

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 75705 / August 14, 2015

Admin. Proc. File No. 3-16434

In the Matter of the Application of

Darren M. Smith
Lima, OH 45820

for Review of Disciplinary Action Taken by FINRA

ORDER GRANTING MOTION TO DISMISS APPLICATION FOR REVIEW

Darren M. Smith, formerly associated with Huntington Investment Company (“Huntington”), a FINRA member firm, seeks review of a FINRA disciplinary action. FINRA barred Smith from associating with any FINRA member in any capacity after he failed to comply with a request for information pursuant to FINRA Rule 8210.¹ FINRA filed a motion to dismiss Smith’s application for review, arguing that Smith failed to exhaust his administrative remedies. Smith did not file an opposition to FINRA’s motion to dismiss. We grant the motion and dismiss the appeal.

I. Background

Smith was employed by Huntington’s banking affiliate for several years before becoming associated with Huntington in November 2013. On November 22, 2013, Huntington filed a Uniform Application for Securities Industry Registration or Transfer (Form U4) with FINRA to register Smith as a limited representative. Although Smith’s registration could not be completed after he failed the Series 6 examination, he remained employed by both Huntington and Huntington’s banking affiliate until April 25, 2014, when Huntington and its affiliate terminated him for using corrective fluid on a legal document.

¹ FINRA Rule 8210(a)(1) states, in relevant part, that FINRA staff has the right to “require a member, person associated with a member, or any other person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically . . . with respect to any matter involved in the investigation.”

FINRA initiated an investigation after Huntington filed a Uniform Termination Notice for Securities Industry Registration (Form U5) as to Smith. FINRA requested documents and information from Smith three times in 2014. FINRA sent the requests on June 2 and 18, and served the third request on July 16.² The record does not reflect a response from Smith to any of the requests.

All three of the requests asked Smith to provide FINRA with information concerning the allegations that he used corrective fluid on a legal document and any documentation relating to the allegations. The July request additionally asked whether the customer approved the document's alteration, whether Huntington approved the use of corrective fluid, and whether any other Huntington employees were involved. All three of the requests also asked for information about any other complaints regarding Smith's employment at Huntington. Each of the requests informed Smith of his obligation to fully comply with the request and warned that failure to do so could "expose [him] to sanctions, including a permanent bar from the securities industry." The July request required a response by July 29, 2014.

On November 10, 2014, FINRA's Enforcement Department notified Smith that, pursuant to Rule 9552, he would be suspended on December 4, 2014 for his failure to comply with the July request (the "Pre-Suspension Notice").³ FINRA sent the Pre-Suspension Notice to Smith's home address by certified and first-class mail; it was delivered and signed for by Smith on November 22, 2014. The Pre-Suspension Notice informed Smith that he could avoid suspension by complying with the July Rule 8210 request before the effective date of the suspension. It noted that a timely request for a hearing would prevent the suspension from taking effect, and that once the suspension took effect, Smith could seek termination of the suspension on the ground of full compliance. Finally, it warned Smith that that if he failed to request reinstatement within three months of the date of the Pre-Suspension Notice, he would automatically be barred from associating with any FINRA member in any capacity effective February 13, 2015.⁴

Smith did not take any action in response to the Pre-Suspension Notice. Accordingly, on December 4, 2014, FINRA sent Smith a letter, again by certified and first-class mail, notifying him that he was suspended from associating with any FINRA member, effective immediately

² The June 2 and 18 requests were sent by certified and first-class mail to Smith's address of record in FINRA's Central Registration Depository (CRD). Smith acknowledges receiving "multiple communications" from FINRA prior to September 2014 and does not dispute that he received the June 2 and 18 Rule 8210 Requests. The July request was hand-delivered to Smith at the same address.

³ FINRA Rule 9552(a) states that if a person subject to FINRA's jurisdiction fails to provide FINRA staff with requested information or testimony, FINRA staff may provide written notice to that person "specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in [a] suspension."

⁴ FINRA Rule 9552(f) permits a suspended individual to "file a written request for termination of the suspension on the ground of full compliance with the notice." FINRA Rule 9552(h) provides that a suspended person who "fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred."

(“Notice of Suspension”). The Notice of Suspension reiterated that Smith could request termination of the suspension on the ground of full compliance. Like the Pre-Suspension Notice, the Notice of Suspension stated that failure to seek relief by February 13, 2015 would result in Smith being barred “from associating with any FINRA member in any capacity.”

In the three months following the Pre-Suspension Notice, Smith did not provide FINRA with the information and documents specified in the July Rule 8210 request, challenge his suspension, or otherwise request relief from FINRA. Thus, on February 13, 2015, FINRA notified Smith that, effective immediately, he was barred (the “Bar Notice”). FINRA sent the Bar Notice to Smith by certified and first-class mail; Smith signed for the certified mail shipment on March 3, 2015. The Bar Notice explained that Smith could file an appeal with the Securities and Exchange Commission within thirty days if he believed the bar was imposed erroneously.

