BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Brendan D. Feitelberg

For Review of Action Taken by

Financial Industry Regulatory Authority

File No. 3-19214

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Lisa Jones Toms
Associate General Counsel

FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
202-728-8044 Telephone
202-728-8264 Facsimile

September 25, 2019

Financial Industry Regulatory Authority

Lisa Jones Toms
Associate General Counsel

Direct: (202) 728-8044
Fax: (202) 728-8264

September 25, 2019

VIA MESSENGER AND FACSIMILE

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: In the Matter of the Application for Review of Brendan D. Feitelberg
Administrative Proceeding No. 3-19214

Dear Ms. Countryman:

Enclosed please find the original and three (3) copies of FINRA's Brief in Opposition to the Application for Review in the above-captioned matter.

Please contact me at (202) 728-8044 if you have any questions.

Sincerely,

Lisa Jones Toms

Enclosures

cc: Robert A. Fisher, Esq. (via FedEx)
Scott Seitz, Esq. (via FedEx)

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I. INTRODUCTION

This case involves FINRA's attempts to find out why Brendan D. Feitelberg did not report a state tax lien as FINRA's rules require. FINRA sent two requests for information and documents to Feitelberg, which advised him that if he failed to respond to FINRA's requests, he could be subject to disciplinary action, including a permanent bar from the securities industry. In accordance with its rules, FINRA properly served these requests by U.S. Postal Service mail to Feitelberg's residential address. Feitelberg responded to FINRA's first information request by asking for more time, which FINRA agreed to. After Feitelberg did not provide any information to FINRA, FINRA staff send a second request and a series of warnings that he should provide the requested information and documents or he would be suspended and eventually barred. When Feitelberg did not respond to any of these warnings, FINRA barred him.

Feitelberg then waited until six months after his bar to respond to FINRA's requests and to submit his application for review with the Commission. The Commission should dismiss Feitelberg's application for review because it is untimely and because he failed to avail himself

of the option to provide the information or request a hearing and explain why he should not be suspended.

II. BACKGROUND

On April 12, 2018, Feitelberg's former employer, United Planners' Financial Services of America A Limited Partner ("United Planners"), filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") reporting that Feitelberg failed to disclose to his firm a state tax lien after he entered into a Consent Order with the State of Massachusetts in July 2017. *See* RP 129, 144.[1] Based on United Planners' allegation, FINRA thereafter commenced an investigation to determine whether violations of the federal securities laws or FINRA rules had occurred.

A. FINRA Requests that Feitelberg Provide Information and Documents Pursuant to FINRA Rule 8210

On April 26, 2018, FINRA sent Feitelberg a letter, pursuant to FINRA Rule 8210,[2] requesting information and documents related to United Planners' allegation that Feitelberg failed to disclose the State of Massachusetts tax lien to United Planners, and through the firm, the appropriate regulatory agencies ("April 26, 2018 request"). RP 33-34. FINRA asked Feitelberg

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[1] "RP __" refers to the page numbers in the certified record filed by FINRA on July 5, 2019.

[2] FINRA Rule 8210 requires FINRA members, persons associated with FINRA members, 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 authorized by the FINRA By-Laws or rules. FINRA Rule 8210(a)(1). The rule "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations." *Asensio & Co. Inc.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *17 (Dec. 20, 2012).

to provide a signed written statement about the allegations, state whether there were any additional reportable financial events that Feitelberg failed to timely disclose, state whether he had any open or unresolved complaints within the last three years of his employment at the firm, and if so, to provide additional information. RP 33. The April 26, 2018 request specifically informed Feitelberg that, under FINRA Rule 8210, he was obligated to respond to FINRA's request "fully, promptly, and without qualification." RP 33. The request further warned that any failure on Feitelberg's part to satisfy his obligations could expose him to sanctions, "including a permanent bar from the securities industry." RP 33.

FINRA sent all of its requests and notices, including the April 26, 2018 request, by certified (return receipt requested) and first-class mail to Feitelberg's address of record as contained in the Central Registration Depository ("CRD"®). Before sending the April 26, 2018 request, FINRA confirmed Feitelberg's current mailing address by conducting a public records database search on April 18, 2018. RP 2-32. The certified mailing was returned to FINRA as "unclaimed" on May 29, 2018. RP 35. The U.S. Postal Service did not return the first-class mailing.

B. Feitelberg Acknowledges Receipt of, But Fails to Respond to, FINRA's 8210 Request

On May 9, 2018, Feitelberg acknowledged in an email to FINRA that he received the April 26, 2018 request. RP 38. Rather than responding to the request, Feitelberg instead requested two extensions of the deadline for his response—both of which FINRA granted—which moved his response deadline from May 10, 2018, to June 13, 2018. RP 37-38. Feitelberg did not respond to FINRA's April 26, 2018 request for information and documents by the June 13, 2018 deadline and he sought no further extensions to respond to FINRA's requests.

C. FINRA Sends Feitelberg A Second Rule 8210 Request

On July 24, 2018, FINRA sent Feitelberg a second letter pursuant to FINRA Rule 8210 ("July 24, 2018 request"). RP 41-42. The July 24, 2018 request, which set a response deadline of August 3, 2018, stated that FINRA did not receive Feitelberg's response, included a copy of FINRA's April 26, 2018 request, and warned Feitelberg again that his failure to comply with the request could subject him to disciplinary action. RP 41.

FINRA sent the July 24, 2018 request to Feitelberg's CRD Address, which remained unchanged, as well as to the email address Feitelberg used to seek the extensions of his response deadline.[3] RP 43. Feitelberg neither responded nor provided any information or documents responsive to FINRA's July 24, 2018 request.

