

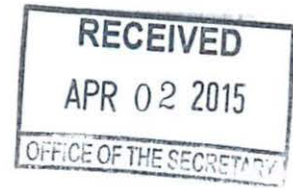


Financial Industry Regulatory Authority

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April 2, 2015

VIA MESSENGER AND FACSIMILE

Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090  
Fax: (202) 772-9324

RE: In the Matter of the Application for Review of Darren M. Smith  
Administrative Proceeding No. 3-16434

Dear Mr. Fields:

Enclosed please find the original and three (3) copies of FINRA's Motion to Dismiss Application for Review and to Stay Briefing Schedule in the above-captioned matter.

Please contact me at (202) 728-8985 if you have any questions.

Very truly yours,

Celia L. Passaro

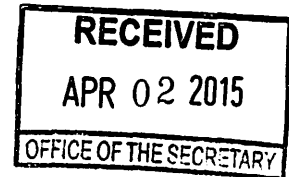
Enclosures

cc: Darren M. Smith (via FedEx and certified mail)

[Redacted]

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



In the Matter of the Application of

Darren M. Smith

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority

File No. 3-16434

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

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April 2, 2015

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

In the Matter of the Application of

Darren M. Smith

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority

File No. 3-16434

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

**I. INTRODUCTION**

The Commission should dismiss Darren M. Smith's application for review (the "Application for Review") for his failure to exhaust the administrative remedies available to him in FINRA's forum. This case involves Smith's prolonged failure to respond to FINRA's requests for information and its subsequent notices of proceedings against him. When FINRA learned that the Huntington Investment Company ("Huntington") had terminated Smith for altering a legal document using corrective fluid, FINRA opened an investigation to determine whether Smith had violated FINRA rules. FINRA served Smith with a Rule 8210 request for information. Smith, however, failed to provide the requested information, notwithstanding FINRA's warnings that he could face disciplinary action if he refused to cooperate. FINRA then initiated an expedited proceeding against Smith, informing him that he would be suspended if he did not take corrective action. Smith again failed to respond and FINRA suspended him. FINRA notified Smith that he could request termination of the suspension on the ground that he

complied fully with FINRA's requests. Smith took no action, never provided the requested information, and FINRA barred him. Smith then filed this appeal.

Smith's Application for Review should be dismissed because he failed to follow FINRA's procedures. Smith disregarded the directives in numerous notices from FINRA and did not take corrective action by providing the requested information. Thus, he failed to exhaust his administrative remedies. Further, the record before the Commission contains no valid grounds for an appeal. While Smith claims to have sent a letter to FINRA in September 2014, there is no evidence in the record of any response, and Smith concedes that he never followed up with any response after he received additional notices of the proceedings FINRA had commenced against him. The Commission should follow its well-established precedent in this area, find that Smith failed to avail himself of FINRA's procedures, and dismiss Smith's Application for Review.<sup>1</sup>

## **II. FACTUAL BACKGROUND**

In November 2012, Smith became associated with Huntington after several years of employment with Huntington's banking affiliate. (RP 46.)<sup>2</sup> On November 22, 2013, Huntington made an initial filing to register Smith as a limited representative. (RP 48-49.) Smith subsequently took, but did not pass, the Series 6 examination and was never registered with FINRA. (RP 48.) On April 25, 2014, after Smith was terminated by Huntington's banking affiliate, Huntington terminated Smith and filed a Uniform Termination Notice for Securities

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<sup>1</sup> 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. *See* 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive argument that Smith's appeal should be dismissed on procedural grounds before it reaches the underlying substance of this appeal.

<sup>2</sup> "RP \_\_\_\_" refers to the page numbers in the certified record filed by FINRA on March 31, 2015.

Industry Registration (“Form U5”). (RP 49.) FINRA learned from Huntington that Smith had been terminated for using corrective fluid on a legal document. (RP 1.)

**A. FINRA’s Requests for Information**

Prompted by Huntington’s Form U5 filing, on June 2, 2014, FINRA sent a FINRA Rule 8210 request for documents and information to Smith.<sup>3</sup> (RP 1-2.) The request asked Smith to provide FINRA with a signed statement responding to the allegation that he had used corrective fluid on a legal document. (*Id.*) The request also asked Smith to provide copies of any relevant documents and to provide information and documents about any other complaints relating to his employment at Huntington during the preceding three years. (*Id.*) The request reminded Smith of his obligation to provide the information and documents requested, and warned that “[a]ny failure ... to satisfy these obligations could expose [Smith] to sanctions, including a permanent bar from the securities industry.” (RP 1.)

