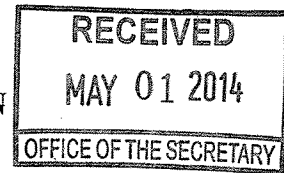


**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**



In the Matter of the Application of

Caryl Trewyn Lenahan

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority

File No. 3-15833

**FINRA'S MOTION TO DISMISS LENAHAN'S APPLICATION FOR REVIEW AND
TO STAY BRIEFING SCHEDULE**

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I. INTRODUCTION

The Financial Industry Regulatory Authority ("FINRA") moves to dismiss the application for review filed by Caryl Trewyn Lenahan ("Lenahan") dated April 4, 2014.

Lenahan seeks to appeal a final FINRA action which, effective September 24, 2012, barred her from associating with any FINRA member in any capacity. FINRA sent and Lenahan received a series of letters that warned her that she would be suspended and eventually barred unless she provided FINRA with the information it had requested. Lenahan ignored FINRA's numerous notices. She did not provide FINRA with any requested information and did not contest her impending bar.

The Commission should dismiss this application for two independent reasons. First, Lenahan failed to exhaust her administrative remedies. Second, Lenahan's application for review is untimely. Lenahan filed this appeal nineteen months after the 30-day appeal deadline

expired. The Commission should follow its previous decisions and dismiss Lenahan's application for review.¹

II. PROCEDURAL AND FACTUAL BACKGROUND

From April 7, 1997 to December 31, 2009, Lenahan was associated with Investors Capital Corp. ("Investors Capital"), a FINRA member firm. During this time, Lenahan met Dominique Beynel ("Beynel"), who later became a customer of Investors Capital and Lenahan's customer. On September 29, 2011, Beynel filed a complaint with FINRA alleging that Lenahan caused her to purchase unsuitable real estate investment trusts by misrepresenting their merits. (RP 3-4.)² In response to Beynel's complaint, FINRA initiated an investigation to determine whether Lenahan violated FINRA rules. *Id.*

A. The December 2, 2011 Request for Information

On December 2, 2011, David Suddeth, a FINRA examiner, sent Lenahan a letter requesting information pursuant to FINRA Rule 8210.³ (RP 1-2.) The letter sought information concerning the allegations of wrongdoing related to Beynel's risk tolerance and suitability of the investments, included a copy of Beynel's complaint, and asked Lenahan to provide a written response to FINRA by December 16, 2011. *Id.*

¹ Pursuant to Commission Rule of Practice 161, FINRA requests that the Commission stay issuance of a briefing schedule in this matter while this motion is pending. The Commission should first evaluate the dispositive arguments that Lenahan's appeal should be dismissed on procedural grounds before it reaches the underlying substance of this appeal.

² "RP __" refers to the page numbers in the certified record filed by FINRA on April 30, 2014.

³ FINRA Rule 8210 provides that FINRA staff has the right to require members, persons associated with a member, and other persons 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. FINRA Rule 8210(a)(1).

Suddeth sent the letter by certified and first-class mail to Lenahan's address of record as contained in the Central Registration Depository ("CRD"[®]), [REDACTED] [REDACTED] (the "CRD Address"). (RP 1.) Lenahan received the letter and signed the certified mail return receipt "Caryl Lenahan" on December 5, 2011. (RP 6.) Lenahan did not respond to FINRA's Rule 8210 request.

B. The December 16, 2011 Request for Information

On December 16, 2011, Suddeth made a second written request pursuant to FINRA Rule 8210 for the information. The second request also included a copy of the December 2, 2011 Rule 8210 request letter. (RP 7.) Suddeth sent the letter to Lenahan by certified and first-class mail to the CRD Address, and set a response deadline of December 30, 2011. (RP 8.) Lenahan again received the letter and signed the certified mail return receipt "Caryl Lenahan" on December 19, 2011. (RP 10.) Lenahan did not, however, respond to FINRA's December 16, 2011 letter.

C. The June 19, 2012 Pre-Suspension Notice

After Lenahan failed to respond to the two requests for information, FINRA's Department of Enforcement ("Enforcement") sought to suspend Lenahan from associating with any FINRA member firm pursuant to FINRA Rule 9552(a). On June 19, 2012, Sandra J. Harris, Senior Director, Policy & Expedited Proceedings for Enforcement warned Lenahan in a letter ("Pre-Suspension Notice") that FINRA intended to suspend her on July 13, 2012 for her failure to respond to the requests for information.⁴ (RP 11.)

⁴ The Pre-Suspension Notice also included copies of the December 2, 2011 and December 16, 2011 requests for information. (RP 11-12.)

