BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Michael R. Turner

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority (formerly NASD)

File No. 3-17995

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

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June 14, 2017

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I. INTRODUCTION

The SEC should dismiss Michael R. Turner's application for review as untimely. Turner's appeal is from a bar that was imposed on him in April 2006, in an expedited proceeding that FINRA (then NASD) brought against him for his failure to provide information that FINRA requested. Turner had 30 days to appeal FINRA's action. His appeal is late by 11 years.

The SEC should not extend the appeal deadline absent a showing of extraordinary circumstances, and Turner has made no such showing. Turner asserts that he was unaware in 2006 of the bar because FINRA sent notice of the bar to two addresses at which he no longer lived. FINRA, however, acted consistent with its rules by sending correspondence to Turner at the residential address that was listed in Turner's Central Registration Depository ("CRD®") record and another address of which FINRA became aware. If Turner's CRD address was not accurate, it was because Turner failed to update his CRD address as required. Furthermore, Turner was aware of the bar at least by October 2009, yet *still* waited seven and one-half years to file this appeal. Turner's choice to wait for years before filing this appeal is not an extraordinary

circumstance that warrants extension of the appeal deadline. The SEC should dismiss Turner's Application for Review.[1]

II. FACTUAL BACKGROUND[2]

A. Turner

Turner entered the securities industry in 1992. (RP 209, 211.)[3] From October 1992 until March 2004, Turner was registered as a general securities representative with American Express Financial Advisors Inc. and IDS Life Insurance Company. (RP 209.) In April 2004, Turner registered as a general securities representative with Duerr Financial Corporation. (RP 209.) On

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[1] Pursuant to SEC Rule of Practice 161 (17 C.F.R. § 201.161), FINRA requests that the SEC stay issuance of a briefing schedule in this matter while this motion is pending. The SEC should first evaluate the dispositive argument that Turner's appeal should be dismissed as untimely before it reaches the underlying substance of this appeal.

[2] This factual background section contains references to several internal FINRA emails that are dated several years after the bar was imposed on Turner, but which are relevant to why there are no extraordinary circumstances warranting an 11-year extension of the appeal deadline. FINRA included these emails in the certified record that FINRA has filed pursuant to SEC Rule of Practice 420(e). In the event that the SEC construes such emails to not be part of the "record upon which the action complained of was taken" (*see* SEC Rule of Practice 420(e), 17 C.F.R. § 201.420(e)), FINRA hereby moves pursuant to SEC Rule of Practice 452 to introduce such internal FINRA emails as additional evidence. The internal FINRA emails are material because they show that at least by 2009, 2011, and 2015, Turner was aware of the bar, understood the 30-day appeal deadline had expired, and was interested in appealing. FINRA also has reasonable grounds for introducing these emails now. The emails did not exist at the time of the NASD Rule 9552 proceeding, and the first time these emails have had any relevance to this SEC administrative proceeding is when Turner filed this untimely application for review on May 22, 2017.

This factual background section also contains references to materials in Turner's CRD record. The SEC can take official notice of the various filings and general information regarding Turner in CRD. *See* SEC Rule of Practice 323, 17 C.F.R. § 201.323; *see also James Lee Goldberg*, Exchange Act Release No. 66549, 2012 SEC LEXIS 762, at *3 n.2 (Mar. 9, 2012). As a convenience to the SEC, FINRA has included these materials in the certified record.

[3] "RP ___" refers to the page numbers in the certified record filed by FINRA on June 14, 2017. References to "Application at ____" are to Turner's application for review.

October 5, 2004, American Express Financial Advisors filed an amended Uniform Termination Notice for Securities Industry Registration ("Form U5") for Turner, which included an "internal review" disclosure that "client accounts may have been subject to multiple sales charges." (RP 236.) In January 2005, Duerr Financial Corporation terminated Turner's registration. (RP 253). Since then, Turner has not been registered with a FINRA member firm.

B. FINRA's Four Rule 8210 Requests

On March 24, 2005, FINRA sent to Turner a first request for information, pursuant to NASD Rule 8210 ("First Request"). (RP 1-11.) The First Request informed Turner that FINRA was "conducting an investigation of matters" disclosed in the amended Form U5 that American Express Financial Advisors filed and asked questions pertaining to seven of his customers. (RP 1.) The First Request informed Turner that he was required to respond by April 14, 2005. (RP 1.) FINRA sent the First Request to Turner, via certified and regular mail, to an address on Dody Drive, in Manteca, California ("the Dody Drive Address"), which was listed as Turner's current residential address in CRD. (RP 1, 11, 219, 221, 225.)