D. FINRA Takes Expedited Action for Feitelberg's Failures to Respond

Because Feitelberg failed to respond in any manner to FINRA's requests, FINRA commenced an expedited proceeding against him.[4] On August 20, 2018, FINRA sent Feitelberg a notice of suspension ("Pre-Suspension Notice") forewarning that Feitelberg would be suspended from associating with any FINRA member in any capacity on September 13, 2018,

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[3] The certified mail receipt stated that no authorized recipient was available and presumably it was returned to FINRA. RP 42. The U.S. Postal Service did not, however, return the first-class mailing. FINRA also sent the July 24, 2018 request to Feitelberg's email address that he used to correspond with FINRA after he received the April 26, 2018 letter. RP 41. The email was not returned to FINRA as undeliverable.

[4] The expedited proceeding was initiated under FINRA Rule 9552. FINRA Rule 9552(a) provides 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."

for his failures to respond to the April 26 and July 24, 2018 requests, unless he took corrective action by complying fully with the requests or requesting a hearing. RP 47-48. The Pre-Suspension Notice further notified Feitelberg that if he failed to request termination of the suspension within three months, he would be automatically barred on November 23, 2018, pursuant to Rule 9552(h).[5] RP 48.

FINRA again sent the Pre-Suspension Notice to Feitelberg's last known residential address as reflected in CRD.[6] RP 47. Although the certified mail receipt was returned to FINRA as "unclaimed," RP 52-53, the first-class mailing was not returned.

E. Feitelberg Does Not Request a Hearing or Take Corrective Action, and FINRA Suspends Him

Feitelberg did not request a hearing or comply in any manner with FINRA's April 26 and July 24, 2018 requests for information and documents by the suspension date. Accordingly, on September 13, 2018, FINRA by written notice (the "Suspension Notice") suspended Feitelberg, effective immediately, from association with any FINRA member in all capacities. RP 57-58. The Suspension Notice advised that Feitelberg could terminate his suspension by written request under FINRA Rule 9552(f) on the grounds that he fully complied with the Pre-Suspension Notice. RP 57. It stressed, however, that if Feitelberg failed to seek a termination of his suspension by November 23, 2018, then FINRA would automatically bar him from the securities industry under FINRA Rule 9552(h). RP 57.

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[5] 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."

[6] A search of a public records database confirmed that, as of August 17, 2018, Feitelberg's current mailing address was the CRD address to which FINRA sent the Pre-Suspension Notice. RP 45-46.

Like the previous requests and notices, FINRA sent the Suspension Notice to Feitelberg's CRD address, which as of September 10, 2018, FINRA confirmed it was his current address by conducting a public records database search. RP 55-56. The certified mailing was returned to FINRA unclaimed, but the U.S. Postal Service did not return the first-class mailing. RP 59-61. Feitelberg provided no response to the Suspension Notice.

F. FINRA Bars Feitelberg under Rule 9552(h) for His Complete Failures to Respond

Feitelberg did not challenge his suspension in the several months leading up to November 23, 2018. He also did not comply in any manner with FINRA's April 26 and July 24, 2018 requests for information and documents. Accordingly, on November 23, 2018, FINRA sent Feitelberg written notice ("Bar Notice") that he was barred, effective immediately. RP 65-66. The Bar Notice advised that "[t]o comply with the SEC's rules regarding timeliness," Feitelberg had to appeal FINRA's action within 30 days of service of the notice by filing an application for review with the Commission. RP 65. After a public records database search confirmed that, as of November 20, 2018, Feitelberg's current mailing address was still his CRD address, RP 63-64, FINRA sent the Bar Notice to that address by certified and first-class mail. The certified mail was delivered to Feitelberg's CRD address and confirmed by signed return receipt on November 30, 2018. RP 67-68. Again, the U.S. Postal Service did not return the first-class mailing to FINRA. Feitelberg did not file an appeal within the 30-day period and he did not move the Commission to extend the appeal deadline.

G. More Than Five Months after the Bar Went Into Effect, Feitelberg Sends His Written Response to FINRA

More than five months after FINRA barred him, Feitelberg retained counsel who contacted FINRA on his behalf to inquire about the possibility of FINRA lifting his bar. On May

9, 2019, FINRA requested a written confirmation by counsel that he represented Feitelberg so that it could send copies of FINRA's requests to counsel and notices previously sent to Feitelberg. RP 70. FINRA emailed Feitelberg's counsel the copies of FINRA's correspondence on the next day. RP 69.

On May 13, 2019, Feitelberg—through his counsel—provided a written response to FINRA's April 26, 2018 request. RP 81-92. In his response, Feitelberg explained that his response was delayed because he was ill, [redacted] in August" [redacted] months." RP 83. At the time, Feitelberg never stated—as he claims today—that he did not receive any of FINRA's requests and notices. Feitelberg also did not provide FINRA with any documentation, such as a doctor's note or medical instructions that reflect his health condition.

By letter dated May 24, 2019, FINRA apprised counsel that it received Feitelberg's response, however, Feitelberg had failed to respond to two FINRA requests for information and documents issued under FINRA Rule 8210, and he also failed to request a hearing or take corrective action in light of the Pre-Suspension and the Suspension Notices. RP 93. Moreover, FINRA informed counsel that, as provided in the Bar Notice that it attached (along with all of FINRA's previous correspondence), Feitelberg had 30 days to appeal FINRA's action of barring him, an appeal which he failed to pursue timely with the Commission. RP 93. FINRA further stated that Feitelberg "failed to exhaust his administrative remedies." and thus FINRA would not reconsider lifting Feitelberg's bar. RP 94.

Six months after FINRA barred him, Feitelberg submitted an application for review with the Commission on June 21, 2019. RP 123-26.