The Pre-Suspension Notice stated that Lenahan could avoid imposition of the suspension if she took corrective action by complying with the information requests before the suspension date of July 13, 2012. (RP 11.) The Pre-Suspension Notice explained that Lenahan had the opportunity to request a hearing pursuant to FINRA Rule 9552(e), which, if made before the suspension date, would stay the effective date of any suspension.⁵ *Id.* The Pre-Suspension Notice further explained that Lenahan could seek reinstatement during her suspension, and stressed that if she failed to request termination of the suspension within three months, she would be automatically barred on September 24, 2012. (RP 12.)

FINRA sent the Pre-Suspension Notice to the CRD Address by FedEx Overnight Delivery and first-class mail. Neither mailing was returned. Lenahan did not respond to the Pre-Suspension Notice, nor did she answer FINRA's outstanding requests for information.

D. The July 13, 2012 Suspension Notice

On July 13, 2012, Harris, on behalf of Enforcement, notified Lenahan in a letter ("Suspension Notice") that she was suspended, effective immediately, from association with any FINRA member firm in any capacity. (RP 19.) The Suspension Notice stated that Lenahan was suspended because she had failed to provide the requested information, and failed to take corrective action by July 13, 2012. The Suspension Notice advised Lenahan that she could file a written request for termination of the suspension on grounds of full compliance with the information requests. *Id.* It also reiterated the warning that if Lenahan failed to seek relief from the suspension she would be automatically barred on September 24, 2012. *Id.*

⁵ The Pre-Suspension Notice provided Lenahan with the address of FINRA's Office of Hearing Officers where she could direct a request for a hearing. (RP 11.)

FINRA sent the Suspension Notice to the CRD Address by FedEx Overnight Delivery and first-class mail. Neither mailing was returned. The FedEx shipping receipt shows that the Suspension Notice was delivered on July 16, 2012. (RP 21.) Lenahan did not respond to the Suspension Notice.

E. The September 24, 2012 Bar Notice

Lenahan did not challenge her suspension in the months leading up to September 24, 2012. Accordingly, on that date, Harris notified Lenahan that she was barred from association with any FINRA member in any capacity in accordance with FINRA Rule 9552(h) (“Bar Notice”). (RP 27.) The Bar Notice informed Lenahan that she could appeal FINRA’s action by filing an application for review with the Commission within 30 days of her receipt of the letter. *Id.* FINRA sent the Bar Notice to the CRD address by FedEx Overnight Delivery and first-class mail. Neither mailing was returned. The FedEx shipping receipt shows that the Bar Notice was delivered on September 25, 2012. (RP 29.)

F. Lenahan Applies for Commission Review

Nineteen months after FINRA barred her, Lenahan submitted an application for review to the Commission. (RP 31.) In the application for review, Lenahan admits that she received the December 2, 2011 information request, and both the June 19, 2012 Pre-Suspension and July 13, 2012 Suspension Notices.⁶ She openly admits that the filing of her appeal is well overdue by stating that “[m]y Appeal Letter . . . is 19 months late . . .” and “I don’t know how many appeal letters [the Commission] receive[s], but few that are 19 months late.” (RP 31, 33).

⁶ Specifically, the application for review states in relevant part that Lenahan “did not respond to the December 2, 2011 request” and that she “received a Notice of Suspension letter dated June 19, 2012 and the Suspension from Association dated July 13, 2012.” (RP 32.) The Suspension Notice included copies of both Rule 8210 information requests.

Lenahan's application also states that when asked by FINRA examiner, David Suddeth, whether she intended to re-activate her license, she responded "I said I doubted I would." (RP 32.) Lenahan's application then suggests that Suddeth advised Lenahan to not respond to the Rule 8210 request for information. (RP 32-33.)

III. ARGUMENT

The Commission should dismiss Lenahan's application for review because Lenahan failed to exhaust her administrative remedies by providing FINRA the requested information or requesting a hearing. Lenahan admits that she ignored numerous letters and notices from FINRA, failed to follow FINRA procedures to challenge her suspension, and did nothing to stop the suspension from turning into a bar. Lenahan thus failed to exhaust her administrative remedies. In addition, Lenahan filed her application for review nineteen months late and therefore is untimely. The Commission should dismiss the appeal.

