

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 89365 / July 21, 2020

Admin. Proc. File No. 3-19214

In the Matter of the Application of
BRENDAN D. FEITELBERG
For Review of Action Taken by
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF FINRA ACTION

Registered securities association barred individual in an expedited proceeding for failing to respond to requests for information. *Held*, review proceeding is remanded for further consideration.

APPEARANCES:

Robert A. Fisher and *R. Scott Seitz*, of Nixon Peabody LLP, for Brendan D. Feitelberg.

Alan Lawhead, *Gary Dernelle*, and *Lisa Jones Toms* for FINRA.

Appeal filed: June 21, 2019

Last brief received: October 9, 2019

Brendan D. Feitelberg appeals from FINRA action barring him from association with any FINRA member firm in any capacity for failing to respond to FINRA’s requests for information and documents. FINRA asks that we dismiss Feitelberg’s application for review because it is untimely and because he failed to exhaust his administrative remedies. For the reasons set forth below, we remand this proceeding to FINRA for further consideration.

I. Background

A. Feitelberg failed to respond to FINRA’s requests for information.

From May 4, 2017, to April 11, 2018, Feitelberg was associated with United Planners Financial Services of America, A Limited Partner (“United Planners”), a FINRA member firm.¹ On April 12, 2018, United Planners filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) reporting that it terminated Feitelberg because he “did not disclose a state tax lien.” After receiving the Form U5, FINRA commenced an investigation to determine whether violations of the federal securities laws or FINRA rules had occurred.

On April 26, 2018, FINRA sent Feitelberg a request pursuant to FINRA Rule 8210 seeking information concerning Feitelberg’s alleged failure to disclose the tax lien.² The request asked Feitelberg to provide a signed statement responding to the allegations and copies of all documents related to the matter, and to state whether there were any additional reportable financial events that he failed to timely disclose to FINRA. The request also asked Feitelberg to confirm whether there were any complaints regarding his employment that were open or unresolved within the three years prior to his termination, and, if so, to provide additional documentation. The request further informed Feitelberg that he was obligated to respond “fully, promptly, and without qualification,” and warned that “any failure on [Feitelberg’s] part to satisfy these obligations could expose [him] to sanctions, including a permanent bar from the securities industry.” The request directed Feitelberg to respond by May 10, 2018.

FINRA sent the request to Feitelberg by certified and first-class mail to the address listed in FINRA’s Central Registration Depository (the “CRD address”). Before sending the request, FINRA conducted a public records database search and confirmed that Feitelberg’s CRD address was his current mailing address.³ The U.S. Postal Service returned the certified mailing to FINRA as “unclaimed” but did not return the first-class mailing.

On May 9, 2018, Feitelberg acknowledged in an email to FINRA that he received the April 26, 2018, request and asked for an extension of time to file a response. FINRA granted the

¹ Feitelberg currently is not associated with a FINRA member firm.

² See FINRA Rule 8210(a) (requiring 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 an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules).

³ See FINRA Rule 8210(d) (deeming a currently or formerly registered person to have “received” notice of a mailing if FINRA sent it to the “last known residential address of the person as reflected in the Central Registration Depository”).

request and extended the deadline to May 24, 2018. On May 23, 2018, Feitelberg emailed FINRA seeking a second extension, stating that he “need[ed] to consult my lawyer on this matter.” FINRA granted the request and extended the deadline to June 13, 2018. That deadline passed without Feitelberg requesting another extension or providing the information that FINRA sought as part of the April 26, 2018 request.

On July 24, 2018, FINRA sent Feitelberg a second Rule 8210 request that reiterated his obligation to provide the requested information and set a deadline for responding of August 3, 2018. FINRA again warned Feitelberg that a failure to provide the requested information could result in disciplinary action against him. FINRA sent the request to Feitelberg’s CRD address by certified and first-class mail and to the email address Feitelberg had used to communicate with FINRA. The return receipt from the U.S. Postal Service showed that the certified mailing arrived at Feitelberg’s CRD address but that “no authorized recipient [was] available.” The first-class mailing and email were not returned. Feitelberg failed to respond in any way.