II. Discussion

A. Smith was required to comply with the July Rule 8210 request.

Smith was required to comply with FINRA’s July Rule 8210 request because he remained subject to FINRA jurisdiction for two years after his association with Huntington ceased. Rule 8210 provides that any “member, person associated with a member, or any other person subject to FINRA’s jurisdiction” is required to comply with FINRA’s requests.⁵ Under FINRA’s By-Laws, an unregistered person “whose association with a member has been terminated and is no longer associated” with a member remains subject to FINRA’s jurisdiction with respect to “conduct that commenced prior to the termination” and requests for information pertaining to that conduct, subject only to the requirement that FINRA bring a complaint within “two years after the date upon which such person ceased to be associated with the member.”⁶

We conclude that Smith was required to comply with FINRA’s July Rule 8210 request.⁷ Huntington filed a Form U4 to register Smith as a limited representative on November 22, 2013,

⁵ FINRA Rule 8210(a)(1); *see also Order Granting Accelerated Approval of a Proposed Rule Change*, Securities Exchange Act Release No. 68386, 2012 WL 6100226, at *2 (Dec. 7, 2012) (“Rule 8210 applies to all members, associated persons, and other persons over whom FINRA has jurisdiction, *including former associated persons subject to FINRA’s jurisdiction as described in the FINRA By-Laws.*”) (emphasis added).

⁶ FINRA By-Laws of the Corporation, art. V, § 4, ¶ (a) & (a)(iii).

⁷ We consider only the July Rule 8210 request, which was personally served on and received by Smith in accordance with FINRA Rules 8210(d) and 9134(a)(1). FINRA Rule 8210(d) provides that a Rule 8210 request directed at a “person subject to FINRA’s jurisdiction who was formerly associated with a member in an unregistered capacity,” like Smith, “shall be deemed received by the person upon personal service, as set forth in Rule 9134(a)(1).” In turn, Rule 9134(a)(1) establishes that “personal service” can be accomplished by, *inter alia*, handing the documents to the individual. FINRA Rule 9134(a)(1). In contrast, FINRA Rule 9552 allows pre-suspension, suspension, and bar notices to be served by any method permitted under FINRA Rule 9134, including service by mail, service by a traceable courier service, or personal service

making Smith a person associated with a FINRA member as of that date.⁸ Smith’s association with Huntington was terminated in April 2014, at which time he became a formerly associated person. FINRA sent the July Rule 8210 request in July 2014, shortly after Smith’s termination and well within the two-year window in which Smith remained subject to FINRA’s jurisdiction as a person formerly associated with a member in an unregistered capacity. And it is undisputed that the July Rule 8210 request sought information about “conduct that commenced prior to [Smith’s] termination”—Smith’s alleged use of corrective fluid on a legal document while employed by Huntington.

B. Smith failed to exhaust his administrative remedies.

We emphasize that “[i]t is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review.”⁹ On this basis, we have held that “we will not consider an application for review if the applicant failed to exhaust FINRA’s procedures for contesting the sanction at issue.”¹⁰ As the Second Circuit has reasoned:

Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised. Moreover, like other administrative exhaustion requirements, the SEC’s promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review. It also provides SROs with the opportunity to correct their

(...continued)

at an individual’s home address as reflected in FINRA’s records. Service by mail is complete upon mailing. *See* FINRA Rule 9134(b)(3).

⁸ FINRA’s By-Laws defines a person “associated with a member,” among other things, as “a natural person who . . . has applied for registration.” FINRA By-Laws of the Corporation, art. 1, ¶ (rr).

⁹ *MFS Secs. Corp.*, Exchange Act Release No. 47626, 2003 WL 1751581, at *5 & n.29 (Apr. 3, 2003) (citing *Royal Secs. Corp.*, Exchange Act Release No. 5171, 36 SEC 275, 1955 WL 43159, at *2 (May 20, 1955)), *aff’d*, 380 F.3d 611 (2d Cir. 2004).

¹⁰ *E.g.*, *Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 WL 265812, at *2 (Jan. 24, 2014) (dismissing applicant’s appeal for failure to exhaust administrative remedies where FINRA barred applicant under Rule 9552 for failing to respond to Rule 8210 information requests); *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 WL 1683913, at *3 (Apr. 18, 2013) (same); *Norman S. Chen*, Exchange Act Release No. 65345, 2011 WL 4336720, at *2 (Sept. 16, 2011) (same); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 WL 1840609, at *2 (May 6, 2010) (same); *see also MFS Secs. Corp.*, 2003 WL 1751581, at *6 (refusing to consider applicant’s denial of access to services claim because applicant failed to exhaust New York Stock Exchange’s procedures).

own errors prior to review by the Commission. The SEC's exhaustion requirement thus promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations.¹¹

The same reasoning applies here. FINRA suspended, and eventually barred, Smith for failing to respond to its July Rule 8210 request. Given Smith's failure to contest this sanction before FINRA, we dismiss Smith's application for review to avoid undermining the important self-regulatory functions of FINRA.