III. ARGUMENT

Feitelberg's application for review is well beyond the 30-day appeal deadline. Feitelberg's belated attempt to comply with FINRA's requests for information and documents six months after his bar provides no extraordinary circumstance that resets the 30-day appeal deadline. Feitelberg's application for review is untimely and should be dismissed.

The Commission should also dismiss Feitelberg's appeal because he failed to exhaust his administrative remedies by either promptly providing FINRA the information and documents it requested or requesting a hearing. FINRA properly served Feitelberg the written requests for information and documents and notices of the expedited proceeding to suspend and bar him. Under FINRA rules of procedure that explicitly authorize service by mail, Feitelberg had proper notice of the expedited proceedings. For several months, Feitelberg made the choice to ignore numerous written communications that FINRA properly served on him. By failing to respond to FINRA's numerous requests and notices, as it warned, FINRA barred him. The Commission should dismiss Feitelberg's appeal because he failed to exhaust his administrative remedies.

A. The Applicable Standard for Commission Review of Expedited Proceedings is Section 19(f) of the Exchange Act

The applicable standard for Commission review of Feitelberg's bar in a FINRA expedited proceeding is Section 19(f) of the Securities Exchange Act of 1934 ("Exchange Act"). 15 U.S.C. § 78s(f); *see also Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at *12 n.10 (Sept. 29, 2015) ("Section 19(f) provides the standard for [Commission] review of expedited disciplinary proceedings for violations of Rule 8210."). Under that provision, the Commission should dismiss Feitelberg's appeal if it determines that (1) the specific grounds on which FINRA barred Feitelberg exist in fact, (2) FINRA barred

Feitelberg in accordance with its rules, and (3) FINRA's rules are, and were applied in a manner, consistent with the Exchange Act. 15 U.S.C. § 78s(f).[7]

The Commission should find that the specific grounds for FINRA barring Feitelberg exist in fact and FINRA acted in accordance with its rules. FINRA properly served Feitelberg as provided in its procedural rules by U.S. Postal Service mail with notices of proceedings that stated the factual basis for Feitelberg's suspension and bar, stated when his suspension and bar would take effect, and explained to Feitelberg what steps he could take to avoid such action. RP 47-48, 57-58, 65-66. These facts and FINRA's rules are discussed in Sections C.3. & 4., *infra*. Because of the regulatory importance that Rule 8210 serves, barring Feitelberg for his failures to provide to FINRA the requested information and documents in any manner is appropriate and consistent with the purposes of the Exchange Act. *Asensio & Co. Inc.*, 2012 SEC LEXIS 3954, at *17 (finding violators of Rule 8210 "present too great a risk to the markets and investors to be permitted to remain in the securities industry").

B. Feitelberg's Application for Review Is Untimely

Feitelberg's appeal, dated June 21, 2019, should be dismissed as untimely. On November 23, 2018, FINRA properly served by mail the Bar Notice informing Feitelberg that he was barred from associating with any FINRA member under FINRA Rule 9552(h). RP 65-68. Pursuant to Exchange Act Section 19(d)(2), Feitelberg was required to file an application for

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[7] Section 19(f) of the Exchange Act further provides that the Commission will set aside a challenged action if it finds that it "imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title." 15 U.S.C. § 78s(f). Feitelberg does not assert in his appeal, and the record does not provide, that his bar imposes any burden on competition.

review with the Commission "within 30 days" after he was barred on November 23, 2018.[8] 15 U.S.C. § 78s(d)(2). Feitelberg did not file an appeal within the 30-day period, and he did not move the Commission to extend the appeal deadline pursuant to SEC Rule of Practice 420. 17 C.F.R. § 201.420(b). Instead, Feitelberg appealed on June 21, 2019, which is six months past the 30-day appeal deadline. The Commission should therefore dismiss Feitelberg's late application for review.

There are no extraordinary circumstances that warrant the Commission's acceptance of Feitelberg's late appeal. In his opening brief, Feitelberg theorizes that his appeal deadline should extend an additional six months ending on June 24, 2019, because he "never received notice of the determination in November 2018" and thus "his 30-day window did not start at that time." Br. 12 n.12. Feitelberg argues that, instead, the 30-day appeal period began on May 24, 2019, "when FINRA, after reviewing his responses to its original inquiry, sent a final determination that he was barred." Br. 12 n.12. Feitelberg is mistaken.

Feitelberg was required to file an application for review with the Commission within 30 days of Feitelberg's receipt of the Bar Notice, which was on November 23, 2018. *See* FINRA Rule 9134(b)(3) (providing that service by mail is complete upon mailing). Feitelberg claims he never *received* the Bar Notice in November 2018. Br. 2. But the record shows that FINRA properly served the Bar Notice through the U.S. Postal Service by certified mail (return receipt requested) and first-class mail. RP 65. The U.S. Postal Service delivered the certified mail upon receiving a signature for the mailing on November 30, 2018, and the first-class mailing was not

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[8] The appeal period for this case ran from FINRA's service date of the Bar Notice on November 23, 2018 (plus three days for service), until the appeal deadline date of December 27, 2018.

returned to FINRA. RP 67-68. Although Feitelberg claims that the signature for the Bar Notice was not his or anyone he knows, Br. 2, he does not argue that his CRD address where all of FINRA's requests and notices were sent was not his current address. In any event, FINRA is not required to verify the individual who signs certified mail on behalf of the respondent. *Cf. David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *37 (July 27, 2015) (holding "FINRA had no obligation to confirm the mobility and vision of persons who sign [] certified mail receipts"). Feitelberg received proper service of FINRA's determination to bar him. His purported belated discovery of the bar does not excuse his untimely appeal. *Rogelio Guevara*, Exchange Act Release No. 78134, 2016 SEC LEXIS 2233, at *8 (Jun. 22, 2016) (finding an applicant's delayed collection of FINRA's bar notice after proper service by mail does not excuse his failure to file a timely appeal).