On April 15, 2005, FINRA sent to Turner a second request for the same information, pursuant to NASD Rule 8210 ("Second Request"). (RP 25-37.) The Second Request informed Turner that FINRA had not received a response to its First Request, included a copy of the First Request, and cautioned Turner that failing to respond by April 29, 2005, may result in disciplinary action. (RP 25.) FINRA sent the Second Request to Turner, via certified and regular mail, to the Dody Drive Address. (RP 25, 37.)

On April 27, 2005, FINRA received back the certified mailing of the First Request, which was unclaimed. (RP 13-24.) The returned envelope contained a sticker on which was

printed, "Notify Sender of New Address," followed by "Turner," followed by an address on Bankston Drive in Tracy, California ("the Bankston Drive Address"). (RP 23-24.)

On May 3, 2005, FINRA sent to Turner a third request for the same information, pursuant to NASD Rule 8210 ("Third Request"). (RP 53-66.) The Third Request informed Turner that FINRA had not received a response to its Second Request, included a copy of the Second Request, and cautioned Turner that failing to respond by May 17, 2005, may result in disciplinary action. (RP 53.) FINRA sent the Third Request to Turner, via certified and regular mail, to the Dody Drive Address and the Bankston Drive Address. (RP 53, 66.)

On June 3, 2005, FINRA sent to Turner a fourth request for the same information, pursuant to NASD Rule 8210 ("Fourth Request"). (RP 97-111.) The Fourth Request informed Turner that FINRA had not received a response to its Third Request, included copies of the Second and Third Requests, stated that the Fourth Request was the "final request," and cautioned that failing to respond by June 17, 2005, would result in disciplinary action. (RP 97.) FINRA sent the Fourth Request to Turner, via certified and regular mail, to the Dody Drive Address and the Bankston Drive Address. (RP 97, 111.)

On July 13, 2005, FINRA received back the certified mailing of the Second Request, and the returned envelope was marked "unclaimed." (RP 39-52.) On July 28, 2005, FINRA received back the certified mailings of the Third Request sent to the Dody Drive Address and the Bankston Drive Address. (RP 67-95.) Both were returned unclaimed, and the one addressed to the Dody Drive Address contained a sticker that indicated the Bankston Drive Address was a new address for Turner. (RP 80, 94-95.) Also on July 28, 2005, FINRA received back,

unclaimed, the certified mailing of the Fourth Request that was sent to the Bankston Drive Address.[4] (RP 113-127.)

C. The NASD Rule 9552 Proceeding

Two months later, on September 28, 2005, FINRA issued to Turner a notice that FINRA intended to suspend him on October 24, 2005, because he failed to provide information in response to the First, Second, Third, and Fourth Requests ("Notice of Intent to Suspend").[5] (RP 129.) The notice attached copies of the four requests and informed Turner the suspension would not take effect if he complied with the requests before the suspension date. (RP 129.) FINRA sent the Notice of Intent to Suspend to Turner, via overnight courier and first-class mail, at the Dody Drive Address and the Bankston Drive Address. (RP 129.)

On October 24, 2005, FINRA issued to Turner a notice that he was suspended ("Notice of Suspension"), pursuant to NASD Rule 9552 and in accordance with the Notice of Intent to Suspend. (RP 148.) It notified Turner that he could file a written request for termination of the suspension on the ground of full compliance with the Notice of Intent to Suspend, and that if he

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[4] The record does not reflect that any of the first-class mailings of the four Rule 8210 requests were returned.

[5] The notice referenced NASD Rule 9552(a), which stated that

> [i]f a member, person associated with a member or person subject to NASD's jurisdiction fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the NASD By-Laws or the NASD rules, . . . NASD 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.

In December 2008, NASD Rule 9552 was superseded by FINRA Rule 9552. *FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50 (Oct. 2008).

failed to request termination of the suspension within six months of the date of the Notice of Intent to Suspend, he would be automatically barred. (RP 148-149.) FINRA sent the Notice of Suspension to Turner, by overnight delivery and first-class mail, at the Dody Drive Address and the Bankston Drive Address. (RP 148.)

