



UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

In the Matter of:

**BRENDAN FEITELBERG**

For Review of Action taken by

FINRA

Re: FINRA No. 20180581236

3-19214

**APPLICATION FOR REVIEW**

Pursuant to Rule 9370(a) of the FINRA Code of Procedure, Section 19(d)(2) of the Securities Exchange Act of 1934, C.F.R. §201.420, and Rule 420 of the SEC Rules of Practice, Brendan Feitelberg files this appeal to the Securities and Exchange Commission (SEC) of FINRA's decision to bar him for life from associating with any FINRA member in any capacity, which Justice Kavanaugh has previously noted is the "securities industry equivalent of capital punishment," *Saad v. Sec. & Exch. Comm'n*, 873 F.3d 297, 306 (D.C. Cir. 2017), for the offense of not opening his mail.

**Facts**

Mr. Feitelberg was fired from his job in the Spring of 2018 because of an issue with a tax lien. He had tax liens with both the Commonwealth of Massachusetts and the federal government. Because he had already set up a payment plan with the Commonwealth, he did not appreciate that still constituted a lien and thus only reported the federal government lien to his employer (and, through them, the appropriate regulatory agencies). He was fired for this mistake and FINRA reached out on April 26, 2018, with questions about the incident. Mr. Feitelberg sought and received two extensions, making his response due August 3, 2018. In July 2018, Mr. Feitelberg began to feel extremely ill with no clear cause. [REDACTED]

[REDACTED] in August with [REDACTED], [REDACTED]. This ultimately [REDACTED]. The recovery from this was extensive. Mr. Feitelberg recovered and returned to work in February 2019, only to discover that, unbeknownst to him, FINRA had issued a lifetime ban on November 23, 2018, for not responding to their inquiry.

Mr. Feitelberg retained counsel, gathered the requested documentation, and reached out to FINRA. FINRA initially requested Mr. Feitelberg respond to its initial questions, which he did. On May 24, 2019, FINRA subsequently stated that they would not reconsider their lifetime ban of Mr. Feitelberg.<sup>1</sup>

<sup>1</sup> This appeal is timely under SEC regulations because Mr. Feitelberg never received the Bar Letter in November. See Rule 420 (b) ("An applicant must file an application for review with the Commission within 30 days after the notice of the determination is filed with the Commission and received by the aggrieved person applying for review."). In May 2019, FINRA engaged with Mr. Feitelberg and asked for answers to its original

## Law

Some version of these facts is no doubt familiar to both FINRA and the SEC. Historically, the SEC, has often summarily dismissed these types of cases, noting that the appellant failed to exhaust their administrative remedies before FINRA often with a citation to *MFS Sec. Corp. v. SEC*, 380 F.3d 611 (2d Cir. 2004). See, e.g., *In the Matter of the Application of Kalid Morgan Jones*, No. 3-17852 (2017). But the Supreme Court's recent opinion in *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1639 (2017) casts considerable doubt on the legality the practice that the SEC is summarily affirming, namely FINRA's use of a lifetime bar for not opening mail. See also *Saad v. Sec. & Exch. Comm'n*, 873 F.3d 297, 304-307 (D.C. Cir. 2017) (J. Kavanaugh concurring).<sup>2</sup>

All sanctions are either punitive or remedial. "Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'" *Kokesh* 137 S. Ct. at 1643 (internal citations omitted). Whereas a remedial sanction "simply returns the defendant to the place he would have occupied had he not broken the law." *Id.* at 1644. "A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1645 (emphasis added) (internal citations omitted). A lifetime industry ban for not responding to FINRA is plainly punitive. It goes far beyond denying Mr. Feitelberg of any benefit he received by not responding to FINRA (here, none) and is (at best) a deterrent so others will respond. Under binding precedent, FINRA cannot hand out *any* punitive punishment. *Siegel v. S.E.C.*, 592 F.3d 147, 157 (D.C. Cir. 2010) ("[I]t is important to remember that [FINRA] 'may impose sanctions for a remedial purpose, but not for punishment.' *McCurdy v. SEC*, 396 F.3d 1258, 1264 (D.C.Cir.2005).")<sup>3</sup>

For the foregoing reasons and in light of *Kokesh* and *Saad*, Mr. Feitelberg respectfully requests the SEC review the disciplinary action taken against him by FINRA.

---

questions. Mr. Feitelberg provided those answers. FINRA affirmed its decision on May 24, 2019, and this appeal is within 30 days of that date.

<sup>2</sup> The D.C. Circuit remanded *Saad* to the SEC for further proceedings. A ruling is pending. See *In the Matter of the Application of John M.E. Saad*, JOHN M.E. SAAD, No. 3-13678r.

<sup>3</sup> Judge Kavanaugh suggested FINRA could hand out such a punishment if it was individualized. *Saad* 873 F.3d at 306 ("FINRA and the SEC will have to reasonably explain in each individual case why an expulsion or suspension serves the purposes of punishment and is not excessive or oppressive."). In any case, Mr. Feitelberg's conduct does not qualify for a lifetime ban even if the individualized Kavanaugh test applies. Here, Mr. Feitelberg, due to illness, failed to respond to FINRA in a timely manner. The error was neither intentional nor borne out of a desire to avoid an investigation. His punishment is a lifetime ban. Under any sort of individualized analysis, it is hard to imagine a punishment could be more excessive.

Respectfully submitted this 21st day of June, 2019. Mr. Feitelberg can receive service of process at the address below my signature.

Nixon Peabody LLP

/s/ Robert A. Fisher

Robert Fisher

Scott Seitz

NIXON PEABODY LLP

Exchange Place, 53 State Street

Boston, MA 02109-2835

+1(617) 345-1335 - Firm Phone

+1(844) 841-9492 - Fax

*Counsel for Applicant*

Dated: June 21, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that Applicant's APPLICATION FOR REVIEW OF FINRA ACTION AGAINST BRENDAN FEITELBERG has been sent to the following parties entitled to notice as follows:

Office of the Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Mail Stop 1090  
Washington, DC 20549  
(One copy via fax; original and three copies via overnight mail)

Alan Lawhead, Esq.  
Office of General Counsel  
FINRA  
1735 K Street, NW  
Washington, DC 20006  
(One copy via email and one copy via overnight mail)

This 21st day of June, 2019.

/s/ Robert A. Fisher

Robert A. Fisher