

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 50393 / September 16, 2004

Admin. Proc. File No. 3-11402

In the Matter of the Application of

SCOTT E. WIARD  
c/o Edmund J. Sikorski Jr., Esq.  
3300 Washtenaw Avenue, Suite 240  
Ann Arbor, Michigan 48104

For Review of Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DENIAL OF  
APPLICATION TO ASSOCIATE

Registered securities association denied member's  
application to permit employment of individual who is  
subject to statutory disqualification. Held, review  
proceeding dismissed.

COUNSEL:

Edmund J. Sikorski Jr., for Scott E. Wiard.

Marc Menchel, Alan B. Lawhead, and Vickie R. Olafson, for  
NASD.

Appeal filed: February 17, 2004  
Last brief received: May 14, 2004

I.

Scott E. Wiard, a person subject to a statutory  
disqualification, appeals from NASD's denial of the application  
of member firm Prestwick Securities, Inc. ("Prestwick" or the  
"Firm"), to employ him. We base our findings on an independent  
review of the record.

## II.

Wiard is subject to a statutory disqualification 1/ as a result of his April 20, 1999 plea of "no contest" to the felony charge of carrying a concealed weapon on or about his person (the "disqualifying event"). 2/ At the time of the disqualifying event, Wiard was both a general securities principal at member firm Royal Alliance Associates, Inc. ("Royal Alliance"), and a registered investment adviser and president of Horizons Planning Corporation ("HPC"), a financial advisory firm. 3/ On May 23, 2000, Royal Alliance filed a Membership Continuance Application with NASD to permit Wiard to continue his association with that firm. 4/ On December 15, 2000, NASD's National Adjudicatory Council (the "NAC") submitted a Notice to the Commission, pursuant to Exchange Act Rule 19h-1 5/ (the "December 2000

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1/ Section 3(a)(39)(F) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(39)(F), provides that, a person is subject to a "statutory disqualification" if, among other things, such person has been convicted of a felony within ten years of the date of the filing of an application to become associated with a member firm.

Article III, Section 4(g)(2) of the NASD By-Laws, provides that a person is "subject to a 'disqualification' . . . if such person . . . has been convicted within ten years preceding the filing of any application . . . to become associated with a member of the NASD . . . ." NASD Manual at 1307 (Nov. 2003).

2/ State of Michigan v. Wiard, Unified Trial Court, Washtenaw County Circuit Court, Case No. CR-W-99-11923-FH (Apr. 20, 1999). Wiard's plea resulted in a felony conviction, for which he paid a \$2,500 fine. Wiard will remain statutorily disqualified until April 20, 2009.

3/ Wiard has been employed continuously at HPC since 1988.

4/ As a statutorily disqualified person, Wiard is not eligible to associate with a member firm without NASD's consent. See NASD By-Laws, Article III, Section 3(b), NASD Manual at 1305 (Nov. 2003). A member firm may apply for relief either on its own behalf or on behalf of a current or prospective associated person. Id.

5/ 17 C.F.R. § 240.19h-1. Exchange Act Rule 19h-1 requires  
(continued...)

Notice"), informing the Commission of its intention to approve Wiard's continued association with Royal Alliance. 6/ As a condition of the approval, the December 2000 Notice stated that "Wiard will not maintain discretionary accounts[.]"

Wiard joined Prestwick in August 2003. 7/ On August 6, 2003, Prestwick filed a Membership Continuance Application with NASD to allow Wiard to associate with the Firm as a general securities representative and general securities principal (the "Prestwick Application"). Wiard's proposed business activities at Prestwick are the same as those he conducted at Royal Alliance. Those business activities involve Wiard's customers who own variable annuities through HPC. Their variable annuity assets are held in sub-accounts which are invested in mutual funds within the same fund family. HPC assesses a two percent annual management fee for the management of his customer accounts. Wiard manages the accounts by reallocating assets in block moves between money-market and equity index mutual funds that are contained in the variable annuity product. This arrangement is covered by an investment management agreement entitled "Authorization for Discretionary Accounts" (the "Agreement") that grants HPC a limited power of attorney "to buy, sell, or otherwise exchange" mutual funds or variable annuities "all at such time, in such amounts, and at such prices as [HPC] in its sole discretion may determine." The Agreement also gives HPC "full authority to communicate such orders directly to the mutual funds or variable annuities managers or companies."