FINRA sent the request by certified and first-class mail to Smith’s address of record as contained in the Central Registration Depository (“CRD”<sup>®</sup>), [REDACTED], OH 45805 (the “CRD Address”), and requested a response from Smith no later than June 16, 2014. (RP 1, 53.) Smith did not respond.

On June 18, 2014, FINRA sent Smith a second Rule 8210 request, enclosing the June 2, 2014 request. (RP 3.) The second request reminded Smith of his obligation to provide

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<sup>3</sup> FINRA Rule 8210 requires persons subject to FINRA’s jurisdiction to provide documents and written information to FINRA, upon the request of FINRA staff, with respect to any matter involved in an investigation. The rule “provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations.” *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at \*13 (Nov. 14, 2008), *petition for review denied*, 347 F. App’x 692 (2d Cir. 2009). The Commission has made clear that a person who fails to respond to a request issued under FINRA Rule 8210 impedes FINRA’s ability to detect misconduct and protect the investing public. *Id.* at \*13-14.



documents and information to FINRA under Rule 8210, and directed him to respond by July 2, 2014. (*Id.*) The second request was sent by certified and first-class mail to Smith's CRD Address.<sup>4</sup> (*Id.*) Once again, Smith did not respond.

On July 8, 2014, FINRA served Smith with a third request for information pursuant to Rule 8210 (the "July Rule 8210 Request"). (RP 5-6.) Like the previous requests, the July Rule 8210 Request sought information concerning the circumstances of Smith's termination by Huntington, and asked Smith to provide a signed statement addressed to FINRA responding to the allegations that he used corrective fluid on a legal document and to provide copies of all relevant documentation. (RP 5.) The letter also asked Smith whether the customer approved the alteration of the document, whether other Huntington employees were involved, and whether Huntington approved the use of corrective fluid on such documents. (*Id.*) Further, the letter asked if there were any complaints regarding his employment at Huntington which were open or resolved within the preceding three years of the date of his termination, and to provide documentation of any such complaints. (*Id.*) The letter asked Smith to respond no later than July 29, 2014. (*Id.*) The letter warned Smith that, pursuant to Rule 8210, "[a]ny failure on [Smith's] part to satisfy these obligations could expose [him] to sanctions, including a permanent bar from the securities industry." (RP 6.)

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<sup>4</sup> While the first and second FINRA Rule 8210 requests were not personally served on Smith, as required under FINRA Rule 8210(d) for a person subject to FINRA's jurisdiction who was formerly associated with a member in an unregistered capacity, they were mailed to the address where he was subsequently personally served, and Smith appears to acknowledge having received "multiple communications" from FINRA prior to September 2014. (RP 5-10, 33.)

FINRA served Smith with the July Rule 8210 Request by hand-delivering it to him on July 16, 2014 at his CRD Address.<sup>5</sup> (RP 7-10.) Smith did not respond to this or the two previous Rule 8210 requests. Given Smith's silence, FINRA's Department of Enforcement ("Enforcement") initiated efforts to suspend Smith. On August 5, 2014, FINRA sent Smith a letter addressed to his CRD Address notifying him that the matter had been referred to Enforcement. (RP 11.)

**B. The November 10, 2014 Pre-Suspension Notice**

After Smith failed to respond to the requests for information, Enforcement sought to suspend Smith from associating with any FINRA member firm pursuant to FINRA Rule 9552.<sup>6</sup> (RP 13-14.) On November 10, 2014, Sandra J. Harris, FINRA's Senior Director of Policy and Expedited Proceedings, warned Smith in a letter (the "Pre-Suspension Notice") that FINRA planned to suspend him on December 4, 2014, for his failure to respond to the July Rule 8210 Request.<sup>7</sup> (*Id.*)

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<sup>5</sup> FINRA Rule 8210(d) requires FINRA to personally serve, pursuant to Rule 9134(a)(1), an unregistered associated person when requesting documents and information under Rule 8210. FINRA Rule 9134(a)(1) provides that "[p]ersonal service may be accomplished by handing a copy of the papers to the person required to be served." Here, the July Rule 8210 Request was served on Smith by a process server who handed it to him at the CRD Address. (RP 7-10.)

