SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 81693 / September 22, 2017

Admin. Proc. File No. 3-17995

In the Matter of the Application of

MICHAEL ROSS TURNER

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Registered securities association barred formerly registered person from associating with members for failing to respond to requests for information. *Held*, application for review is dismissed.

APPEARANCES:

Tad A. Devlin, Kaufman Dolowich & Voluck, LLP, for Michael Ross Turner

Alan Lawhead and *Michael Garawski* for FINRA

Appeal filed: May 26, 2017
Last brief received: July 10, 2017

Michael Ross Turner, formerly an associated person of a FINRA member firm, seeks review of FINRA action barring him from associating with any FINRA member for failing to respond to its requests for information.[1] FINRA moves to dismiss Turner's application because it is untimely. We grant FINRA's motion and dismiss Turner's application for review.

[1] Although at the time of Turner's bar FINRA was known as NASD, we refer to both entities as FINRA for the sake of clarity.

I. Background

A. FINRA barred Turner for failing to respond to requests for information.

Turner joined the securities industry in October 1992, when he registered with FINRA member firm American Express Financial Advisors ("Amex"). On March 8, 2004, Amex terminated Turner and filed with FINRA a Uniform Termination Notice for Securities Industry Regulation ("Form U5"). Amex filed an amendment to its Form U5 on October 5, 2004. The amended Form U5 stated that "client accounts may have been subject to multiple sales charges."

FINRA instituted an investigation into the circumstances surrounding Turner's termination. Between March and June 2005, FINRA sent four requests for information to Turner's address of record listed in the Central Registration Depository ("CRD") via both first-class and certified mail. Each certified mailing was returned except for one sent on June 3, 2005. One of the returned letters listed a new mailing address, and FINRA sent subsequent requests both to the CRD address and the new address. None of the first-class mailings sent to either address was returned to FINRA. The letters warned variously that a failure to respond "may" or "will result in disciplinary action." Turner did not respond to FINRA's requests for information.

FINRA initiated expedited proceedings against Turner. On September 28, 2005, it sent Turner a letter stating that a failure to respond to the requests for information by October 24, 2005 would result in him being suspended (the "Pre-Suspension Notice"). The Pre-Suspension Notice also stated that a failure to request termination of the suspension within six months would result in a bar from associating with any FINRA member firm in any capacity. FINRA sent the Pre-Suspension notice to both of Turner's addresses. Turner did not respond.

On October 24, 2005, FINRA sent Turner a letter informing him that he was suspended (the "Suspension Notice"). The Suspension Notice reiterated the deadline of six months from September 28, 2005 for Turner to request termination of his suspension. FINRA sent the Suspension Notice to both of Turner's addresses. Turner did not request that his suspension be terminated.

On April 4, 2006, FINRA sent Turner a letter informing him that he was barred from associating with any FINRA member firm in any capacity (the "Bar Notice"). The Bar Notice stated that Turner could appeal to the SEC within thirty days. FINRA sent the Bar Notice to both of Turner's addresses. It is unclear whether any of the notices FINRA mailed to Turner were delivered or returned to FINRA. In any case, Turner did not file an appeal within thirty days.

B. Turner did not appeal until eleven years after he was barred.

Turner asserts that he did not learn of the bar until 2009. According to him, he "moved residences three times" in 2004 and 2005 and never received the correspondence FINRA sent him during that period. Turner says that also he did not investigate his registration status at that time because his post-Amex employer prohibited employees "from maintaining securities

licenses," he was "satisfied with [his] employment situation," and he "intended to allow [his] licenses to lapse and planned to renew them if and when appropriate."

In 2009, after his employer reversed its policy prohibiting securities licenses and alerted him that he had been barred, Turner spoke with an employee in FINRA's Office of the Ombudsman. On October 27, 2009, this employee emailed Turner a copy of his Bar Notice, along with updated information for filing an appeal with the Commission. Turner acknowledged receipt the same day. He explained that he had "moved a few times between the years 2004-2005," that he "[did] not think that [he] ever received [the Bar Notice]," and that he was "very interested in requesting an appeal." He asked whether an appeal was "still an option since the month period has lapsed," and if so "what the steps are." The record also shows that Turner spoke on the phone with another FINRA employee on November 2, 2009. Turner did not appeal within thirty days of receiving the Bar Notice via email.