B. FINRA suspended and barred Feitelberg for failing to respond to its requests.

FINRA commenced an expedited proceeding against Feitelberg pursuant to FINRA Rule 9552(a) based on his failure to respond to FINRA’s requests for information.⁴ On August 20, 2018, FINRA sent Feitelberg a notice (the “Pre-Suspension Notice”) informing him that he would be suspended from associating with any FINRA member on September 13, 2018, if he failed to provide the requested information by that date. The Pre-Suspension Notice stated that the suspension would not take effect if Feitelberg took corrective action before September 13, 2018, by complying with FINRA’s requests. It also stated that Feitelberg could prevent the suspension from becoming effective by requesting a hearing pursuant to FINRA Rule 9552(e).⁵ The Pre-Suspension Notice explained further that FINRA Rule 9552(f) allowed Feitelberg to request termination of a suspension based on full compliance with the requests for information

⁴ See FINRA Rule 9552(a) (“If a member, person associated with a member or person subject to FINRA’s jurisdiction fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the FINRA By-Laws or FINRA rules, or fails to keep its membership application or supporting documents current, FINRA staff may provide written notice to such member or 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 suspension of membership or of association of the person with any member.”).

⁵ See FINRA Rule 9552(e) (“A member or person served with a notice under this Rule may file . . . a written request for a hearing pursuant to Rule 9559.”).

but that, once a suspension was imposed, a failure to respond by November 23, 2018, would trigger an automatic bar.⁶ FINRA sent the Pre-Suspension Notice to Feitelberg's CRD address by certified and first-class mail.⁷ FINRA did so after searching a public records database that showed no updated mailing address for Feitelberg. The U.S. Postal Service returned the certified mailing to FINRA as "unclaimed" but did not return the first-class mailing.

Feitelberg did not provide the requested information, request a hearing, or otherwise respond to the Pre-Suspension Notice. On September 13, 2018, FINRA sent Feitelberg a notice (the "Suspension Notice") stating that he was suspended, reiterating the process for requesting termination of the suspension, and warning that a failure to respond would result in an automatic bar on November 23, 2018. FINRA sent the Suspension Notice by certified and first-class mail to Feitelberg's CRD address after again checking the public records database for Feitelberg's current mailing address. The U.S. Postal Service returned the certified mailing to FINRA as "unclaimed" but did not return the first-class mailing. Feitelberg again failed to respond.

On November 23, 2018, FINRA sent Feitelberg a notice (the "Bar Notice") informing him that he was barred from associating with any FINRA member and advising that he could appeal the bar by filing an application for review with the Commission "within thirty days of his receipt" of the Bar Notice. FINRA sent the Bar Notice by certified and first-class mail to the CRD address after a third public records search confirmed it was Feitelberg's current mailing address. The certified mailing was delivered at that address and acknowledged with an illegible signature. As with each of FINRA's requests and notices, the U.S. Postal Service did not return the first-class mailing. Feitelberg did not file an appeal within the 30-day period.

C. Feitelberg provided a belated response to FINRA's requests and filed an appeal.

In May 2019, more than five months after FINRA barred him, Feitelberg retained counsel. Counsel contacted FINRA and provided a written response to FINRA's requests. In the response, Feitelberg explained that his delay in responding was due to the fact that he suffered a serious illness that required hospitalization, surgery, and an extended recovery period.

On May 24, 2019, FINRA sent Feitelberg a letter stating that he failed to respond to FINRA's requests for information, failed to respond to FINRA's notices, and failed to appeal FINRA's action barring him within the 30-day appeal period. The letter stated further that "[b]y

⁶ See FINRA Rule 9552(f) ("A member or person subject to a suspension pursuant to this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision."); FINRA Rule 9552(h) ("A member or person who is suspended under this Rule and fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred.").

⁷ See FINRA Rule 9552(b) (allowing pre-suspension, suspension, and bar notices to be served by any method permitted under FINRA Rule 9134); FINRA Rule 9134(a)(2) (providing for service by mail by U.S. Postal Service); FINRA Rule 9134(b)(1) (providing for service on a natural person at the natural person's residential address as reflected in the CRD); FINRA Rule 9134(b)(3) (stating that "[s]ervice by mail is complete upon mailing").

failing to avail himself of FINRA’s administrative process” Feitelberg “failed to exhaust his administrative remedies[,]” and therefore FINRA “[would] not reconsider the” bar.

On June 21, 2019, Feitelberg filed an application for review of his bar with the Commission. Feitelberg argued that he never received actual notice of the suspension or possibility of a bar, and that he did not learn that FINRA had barred him until after he “recovered [from surgery] and returned to work in February 2019.” Feitelberg also argued that remanding this case to FINRA to determine whether a bar was appropriate was consistent with Commission precedent. Feitelberg argued further that, because FINRA did not afford him a hearing, he did not have an opportunity to submit evidence of his medical condition into the record.