<sup>6</sup> FINRA Rule 9552(a) states that

[i]f 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.

<sup>7</sup> The Pre-Suspension Notice also included a copy of the July Rule 8210 Request. (RP 13.)

The Pre-Suspension Notice stated that Smith could avoid imposition of the suspension if he took corrective action by complying with the information request before the suspension date of December 4, 2014. (*Id.*) The Pre-Suspension Notice further explained that Smith had the opportunity to request a hearing before the suspension date of December 4, to contest the imposition of the suspension, and to seek termination of the suspension if he complied fully with the request. (*Id.*) The Pre-Suspension Notice stressed not only that Smith could seek reinstatement during his suspension, but also that if he failed to request termination of the suspension within three months, he would be in default, and barred on February 13, 2015. (RP 14); *see also* FINRA Rule 9552(h).<sup>8</sup>

FINRA sent the Pre-Suspension Notice to the CRD Address by certified and first-class mail. (RP 10.) The certified mail shipment detail for the mailing to the CRD Address indicates that the letter was delivered and signed for by Smith on November 22, 2014. (RP 15-16.) The first-class mailing was not returned. Smith did not respond to the Pre-Suspension Notice, nor did he answer FINRA's outstanding request for information.

**C. The December 4, 2014 Suspension Notice**

Because Smith failed to take any action in response to the Pre-Suspension Notice, on December 4, 2014, Harris notified Smith in a letter (the "Suspension Notice") that he was suspended, effective immediately, from association with any FINRA member firm in any capacity. (RP 21-22.) The Suspension Notice advised Smith that he could file a written request to terminate the suspension based on fully providing the information and documents that FINRA

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<sup>8</sup> 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."

requested in the July Rule 8210 Request. (*Id.*) The Suspension Notice reiterated the warning that Smith's failure to seek relief from the suspension by February 13, 2015, would result in a default and an automatic bar pursuant to FINRA Rule 9552. (*Id.*)

FINRA sent the Suspension Notice by certified and first-class mail to the CRD Address.<sup>9</sup> (RP 21.) The certified mail shipment detail for the mailing to the CRD Address indicates that the letter was unclaimed. (RP 23.) The first-class letter to the CRD Address, however, was not returned. Smith did not respond to the Suspension Notice.

**D. The February 13, 2015 Bar Notice**

In the three months following the Pre-Suspension Notice, Smith did not provide FINRA with the requested information, challenge his suspension, or otherwise communicate with FINRA. Accordingly, on February 13, 2015, Harris notified Smith that, effective immediately, he was in default and barred (the "Bar Notice"). (RP 27-28.)

FINRA sent the Bar Notice by certified and first-class mail to Smith's CRD Address.<sup>10</sup> (RP 27.) The certified mail shipment detail for the mailing to the CRD Address indicates that the letter was delivered and signed for by Smith on March 3, 2015. (RP 29-31.) The first-class letter to the CRD Address was not returned.

On March 3, 2015, approximately two weeks after FINRA mailed the Bar Notice and the same day Smith accepted delivery of the certified mailing, Smith submitted his Application for

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<sup>9</sup> Prior to mailing the Suspension Notice, FINRA staff searched a comprehensive public records database in LexisNexis to determine Smith's current mailing address, which FINRA staff determined was the CRD Address. (RP 19.)

<sup>10</sup> Prior to mailing the Bar Notice, FINRA staff again searched a comprehensive public records database in LexisNexis to determine Smith's current mailing address, which FINRA staff determined was the CRD Address. (RP 25.)

Review to the Commission. (RP 33, 40.) In his Application for Review, Smith acknowledges that he received “multiple communications” from FINRA. (RP 33.) He also claims that he sent a letter to FINRA in September 2014. (*Id.*) FINRA’s files, however, contain no such letter. In any event, Smith also acknowledges receiving “multiple more communications” from FINRA after he purportedly sent his letter. (*Id.*)

### **III. ARGUMENT**

The Commission should dismiss Smith’s Application for Review because he failed to exhaust his administrative remedies by providing the requested information or requesting a hearing. Despite receiving notice of these proceedings in accordance with FINRA rules, Smith ignored numerous letters and notices from FINRA, failed to follow FINRA procedures to challenge his suspension, and defaulted. Smith took no action until he was barred, and the action that he did take was deficient under FINRA rules. Smith failed to exhaust his administrative remedies. The Commission therefore should dismiss this appeal.