Moreover, FINRA's denial of Feitelberg's request to lift the bar (well after the appeal period expired) is not a final FINRA action that is reviewable by the Commission and thus does not serve, as Feitelberg suggests, to reset the 30-day appeal deadline. In *Warren B. Minton*, the Commission found that FINRA's (then NASD's) denial of Minton's motion to set aside an earlier default decision was not a FINRA final action. 55 S.E.C. 1170, 1176 (2002). In dismissing Minton's appeal, the Commission determined it lacked jurisdiction to review FINRA's denial because the FINRA imposed no new sanctions on Minton, did not deny him membership, or otherwise limited his access to FINRA services. *Id.* at 1176 (citing *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1098 (1998) (finding that the Commission lacked jurisdiction to consider an appeal of NASD's refusal to set aside a default decision when the refusal did not impose discipline, deny membership or deny access)).

The Commission should reach the same conclusion here. Feitelberg waited more than five months after his bar took effect to contact FINRA and provide a written response.[9] RP 81-92. FINRA took its final action on November 23, 2018, and not the date that FINRA declined by letter to lift Feitelberg's bar, which imposed no new sanctions on him. *Cf. David Richard Kerr*, Exchange Act Release No. 79744, 2017 SEC LEXIS 76, at *15 (Jan. 5, 2017) (supplying an untimely response after the bar was already effective, "even if it contained all the information that FINRA requested," did not preserve Kerr's ability to seek review). The 30-day appeal deadline of December 27, 2018, passed without Feitelberg filing an application for review. As the Commission has previously held, "strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief." *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 SEC LEXIS 641, at *10 (Mar. 1, 2013). "[P]arties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed." *Id.* The public interest is not served in this case by accepting an appeal that is six months late. *See Guevara*, 2016 SEC LEXIS 2233, at *5 (refusing to accept an application for review filed almost two months after he was barred); *John Vincent Ballard*, Exchange Act Release No. 77452, 2016 SEC LEXIS 1151, at *7 (Mar. 25, 2016) (dismissing an

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[9] In his brief, Feitelberg notes that his counsel corresponded with a FINRA investigator by "email, telephone, and voicemail" a week before FINRA's May 9, 2019 email requesting confirmation of his counsel's representation of Feitelberg. Br. 2 n.4. But as Feitelberg admits, the emails with FINRA staff during that time were "not substantive" and inconsequential to his grievances on appeal. FINRA did not include these communications in the record because counsel had not established that he represented Feitelberg. Indeed, Feitelberg has not moved to supplement the record with these emails. FINRA confirms that, in accordance with Rule of Practice 420(e), it has provided the Commission with the documents that served as the basis upon which FINRA's action that Feitelberg complains of was taken. 17 C.F.R. § 201.420(e).

application for review filed 21 days after the deadline to file an appeal expired). Accordingly, the Commission should dismiss Feitelberg's appeal because it is untimely.

C. Feitelberg Failed to Exhaust His Administrative Remedies

The Commission should independently dismiss Feitelberg's application for review because he failed to follow FINRA procedures, and consequently, failed to exhaust his administrative remedies.

1. The Commission Has Correctly Applied the Exhaustion Requirement to Applicants Similar to Feitelberg

In dozens of cases, the Commission has required that applicants who are seeking to appeal to the Commission must have pursued the available methods of challenging a pending bar before FINRA or they have failed to exhaust FINRA's procedures. *See, e.g., 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 his administrative remedies and FINRA barred him for failing to comply with FINRA's Rule 8210 request). Feitelberg nevertheless argues, near the end of his brief, that he qualifies for an exception to the doctrine of administrative exhaustion. Br. 13-14. Feitelberg relies primarily on three Supreme Court cases and *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690 (3d Cir. 1979). *See* Br. 13 (citing *McCarthy v. Madigan*, *Gibson v. Berryhill*, and *Barry v. Barchi*). Contrary to Feitelberg's claims, these authorities either establish that an exception to exhaustion does *not* apply, or discuss an exception that is inapplicable here.

Feitelberg's central claim is that he can challenge the adequacy of FINRA's administrative remedy and thereby be excused from exhausting FINRA's remedy. Br. 13-14. The controlling case law, however, directly refutes this theory. Initially, Feitelberg's heavy reliance on *McCarthy v. Madigan*, 503 U.S. 140 (1992), is misplaced because Congress

superseded *McCarthy*'s holding by later amending the statute at issue. *See Booth v. Churner*, 532 U.S. 731, 740-41 (2001) (discussing that Congress adopted the Prison Litigation Reform Act of 1975 with a broad exhaustion requirement and "the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result."); *see also id.* at 733-34 (noting that *McCarthy* is superseded by statute).

In the controlling Supreme Court decision in this area, *Woodford v. Ngo*, the Court held that proper exhaustion of administrative remedies requires a prisoner to comply with administrative deadlines and other procedural rules. 548 U.S. 81, 90-91 (2006). The Court explained that—based on a statute that required prisoners to exhaust all "available" remedies before filing a federal lawsuit—a prisoner must timely file a grievance form and complete a three-step review process to properly exhaust administrative remedies. *Id.* at 85-86. In *Woodford*, the prisoner's grievance was rejected by the Department of Corrections because it was not filed within the deadline of 15 working days from the action being challenged. *Id.* at 86-87. The Court reversed the court of appeals decision, which had held that the prisoner had exhausted administrative remedies because no such remedies remained available. *Id.* at 87. In correcting this error, the Court reasoned that "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90-91. Applying the concepts from *Woodford* to Feitelberg's appeal yields the unmistakable result that he failed to exhaust his FINRA remedies. Just as the prisoner in *Woodford* failed to exhaust properly when he filed beyond the grievance deadline, so too did Feitelberg fail to exhaust when he never asked for a hearing before a FINRA Hearing Officer, nor did he provide the requested information.