A. Lenahan Failed to Exhaust Her Administrative Remedies

The Commission should not consider Lenahan's application for review because she failed to follow FINRA procedures, and consequently, failed to exhaust her administrative remedies. As the Commission has held previously, it "will not consider an application for review if the applicant failed to exhaust FINRA's procedures for contesting the sanction at issue." *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268, at *10 (Apr. 10, 2014) (dismissing application for review where respondent failed to avail himself of administrative remedies and FINRA barred him for failure to respond to FINRA's Rule 8210 request). The precedent in this area is well-settled. *Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 SEC LEXIS 283, at *8 (Jan. 24, 2014) (dismissing appeal for failure to exhaust FINRA's administrative remedies); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC

LEXIS 1563, at *5, 8 (May 6, 2010) (same); *Jeffrey A. King*, Exchange Act Release No. 52571, 58 S.E.C. 839, 844-45 (2005) (same); *Lee Gura*, 57 S.E.C. 972, 976-77 (2004) (same); *David I. Cassuto*, 56 S.E.C. 565, 570 (2003) (dismissing appeal because “applicant failed to follow NASD procedures”); *Gary A. Fox*, 55 S.E.C. 1147, 1149 (2002) (same).

An aggrieved party – such as Lenahan – is required to exhaust her administrative remedies before resorting to an appeal. Those who fail to exercise their rights to administrative review cannot claim that they have exhausted their administrative remedies. *Royal Sec. Corp.*, 36 S.E.C. 275, 277 n.3 (1955). Federal courts, as well as the Commission, have applied the exhaustion doctrine to FINRA procedures. *See Lang v. French*, 154 F.3d 217, 220 (5th Cir. 1998) (holding that “[NASD] disciplinary orders are reviewable by the [Commission] after administrative remedies within the NASD are exhausted”); *Swirsky v. NASD*, 124 F.3d 59, 62 (1st Cir. 1997) (same).

Lenahan failed repeatedly to comply with FINRA procedures to prevent or challenge her suspension. She failed to exhaust her available remedies. Lenahan chose not to respond to two Rule 8210 requests, in which FINRA informed her that the failure to respond could result in serious sanctions, including a bar. After the issuance of the Pre-Suspension Notice, Lenahan had the opportunity to take corrective action by complying with the Rule 8210 requests or, alternatively, to request a hearing and set forth the reasons why she believed her suspension should be set aside. (RP 11-12.) But Lenahan did not take corrective action or request a hearing. After issuance of the Suspension Notice, Lenahan had the opportunity to move for reinstatement on the grounds that she had fully complied with the Pre-Suspension Notice. (RP 19-20.) Similar

to her decision not to respond to FINRA's two requests for information, Lenahan did nothing. Accordingly, pursuant to FINRA Rule 9552(h), Lenahan was barred.⁷ (RP 27-28.)

By failing to take action in accordance with FINRA rules and as directed by the Pre-Suspension and Suspension Notices, Lenahan forfeited her ability to challenge the actions of FINRA before the Commission. *See Profeta*, 2010 SEC LEXIS 1563, at *6 (finding in a Rule 9552 proceeding that "FINRA's actions were in accordance with its rules and the purposes of the Exchange Act [when] rules set forth the procedures for suspending and ultimately barring individuals who fail to supply requested information or take corrective action"); *Cassuto*, 56 S.E.C. at 570-72 (dismissing application for review because of applicant's failure to ask for a hearing or to move for reinstatement after suspension in NASD action stemming from failure to respond to Rule 8210 requests for information); *Fox*, 55 S.E.C. at 1149 (holding that the Commission is precluded from considering an application for review of NASD action barring applicant when applicant failed to avail himself of NASD procedures setting forth opportunities for review).

Lenahan could have prevented the suspension and subsequent bar by: (1) providing the information at issue, (2) requesting a hearing timely, or (3) contesting the suspension during the three-month suspension period, as detailed in the Pre-Suspension Notice. (RP 11-12.) She took none of these steps. Instead, Lenahan filed this appeal more than twenty-two months after she received the Suspension Notice, and nineteen months after FINRA notified her that her suspension had converted to a bar. (RP 31-39.)

⁷ FINRA Rule 9552(h) states, "[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."

Lenahan argues that her bar should be eliminated because she was unaware of the “devastating ramifications of the suspension and bar.” (RP 32.) At the time she received the information requests, Lenahan claims that her license was inactive, she was not emotionally able to deal with a contested complaint, and – since she did not intend to re-activate her license – she followed the “misguided” advice of Suddeth by not responding to the requests. (RP 31-33.)

Yet FINRA rules make clear Lenahan’s obligations as an associated person of a member to respond to FINRA’s Rule 8210 requests. *See* FINRA Rule 0140(a)(providing that the “[r]ules shall apply to all members and persons associated with a member,” and that “[p]ersons associated with a member shall have the same duties and obligations as a member . . . ”); *see also* FINRA Rule 8210(c) (requiring associated persons to comply with the document and information requirements under Rule 8210). In addition, Lenahan received a series of letters from FINRA that highlighted her obligation to respond, including the consequences for not responding timely, to FINRA’s requests for information. (RP 1-2, 7, 11-12, 19-20, 27-28.)