#### **A. FINRA Has Jurisdiction Over Smith**

Smith is subject to FINRA’s jurisdiction because he was a person associated with a FINRA member firm, Huntington. Article I of FINRA’s By-Laws defines an associated person in part as “a natural person who is registered or *has applied for registration.*” (Emphasis added); *see also NASD Notice to Members 99-95*, 1999 NASD LEXIS 117 (Nov. 1999) (explaining that any person who signs and submits a Form U4 for registration is an associated person subject to FINRA’s jurisdiction). Under Article IV, Section 1 of FINRA’s By-Laws and FINRA Rule 0140(a), all FINRA’s rules, including FINRA Rules 8210 and 9552, apply to persons associated with a member, and associated persons “have the same duties and obligations as a member under the Rules.” Moreover, under Article IV, Section 4(a)(iii) of FINRA’s By-Laws, FINRA retains

jurisdiction over an associated person for two years after the date upon which that person ceases being associated with a FINRA member. *See also NASD Notice to Members 92-19*, 1992 NASD LEXIS 50 (Apr. 1992) (noting that FINRA retains jurisdiction over associated persons for two years after termination and associated persons are required to provide information to FINRA as long as it retains jurisdiction).

The record is clear that Smith became associated with Huntington and applied for registration with FINRA on November 22, 2013. (RP 49.) At that point, Smith was subject to FINRA's jurisdiction and obligated to follow its rules, including the obligation to provide documents and information under FINRA Rule 8210 and the obligation to follow the procedures set out in FINRA Rule 9552. Moreover, FINRA retained jurisdiction over Smith for two years after his termination by Huntington in April 2014—i.e., through April 2016—a period which covers the requests and proceedings at issue in this case. (*Id.*)

**B. Smith Failed to Exhaust His Administrative Remedies**

The Commission is precluded from considering Smith's Application for Review because he failed to follow FINRA procedures, and consequently, failed to exhaust his administrative remedies. As the Commission recently emphasized, "[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 the review." *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268, at \*10 (Apr. 10, 2014). The Commission has repeatedly held that requiring respondents to exhaust their administrative remedies before FINRA is necessary to FINRA's important regulatory functions, promotes development of the record, allows FINRA the opportunity to correct any error in its earlier decisions, and promotes the efficient resolution of disputes between FINRA and its members. *See, e.g., Caryl Trewyn*

*Lenahan*, Exchange Act Release No. 73146, 2014 SEC LEXIS 3503, at \*6-7 (Sept. 19, 2014) (quoting *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004)); *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 SEC LEXIS 1147, at \*12 (Apr. 18, 2013) (same); *Mullins*, 2014 SEC LEXIS 1268, at \*10 (same).

As an aggrieved party, Smith was required to exhaust his administrative remedies before resorting to an appeal. See *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at \*5 (May 6, 2010) (explaining that the Commission “will not consider an application for review if the applicant failed to exhaust FINRA’s procedures for contesting the sanction at issue”). 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). This doctrine applies with equal force to FINRA proceedings. 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) (noting that the court “agree[s] with other circuits that have considered the question” and concluded that the doctrine of exhaustion of administrative remedies applies in NASD disciplinary actions).

The precedent with respect to FINRA Rule 9552 expedited proceedings is well-settled, and the Commission has consistently dismissed respondents’ applications for review where respondents failed to exhaust their administrative remedies under Rule 9552. See, e.g., *Gerald J. Lodovico*, Exchange Act Release No. 73748, 2014 SEC LEXIS 4732, at \*7-8 (Dec. 4, 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 requests); *Mullins*, 2014 SEC LEXIS 1268, at \*13-14 (same); *Mark Steven Steckler*, Exchange Act Release No. 71391,

2014 SEC LEXIS 283, at \*9-13 (Jan. 24, 2014) (same); *Martinez*, 2013 SEC LEXIS 1147, at \*11-15 (same); *Norman Chen*, Exchange Act Release No. 65345, 2011 SEC LEXIS 3224, at \*6, 11 (Sept. 16, 2011) (same); *Profeta*, 2010 SEC LEXIS 1563, at \*5, 8 (same).