Two years later, on November 23, 2011, Turner spoke with and subsequently emailed Jacqueline Whelan, then with FINRA's Department of Enforcement. He expressed interest in "get[ting] a job in . . . a non-securities banking position and/or maybe renew[ing] [his] license." Whelan responded on November 29, 2011, suggesting that Turner contact Alan Lawhead, a FINRA Vice President and Director of its Office of General Counsel's Appellate Group.[2] Turner replied the same day, saying that he would "pursue action through the contact [Whelan] provided." Ten days later, on December 9, 2011, Turner told Whelan by email that "my attorney . . . feels that in order to proceed that I need to be sponsored by a broker dealer." In a response later that day, Whelan described the process for "a member firm wishing to associate [Turner]" and stated: "You should rely on your attorney to advise you about your options and the process going forward." Turner still did not appeal.

Over three years later, on March 11, 2015, Turner emailed Lawhead to ask how he could "get [his] record expunged." The next day, Lawhead responded that "[t]here is no procedure in FINRA's rules that allows for the elimination or expungement of a default decision." He continued: "You should consider consulting with an attorney of your choice to address your issues." Once again, Turner did not appeal.

Nearly two years later, on February 7, 2017, Turner filed a lawsuit in San Francisco County Superior Court requesting that the Court "expunge his FINRA disbarment."[3] On May 1, 2017, after consulting FINRA, Turner moved to dismiss his petition without prejudice.[4]

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[2] Lawhead, the Director of the Appellate group in FINRA's Office of General Counsel, now represents FINRA in this proceeding.

[3] Petition, *In re Michael Turner*, No. CPF-17-515471 (Cal. Super. Ct. Feb. 9, 2017).

[4] Request for Dismissal, *In re Michael Turner*, No. CPF-17-515471 (Cal. Super. Ct. May 1, 2017).

On May 22, 2017, more than eleven years after being barred from association with any FINRA member firm and seven and a half years after he concedes he had actual notice of the bar, Turner filed this application for review.

II. Analysis

Section 19(d)(2) of the Securities Exchange Act of 1934 provides that a person who wishes to appeal FINRA action must file an application for review with the Commission "within thirty days after the date" that notice of the decision "was . . . received by such aggrieved person, or within such longer period as [the Commission] may determine."[5] Rule of Practice 420(b), which is the "exclusive remedy for seeking an extension of the 30-day [filing] period," authorizes us to consider an otherwise untimely application for review if we find, in the exercise of our discretion, that "extraordinary circumstances" are present.[6] We have said that "[a]n applicant whose application is delayed as a result of extraordinary circumstances remains under an obligation to proceed promptly in pursuing appellate recourse."[7] We find that Turner did not file his application for review as soon as reasonably practicable after receiving actual notice of FINRA's decision, and that there are no extraordinary circumstances justifying a late appeal.

FINRA Rule 8210(d) deems a formerly registered person to have "received" notice of a mailing if FINRA sent it to the person's "last known residential address . . . as reflected in the [CRD]."[8] FINRA mailed the Bar Notice to Turner's CRD address on April 4, 2006. Yet Turner waited until May 22, 2017—more than eleven years later—to appeal FINRA's decision.

No extraordinary circumstances justify this delay. Turner contends that extraordinary circumstances exist because FINRA had "actual knowledge [he] was no longer at his CRD address" and therefore did not comply with its own service rules. We need not determine whether FINRA had such knowledge or whether its service was improper because neither fact would excuse Turner's failure to appeal promptly after learning of the bar.

Although we have previously remanded FINRA action where an applicant lacked actual notice of FINRA's decision due to possible defects in how FINRA served its notices,[9] we have

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[5] 15 U.S.C. § 78s(d)(2); *accord* Rule of Practice 420(b), 17 C.F.R. § 201.420(b).

[6] 17 C.F.R. § 201.420(b).

[7] *PennMont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *4 (Apr. 23, 2010).

[8] FINRA Rule 8210(d); *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *7 (July 27, 2015) ("[W]hen the Rule 8210 requests and disciplinary complaints were mailed to [his] CRD address they were deemed to have been received there, whether or not [he] actually receive[d] them.") (internal quotations and citation omitted).