Approximately six months later, on April 4, 2006, FINRA sent Turner a letter ("Bar Letter") advising him that he was barred from associating with any member firm in any capacity on April 3, 2006, "pursuant to NASD Rule 9552(h)"[6] and in accordance with the Notice of Intent to Suspend and the Notice of Suspension. (RP 151.) The Bar Letter informed Turner that "[i]f you seek to appeal this regulatory action to the . . . SEC . . ., you must file an application with the SEC at the address listed below." (RP 151.) It stated that "[t]o comply with the SEC's rule regarding timeliness, you must file an application for review within thirty days of your receipt of this letter." (RP 151). It stated that "a copy of the application, as well as copies of all documents you file with the SEC, must be sent to NASD." (RP 151.) It provided the SEC's address (which was on Fifth Street NW, Washington DC) and NASD's address. (RP 151.) Finally, it explained what information Turner must include in any application for review with the SEC and informed him that any questions about the appeal process should be directed to the SEC's Office of the Secretary. (RP 152.) FINRA sent the Bar Letter to Turner, via express overnight delivery and first-class mail, to the Dody Drive Address and the Bankston Drive Address. (RP 151.)

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[6] NASD Rule 9552(h) provided that "[a] member or person who is suspended under this Rule and fails to request termination of the suspension within six months of issuance of the original notice of suspension will automatically be expelled or barred." Turner's CRD record reflects that he was automatically barred when he failed to request termination of his suspension within six months of the date of the Notice of Intent to Suspend. (RP 216.)

At all relevant times, the Dody Drive Address was listed in CRD as Turner's residential address. (RP 221.)

D. Turner's October 27, 2009 Email Correspondence with FINRA Staff

More than three years after Turner's bar became effective, Turner corresponded via email with Mariann Miller ("Miller"), then an employee of FINRA's Office of the Ombudsman, about his bar. In an email dated October 27, 2009, Miller forwarded to Turner an electronic copy of the Bar Letter. (RP 157-160.) Miller also provided Turner with the following updated information about how to appeal the bar to the SEC, if he sought to do so:

> Michael, Here is the information related to the Bar Letter sent to you on April 4, 2006, in connection with [Rule 9552 Matter No. E0120040326-02].
>
> **Please note that the attached letter is over three years old, and that the addresses listed thereon for appealing the Bar have changed since it was issued. If Mr. Turner is intent upon requesting an appeal to the Bar, please advise him that he should use the newer addresses (listed below), NOT those on the April 4th letter. The correct addresses are:**
>
> Office of the Secretary
> U.S. Securities and Exchange Commission
> 100 F Street, NE
> Mail Stop 1090
> Washington, DC 20549 Alan Lawhead, Esq.
>
> Office of General Counsel
>
> FINRA
> 1735 K Street, NW
> Washington, DC 20006

(RP 157.)[7]

[7] The bolded section of Miller's email appears to have been cut-and-pasted from a document that Miller received from Paul Arnold ("Arnold"), then a paralegal in Enforcement. (RP 153.)

A few hours later, Turner emailed Miller a response. (RP 166.) Turner acknowledged that the Bar Letter was "dated 3 ½ years ago." (RP 166.) He asserted that he had "moved a few times between . . . 2004-2005," including: (i) in "late summer/fall 2004" from the Dody Drive Address to the Bankston Address; (ii) approximately one year later to Turner's father-in-law's house; and (iii) in mid-September 2005 to an address on Koster Road in Tracy, California. (RP 166.) Turner wrote, "I do not think that I ever received this letter attached to your e-mail" and "I am very interested in requesting an appeal to the bar." (RP 166.) Turner also asked Miller questions about the process for appealing the bar well after the appeal deadline had expired, including "[i]s that still an option since the month period has lapsed?", "[c]ould you please tell me what the steps are of the process?", and "[i]s there an application on the FINRA website?" (RP 166.)[8]

E. Turner's Correspondence with FINRA in November and December 2011

More than five years after Turner was barred, in late 2011, he exchanged correspondence with another FINRA employee about his bar.[9] In an email dated November 23, 2011, Turner wrote to Jacqueline Whelan ("Whelan"), then an attorney in Enforcement. (RP 184.) Turner forwarded to Whelan details about his bar that he had obtained from a "bank that rescinded my employment offer," including the number of the NASD Rule 9552 proceeding and the dates of his suspension and bar. (RP 184.) Turner asked Whelan, "[h]ow I can [sic] take care of this to

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[8] Additional emails reflect that Arnold and Jill Jablonow ("Jablonow"), an attorney in Enforcement, had additional discussions about Turner's October 27, 2009 email, and that Jablonow called Turner on Monday, November 2, 2009. (RP 161-181.)