The Commission has applied the lessons from *Woodford* and it should do so again here. In *Christine D. Memet*, Exchange Act Release No. 83711, 2018 SEC LEXIS 1876 (July 25, 2018), the Commission relied on *Woodford* and dismissed the applicant's appeal, noting that the applicant could not "escape the consequences of her failure to comply or exhaust in accordance with FINRA procedures by failing to receive or claim mail properly sent to her address." *Id.* at *15.

Feitelberg's remaining assertions of an exception to the exhaustion requirement—unconstitutional bias within an adjudication process (or irreparable injury)—also have no merit.[10] Br. 13. In *First Jersey Securities*, the Third Circuit explicitly rejected the contention that an NASD member firm qualified for the irreparable-injury exception to the exhaustion requirement. 605 F.2d at 696. "Although we recognize the potential for harm that exists, we believe that the integrity of the administrative process requires us to reject this justification for intrusion." *Id.* at 697. The Third Circuit therefore concluded that the exhaustion of available remedies applied to NASD proceedings. *Id.* at 696.

In *First Jersey Securities*, the Third Circuit analyzed the broker-dealer's argument that NASD's disciplinary proceedings were so biased as to be a constitutional violation, citing *Gibson v. Berryhill*, 411 U.S. 564 (1973). *Id.* at 697-98. But contrary to Feitelberg's argument (Br. 13), the Third Circuit held that NASD's system of self-regulation was "sufficiently dissimilar in crucial respects" from the Board of Optometry in *Berryhill*, including that "NASD is a voluntary association, not a state agency" and concluded that the claim of systemic bias was

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[10] We recognize that Feitelberg does not use the terms "unconstitutional bias" and "irreparable injury," however the cases that he cites to address these very subjects and Feitelberg should not be allowed to shift his argument in his reply brief.

unwarranted. *Id.* at 698. "Although Congress preferred self-regulation by a private body over direct involvement of a governmental agency, it established safeguards to prevent abuse of the system." *Id.* at 698. To be sure, the Commission's reliance on the exhaustion requirement is bolstered by a consensus of federal courts. *See MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004) (applying the exhaustion of administrative remedies requirement to self-regulatory organizations); *First Jersey Sec.*, 605 F.2d at 696 ("We believe that the doctrine of exhaustion of administrative remedies applies with equal force to the disciplinary proceedings of the NASD."); *Charles Schwab & Co. v. FINRA*, 861 F. Supp. 2d 1063, 1069 (N.D. Ca. 2012) (finding that plaintiff's failure to exhaust administrative remedies left the court without jurisdiction).

In sum, Feitelberg's references to potential exceptions to the exhaustion requirement are contrary to the Commission's decisions and the specific case law that has ruled on these issues.

2. FINRA Provided Feitelberg with a Fair Proceeding

In his brief, Feitelberg argues that FINRA violated his due process rights under the Fifth Amendment of the Constitution and denied him a fair procedure because FINRA barred him in an expedited proceeding for which he claims he had no actual notice. Br. 7-10. The Commission should reject Feitelberg's arguments because FINRA is not subject to constitutional due process requirements, and the record fully establishes that FINRA provided Feitelberg with a fair proceeding in accordance with its Code of Procedure.

It is well established that self-regulatory organizations, such as FINRA, are private actors and therefore are not subject to the Constitution's due process requirements. *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *34 (Oct. 20, 2011) ("FINRA is not a state actor and thus, traditional Constitutional due process requirements do not apply to its disciplinary proceedings.") (citing *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999)); *Scott*

Epstein, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *51 (Jan. 30, 2009) ("[I]t is well-established that self-regulatory organizations ("SROs") are not subject to the Constitution's due process requirements."); *James Gerald O'Callaghan*, Exchange Act Release No. 61134, 2008 SEC LEXIS 1154, at *28 (May 20, 2008) ("[C]onstitutional due process requirements generally do not apply to self-regulatory organizations.").[11] Therefore, Feitelberg's argument that FINRA infringed upon his Fifth Amendment due process rights fails.

Pursuant to the Exchange Act, Feitelberg is entitled to, and did receive, a fair notice of its proceeding. 15 U.S.C. § 78o-3(b)(8). The Commission has determined that the procedures set forth in the FINRA Rule 9550 Series, which allow FINRA to take expedited action and bar individuals for failing to respond to FINRA's inquiries in any manner, are consistent with the standards applicable to a national securities association under the Exchange Act because they "promote an efficient but fair and reasonable process." *Romano*, 2015 SEC LEXIS 3980, at *19 n.20 (citation omitted). As we discuss in more detail in Section C.3., *infra*, FINRA properly served Feitelberg several written notices of the expedited proceeding it instituted against him for his failure to provide information and documents and sent U.S. mail and email to Feitelberg at his current residence. Feitelberg thus was given a fair proceeding.

3. FINRA Followed Its Rules on Service by Mail

The primary argument that Feitelberg raises on appeal is that he "never received actual notice of his suspension or the possibility of a bar." Br. 1; *see also* Br. 5, 9 & n.10, 10, 12, 14.

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[11] These decisions are consistent with FINRA's status as a private organization that does not engage in state action. *See D.L. Cromwell Invs., Inc. v. NASD*, 279 F.3d 155, 161 (2d. Cir. 2002) (finding that to establish a Fifth Amendment violation, the plaintiff must demonstrate that the NASD's conduct constituted state action."); *Jones v. SEC*, 115 F.3d 1173, 1183 (4th Cir. 1997) (stating that because NASD "is not a governmental agency," "it is highly questionable whether its disciplinary action of members, even if it is considered to be a quasi-public corporation, can implicate the Double Jeopardy Clause").