[9] *See, e.g.*, *Kevin M. Murphy*, Exchange Act Release No. 79016, 2016 WL 5571633, at *4 (Sept. 30, 2016) (remanding for FINRA to determine if it "complied with its service rules").

not done so where the applicant failed to appeal promptly after receiving actual notice. Even "when circumstances beyond the applicant's control give rise to the delay" in appealing, the applicant must "demonstrate that he or she promptly arranged for the filing of the appeal as soon as reasonably practicable."[10] Turner did not arrange to promptly file an appeal as soon as reasonably practicable after first receiving actual notice in October 2009.[11]

Turner admits that he received actual notice of the bar in October 2009 and acknowledged receipt of the Bar Notice by email to FINRA. An applicant's "email response to FINRA's . . . email attaching the decision demonstrates that he received actual notice."[12] Turner alleges that, based on his conversation with a FINRA employee, he believed "no action was necessary at the time." However, the record does not reflect the details of this conversation, and Turner's email reply acknowledging the appeal deadline demonstrates that he was aware of the urgency of submitting an appeal. At a minimum, Turner had actual notice of his bar from at least October 2009, and he did not promptly appeal as soon as reasonably practicable thereafter.

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[10] *PennMont Sec.*, 2010 WL 1638720, at *4.

[11] Because he did not appeal promptly after receiving actual notice, we need not consider Turner's claims that extraordinary circumstances exist because he did not receive FINRA's letters, he expected his employer to update his CRD address, and FINRA failed to serve him through his new employer's business address. We note that Turner's brief erroneously truncates FINRA Rule 8210(d) to imply that when FINRA has actual knowledge of an out-of-date CRD address it must mail its notices "to the last known business address of the member." The rule provides that in that situation FINRA may mail the notices either to "the last known business address of the member" *or* "the last known residential address of the person as reflected in the Central Registration Depository" *and* "any other more current address" known to FINRA. We note further that while registered with a broker-dealer and while a formerly registered person subject to FINRA's continuing jurisdiction—for the two years after Amex filed the Form U5 in October 2004—Turner was obligated to update his CRD within 30 days of a change in his residential address. *See, e.g.*, *NASD Reminds Registered Persons of Continuing Obligation to Update NASD Records*, NASD Notice to Members 97-31, 1997 WL 1909798, at *1-2 (May 1997) (reminding registered persons of their obligation to notify FINRA of their current mailing address "while . . . associated with any NASD member firm" and "as long as the NASD retains jurisdiction to bring a disciplinary action against the registrant"). Despite conceding that he "moved residences three times" in 2004 and 2005, Turner did not update his CRD address.

[12] *John Vincent Ballard*, Exchange Act Release No. 77452, 2016 WL 1169072, at *3 (Mar. 25, 2016); *see also, e.g.*, *John G. Harmann*, Exchange Act Release No. 32932, 1993 WL 380029, at *5 (Sep. 21, 1993) ("Once individuals are involved in a disciplinary proceeding and have actual notice . . . it is incumbent upon them to inform themselves of the potential outcomes.").

Indeed, Turner chose not to file an appeal on several occasions after receiving actual notice of the bar. He contacted Whelan in 2011 and admits that by Fall 2011 he "understood the gravity of the bar, and of the need to take correct[ive] action." Yet he did not appeal then.

Turner says that in 2011 he "retained an attorney to address the bar, but was not apprised of the option to appeal FINRA's ruling with the SEC." But the advice of Turner's prior counsel in 2011 could not have affected his failure to appeal in 2009. And the Bar Notice itself—attached to the 2009 email—informed Turner of the option of appealing to the Commission.[13]

Turner again contacted FINRA in March 2015, when he spoke with Lawhead. Acting pro se, he emailed FINRA and acknowledged his bar on March 11, 2015. Again, he did not appeal promptly after this acknowledgment and instead waited two more years to appeal. Even if we construed Turner's lawsuit in California Superior Court as an attempt to file an appeal, it was not prompt. It was filed in early 2017, over seven years after he first received actual notice.

Turner's repeated failure to promptly appeal after receiving actual notice of his bar establishes that no extraordinary circumstances justify excusing his failure to file an appeal within thirty days of his receipt of the Bar Notice. We have previously dismissed as untimely an appeal of a bar FINRA imposed when a pro se applicant waited four months after receiving actual notice via email to appeal to the Commission.[14] And we have rejected attempts to "blame

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[13] We have suggested that "attorney misconduct" might be an "extraordinary circumstance beyond the party's control" that could excuse an untimely filing. *PennMont Sec.*, 2010 WL 1638720, at *4. But Turner has not attempted to substantiate a claim of attorney "misconduct," and we discern no basis in the record to do so. Having advised Turner to become "sponsored by a broker-dealer," his prior counsel apparently contemplated that a member firm would apply on Turner's behalf "for relief from the statutory disqualification by filing an MC-400 Application" with FINRA. *Nicholas S. Saava*, Exchange Act Release No. 72485, 2014 WL 2887272, at *2 (June 26, 2014) (describing FINRA's eligibility proceedings as the vehicle for seeking relief from a statutory disqualification); *see also* 15 U.S.C. § 78c(a)(39)(A) (defining a statutory disqualification to include a "bar[] . . . from being associated with a member of" FINRA). Turner's former attorney might have counseled this course of action since Turner had not appealed within 30 days of FINRA sending the Bar Notice in 2006 or his receiving it in 2009. This speculatation aside, Turner did not introduce meaningful evidence about his prior counsel's representation and therefore did not meet his burden of substantiating a claim of attorney misconduct.