[9] Turner's assertion (Application at 2) that he "learned for the first time in Fall 2011 that he had been barred" is belied by the October 27, 2009 emails discussed above.

get a job in both a non-securities banking position and/or maybe renew my license. Also, how I can [sic] get a broker dealer to sponsor me to remedy this with this still on my record?" (RP 184.)

In an email response to Turner dated November 29, 2011, Whelan described details about the four NASD Rule 8210 requests that FINRA had sent to Turner and the NASD Rule 9552 proceeding that resulted in his bar, and stated that "[n]o information was ever provided by you to FINRA." (RP 183-184.) Whelan informed Turner, "[i]f you believe there are extenuating circumstances that should excuse your failure to provide information and respond to the various notices issued in connection with the Rule 9552 proceeding, I would recommend that you correspond with our Office of General Counsel" and "send your communication to the attention of Alan Lawhead[10] . . . . There can be no assurance that the Rule 9552 proceeding can or will be vacated or 'cleared up' in any way that removes it from your record." (RP 184.)

On December 9, 2011, Turner again emailed Whelan. (RP 185.) Turner wrote, "[y]ou indicated that the next step for me would be to contact Alan Lawhead . . . . My attorney, however, feels that in order to proceed that I need to be sponsored by a broker dealer. Can you tell me what the appropriate next step is?" (RP 185.) In an email response the same day, Whelan provided Turner with information related to FINRA statutory disqualification proceedings (i.e., proceedings filed by a member firm seeking to associate with a disqualified

[10] Alan Lawhead is one of the undersigned attorneys on this motion. He is Vice President and Director of the Appellate Group in the Office of General Counsel.

person), but Whelan did not directly respond to Turner's question about the "appropriate next step."[11] (RP 185.)

F. Turner's Correspondence with FINRA in March 2015

Nearly nine years after the bar was effective, Turner exchanged emails with Lawhead. In an email dated March 11, 2015, Turner wrote that he had previously "found out" that "[u]nbeknownst to me, I had received a default judgment for failure to respond" to FINRA requests for information. (RP 188B.) Turner further wrote that "[s]everal years ago, I retained an attorney to assist with this matter," that the attorney "concluded that I needed to be sponsored by a brokerage firm then proceed with an appeal hearing about the issue," and that "I tried to get sponsored by several local brokerage firms and they all declined to help." (RP 188B.) Turner asked Lawhead "how else may I appeal or get my original due process" or "get my record expunged." (RP 188B.)

In response, Lawhead informed Turner that "[m]y advice is to FINRA" and that "I do not give suggestions about how to eliminate FINRA decisions to those who were the subject of a FINRA decision." (RP 188A.) After Lawhead noted that he did not "hav[e] the details of your default decision," he provided general procedural information regarding default decisions in disciplinary proceedings[12] and stated, "I cannot give you advise about overturning a FINRA decision." (RP 188A.) Lawhead suggested only that Turner consider consulting with an attorney of his choice to address his issues. (RP 188A.)

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11 Turner asserts that in 2011, he "sought reinstatement from FINRA directly, but it declined his request." (Application at 2.) Turner offers no proof that he "sought reinstatement from FINRA," and FINRA is not aware of any such action taken by Turner.

12 Default decisions in disciplinary proceedings are governed by FINRA Rule 9269.

G. Turner's May 2017 Appeal

On May 22, 2017, Turner filed the instant appeal. (RP 189-205.) The appeal was filed more than 11 years after the bar became effective, approximately seven and one-half years after his correspondence about the bar with Miller, more than five years after his correspondence about the bar with Whelan, and more than two years after his correspondence with Lawhead.

III. ARGUMENT

The SEC should dismiss Turner's appeal because it is untimely. Pursuant to Section 19(d)(2) of the Securities Exchange Act of 1934 ("Exchange Act") and SEC Rule of Practice 420(b) (17 C.F.R. § 201.420(b)), an applicant must file an application for review of a FINRA disciplinary sanction with the SEC within 30 days after the notice of the determination is filed with the SEC and received by the aggrieved person applying for review. SEC Rule of Practice 420(b) further provides that the SEC "will not extend this 30-day period, absent a showing of extraordinary circumstances" and that "[t]his section is the exclusive remedy for seeking an extension of the 30-day period." *See Lance E. Van Alstyne*, 53 S.E.C. 1093, 1099 & n.15 (1998) ("In the interests of finality, only under extraordinary circumstances will we authorize the filing of a late appeal from an SRO action that is subject to the Section 19(d)(1) filing requirement.").