With his application for review, Feitelberg submitted a sworn affidavit.⁸ In the affidavit, Feitelberg stated that he was “hospitalized in August 2018 with diverticulitis”; that “[t]he recovery from this illness was extensive and all-consuming and from mid-July 2018 into 2019 [he] was either in the hospital or recovering”; that he “never received the letters FINRA sent on July 24, 2018, August 20, 2018, and September 13, 2018”; and that he “also never received FINRA’s letter dated November 23, 2018, and during that time period [he] was recovering at a relative’s residence.” In the affidavit, Feitelberg also attested that “[t]he signature on the November 28, 2019 certified mail receipt [was] neither [his] nor one that [he] recognize[d][,]” that he “did not authorize anyone to accept mail for [him][,] and that the building in question does not have a concierge service or some other service that receives mail.”

FINRA filed a motion to dismiss.⁹ In its motion, FINRA argued that dismissal of the application was proper because Feitelberg filed an untimely appeal and there were no extraordinary circumstances that would warrant “reset[ting] the 30-day appeal deadline.” FINRA also argued that it properly served Feitelberg by mailing its information requests and notices to his CRD address, and that Feitelberg failed to exhaust his administrative remedies.

⁸ We consider Feitelberg’s affidavit pursuant to Commission Rule of Practice 452, which provides that the Commission “may allow the submission of additional evidence” where “such additional evidence is material” and “there were reasonable grounds for failure to adduce such evidence previously.” 17 C.F.R. § 201.452. Feitelberg’s affidavit meets this standard.

⁹ Contemporaneously with the filing of its motion to dismiss, FINRA moved for a stay of the briefing schedule. *See Brendan D. Feitelberg*, Exchange Act Release No. 86491, 2019 WL 3387090, at *1 (July 26, 2019) (order scheduling briefs). We denied a stay and ordered briefing to proceed as scheduled because it was “appropriate to consider FINRA’s motion to dismiss Feitelberg’s application for review along with the parties’ briefs on the merits.” *Brendan D. Feitelberg*, Exchange Act Release No. 86898, 2019 WL 4242459, at *2 (Sept. 6, 2019).

II. Analysis

A. **Feitelberg did not file a timely application for review, but he has submitted evidence indicating that extraordinary circumstances prevented him from doing so and that he acted promptly to file his appeal once he was able to do so.**

Under Section 19(d)(2) of the Securities Exchange Act of 1934, a person aggrieved by FINRA action that is reviewable by the Commission must file an application for review “within thirty days” after the date that notice of the action “was filed with [the Commission] and received by such aggrieved person, or within such longer period as [the Commission] may determine.”¹⁰ Rule of Practice 420(b) provides that an applicant “must” file an application for review “within 30 days after the notice of the determination is filed with the Commission and received by the aggrieved person applying for review.”¹¹ Rule 420(b), which “is the exclusive remedy for seeking an extension of the 30-day period,” further provides that the Commission “will not extend this 30-day [filing] period, absent a showing of extraordinary circumstances.”¹²

Feitelberg filed his application for review on June 21, 2019. But FINRA served the Bar Notice on Feitelberg in accordance with its rules on November 23, 2018.¹³ As a result, the deadline for him to file an appeal was December 27, 2018.¹⁴ Feitelberg did not file his application for review until almost six months later. Accordingly, it was untimely.

Although Feitelberg argues that the 30-day period did not begin to run until May 24, 2019, when FINRA sent him a letter stating that it would not reconsider the bar, he cites no authority to support that proposition and we are aware of none. Nor did the May 24, 2019 letter provide Feitelberg with a new basis to file an application for review under Exchange Act Section 19(d). The May 24, 2019 letter did not impose a final disciplinary sanction on Feitelberg, deny him membership, prohibit or limit his access to services, or bar him from association with a

¹⁰ 15 U.S.C. § 78s(d)(2).

¹¹ 17 C.F.R. § 201.420(b).

¹² *Id.*

¹³ *See supra* note 7; *see also, e.g., Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 WL 3584177, at *6 (July 25, 2018) (“By mailing the Bar Notice to Dowd’s CRD address on March 27, 2017, FINRA provided him with notice of the action and thereby ‘started the running of the appeal period.’”) (quoting *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at *4 (Feb. 8, 2016)); *cf. Rao v. Baker*, 898 F.2d 191, 197 (D.C. Cir. 1990) (finding in the context of a similar statutory deadline for appealing decisions of the Equal Employment Opportunity Commission that the applicant received constructive notice of the decision when it was mailed to the address provided by the applicant to the agency).

