten years preceding the filing of an application or at any time thereafter of any felony or misdemeanor which the Corporation finds involves the purchase or sale of any security or arises out of the conduct of the business of a broker, dealer or investment adviser; or which involves embezzlement, fraudulent conversion, or misappropriation of funds or securities, or which involves mail fraud, or fraud by wire, radio, or television;

Article I, Section 13 of the NASD Bylaws (December 1984 reprint), provided:

> **Sec. 13.** (a) A member shall retain its membership in the Corporation only so long as the Board of Governors deems that it possesses all of the qualifications for membership, and a broker or dealer seeking membership may, if the Board of Governors deems it appropriate, be denied admission therein if it is subject to any of the disqualifications provided in this Article.
>
> (b) If the Corporation has reason to believe there is a disqualification, the member or broker or dealer shall be promptly notified in writing of the specific grounds of such disqualification from or denial of membership. If it deems it appropriate, the Board of Governors may summarily cancel the membership of a member if it becomes subject to any of the disqualifications provided in this Article or if it continues to associate with a person who is subject to any of the same disqualifications.
>
> (c) Any member or broker or dealer may make an application to the Corporation requesting continuance in or admission to membership notwithstanding the disqualification. If an application is filed with the Corporation, the applicant and any person whose association with the applicant gives or would give rise to the disqualification shall be given an opportunity to be heard with respect to the application and shall demonstrate why the application should be granted. If requested, or if directed by the Corporation, a hearing shall be held before a committee comprised of at least one member of the appropriate District Committee and at least one member of the Board of Governors, and a record shall be kept. Such committee shall make a recommendation as to the application which shall be forwarded to the Board of Governors together with the record.
>
> (d) The Board of Governors shall make a written determination upon the record before it, setting forth therein the specific grounds upon which such determination is based and the conditions, if any, as to the continuance in or admission to membership it considers appropriate.
>
> (e) The Board of Governors shall promptly notify the applicant of any action taken. When appropriate, an application shall be promptly filed with the Commission pursuant to Section 15A of the Act. Any applicant or person who is aggrieved by the action of the Board of Governors may make application for review of such action to the Commission pursuant to Section 15A of the Act.