[14] *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *4 (Mar. 1, 2013); *see also Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 WL 2117161, at *3 (May 20, 2008) (holding that a "tactical decision" to send two letters to FINRA rather than pay the expense of a timely-filed petition for review "does not constitute extraordinary circumstances").

[a] former attorney for [the] failure to file pro se,"[15] and have held that "pro se status does not justify an extension of time."[16] So too here. Turner had numerous opportunities to appeal his bar in the eleven years between the Bar Notice and his application for review and in the seven and a half years after he concedes he had actual notice of the bar. We find no extraordinary circumstances that warrant relieving Turner of the thirty-day deadline for filing an appeal in light of his failure to avail himself of any of these opportunities.[17]

Finally, Turner contends that we should invoke Rule of Practice 100(c) to "waive" the "30 day requirement articulated under SEC Rule 420." Rule 100(c) authorizes us to direct that an "alternative procedure" shall apply to a proceeding if "to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding."[18] According to Turner, waiving the 30-day deadline for filing an appeal would serve the interests of justice because before his bar he had a "flawless professional record." He asserts further that "[j]ustice would be served by remanding this matter to FINRA to allow Turner to respond to its requests for information," which he says he will do "immediately." We find no basis for relieving Turner from the 30-day deadline for filing an appeal without a showing of extraordinary circumstances.

Rule of Practice 420(b) states that a showing of extraordinary circumstances is "the exclusive remedy for seeking an extension of the 30-day [appeal] period."[19] And because "'strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief,' the extraordinary circumstances exception to the 30-day filing deadline 'is to be narrowly construed and applied only in limited circumstances.'"[20] Accordingly, we do not believe it is appropriate to direct that an "alternative procedure" apply to this proceeding. Timing requirements are important because "parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed."[21] It would not serve the interests of justice to excuse Turner's failure to follow

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15 *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 WL 1826641, at *2 (May 8, 2014).

16 *Ballard*, 2016 WL 1169072, at *3.

17 *See Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 WL 4656403, at *3 & n.14 (Sept. 19, 2014) (dismissing untimely appeal because applicant's claimed ignorance of bar's consequences and reliance on SRO employee's advice did not constitute extraordinary circumstances, and even "if Lenahan's ignorance were an extraordinary circumstance, she states that she became aware of the negative consequences of the bar in August 2013, yet she offers no justification for waiting an additional eight months to file her application for review").

18 17 C.F.R. § 201.100(c).

19 *Id.* § 201.420(b).

20 *Ballard*, 2016 WL 1169072, at *3 (quoting *Ceballos*, 2013 WL 772515, at *3).

21 *Ceballos*, 2013 WL 772515, at *3.

procedural rules, and allow him to file an untimely appeal, without a showing that his failure to appeal timely was the result of the extraordinary circumstances contemplated by Rule 420.[22]

An appropriate order will issue.[23]

By the Commission (Chairman CLAYTON and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

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[22] *See Larry Saylor*, Exchange Act Release No. 51949, 2005 WL 1560275, at *4-5 & n.14 (June 30, 2005) (finding no "extraordinary circumstances" that would warrant allowing applicant to file an untimely appeal even though applicant "point[ed] to his clean disciplinary record since the imposition of the principal bar" as a justification for finding jurisdiction or allowing an untimely appeal); *Jonathan Roth Ellis*, Exchange Act Release No. 80312, 2017 WL 1103694, at *5 (Mar. 24, 2017) (dismissing applicant's appeal to the Commission because applicant's "belated desire to cooperate" with FINRA did not excuse his failure to follow procedural rules).

[23] 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.

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MICHAEL ROSS TURNER

For Review of Action Taken by

FINRA

ORDER DISMISSING APPEAL OF ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the appeal filed by Michael R. Turner be, and it hereby is, dismissed.

By the Commission.

Brent J. Fields
Secretary