As the SEC has previously stated, "strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief," and "parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed." *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 SEC LEXIS 641, at *10 (Mar. 1, 2013). For this reason, the "extraordinary circumstances" exception to the 30-day period "is to be narrowly construed and applied only in limited circumstances." *Id.* "To

do otherwise would thwart the very clear policies of finality and certainty underlying the thirty-day filing deadline set forth in Exchange Act Section 19(d) and Rule of Practice 420(b)." *Id.*

Once Turner's bar became effective on April 4, 2006, he had 30 days to file an appeal. He did not do so, however, for more than 11 years. Turner has not demonstrated that there are "extraordinary circumstances" that warrant accepting his untimely appeal.

A. Assuming that Turner Did Not Receive FINRA's Correspondence in 2005 and 2006, That Is Not an Extraordinary Circumstance Warranting a Late Appeal.

Assuing, *arguendo*, that Turner did not actually receive FINRA's requests and notices back in 2005 and 2006, that is not an extraordinary circumstance warranting the acceptance of his late appeal, for two reasons. First, if Turner never actually received FINRA's correspondence in 2005 and 2006, he has only himself to blame, because FINRA sent all correspondence to his CRD residential address, but Turner failed to keep his residential address updated in CRD as required. Second, Turner had notice of the bar at least by 2009, and again in 2011 and 2015, yet still took no steps at those times to seek leave from the SEC to file a late appeal.

1. Turner Failed to Update His Residential Address in CRD.

Article V, Sec. 2(c) of the NASD and FINRA By-Laws required and requires, respectively, that every application for registration be kept "current at all times" by filing supplementary amendments not later than 30 days after learning of the circumstances that give rise to the amendment. This requirement obligates registered persons to notify FINRA when the residential address in their application for registration changes, and this obligation continues after a person terminates registration for the period of time over which FINRA retains jurisdiction over that person. *See, e.g., David Kristian Evansen*, Exchange Act Release No.

75531, 2015 SEC LEXIS 3080, at *29 (July 27, 2015) (explaining that applicant was required to update and receive mail at his CRD address for the period after his termination from registration for which he was subject to FINRA's continuing jurisdiction); *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 SEC LEXIS 1147, at *4 & n.6 (Apr. 18, 2013) (stating that as part of the registration process, associated persons obligate themselves to keep a current address on file with FINRA at all times and for at least two years after the filing of a Form U5); *Warren B. Minton, Jr.*, 55 S.E.C. 1170, 1177-78 (2002) (noting that registered persons have a continuing duty to update their CRD address); *see also* NASD and FINRA By-Laws, Art. V, Sec. 4 (explaining FINRA's retention of jurisdiction). Prior to the relevant period, FINRA reminded registered representatives of these fundamental obligations, which facilitate FINRA investigations. *See NASD Notice to Members 97-31*, 1997 NASD LEXIS 35, at *1 (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, . . . up to four years after the registrant's association ends").

Despite FINRA's reminder to keep one's address current, Turner failed to update his residential address in CRD. As of May 7, 2003, Turner's Uniform Application for Securities Industry Registration or Transfer ("Form U4") reflected that his current residential address was the Dody Drive Address. (RP 225.) Turner asserts in his application for review that "[b]etween August 2004 and September 2005, Turner moved residences three times." (Application at 1.) During the period between August 2004 and September 2005, Turner was either registered with, or only a few months removed from his registration with, a broker-dealer (Duerr Financial

Corporation), and was obligated to update his residential address with CRD. Turner, however, never updated his CRD record to reflect any address besides the Dody Drive Address.