¹⁴ Because the November 23, 2018 letter notifying Feitelberg of the bar was served by mail, we add three days to the 30-day appeal period. *See* Rule of Practice 160(b), 17 C.F.R. § 201.160(b). We add one more day to the appeal period to account for the fact that the deadline fell on a Sunday. *See* Rule of Practice 160(a), 17 C.F.R. § 201.160(a).

member.¹⁵ Rather, it merely refused to revisit FINRA’s previous action. Consequently, FINRA did not take any action in the May 24, 2019 letter that was reviewable under Section 19(d).¹⁶

Nonetheless, pursuant to Rule of Practice 420(b), the Commission may consider an otherwise untimely application for review in the exercise of its discretion if there are “extraordinary circumstances.”¹⁷ In *PennMont Securities*, we stated that “an extraordinary circumstance under Rule of Practice 420(b) may be shown where the reason for the failure timely to file was beyond the control of the applicant.”¹⁸ After looking to analogous areas of federal law, we identified a “serious illness” that caused the delay in filing as an example of the type of circumstance that could warrant considering an untimely appeal.¹⁹

In *PennMont*, we stated further that “[e]ven when circumstances beyond the applicant’s control give rise to the delay,” “an applicant must also demonstrate that he or she promptly arranged for the filing of the appeal as soon as reasonably practicable thereafter.”²⁰ “An applicant whose appeal is delayed as a result of an extraordinary circumstance remains under an obligation to proceed promptly in pursuing appellate recourse.”²¹

We find that *PennMont*’s standard has been met in this case. Feitelberg’s sworn affidavit indicates that he was suffering from a serious illness that prevented him from timely appealing his bar. And Feitelberg’s other submissions indicate that he acted promptly to file an appeal as soon as reasonably practicable after he recovered and learned of the bar. Feitelberg retained counsel, provided a written response to FINRA’s requests for information, and filed an

¹⁵ See 15 U.S.C. § 78s(d)(1) (providing for Commission review of SRO action that imposes any final disciplinary sanction on a member thereof or participant therein; denies membership or participation to any applicant; prohibits or limits any person in respect to access to services offered by the SRO or member thereof; or imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member).

¹⁶ See, e.g., *Warren B. Minton, Jr.*, Exchange Act Release No. 46709, 2002 WL 32140276, at *3 (Oct. 23, 2002) (holding that NASD’s denial of a motion to set aside a default decision was not reviewable under Section 19(d) because “the NASD merely rejected Minton’s collateral attack on the NASD’s 1999 disciplinary action against him[,]” and did not impose any disciplinary sanctions on Minton, deny him membership, bar him from association, or limit his access to NASD services); see also *id.* at *3 n.10 (collecting similar cases).

¹⁷ 17 C.F.R. § 201.420(b).

¹⁸ Exchange Act Release No. 61967, 2010 WL 1638720, at *4 (Apr. 23, 2010), *petition denied*, 414 F. App’x 465 (3d Cir. 2011); accord *Kenneth Joseph Kolquist*, Exchange Act Release No. 82202, 2017 WL 5969252, at *4 (Dec. 1, 2017); *McBarron Capital LLC*, Exchange Act Release No. 81785, 2017 WL 4335069, at *2 (Sept. 29, 2017).

¹⁹ *PennMont Sec.*, 2010 WL 1638720, at *4 n.24.

²⁰ *Id.* at *4.

²¹ *Id.*

application for review within 30 days after FINRA refused to lift the bar. Accordingly, we find that extraordinary circumstances justify our consideration of Feitelberg's untimely appeal.²²

B. We remand this proceeding to FINRA for further consideration.

In addition to arguing that Feitelberg's appeal should be dismissed as untimely, FINRA argues that it should be dismissed because Feitelberg failed to exhaust his administrative remedies. But Feitelberg's failure to avail himself of FINRA's procedures for avoiding a suspension or bar appears to have resulted from the same illness that prevented him from filing a timely appeal with the Commission. And FINRA's letter to Feitelberg stating that it would not reconsider the bar even after receiving Feitelberg's response to its requests for information and explanation for his delay in responding did not include any justification as to why a bar was nonetheless appropriate in these circumstances. Indeed, FINRA's letter did not even mention Feitelberg's explanation for his belated response. We believe it is appropriate to remand the proceeding to FINRA for it to address the circumstances that led to the bar before determining whether Feitelberg failed to exhaust his administrative remedies.