The July Rule 8210 request sought specific information related to Smith's termination from Huntington. Among other things, it warned Smith that "[a]ny failure on [his] part to satisfy these obligations could expose [him] to sanctions," including a "permanent bar from the securities industry." The November 2014 Pre-Suspension Notice stated that FINRA intended to suspend Smith on December 4, 2014 unless he complied with the Rule 8210 request or sought a hearing to contest the suspension. Smith did neither. In December 2014, Smith was notified that his suspension had taken effect and informed once more that he would automatically be barred on February 13, 2015 unless he requested termination of the suspension on the ground of full compliance with the underlying request. As detailed above, Smith took no corrective action in response to any of these notices and, as such, he has failed to exhaust FINRA's internal system of administrative remedies.

Smith did not respond to FINRA's motion to dismiss his application for review. In his application for review, he claims to have sent FINRA a letter in September 2014 "in regards to this situation and [his] license." This letter is not in the record and has no bearing on our conclusion that Smith failed to exhaust administrative remedies for two distinct reasons.

First, Smith acknowledges that his purported September 2014 letter was likely never received by FINRA. He states that FINRA sent him "multiple more communications"—*e.g.*, the Pre-Suspension Notice and the Notice of Suspension—afterwards, which led him to "assum[e]" that his September 2014 "letter was not received." Thus, Smith was aware by mid-November 2014 at the latest that FINRA had not received his letter. He had ample time remaining to respond before the suspension took effect on December 4, 2014 or to seek to have the suspension terminated before imposition of the bar on February 13, 2015. Yet Smith did not do either of these things or otherwise attempt to contact FINRA.¹² Given Smith's awareness of FINRA's non-receipt of the September 2014 letter, and his failure to take any follow-up measures, we do

¹¹ *MFS Secs. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004).

¹² *See Mark Steven Steckler*, 2014 WL 265812, at *3 (rejecting argument that applicant should be excused from exhausting administrative remedies on the ground that he purportedly "could not view" the letters from FINRA until June, because "[e]ven if this were the case, viewing the correspondence at any point in June still provided him with sufficient time to respond").

not believe that Smith has properly invoked FINRA’s administrative procedures for challenging his suspension.¹³

Second, even as characterized by Smith in his application for review, the purported September 2014 letter would not satisfy the procedural requirements for terminating a sanction. As we have explained, “in order to request termination under FINRA Rule 9552(f) and ultimately to preserve the right to Commission review, a suspended individual is required to send a timely request to FINRA in the first instance.”¹⁴ One of the procedural requirements for such a request is “full compliance”—*i.e.*, providing all the information and documents demanded in the underlying Rule 8210 request.¹⁵ Based on the description in the application for review, Smith’s purported September 2014 letter apparently argued that his termination from Huntington’s banking affiliate was based on an alteration of his “own signature” on a “business checking account document,” not “any form of investment paperwork.”¹⁶ Yet even if Smith had sent the letter to FINRA as he claims, it would not demonstrate full compliance with the July Rule 8210 request.¹⁷ Among other things, it does not address whether the document’s alteration was approved by the customer or whether there were other complaints during Smith’s tenure. And it does not provide any additional documentation regarding the allegations, such as Huntington correspondence or memoranda. For this reason as well, we conclude that Smith cannot rely on the purported September 2014 letter to exhaust FINRA administrative remedies.

In short, FINRA properly served Smith with the July Rule 8210 request, and Smith does not claim otherwise. Smith does not dispute that he was aware of the potential sanctions for non-compliance, which were reiterated in the Pre-Suspension Notice and Notice of Suspension. Nor does he dispute that he failed to seek relief through FINRA’s established procedures. Accordingly, Smith failed to exhaust the administrative remedies available to him through FINRA, and we see no basis for denying FINRA’s motion to dismiss.¹⁸

¹³ See, e.g., *Cannon v. Washington*, 418 F.3d 714, 718-19 (7th Cir. 2005) (finding that plaintiff had not properly exhausted his administrative remedies where he was aware that his grievance had been returned for insufficient postage and he failed to take advantage of the procedure for submitting a late grievance).

¹⁴ *Marcos A. Santana*, Exchange Act Release No. 74138, 2015 WL 327678, at *3 (Jan. 26, 2015) (citing *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *5 (Mar. 1, 2013)).

¹⁵ FINRA Rule 9552(f); see also *Marcos A. Santana*, 2015 WL 327678, at *3 n.13.

¹⁶ According to Smith, the document was a “Certified Copy of Limited Liability Company Resolutions to Open and Maintain a Bank Account or Safe Deposit Box” filed on behalf of Jones York Township Farm, LLC. The relationship between Smith and this company is unclear.

¹⁷ See *Marcos A. Santana*, 2015 WL 327678, at *3 n.13.

¹⁸ We note that Smith also did not file a response to FINRA’s motion to dismiss. His failure to “respond to a dispositive motion within the time provided” provides an additional, and independent, reason for us to dismiss the review proceeding. See Rule of Practice 155(a)(2), 17

Accordingly, IT IS ORDERED that FINRA's motion to dismiss the application for review filed by Darren M. Smith is GRANTED.

By the Commission.

Brent J. Fields
Secretary