Assuming, for the sake of argument, that Lenahan did not understand that her inaction could result in her being barred, her lack of understanding is no reason to invalidate FINRA’s actions. The Commission repeatedly has held that ignorance of FINRA requirements is no excuse for violative behavior. *Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995) (citing *Carter v. SEC*, 726 F.2d 472, 473-474 (9th Cir. 1983) (stating that “as employees, [the representatives] are assumed as a matter of law to have read and have knowledge of these rules and requirements”)). Although Lenahan admits in her application that she did not fully appreciate the ramifications of her noncompliance, she inappropriately shifts her burden of complying with FINRA rules to a FINRA examiner. “Participants in the securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of

knowledge, understanding, or appreciation of these requirements.” *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *73-74 (Jan. 30, 2009); *Kocherhans*, 52 S.E.C. at 531; *Patrick G. Keel*, 51 S.E.C. 282, 287 (1993) (finding that respondent did not take responsibility for making unsuitable recommendations but blamed his supervisor and customers instead.)

Moreover, even Lenahan’s attempt to shift the blame to Suddeth lacks an evidentiary basis. Lenahan’s application for review contains no evidence or documentation supporting her claim that Suddeth advised her not to respond. The record does not contain this evidence because the opportunity for Lenahan to make this claim was during a FINRA hearing. But Lenahan freely admits that she was given the opportunity to appeal and “did nothing” (RP 41). Lenahan risked her future as an associated person of a FINRA firm by allowing herself to be barred in the hope that it would not impact her future endeavors. The Commission should not allow her to change her mind through an appeal. As the Commission explained in *Mayer A. Amsel*, 52 S.E.C. 761, 767 (1996), “it is inappropriate for a party to ‘suppress his misgivings while waiting anxiously to see whether the decision goes in his favor.’ In a similar vein, we have stated that ‘a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action.’” (citation omitted). To be sure, Lenahan’s departure from the securities industry was voluntary, and her decision not to comply with FINRA rules was intentional. Lenahan cannot blame FINRA now for her past decisions.

Lenahan’s failure to follow FINRA’s procedures means that she does not qualify for appellate review by the Commission. *See Cassuto*, 56 S.E.C. at 570-72. The Commission should dismiss this appeal.

B. Alternatively, This Application for Review Should Be Dismissed as Untimely

Even if Lenahan had exhausted her administrative remedies—which plainly she did not—the Commission should dismiss this appeal on the separate ground that it is untimely.

Section 19(d)(2) of the Securities Exchange Act of 1934 (“Exchange Act”) provides that any person aggrieved by a final disciplinary sanction imposed by a self-regulatory organization may file an appeal “within 30 days” after the date the notice of the self-regulatory organization’s determination was filed with the SEC and received by the aggrieved person, or “within such longer period as [the SEC] shall determine.” 15 U.S.C. § 78s(a)(1). SEC Rule of Practice 420 is the “exclusive remedy” for seeking an extension of the thirty-day appeal period. 17 C.F.R. § 201.420(b). That rule provides that the Commission will allow the filing of a late application for review only upon “a showing of extraordinary circumstances.” *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, at *7 & n.9 (May 20, 2008).

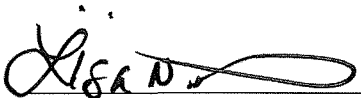
Lenahan’s appeal is untimely and the Commission should dismiss it. Harris sent the bar letter to Lenahan on September 24, 2012. Lenahan’s application for review is dated April 4, 2014, which is nineteen months beyond the appeal deadline. Indeed, Lenahan acknowledges that her appeal, filed nineteen months late, is well past the 30-day deadline. (RP 31.) In similar circumstances, the Commission has declined to review late applications for review. *See Warren B. Minton, Jr.*, 55 S.E.C. 1170, 1178 (2002) (refusing to accept an application for review filed 2.5 years after final NASD action); *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1099 (1988) (refusing to accept an application for review filed five months after notice of NASD decision). Accordingly, the Commission should dismiss Lenahan’s appeal because it is untimely.

IV. CONCLUSION

Lenahan repeatedly failed to respond to FINRA's requests for information, and consequently, FINRA suspended her. She then disregarded the directives set forth in FINRA's notices and failed to follow FINRA's administrative procedures to terminate the suspension. As a result, FINRA barred Lenahan. The Commission should dismiss Lenahan's application for review because she failed to exhaust her administrative remedies, or because it is untimely.

Respectfully submitted,

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