But FINRA's rules provide for service by mail; personal service of each of the notices FINRA mailed to Feitelberg is not required. The record establishes that FINRA acted in accordance with its rules and properly served Feitelberg its requests and notices by mail. The U.S. Postal Service returned none of the first-class mailings. Moreover, Feitelberg acknowledged receipt of FINRA's first request for information.

FINRA properly served Feitelberg two Rule 8210 requests by certified (return receipt requested) and first-class mail to his residence as reflected in CRD. *See* FINRA Rule 8210(d) (providing that Rule 8210 notices "shall be deemed received" by a formerly registered person to whom it is directed by mailing the notice to the "last known residential address of the person" as reflected in CRD). The April 26 and July 24, 2018 requests informed Feitelberg of his obligation under FINRA Rule 8210 to respond to FINRA's requests and warned that his failure to comply could subject him to disciplinary action. RP 33, 41. In an email dated May 9, 2018, Feitelberg acknowledged that he received the April 26, 2018 request. RP 38. Moreover, Feitelberg had constructive notice of the July 24, 2018 request, which FINRA sent to his CRD address by certified (return receipt requested) and first-class mail, as well as to Feitelberg's email address. RP 41; *see also Evansen*, 2015 SEC LEXIS 3080, at *36 (deeming Evansen "to have received the requisite constructive notice" when FINRA's Rule 8210 request was sent to his most recent CRD address).

Because Feitelberg failed to respond to the Rule 8210 requests, FINRA commenced expedited proceedings against him under FINRA Rule 9552. FINRA properly served the Pre-Suspension, Suspension, and Bar Notices to Feitelberg's CRD address by certified mail (return receipt requested) and first-class mail. RP 47, 57, 65; *see also* FINRA Rule 9552(b) (requiring that FINRA send written notice pursuant to the service procedures under FINRA Rule 9134 (or

by facsimile or email)); FINRA Rule 9134(a)(2) and (b)(1) (providing that written notice is properly served through the U.S. Postal Service by sending the first-class and certified mail to the person's residential address, as provided in CRD).

FINRA did not have actual knowledge that Feitelberg's CRD was out of date. *See* FINRA Rule 9134(b)(1) (providing that when FINRA has actual knowledge that the recipient's CRD address is outdated, duplicate copies shall be served at the individual's "last known residential address *and* the business address in the [CRD] of the entity with which the natural person is employed or affiliated"). In fact, before FINRA sent the Pre-Suspension and Suspension Notices, FINRA searched Feitelberg's address in a public records database and confirmed that his current address was the same address he provided in his CRD record. *See* RP 45-46, 55-56, 63-64. Therefore, FINRA complied with its rules on service by mail. In his brief, Feitelberg's incorrectly states that FINRA knew that he did not have actual notice of the disciplinary proceeding because "all of its mailing were returned undeliverable." Br. 12. FINRA's rules, however, provide for service by mail of its notices, and the first-class mailings were delivered. A signed return receipt for certified mail is not required under FINRA rules. Feitelberg therefore had proper notice that his continued failure to respond to FINRA's requests would result in disciplinary action unless his took corrective action. *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at *12 (Feb. 8, 2016) ("The service requirement was satisfied upon mailing, as a result. Manzella had notice of information contained in the letters, including the means to challenge her suspension."). Notwithstanding that Feitelberg did not sign for the certified mail sent to him, FINRA properly served all the notices in this case.

4. Because of Feitelberg's Inaction, He Failed to Exhaust His Administrative Remedies

Under the rules applicable to a formerly registered person, Feitelberg had the responsibility to keep his CRD address up to date. *Evansen*, 2015 SEC LEXIS 3080, at *29. When a person cannot readily provide information to FINRA, they must explain why they cannot. *N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *21 (May 8, 2015). Feitelberg made no attempts to respond to FINRA's requests and notices, nor did he offer any reason or explanation for his unresponsiveness.

Throughout his brief, Feitelberg claims that his failure to exhaust his administrative remedies and noncompliance with FINRA rules was due to a [redacted] that [redacted] in August 2018 for [redacted]. Br. 1-2, 6, 10, 14. As a preliminary matter, the Commission has long held that "unsubstantiated personal and [redacted] do not excuse an applicant's failure to respond" to FINRA's requests and notices. *Lee Gura*, 57 S.E.C. 972, 977 (2004) (citing *John A. Malach*, 51 S.E.C. 618, 620 (1993)). To this date, Feitelberg has provided no substantive evidence, such as a medical record or a doctor's diagnosis, demonstrating that his [redacted] prevented him from promptly responding to FINRA's requests and notices.

Even if Feitelberg was unable to meet the deadlines in FINRA's requests and notices because of a [redacted] "it was his obligation to contact FINRA, explain the reasons why his response would be delayed, and propose alternate arrangements." *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *73 (Sept. 24, 2015); *see also Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18 (Nov. 8, 2007) ("As we have often noted, recipients of requests under Rule 8210 must promptly respond to the requests or explain why they cannot."). Feitelberg received FINRA's requests for

information and documents and therefore knew of the potential consequences of his failures to respond. Nevertheless, Feitelberg never informed FINRA staff of his medical circumstance, nor did he seek an extension or deferment of the date on which he was required to respond to FINRA. *Accord Manzella*, 2016 SEC LEXIS 464, at *14 n.17 (finding that the applicant—notwithstanding her personal or emotional circumstances—was required to respond to FINRA's requests "even if only to explain her circumstances or to seek an extension of time to respond") (citations omitted).