Smith failed repeatedly to comply with FINRA procedures to prevent or challenge his suspension. Smith chose not to respond to July Rule 8210 Request, in which he was informed that a failure to respond could result in a disciplinary action and serious sanctions, including a bar. (RP 5-6.) After issuance of the Pre-Suspension Notice, Smith had the opportunity to take corrective action by complying with the July Rule 8210 Request or, alternatively, to request a hearing and set forth the reasons why he believed his suspension should not be imposed. (RP 13-14.) But Smith did not take corrective action or request a hearing.

Likewise, after issuance of the Suspension Notice, Smith had the opportunity to move for reinstatement on the ground that he had complied with the Pre-Suspension Notice. (RP 21-22.) Similar to his decision not to respond to FINRA's July Rule 8210 Request or the Pre-Suspension Notice, Smith did nothing. Accordingly, pursuant to FINRA Rule 9552(h), Smith was barred. (RP 27-28.)

In the Application for Review, Smith claims that he sent a letter to FINRA in September 2014. (RP 33.) Smith does not provide a copy of this letter, however, and FINRA has no record of having received any response from Smith. Smith acknowledges receiving "multiple more communications" from FINRA after purportedly sending this letter, and seemingly concedes that this purported letter was "not received." (*Id.*) He acknowledges, moreover, not making any additional attempt to respond to FINRA's requests or comply with its procedures. (*Id.*) In any event, even if Smith did send a letter to FINRA as he claims, it would not excuse his failure to avail himself of FINRA's procedures.



Smith gives no reason for his more than seven-month failure to respond to multiple notices from FINRA other than a “busy schedule.” (*Id.*) He also suggests that he never called or emailed anyone at FINRA because all FINRA’s communications to him were in writing—a disingenuous claim given that virtually all FINRA’s communications to him included telephone and email contact information and invited him to contact the person sending the letter if he had any questions. (RP 2, 3, 5-6, 14, 22, 33.) In any event, a busy schedule does not excuse compliance with FINRA rules.

Smith also attaches six pages to his Application for Review that appear to be related to Huntington. (RP 34-39.) Several of the pages are partially or completely illegible. (*Id.*) To the extent these documents purport to be a response to FINRA’s July Rule 8210 Request, the response is not only untimely, it is substantially incomplete. Smith neither provides the signed statement requested in the July Rule 8210 Request, nor answers the other questions related to his termination by Huntington. (RP 5-6, 33.) Moreover, it is not clear whether Smith has provided all the documents requested by FINRA, and he never answers whether there were complaints regarding his employment at Huntington that were open or resolved within three years of his termination. (*Id.*) And, if there were, Smith never provides the relevant documentation. (RP 33-41.)

Even assuming Smith has made an attempt at compliance—albeit incomplete and untimely—his efforts are irrelevant for purposes of the Commission’s consideration of his Application for Review. The issue before the Commission is not Smith’s underlying misconduct—his failure to respond to the July Rule 8210 Request—but rather, whether Smith failed to follow FINRA procedures to challenge his suspension, and consequently, forfeited his ability to challenge FINRA’s actions before the Commission. *See Marcos A. Santana*, Exchange

Act Release No. 74138, 2015 SEC LEXIS 312, at \*10-11 (Jan, 26, 2015) (dismissing an application for review for failure to exhaust administrative remedies under FINRA Rule 9552 where respondent claimed to have complied with the Rule 8210 request). Here, the record is undisputed that Smith did not follow the required procedural steps as a condition of applying for review and, thus, failed to exhaust his administrative remedies. Smith could have previously provided the information at issue, requested a hearing, or contested the suspension during the three-month suspension period. (RP 13-14, 21-22.) He took none of these steps. Smith instead filed this appeal more than three months after he received the Suspension Notice and after FINRA notified him that, consistent with the explicit language of FINRA Rule 9552 (as well as the Pre-Suspension, Suspension, and Bar Notices), his suspension had converted to a bar. (RP 33.)

By repeatedly failing to respond to the FINRA's requests for information and disregarding the directions set forth in the Pre-Suspension and Suspension Notices, Smith is precluded from challenging FINRA's action before the Commission. *See, e.g., Mullins*, 2014 SEC LEXIS 1268, at \*13-14 (relying on "well-established precedent" when dismissing an application for review in a FINRA Rule 9552 proceeding where applicant failed to request a hearing or take corrective action in FINRA's forum); *Steckler*, 2014 SEC LEXIS 283, at \*8 (same); *Martinez*, 2013 SEC LEXIS 1147, at \*15 (same); *Chen*, 2011 SEC LEXIS 3224, at \*10 (finding that applicant's conduct "amounted to a complete failure to respond and [FINRA] acted consistently with the purposes of the Exchange Act in imposing the bar"); *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”). Smith should have considered the implications of a bar rather than choosing to ignore the July Rule 8210 Request and FINRA’s repeated notices.