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- 5/ (...continued)  
that, if a self-regulatory organization ("SRO") proposes to allow a person subject to a statutory disqualification to associate, or continue to associate, with an SRO member firm, the SRO shall file a notice with the Commission of the proposed association except in certain circumstances not relevant here.
- 6/ The Commission's Division of Market Regulation subsequently informed NASD that it would not recommend to the Commission that the Commission invoke Exchange Act Section 6(c)(2), 15 U.S.C. § 78f(c)(2) to direct NASD to bar Wiard from continued association.
- 7/ In 2002, Wiard terminated his association with Royal Alliance and another member firm filed a Membership Continuance Application to permit Wiard to associate with it. That firm withdrew its application before NASD issued a decision on the application.

Paul Sikorski, Prestwick's compliance officer, testified at the hearing that Wiard's customer "accounts will have a discretionary investment management agreement with [HPC]." Wiard testified that, in switching customer funds among mutual fund sub-accounts, "it is discretionary to my firm as to when we pull the trigger between two funds."

On February 5, 2004, the NAC denied the Prestwick Application. The NAC observed that the handling of discretionary accounts was "at odds with the close supervisory scrutiny" normally imposed on a statutorily-disqualified individual. The NAC also concluded that Wiard had disregarded the prohibition against maintaining discretionary accounts in the December 2000 Notice by operating a discretionary, fund-switching program for his customers while associated with Royal Alliance. The NAC found that Wiard would not change the servicing of his customers' accounts from a discretionary to a non-discretionary basis. The NAC accordingly found that it would not be in the public interest to permit Wiard to associate with Prestwick. 8/

### III.

Section 19(f) of the Exchange Act governs our review of this appeal. 9/ If we find that: (1) the specific grounds on which NASD based its action exist in fact; (2) NASD's action is in accordance with its rules; and (3) NASD's rules are and were applied in a manner consistent with the purposes of the Exchange Act, we must dismiss Wiard's appeal. 10/ If we do not make these findings or if we find that NASD's action imposes an undue burden on competition, we must set aside NASD's action. 11/

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8/ The NAC's decision identified a pending 2003 NASD enforcement action against Wiard based on customer complaints regarding churning, misrepresentation, and unsuitable recommendations. The NAC's decision stated that it gave no weight to this matter in denying the Prestwick Application.

9/ 15 U.S.C. § 78s(f).

10/ Id. See Frank Kufrovich, Securities Exchange Act Rel. No. 45437 (Feb. 13, 2002), 76 SEC Docket 2709, 2714.

11/ Exchange Act § 19(f), 15 U.S.C. § 78s(f). Wiard does not argue, nor does the record indicate, that NASD's action imposes a burden on competition not necessary or appropriate

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The Specific Grounds Exist In Fact

Wiard is subject to a statutory disqualification by virtue of his felony conviction. The earlier application to associate with Royal Alliance was approved conditioned upon the prohibition in the December 2000 Notice against Wiard's maintaining discretionary accounts. Wiard violated, and continues to violate, that prohibition by managing customer accounts pursuant to an investment advisory agreement that expressly authorizes HPC to manage discretionary accounts.

An account is discretionary where a broker has discretionary authority to buy and sell securities. 12/ By contrast, a non-discretionary account is one in which an investor must give prior approval to all transactions. 13/ Here, the terms of the Agreement are plain and the discretionary authorization is

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11/ (...continued)  
in furtherance of the purposes of the Exchange Act, and we do not consider that it does. See, e.g., Stephen L. Keidash, Exchange Act Rel. No. 43555 (Nov. 14, 2000), 73 SEC Docket 2505, 2507 (finding no indication of undue burden on competition); Edmund M. Kilbourn, 50 S.E.C. 603, 604 (1991) (same).

12/ See Hotmar v. Lowell H. Listrom & Co., 808 F.2d 1384, 1385 (10th Cir. 1987) (comparing discretionary and non-discretionary accounts). See also SEC v. Zandford, 535 U.S. 813, 823 (2002) (describing how a discretionary account enables individuals "to delegate authority to a broker who will make decisions in their best interests without prior approval").

Exchange Act Section 3(a)(35), 15 U.S.C. § 78c(a)(35), provides that "[a] person exercises 'investment discretion' with respect to an account if" such person ". . . is authorized to determine what securities or other property shall be purchased or sold by or for the account," or "makes decisions as to what securities or other property" to buy or sell for the account, "even though some other person may have responsibility for such investment decisions," or "otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account . . . ."

13/ Hotmar, 808 F.2d 1384, 1385 (10th Cir. 1987).

unambiguous. 14/ In practice, Wiard's switching of customer funds among mutual funds within the same fund family involves selling shares of one mutual fund in order to purchase shares of another. By Wiard's own admission, he has and exercises discretionary authority to determine which mutual fund holdings should be sold and which should be bought when such switches are made.