Feitelberg attaches his own affidavit as an exhibit to his opening brief explaining that, during the entire period at issue, he was either [redacted] and thus could not respond to FINRA's requests and notices. Br. 1 n.3. As an initial matter, the Commission should not rely upon the affidavit because Feitelberg failed to move the Commission to adduce the affidavit as additional evidence to the record, as required under Commission Rule of Practice 452. 17 C.F.R. § 201.452. Even if the Commission were to accept Feitelberg's affidavit as supplemental evidence—which it should not—the Commission should find that Feitelberg's affidavit fails to show why he, or someone on his behalf, could not contact FINRA and ask for more time to respond to FINRA's requests and notices.

First, the affidavit vaguely states that Feitelberg was hospitalized in August 2018 "for several weeks," and had an "extensive and all-consuming" [redacted] from "July 2018 until 2019." But there are no specific dates to establish when Feitelberg was [redacted] or details on whether he was at home [redacted] at the time FINRA's notices were delivered to his address.

Second, the affidavit states that "As FINRA's record indicates," Feitelberg never received FINRA's letters. Affidavit at paragraph 6. FINRA's record establishes, however, that

the first-class mailings of all of FINRA's request letters and notices were delivered. Therefore, Feitelberg's characterization of the record is not a statement based on his personal knowledge and therefore fails to establish a key fact.

Third, the affidavit claims that Feitelberg did not receive the Bar Notice because he was "recovering at a relative's residence." But Feitelberg did not provide a medical affidavit, a copy of his medical discharge, or other such evidence showing when he began [redacted] and that [redacted] prevented him from looking at his mail until several months later. In his affidavit, Feitelberg had the burden of showing with particularity why he could not readily provide the information and documents that FINRA requested. Feitelberg failed to meet his burden. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact."). The affidavit neither excuses Feitelberg's violations of FINRA Rule 8210 nor defends his failure to exhaust his administrative remedies to FINRA.

Feitelberg argues that the Commission's decisions in *Destina Mantar* and *Robert J. Langley* support a remand of this case back to FINRA. Those cases, however, are easily distinguishable. In *Destina Mantar*, Exchange Act Release No. 79851, 2017 SEC LEXIS 194 (Jan. 19, 2017), the Commission remanded an expedited proceeding to FINRA where all of FINRA's information requests and notices had been sent to Mantar's CRD address, but each of the certified mailings was returned to FINRA as "not deliverable as addressed" and Mantar asserted that she did not receive any of FINRA's requests or notices and only learned about them two weeks after FINRA had barred her. *Id.* at *6-7. Mantar sent a written response to FINRA's information requests, but FINRA declined to lift the bar. *Id.* at *8. "Mantar filed a timely application with the Commission for review of the bar." *Id.*

The Commission's holding is factually distinguishable in three critical ways. First, Feitelberg received the April 26, 2018 request for information and asked FINRA twice for an extension of time. RP 37-40. Based on these extension requests and FINRA's warnings in the information requests that a failure to respond could result in a bar from the securities industry, Feitelberg knew that he had not provided FINRA with any information. In *Mantar*, by contrast, the respondent maintained that she had received no information requests or other notices from FINRA. Second, in *Mantar*, FINRA did not explain why Mantar's response to FINRA's information requests was insufficient to lift the bar imposed on her. *Mantar*, 2017 SEC LEXIS 194 at *8-9. Here, in a letter dated May 24, 2019, FINRA acknowledged receiving Feitelberg's belated response, but explained that it would not lift the bar because Feitelberg repeatedly failed to respond to FINRA's requests and notices and failed to avail himself of FINRA's administrative process.[12] RP 93-94. Third, Mantar filed a timely appeal with the Commission. Here, Feitelberg's appeal was not timely filed. Feitelberg's extensive delay in contacting FINRA and eventually providing a written response to FINRA on May 13, 2019, means that FINRA waited for more than a year to receive any information from Feitelberg.

The Commission's decision in *Robert H. Langley* is also readily distinguishable. 57 S.E.C. 1125 (2004). There, the Commission remanded the case because the record showed that NASD staff contacted Langley and had at least one telephone conversation regarding the allegations in the case and that Langley "remained reachable at the telephone number used to

[12] At the time Feitelberg's counsel provided FINRA his written response to the April 26, 2018 request in May 13, 2019, RP 81-92, Feitelberg never claimed that his response was delayed because he did not receive FINRA's requests and notices, which would have allowed FINRA's Department of Enforcement to further assess why Feitelberg purportedly did not receive them. Instead, Feitelberg is making this claim for the first time in his appeal before the Commission.

make this call throughout the period at issue." *Id.* at 1129. In light of this information, the Commission found the record unclear on whether, notwithstanding Langley's obligation to keep his CRD record current, the "staff was able to contact Langley by telephone." *Id.* at 1132. Here, FINRA staff attempted to contact Feitelberg through the channels that had worked to reach him: his CRD address and via email. FINRA staff reasonably believed that Feitelberg had decided not to cooperate in FINRA's investigation. When this occurs, FINRA staff routinely begins an expedited proceeding.

The Commission has a solid body of precedent in which it has dismissed applications for review where a firm or an individual has failed to use the procedural steps available under FINRA's rules so that FINRA can address the issues on the merits. *See Memet*, 2018 SEC LEXIS 1876, at *11 ("[W]e have held consistently that we will not consider an application for review of FINRA action 'if that applicant failed to exhaust FINRA's procedures for contesting the sanction' before seeking Commission review.") (citation omitted); *Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 SEC LEXIS 1875, at *19 (July 25, 2018) (dismissing appeal because respondent failed to exhaust FINRA's administrative remedies); *Guevara*, 2016 SEC LEXIS 2233, at *11 (dismissing appeal for failure to exhaust administrative remedies); *Manzella*, 2016 SEC LEXIS 464, at *15 (same); *Gerald J. Lodovico*, Exchange Act Release No. 73748, 2014 SEC LEXIS 4732, at *7 (Dec. 4, 2014) (same); *Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 SEC LEXIS 3503, at *6 (Sept. 19, 2014) (same). FINRA maintains an interest in the finality of our decisions and in members and their associated persons exhausting their administrative remedies before FINRA first. *Ceballos*, 2013 SEC LEXIS 641, at *9-10 ("[S]trict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief."). Because Feitelberg failed to exhaust his administrative remedies

before seeking relief from the Commission, the Commission should follow established precedent and dismiss Feitelberg's application for review.