The SEC has held that an applicant is deemed to have received notices sent to the CRD address, and that an applicant's failure to update the CRD address does not excuse a failure to timely respond to notices sent to the CRD address or a failure to timely appeal. *See, e.g.*, *Rogelio Guevara*, Exchange Act Release No. 78134, 2016 SEC LEXIS 2233, at *8 (June 22, 2016) (finding that "because [applicant] failed to keep his CRD address current as FINRA's by-laws require, his belated collection of FINRA's bar notice [under FINRA Rule 9552]" did not excuse his failure to timely appeal) (footnote omitted); *Martinez*, 2013 SEC LEXIS 1147, at *15 (rejecting applicant's claim that his failure to respond to Rule 8210 requests and Rule 9552 notices was excused by FINRA's use of an old mailing address, where applicant failed to update his CRD address); *see also Jonathan Roth Ellis*, Exchange Act Release No. 80312, 2017 SEC LEXIS 970, at *13 (Mar. 24, 2017) (holding that applicant was deemed to have received Rule 8210 requests and notices in Rule 9552 proceeding sent to CRD address); *Edward J. Jakubik*, Exchange Act Release No. 61541, 2010 SEC LEXIS 1014, at *16 (Feb. 18, 2010) (finding that an applicant was deemed to have received a default decision sent to applicant's CRD address). Updating a CRD record to ensure the receipt of mail from FINRA is not something beyond an applicant's control. *See Pennmont Sec.*, Exchange Act Release No. 61967, 2010 SEC LEXIS 1353, at *18 (Apr. 23, 2010) ("[A]n 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 that causes the delay."), *aff'd*, 414 F. App'x 465 (3d Cir. 2011).

Turner argues that his failure to update his residential address should be excused, but that lacks merit. Turner contends that in mid-2004 he began working for Union Safe Deposit Bank,

which "allowed Turner to retain his Series 7 and Series 63 licenses"; that soon thereafter Union Safe Deposit Bank was acquired by Bank of the West, which "prohibited employees from maintaining securities licenses;" and that he was "under the impression" that those two firms "had informed NASD of his changes in . . . addresses" because "it was customary for employers to advise NASD of such administrative issues." (Application at 1.) Although a registered representative's broker-dealer will file amendments to Form U4 when the representative causes his broker-dealer to do so, there is no evidence that Union Safe Deposit Bank or Bank of the West were broker-dealers, or that Turner—who was never registered with either company as a general securities representative—had any reasonable expectation that those firms would have attempted to update his CRD record even if he had asked.[13]

Regardless, FINRA "must be able to rely on its records," and Turner cannot shift his independent responsibility to keep current information on file with CRD to the firms for which he worked. *See David I. Cassuto*, 56 S.E.C. 565, 570 (2003) (holding that it is an applicant's responsibility to maintain a current CRD address and that to hold otherwise would permit an applicant to "thwart an NASD investigation by moving without leaving a forwarding address"); *Nazmi C. Hassanieh*, 52 S.E.C. 87, 90 & n.13 (1994) (rejecting applicant's argument that he believed his member firm was somehow obligated to update his information in CRD); *NASD Notice to Members 97-31*, 1997 NASD LEXIS 35, at *5 (reminding that "a registered person must cause the firm(s) with which he or she is associated to file an amended Form U4" and that former registered persons "should advise the NASD of any changes to the information on their

[13] Similarly, Turner makes no claim that he ever asked Duerr Financial Corporation to update his CRD residential address during the time he was registered with that broker-dealer.

Form U-4"); *cf. Ashton Nashir Gowadia*, 53 S.E.C. 786, 791 (1998) (finding that representative's assumption that member firm had updated his CRD address did not mitigate his failure to do so).

Turner's purported failure to receive FINRA's requests and notices is not an extraordinary circumstance warranting a late appeal, where the reason for his lack of receipt is his own failure to update his CRD residential address.

2. Turner Was Aware of the Bar in 2009, 2011, and 2015, Yet Did Not Attempt at Those Times to Seek Leave for Filing a Late Appeal.

The second reason why Turner's purported lack of notice of the NASD Rule 9552 proceeding back in 2005 and 2006 would not be an "extraordinary circumstance" is because he was aware of the bar at least by 2009, and then *again* in 2011 and 2015, yet even failed at those times to promptly seek leave to file a late appeal.

On October 27, 2009, Miller sent Turner a copy of the Bar Letter. (RP 157.) Turner responded on the same day and wrote, "I am very interested in requesting an appeal to the bar." (RP 166.) *Cf. John Vincent Ballard*, Exchange Act Release No. 77452, 2016 SEC LEXIS 1151, at *10 (Mar. 25, 2016) (finding that applicant's email response to an email from FINRA that attached a decision proved that applicant had actual notice of that decision). Two years later, in a November 23, 2011 email that Turner sent to Whelan, Turner again acknowledged his awareness of the bar. (RP 184.) And three years after that, in a March 11, 2015 email that he sent to Lawhead, Turner again demonstrated his awareness of the bar. (RP 188B.)