Wiard does not dispute either the existence of the statutory disqualification or the terms of the Agreement. Rather, he disputes the NAC's finding that, by managing his customers' accounts pursuant to the Agreement, he violates the prohibition in the December 2000 Notice against maintaining discretionary accounts. Wiard argues that his switching of customer accounts between money-market and equity index fund sub-accounts within the same fund family are reallocations of asset categories within a variable annuity wrapper, rather than purchases or sales of customer assets. 15/ In support of this contention, Wiard notes that the shares in the sub-accounts cannot be purchased or sold individually apart from the variable annuity and that no commissions are generated by switches among sub-accounts within the same mutual fund family. Accordingly, he contends, his customer accounts are not discretionary. 16/

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14/ See, e.g., Herbert Moskowitz, Exchange Act Rel. No. 45609 (Mar. 21, 2002), 77 SEC Docket 481, 490 (finding that a written trading authorization granted respondent investment power over signatory's securities account); Reliant Energy Serv., Inc. v. Enron Canada Corp., 349 F.3d 816, 822 (5th Cir. 2003) (stating that "[w]hen a contract is expressed in unambiguous language, its terms will be given their plain meaning and will be enforced as written").

15/ Wiard cites both the Exchange Act Section 3(a)(35), 15 U.S.C. § 78c(a)(35) definition of "investment discretion" and our Investment Adviser Registration Depository website, which defines "discretionary authority" in relevant part as "the authority to decide which securities to purchase or sell . . . ." See <http://www.sec.gov/pdf/adv-glossary.pdf>

16/ Wiard filed a motion to introduce additional evidence pursuant to Rule 452 of our Rules of Practice. Wiard seeks to introduce an "expert report" (the "Lowry document") authored by consultant Robert W. Lowry, who did not testify at the hearing. The Lowry document opines that Wiard did not violate the terms of the December 2000 Notice. NASD

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We reject this reasoning. Section 3(a)(13) of the Exchange Act provides in relevant part that "the terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire." <sup>17/</sup> Section 3(a)(14) of the Exchange Act provides in relevant part that "[t]he terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of." <sup>18/</sup> Wiard's reallocations of his customers' holdings fall within the Exchange Act definitions of "purchase" and "sale" because they involve, as noted above, the disposition of certain securities within a mutual fund family and the acquisition of others. As noted above, Wiard exercises discretionary authority as to when such purchases and sales occur and in what amount. <sup>19/</sup> The fact that no commissions are generated by Wiard's switching activity does not mean that there are no purchases, sales, acquisitions, or dispositions of customer assets involved.

Wiard next cites the exception to NASD Conduct Rule ("Conduct Rule") 2510 contained in Conduct Rule 2510(d). Conduct Rule 2510 sets forth certain rules for handling discretionary accounts, proscribing excessive transactions and requiring authorization and acceptance of accounts, and approval and review

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<sup>16/</sup> (...continued)

opposes the introduction of the Lowry document into evidence.

Rule of Practice 452 requires a showing that there were reasonable grounds for failure to adduce such evidence previously and that the additional evidence is material. In support of his motion, Wiard claims that he "had no notice that expert opinion may have been needed" at the hearing. Wiard does not explain the basis for this assertion. Moreover, Lowry identified all the documents that he reviewed in preparing the Lowry document; the Agreement was not one of them. Accordingly, Wiard has not shown that he had reasonable grounds for failing to adduce the Lowry document previously nor that the additional evidence is material, and we deny his motion.

<sup>17/</sup> 15 U.S.C. § 78c(a)(13).

<sup>18/</sup> 15 U.S.C. § 78c(a)(14).

<sup>19/</sup> Quarterly statements for Wiard's customers include the words "BUY" and "SELL" in the "Account Value" column, next to specific dollar amounts showing the allocation of customers' holdings in each mutual fund.

of all transactions with respect to such accounts. Conduct Rule 2510(d) provides, in pertinent part, that the requirements of Conduct Rule 2510 do not apply to "discretion as to the price at which or the time when an order given by a customer" to purchase or sell a "definite amount" of a "specified security" will be executed. Wiard claims that, since all he is doing is determining the price and time at which the switching will occur, his trading for his customers is covered by this exception.

Wiard's reliance on this exception is inapposite. Conduct Rule 2510(d) does not purport to define discretionary accounts, but rather provides that the requirements of Conduct Rule 2510 do not apply to certain discretionary decisions. Since Wiard determines not only the price and time at which the switching will occur, but also determines which fund shares will be sold and which fund shares will be purchased, the requirements of Conduct Rule 2510 do apply to his discretionary decisions. On the basis of all the foregoing, we find that the specific grounds on which NASD based its denial of the Prestwick Application exist in fact.

