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

REPLY BRIEF BY MEMBER BRENDAN FEITELBERG IN SUPPORT OF HIS APPLICATION FOR REVIEW

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I. INTRODUCTION

Throughout all 27 pages of its opposition, FINRA fails to answer the fundamental question presented in this case: can FINRA permanently bar someone for life from the securities industry when the individual lacked actual notice of the disciplinary proceeding that enacted such punishment? Instead, FINRA mischaracterizes facts and Mr. Feitelberg's arguments, offers new reasons for the first time on appeal to support the bar, and in one instance—apparently unable to defend against Mr. Feitelberg's actual argument regarding notice—decides Mr. Feitelberg's argument is really about "unconstitutional bias," when it is plainly about notice. Indeed, FINRA erroneously contends that the Commission need never reach this pivotal question because Mr. Feitelberg has effectively waived his right to bring this application for review and, in any case, the Commission has generally approved of FINRA's notice provisions in the past.

Both arguments fail. On waiver, FINRA's arguments effectively put its actions beyond the review of the Commission—one cannot challenge a disciplinary action she does not know about—and are not in accord with the Securities Exchange Act of 1934 (the "Exchange Act") or Supreme Court case law. Furthermore, prior holdings by the Commission that FINRA's notice procedures are *generally* in accordance with the Exchange Act are not determinative here because Mr. Feitelberg's challenge to FINRA's notice rules is not a facial challenge. Rather, Mr. Feitelberg has illustrated why FINRA's rules, as *applied* in this manner, violate the Exchange Act. *See* § 78s (f) (requiring that "such rules are, and were *applied* in a manner, consistent with the purposes of [the Exchange Act]" (emphasis added)). For the reasons herein and in the original Brief by Member Brendan Feitelberg in Support of His Application for Review, (hereinafter, "Brief in Support") the Commission should rescind Mr. Feitelberg's bar and remand this matter back to FINRA for further proceedings.

II. ARGUMENT

a. This Application for Review is timely.

While FINRA contends in its Brief in Opposition to the Application for Review (hereinafter "Response") that "Feitelberg was required to file an application for review with the Commission 'within 30 days' after he was barred on November 23, 2018," Response at 10, this is directly contrary to the plain language of the statute (which FINRA fails to fully include). Section 78s(d)(2) of the Exchange Act explicitly states that "[a]ny action...shall be subject to review by the appropriate regulatory agency for such member...upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency *and received by such aggrieved person...*" *Id.* (emphasis added); *see also* SEC Rule of Practice 420 (An application for review is due within "30 days after the notice of the determination is filed with the Commission and received by the aggrieved person applying for review"). Mr. Feitelberg did not receive the letter in November (nor for the next six months) and thus, under the plain language of the statute, his window to appeal did not start.

FINRA's fallback argument—that under its rules Mr. Feitelberg "received" the letter because they sent it to the correct address, regardless of whether he actually "received" the letter as that term is commonly understood—is equally unavailing. *See* Response at 10 ("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)."). As the statute makes clear, Congress plainly intended the 30 day appeal window to start when the notice was "*received by such aggrieved person.*" § 78s(d)(2) (emphasis added). SEC Rule of Practice 420 uses nearly identical language. *Id.* (30 days begins after notice is "received by such aggrieved person.")

FINRA Rule 9134(b)(3) deals with when FINRA considers service by mail to have happened. *Id.* ("Service by mail is complete upon mailing."). But Mr. Feitelberg is not challenging that FINRA failed to follow its rules, rather he is challenging that the application of those rules here were not in accord with the notice provisions of the Exchange Act. *See* § 78s (f). And FINRA, of course, cannot override the express statutory text of an Act written by Congress (and the Commission) through an internal rule.

b. The doctrine of administrative exhaustion does not apply.