Turner made no attempt in 2009, 2011, or 2015, however, to seek leave to file a late appeal. Turner's choice not to appeal in 2009, 2011, or 2015 is not an extraordinary circumstance that warrants accepting his late appeal filed in 2017. *See Ceballos*, 2013 SEC LEXIS 641, at *11-12 (finding no extraordinary circumstances where applicant, after being barred in a Rule 9552 proceeding, called FINRA two months later, received an electronic copy

of the bar notice, and then waited another four months to file a late appeal); *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, at *14 (May 20, 2008) (finding no extraordinary circumstances where, among other things, the delay in the appeal was not caused by FINRA but "from [applicant's] deliberate choice not to appeal"); *Pennmont Sec.*, 2010 SEC LEXIS 1353, at *18-19 (holding that "[e]ven when circumstances beyond the applicant's control give rise to the [failure to make a timely filing], . . . an applicant must also demonstrate that he or she promptly arranged for the filing of the appeal as soon as reasonably practicable thereafter" and 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").

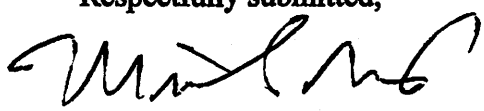
Turner admits that he was aware of the bar by 2011 and did not try to file a late appeal at that time, but blames an attorney he retained in 2011, who purportedly "did not advise of the option to appeal FINRA's determination to the SEC." (Application at 2.) Turner's purported reliance on his attorney, however, is not an extraordinary circumstance for granting Turner's late appeal, for four separate reasons. First, Turner has not provided sufficient evidence to demonstrate that he reasonably relied on his counsel—especially considering that FINRA had already informed Turner on two prior occasions that any appeal should be filed with the SEC. (RP 151, 157.) *See, e.g.*, *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *40 (Nov. 14, 2008) (holding that a reliance on counsel argument must demonstrate that the respondent made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice, and stating that it "isn't possible to make out an advice-of-counsel claim without producing the actual advice from an actual lawyer") (internal quotation marks omitted), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). Second, Turner's argument about legal advice he purportedly received in 2011 has *no* relevance

to his failure to promptly pursue appellate recourse in 2009, when he acknowledged receiving an emailed copy of the Bar Letter. Third, the SEC has rejected an applicant's argument that his attorney's failure to advise him of certain legal options justified an extension of the 30-day appeal deadline. *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 SEC LEXIS 1598, at *4-5, 9 (May 8, 2014) (finding no extraordinary circumstances where petitioner blamed his late appeal on his lawyer's failure to advise him he could file a pro se appeal). Fourth, even if Turner's lawyer had advised him in 2011 that he could have attempted to file a late appeal with the SEC, it would have made no difference. Any appeal filed in 2011 would still have been five years late, and still would have lacked the extraordinary circumstances to justify a late appeal. In sum, Turner's purported lack of notice of FINRA's correspondence in 2005 and 2006 is not an extraordinary circumstance when he was demonstrably aware of the bar in 2009, 2011, and 2015 yet still chose not to file a late appeal for years.

IV. CONCLUSION

Turner's appeal is 11 years late, and he has not identified extraordinary circumstances for accepting his late appeal. Accordingly, the SEC should dismiss Turner's Application for Review as untimely.

Respectfully submitted,



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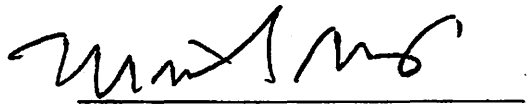
June 14, 2017

CERTIFICATE OF COMPLIANCE

I, Michael Garawski, certify that the foregoing FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule, in the matter of Application for Review of Michael R. Turner (File No. 3-17995), complies with the length limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 5,621 words.



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Dated: June 14, 2017

CERTIFICATE OF SERVICE

I, Michael Garawski, certify that on this 14th day of June 2017, I caused a copy of FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule, in the matter of Application for Review of Michael R. Turner, Administrative Proceeding No. 3-17995, to be served by messenger on:

Brent J. Fields, Secretary
Securities and Exchange Commission
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Washington, DC 20549-1090

and via overnight FedEx on:

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Service was made on the Commission by messenger on the Applicant's counsel by overnight FedEx due to the distance between the office of FINRA and Applicant's counsel.

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