5. FINRA's Imposition of a Bar on Feitelberg Was Justified

Feitelberg argues that the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), and the D.C. Circuit's opinion in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), mean that his lifetime bar for not responding to FINRA is punitive. RP 124. He is mistaken. As the Commission most recently held in *John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216 (Aug. 23, 2019), the Supreme Court's holding in *Kokesh* does not apply to FINRA barring individuals like Saad from the securities industry, and FINRA bars as a sanction "cannot be categorically impermissible under the Securities Exchange Act of 1934, because Congress explicitly authorized FINRA to impose such bars." *Id.* at *8.

The Commission's opinion also thoroughly refuted Feitelberg's remaining arguments about the sanction of a bar. Br. 10-11. The Commission found that the Supreme Court confined its analysis in *Kokesh* to the sole question presented: whether disgorgement is a penalty for purposes of the five-year statute of limitations under 28 U.S.C. § 2462. *Saad*, 2019 SEC LEXIS 2216, at *12. The Commission explained that the Supreme Court's context was analyzing a pecuniary sanction when it distinguished between a sanction that deters others, from one that solely compensates a victim for his loss. *Id.* at *5. As the Commission explained, that distinction makes no sense for sanctions, like a bar, that have no monetary component. *Id.* Thus, *Kokesh* does not call into question decisions holding that debarments designed to protect the public are remedial and not punitive. Nothing in *Kokesh* or *Saad* changes the Commission's authority under Section 19(d)(2) of the Exchange Act, 15 U.S.C. § 78s(d)(2), to require

aggrieved persons, like Feitelberg, to exhaust their administrative remedies at the SRO level before seeking appellate review.

Moreover, Feitelberg disregard of his obligation as an associated person to comply with FINRA Rule 8210 constitutes serious misconduct that overwhelmingly justifies a bar. The Commission has stressed the importance of complying with Rule 8210 in connection with FINRA's "obligation to police the activities of its members and associated persons." *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *20 (Sept. 10, 2010). As the Commission explained in *Elliot M. Hershberg*, "[w]hen members and associated persons delay their responses to requests for information, they impede the ability of [FINRA] to conduct its investigations fully and expeditiously." 58 S.E.C. 1184, 1189 (2006). Failing to comply with FINRA Rule 8210 is a serious violation "justifying stringent sanctions" because, as the Commission found in *Hershberg*, "it subverts [FINRA]'s ability to execute its regulatory functions." *Id.* at 1190. Absent mitigation, a bar is the standard remedial sanction under the FINRA Sanction Guidelines for complete failures to respond to Rule 8210 requests. See *FINRA Sanction Guidelines* 33 (2019), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.

As an associated person, Feitelberg agreed to comply with, and remain subject to, FINRA's rules. Feitelberg undermined FINRA's regulatory mandate to detect and deter misconduct by its members and associated persons when he delayed FINRA's investigation by ignoring FINRA's requests and notices. Feitelberg presents no mitigating factors that justify a sanction of less than the standard sanction under the Guidelines for his complete failures to respond to FINRA's requests and notices. The bar is appropriately remedial for individuals, like Feitelberg, who refuse to provide FINRA the information and documents requested of them

because their actions "present a continuing danger to the public interest in securing voluntary cooperation with investigations and, ultimately, detecting and preventing industry misconduct." *Evansen*, 2015 SEC LEXIS 3080, at *64; *see also Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at *43, *45 (Apr. 17, 2014) (barring respondent and finding it remedial and not punitive in light of his "persistent refusal to comply with FINRA's outstanding requests"). The Commission should find the bar FINRA imposed as appropriately remedial and dismiss Feitelberg's appeal.

IV. CONCLUSION

Feitelberg repeatedly failed to respond to FINRA's requests for information, and consequently, FINRA suspended him. 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, FINRA barred Feitelberg. The Commission should dismiss Feitelberg's application for review because it is untimely and he failed to exhaust his administrative remedies.

Respectfully submitted,

By: _____

Lisa Jones Toms
Associate General Counsel
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006
(202) 728-8044 Direct Dial
(202) 728-8264 Facsimile

September 25, 2019

CERTIFICATE OF SERVICE

I, Lisa Jones Toms, certify that on this 25th day of September 2019, I caused a copy of FINRA's Brief in Opposition to the Application for Review (File No. 3-19214), to be sent by messenger and facsimile to:

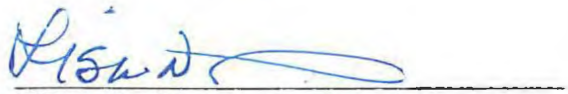
Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F St., NE
Washington, DC 20549

and via FedEx overnight delivery to:

Robert A. Fisher, Esq.
Nixon Peabody LLP
Exchange Place, 53 State Street
Boston, MA 02109-2835

Scott Seitz, Esq.
Nixon Peabody LLP
Exchange Place, 53 State Street
Boston, MA 02109-2835

Service was made on the Securities and Exchange Commission by messenger and on the Applicant's counsel by overnight delivery service due to the distance between the office of FINRA and counsel for the Applicant.



Lisa Jones Toms
Associate General Counsel
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006
(202) 728-8044 Direct Dial
(202) 728-8264 Facsimile