FINRA next attempts to avoid an examination of whether its lack of notice to Mr. Feitelberg was adequate by arguing that Mr. Feitelberg's claims are precluded by the doctrine of administrative exhaustion. *See* Response at 13. FINRA is wrong on the law and misrepresents Mr. Feitelberg's arguments, but as an initial matter it is worth noting that FINRA's argument is hopelessly circular. FINRA claims that Mr. Feitelberg has waived his ability to appeal FINRA's notice provisions because he did not participate in an administrative process for which he lacked notice. How would any defendant ever be able to make an as applied challenge to FINRA's notice provisions? Such a ruling would give FINRA nearly limitless authority (so long as it followed its own rules). Fortunately, the Commission's prior rulings and the law dictate a different, far more reasonable, result.

i. *McCarthy v. Madigan*, as applied here, is still good law.

In *McCarthy v. Madison*, a prisoner sought money damages for an Eighth Amendment claim from the Bureau of Prisons (BOP). 503 U.S. 140, 142 (1992). At that time, as currently is true of matters arising under the Exchange Act, there was no explicit statutory provision requiring a prisoner to exhaust his administrative remedies and McCarthy did not exhaust his BOP administrative remedies before suing in federal district court. *Id.* at 140. The district court

dismissed for failure to exhaust and the appeals court affirmed. *Id.* The Supreme Court reversed. *Id.*

The Court explained that "[o]f 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *Id.* at 144. Under the pertinent statute at that time, as under the Exchange Act today, administrative exhaustion was not mandated by Congress. *Id.* at 149. Thus, any preclusion of McCarthy's civil suit because of a failure to exhaust would necessarily need to sound in the principles behind the judicial doctrine of administrative exhaustion. "In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *Id.* at 146. Outlining numerous exceptions to the doctrine of administrative exhaustion, the Court stated: "In a similar vein, exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'" *Id.* at 148. (quotations and alterations in the original).

After this ruling was handed down, Congress passed the Prison Litigation Reform Act of 1995. A centerpiece of the Prison Litigation Reform Act's "effort to reduce the quantity ... of prisoner suits [was] an invigorated exhaustion provision." *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (internal citations and quotations omitted). Thus, Congress determined that for prospective suits filed by prisoners "exhaustion is required," rather than governed by "sound judicial discretion."

FINRA first takes the incredible position that the Prison Litigation Reform Act of 1995 effectively wiped any piece of *McCarthy* of any precedential value. *See* Response at 13-14 ("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[1] with a broad exhaustion requirement and "the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result.")..."). This is not so. Rather, the Prison Litigation Reform Act of 1995 merely moved suits "with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility" from the category of suits where exhaustion of administrative remedies is governed by "sound judicial discretion" to the category where exhaustion is required by Congress. Lest there be any doubt that the general principles of exhaustion outlined in *McCarthy* are still good law, the Court has repeatedly cited to the general principles outlined in *McCarthy* after the passage of the Prison Litigation Reform Act in 1995, when FINRA claims *McCarthy* was rendered null, including in *Woodford*, which as outlined below, FINRA erroneously believes is relevant to Mr. Feitelberg's matter. *See id.* at 89 (citing *McCarthy* to explain the purposes behind exhaustion); *id.* at 103 (J. Breyer concurring) (citing *McCarthy* and explicitly noting that if Congress has not legislated, exhaustion does not apply if there are "inadequate or unavailable administrative remedies"); *see also Knick v. Township of Scott*, 588 U.S. ——, 139 S. Ct. 2162, 2173-74 (2019) (citing *McCarthy*-principles for a case unrelated to the Prison Litigation Reform Act).

[1] Mr. Feitelberg believes this is intended to be a reference to the Prison Litigation Reform Act of 1995 because there is no Prison Litigation Reform Act passed in 1975 and, in any case, *McCarthy* is a 1992 ruling.

FINRA doubles down on this erroneous position by attempting to analogize *Woodford* to the matter at hand. *See* Response at 14 ("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..."). This argument fails because *Woodford* is a statutory interpretation case regarding the exhaustion provisions in the Prison Litigation Reform Act. *See, e.g., id.* at 93-103 (undertaking a traditional statutory interpretation inquiry). Thus, the "concepts" of *Woodford* cannot be applied to this matter because Congress did not intend for the Prison Litigation Reform Act of 1995 to apply to actions brought under the Exchange Act of 1934.