NASD's Rules Were Applied In A Manner Consistent With The Purposes Of The Exchange Act 20/

In denying the Prestwick Application, the NAC specifically noted that the handling of discretionary accounts is "at odds with the close supervisory scrutiny" to be imposed on a statutorily-disqualified individual. The NAC considered whether Wiard would be likely to abide strictly by the heightened supervisory conditions that it would impose if it approved the Prestwick Application and weighed the difficulty of having a supervisor follow-up with Wiard's customers on an ongoing basis. The NAC found that the prohibition against Wiard maintaining discretionary accounts was therefore an appropriate safeguard on which to condition Wiard's association with a member firm. The NAC also considered that Wiard had violated the prohibition contained in the December 2000 Notice.

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20/ We also find that NASD complied with all its rules. Wiard does not dispute this, apart from his claim, rejected above, that the NAC's decision was inconsistent with Conduct Rule 2510. Our review indicates that NASD complied with all its appropriate notice and other procedural requirements. See Citadel Securities Corp., Exchange Act Rel. No. 49666 (May 7, 2004), 82 SEC Docket 3249, 3254-55; Kufrovich, 76 SEC Docket 2709, 2714.



We have consistently held that, in order to ensure the protection of investors, NASD may demand a high level of integrity from securities professionals. 21/ We have also held that it is appropriate to impose conditions on statutorily-disqualified persons, and have recognized NASD's evaluation of appropriate business standards for the supervision of such persons. 22/ Even though Wiard does not earn commissions for the discretion he exercises over accounts, this does not mean his fund-switching decisions are free from risk of harm to his customers. Because of this risk, it was appropriate for NASD to impose on Wiard the condition prohibiting him from maintaining discretionary accounts, and we find it appropriate for NASD to have considered the violation of the December 2000 Notice prohibition in making its decision. 23/

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21/ Citadel Securities Corp., 82 SEC Docket at 3255.

22/ See, e.g., Citadel Securities Corp., 82 SEC Docket at 3255; Halpert and Co., Inc., 50 S.E.C. 420, 422 (1990).

23/ Wiard claims that NASD investigators did not find that he maintained discretionary accounts when they examined his office on May 21, 2001. In support, he attached to his brief a self-authored memorandum and two isolated excerpts purporting to be from the investigators' report. Because Wiard did not file an appropriate motion to adduce those documents, they are not in the record. See supra note 16 and accompanying text. Absent such a motion, under Exchange Act Section 19(f), we consider only the record presented to NASD. See, e.g., Citadel Securities Corp., 82 SEC Docket at 3252. We therefore reject this claim.

Wiard also claims that, in approving the December 2000 Notice, NASD possessed a copy of the same Agreement at issue here, arguing that it is unreasonable for NASD to criticize him now for violating the prohibition against maintaining discretionary accounts when NASD approved the 2000 application. Wiard has not substantiated his claim that NASD possessed a copy of the Agreement. Wiard attached to his brief other non-record documents, showing that, in connection with the 2000 application, NASD requested in a September 29, 2000 letter "a copy of a disclosure document signed by a customer of [] Wiard's regarding fee-based compensation [fund-switching] services." The record includes no reference to such a request or to whether the requested document was ever received by NASD. Accordingly,

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Accordingly, we find that NASD applied its rules in a manner consistent with the purposes of the Exchange Act and with the public interest in ensuring the integrity of the securities industry. We therefore conclude that NASD's action in denying the Prestwick Application was appropriate. 24/ We therefore will dismiss this review proceeding.

An appropriate order will issue. 25/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, and ATKINS); Commissioner CAMPOS not participating.

Jonathan G. Katz  
Secretary

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23/ (...continued)  
we decline to consider this argument.

24/ Citing Stephen Ketzdorski (sic) [L. Keidash], Exchange Act Rel. No. 43555 (Nov. 14, 2000), 73 SEC Docket 2505, Wiard asserts that NASD must show how his felony creates an unreasonable risk of harm to the market or investors to the extent that NASD based its denial on the underlying felony. Keidash is inapposite here. In Keidash, NASD based its denial solely on the existence of the underlying felony. The NAC's decision here was based on other factors that demonstrated a risk of harm to investors.

25/ We have considered all of the contentions advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

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ORDER DISMISSING REVIEW PROCEEDING

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by Scott E. Wiard be, and it hereby is, dismissed.

By the Commission.

Jonathan G. Katz  
Secretary