Our decision in *Destina M. Mantar* supports this determination.²³ In *Mantar*, we stated that "we have not held in the context of expedited proceedings that mailing documents to an individual's CRD address is always sufficient to support a dismissal for failing to exhaust administrative remedies."²⁴ Although we have dismissed appeals of bars imposed in expedited proceedings for failures to exhaust administrative remedies, we recognized that we have often done so where "there was evidence that the applicants had actual notice of the requests for information."²⁵ We stated that "[i]n cases challenging a bar imposed in expedited proceedings where there is reason to believe the applicant did not have actual notice of FINRA's information requests or notices, we have regularly remanded the matter back to FINRA."²⁶

²² See, e.g., *Islamic Republic of Iran v. Boeing Co.*, 739 F.2d 464, 465 (9th Cir. 1984) (affirming district court's consideration of untimely appeal because the "illness of counsel entrusted with the filing responsibility may amount to extraordinary circumstances" and "counsel's sworn affidavit" established that he was "unable to file the appeal"); cf. *Michael Ross Turner*, Exchange Act Release No. 81693, 2017 WL 4222468, at *4 n.13 (Sept. 22, 2017) (finding that applicant "did not introduce meaningful evidence" to support his claim that extraordinary circumstances justified permitting an untimely appeal); *Kolquist*, 2017 WL 5969252, at *4 (refusing to consider untimely appeal of a bar where nothing applicant submitted "suggests that his health issue prevented him from filing an application for review" timely and where even assuming the reason for the untimely appeal was beyond his control the applicant failed to show that he appealed as soon as reasonably practicable thereafter).

²³ Exchange Act Release No. 79851, 2017 WL 221653 (Jan. 19, 2017).

²⁴ *Id.* at *3; see also *id.* at *3-5 (distinguishing expedited and disciplinary proceedings).

²⁵ *Id.* at *4 & n.12 (collecting cases).

²⁶ *Id.* & n.13 (collecting cases).

We determined that a remand was appropriate in Mantar's case. The record suggested that Mantar may not have had actual notice of FINRA's requests or notices until the day that her bar became effective and that Mantar provided FINRA with the requested information before filing her application for review. We recognized that FINRA had "lifted bars under similar circumstances in previous cases."²⁷ The record contained no explanation from FINRA as to why, under the circumstances of Mantar's case, a bar was still appropriate. We remanded because "[a]bsent this explanation, we [were] unable to determine whether Mantar failed to exhaust her administrative remedies or otherwise opine on the merits of Mantar's appeal."²⁸

We find that a remand is warranted here for similar reasons as in *Mantar*. Like Mantar, Feitelberg is challenging a bar imposed in an expedited proceeding. Also like Mantar, it appears that Feitelberg did not receive FINRA's second Rule 8210 request or any of its notices. As did Mantar, Feitelberg responded to FINRA's requests once he learned of the bar and before he filed his application for review. And, as in *Mantar*, FINRA provided no explanation for why a bar was nonetheless appropriate despite these circumstances.

Accordingly, we remand this proceeding for FINRA to further consider the basis for its action and the appropriateness of barring Feitelberg. As in *Mantar*, we base our decision to remand on the totality of the circumstances: that Feitelberg may have lacked actual notice of FINRA's second Rule 8210 request and notices as a result of a serious illness; that his serious illness may have prevented him from timely responding to the requests and notices; that he responded once he learned of the bar and before he filed his application for review; and that FINRA failed to provide an explanation as to why it would not reconsider the bar under these circumstances. On remand, FINRA should consider Feitelberg's affidavit and the arguments advanced by the parties in their briefs and take any action deemed appropriate and consistent with this opinion. In remanding, we express no view as to a particular outcome.

An appropriate order will issue.²⁹

By the Commission (Chairman CLAYTON and Commissioners PEIRCE, ROISMAN, and LEE).

Vanessa A. Countryman
Secretary

²⁷ *Id.* & n.17 (collecting cases).

²⁸ *Id.* at *4.

²⁹ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Application of
BRENDAN D. FEITELBERG
For Review of Action Taken by
FINRA

ORDER REMANDING PROCEEDING TO FINRA

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

ORDERED that the proceeding with respect to Brendan D. Feitelberg be, and it hereby is, remanded to FINRA for further consideration in accordance with this opinion.

By the Commission.

Vanessa A. Countryman
Secretary