Indeed, FINRA's error ironically illuminates why the doctrine of administrative exhaustion does not apply here. Congress could require complete administrative exhaustion of members going through an SRO process as it did for prisoners suing prison in 1995, but it has declined to do so. Thus, the well-established, judicially created exceptions to the doctrine apply. If FINRA believes it should also be exempted from these exceptions, then it should lobby Congress, instead of attempting to shoehorn the requirements of the Prison Litigation Reform Act to matters arising under the Exchange Act.

ii. *This application for review is about notice, not unconstitutional bias.*

Apparently unable to defend against the actual argument, that the failure to provide notice violated the Exchange Act and failed to provide Mr. Feitelberg with procedural due process, FINRA next attempts to change Mr. Feitelberg's argument to one it can defend: that Mr. Feitelberg is alleging unconstitutional bias within an adjudication process. *See* Response at 23 ("Feitelberg's remaining assertions of an exception to the exhaustion requirement—

unconstitutional bias within an adjudication process (or irreparable injury)—also have no merit."). Although it should have been clear from the fact that over 20% of the brief explains why "FINRA's lack of actual notice violated the Exchange Act of 1934 and Mr. Feitelberg's procedural due process rights," Brief in Support at 7-10, Mr. Feitelberg can remove any doubt: this matter is about notice, not that FINRA is somehow biased against Mr. Feitelberg in a way that violates the Constitution.

Even as FINRA tries this maneuver, it acknowledges it is adding arguments to Mr. Feitelberg's brief: "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." *See* Response at 15, n.10. There is no shift. The case in question is *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 696 (3d Cir. 1979) and here is the totality of Mr. Feitelberg's use of the case in the brief:

> Exhaustion was not necessary because the petitioner was mounting a procedural challenge to the nature of the administrative regime itself, rather than a challenge to the merits of the board's decision. *Id.* at 575 ("[T]he clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion."); *see also Barry v. Barchi*, 443 U.S. 55, 63, 99 n.10 (1979) (citing to Gibson and rejecting "contention that Barchi should not have commenced suit prior to exhausting the procedure contemplated under § 8022. Under existing authority, exhaustion of administrative remedies is not required when 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 696 (3d Cir. 1979) (exhaustion does not apply to NASD's adjudication structure when the "administrative procedure is clearly shown to be inadequate to prevent irreparable injury").

Brief in Support at 13. Based on a single citation to a general principle espoused in *First Jersey Sec., Inc.*, FINRA suggests that Mr. Feitelberg is adopting the entirety of the argument for the Plaintiff in that case. He obviously is not.

Mr. Feitelberg has not failed to exhaust because a challenge to FINRA's lack of notice regarding a disciplinary proceeding fits within well-established exceptions to the doctrine of administrative exhaustion. *See* Brief in Support at 12-14; *see also McCarthy* 503 U.S. at 148 ("Exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that the question of the adequacy of the administrative remedy ... [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.") (internal citations and quotations omitted); *Barry v. Barchi*, 443 U.S. 55, 63, 99 n.10 (1979) (rejecting "contention that Barchi should not have commenced suit prior to exhausting the procedure contemplated under § 8022. Under existing authority, exhaustion of administrative remedies is not required when 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'"). This, of course, makes sense. Mr. Feitelberg's challenge is that he could not exhaust because FINRA failed to provide notice of the administrative disciplinary proceeding. To apply the doctrine of administrative exhaustion to such a challenge would effectively insulate FINRA from meaningful review regarding whether FINRA's notice provisions are adequate in any individual case.[2]

c. FINRA does not contest that "notice," as that term is used in § 78o-3 (h)(1), means actual notice.

As Mr. Feitelberg explained in his Brief in Support, the Supreme Court has repeatedly stressed in adjudicatory matters that the seriousness of the action determines what type of notice is required. *Id.* at 7-10; *see also Hannah v. Larche*, 363 U.S. 420, 442 (1960); *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950); *Dusenbery v. United States*, 534 U.S. 161, 167

[2] In addition to a challenge regarding notice, Mr. Feitelberg also challenged that FINRA's bar was impermissibly punitive. *See* Brief in Support at 10-11. After the Brief in Support was written, the Commission filed an opinion in *In the Matter of the Application of John M.E. Saad for Review of Action Taken by FINRA*, Release No. 86751 (Aug. 23, 2019). While Mr. Feitelberg reserves these issues for subsequent appeals, he acknowledges the Commission's opinion in *Saad* effectively forecloses this line of argument before the Commission.

