

APR 11 2005

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY H. BARKATE,

Petitioner,

v.

SECURITIES AND EXCHANGE
COMMISSION,

Respondent.

No. 04-72839

SEC No. 3-11250

MEMORANDUM*

On Petition for Review of an Order of the
Securities & Exchange Commission

Submitted March 23, 2005**

Before: B. FLETCHER, TROTT, and SILVERMAN, Circuit Judges.

Anthony H. Barkate, a former securities salesperson, petitions pro se for review of the Securities and Exchange Commission's ("SEC") order sustaining a

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

disciplinary decision of the National Association of Securities Dealers, Inc. (“NASD”) barring Barkate from association with any NASD member brokerage firm. We have jurisdiction under 15 U.S.C. § 78y(a). We review the SEC’s affirmance of the NASD’s imposition of sanctions for abuse of discretion, *McNabb v. SEC*, 298 F.3d 1126, 1133 (9th Cir. 2002), and the SEC’s factual findings for substantial evidence, *Eichler v. SEC*, 757 F.2d 1066, 1069 (9th Cir. 1985). We deny the petition for review.

Substantial evidence supports the SEC’s findings that Barkate violated NASD Conduct Rules 2110 and 3040, that he did not submit an outside business activity disclosure form prior to the date upon which he started selling tax lien certificates outside the scope of his regular employment, and that he could not have reasonably believed that these certificates were not securities. *See McNabb*, 298 F.3d at 1133.

The SEC did not abuse its discretion when it sustained the sanction, because it determined that Barkate failed to demonstrate mitigating factors for his conduct and the sanction was within the Sanction Guidelines for violation of NASD Conduct Rules 2110 and 3040. *See id.*

Barkate’s remaining contentions are also without merit.

PETITION FOR REVIEW DENIED.