**C. FINRA Provided Smith with Proper Notice of These Proceedings**

Smith does not contest that FINRA properly notified him of the July Rule 8210 Request and these proceedings pursuant to FINRA’s rules. Indeed, he states that he received “multiple communications” from FINRA, and the record shows he had actual notice of the Pre-Suspension Notice and the Bar Notice. (RP 15-16, 29-30.) Moreover, the record shows that FINRA properly served Smith with the July Rule 8210 Request, the Pre-Suspension Notice, the Suspension Notice, and the Bar Notice. (RP 5-10, 13-16, 21-23, 27-31.)

FINRA Rule 8210(d) provides that “[w]ith respect to a person subject to FINRA’s jurisdiction who was formerly associated with a member in an unregistered capacity,” a request under FINRA Rule 8210 “shall be deemed received by the person upon personal service, as set forth in Rule 9134(a)(1).” Rule 9134(a)(1) states that “[p]ersonal service may be accomplished by handing a copy of the papers to the person required to be served.”

The record establishes that a process server served the July Rule 8210 Request on Smith by hand-delivering it to him at his CRD Address on July 16, 2014. Moreover, while he was not personally served with the earlier June 2, 2014 and June 18, 2014 requests, these letters were sent by first-class and certified mail to the same address. Indeed, Smith acknowledges receiving multiple communications from FINRA. In any event, the personal service of the July Rule 8210 Request alone was sufficient under FINRA’s rules to obligate Smith to provide the requested documents and information.

FINRA Rule 9134(b)(1) governs service of notices of suspension in FINRA Rule 9552 proceedings. *See* FINRA Rule 9552(b). FINRA Rule 9134(b)(1) provides that, “[p]apers served on a natural person may be served at the natural person’s residential address, as reflected in the

[CRD], if applicable.” FINRA Rule 9134(a)(2) provides that service may be accomplished by “mailing the papers through the U.S. Postal Services by using first class mail [or] first class certified mail.”

The record reflects that FINRA sent the Pre-Suspension Notice, the Suspension Notice, and the Bar Notice to Smith’s CRD Address by first-class and certified mail, as required by Rule 9134(b)(1).<sup>11</sup> (RP 13-16, 21-23, 27-31.) Therefore, the record demonstrates that FINRA properly served Smith. *See, e.g., Steckler*, 2014 SEC LEXIS 283, at \*10-11 (finding FINRA’s communications were deemed to have been received by applicant, regardless of whether he had actual receipt, when FINRA properly served him at his CRD address); *Martinez*, 2013 SEC LEXIS 1147, at \*7 (noting that Rule 9552 provides for service of notice by mail at an individual’s CRD address).

The Commission should follow established precedent and reject Smith’s appeal because he failed to exhaust the FINRA administrative remedies that were available to him.

#### **IV. CONCLUSION**

Smith failed to respond to FINRA’s request for information, and consequently, was suspended. He 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, Smith was barred

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<sup>11</sup> As of the filing of this motion, CRD still reflects that Smith’s current address is the CRD Address. (RP 53.) Moreover, the envelope in which Smith submitted his Application for Review to the Commission includes the CRD Address as his return address. (RP 40.)

in accordance with FINRA's administrative procedures. Smith failed to exhaust his administrative remedies. Accordingly, the Commission should dismiss Smith's Application for Review.

Respectfully submitted,



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April 2, 2015

CERTIFICATE OF SERVICE

I, Celia L. Passaro, certify that on this 2nd day of April 2015, I caused a copy of FINRA's Motion to Dismiss Application for Review and to Stay Briefing Schedule, in the matter of Application for Review of Darren M. Smith, Administrative Proceeding No. 3-16190, to be served by messenger and fax on:

Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F St., NE  
Washington, DC 20549-1090  
Fax: (202) 772-9324

and via FedEx and certified mail on:

Darren M. Smith  
[REDACTED]  
[REDACTED]

Service was made on the Commission by messenger and fax and on the Applicant by FedEx and certified mail due to the distance between the office of FINRA and the Applicant.



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