(2002); *Greene v. Lindsey*, 456 U.S. 444, 449 (1982); *Gold v. S.E.C.*, 48 F.3d 987, 992 (7th Cir. 1995). Notably, FINRA never contends that the seriousness of this adjudicatory action is not the sort that the Court intended to require actual notice. This makes sense considering courts have routinely recognized the seriousness of a lifetime bar. *See Saad v. S.E.C.*, 718 F.3d 904, 906 (D.C. Cir. 2013) (A lifetime bar is "the securities industry equivalent of capital punishment").

Rather, FINRA contends that as an SRO the Due Process Clause does not apply to its actions. Response at 16-17. As Mr. Feitelberg acknowledged, it is true there is a circuit split on this issue (though FINRA omits this fact). *Compare Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) (holding the Due Process Clause does not apply to SRO actions), and *Epstein v. SEC*, 416 Fed. Appx. 142, 148 (3d Cir. 2010) (same), *with Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (applying due process). But this issue is entirely beside the point. The First Circuit, which is where this matter occurred, has explained that the requirements under § 78o-3 and the Due Process Clause are effectively the same. *See Cody v. S.E.C.*, 693 F.3d 251, 257 (1st Cir. 2012) ("By statute, FINRA was required to give Cody the substance of procedural due process."); *Gold* 48 F.3d at 991 ("This statutory fairness requirement is closely related to the fairness requirements derived from the Fifth Amendment's Due Process Clause. We have therefore assessed the fairness of the NYSE's jurisdictional rules and enforcement action against Gold by relying on traditional due process principles."). Thus, as FINRA implicitly acknowledges, this is the type of adjudicatory matter where the substance of due process, whether by the Due Process Clause or under § 78o-3, requires actual notice.[3]

[3] FINRA also argues that the SEC has approved of FINRA's notice procedures in the past. Response at 17-19. This is beside the point. Mr. Feitelberg is not arguing that FINRA failed to follow its own rules. Rather, he is arguing that these rules, as applied to him in this matter, are not in accord with the Exchange Act. *See* § 78s (f) (requiring that "such rules are, and were *applied* in a manner, consistent with the purposes of [the Exchange Act]").

d. Rescinding the bar and remanding this matter is consistent with the Commission's precedents and the Commission should disregard the new explanation FINRA presents in its Response for this bar.

The ultimate question at issue here—whether FINRA can permanently bar someone for life from the securities industry when the individual lacked actual notice of the disciplinary proceeding that enacted such punishment—has remained unanswered because the Commission has repeatedly repealed existing bars and remanded cases like this back to FINRA. *See In the Matter of the Application of Destina Mantar for Review of Action Taken by FINRA*, Release No. 79851, 2017 WL 221653 at *4 (Jan. 19, 2017) ("In cases challenging a bar imposed in expedited proceedings where there is reason to believe the applicant did not have actual notice of FINRA's information requests or notices, we have regularly remanded the matter back to FINRA."); *see also In the Matter of the Application of Kevin M. Murphy for Review of Action Taken by FINRA*, Release No. 79016, 2016 WL 5571633, at *4 (Sept. 30, 2016); *In the Matter of the Application of Robert J. Langley For Review of Disciplinary Action Taken by NASD*, Release No. 50917, 2004 WL 3486148 at *4 (Dec. 22, 2004); *In the Matter of the Application of Ryan R. Henry For Review of Action Taken by NASD*, Release No. 53957, 2006 WL 1565128, at *3 (June 8, 2006); *In the Matter of the Application of James L. Bari, Jr., For Review of Disciplinary Action Taken by NASD*, Release No. 48292, 2003 WL 21804686, at *2 (Aug. 6, 2003).[4] The Commission should do the same here. FINRA attempts to distinguish these cases by noting particular, non-decisive facts that do not align perfectly with Mr. Feitelberg's case. *See* Response 23-24 (noting that in *Robert J. Langley* the Commission noted a phone call between Mr. Langley and NASD). While no two

[4] Notably, in his original brief, Mr. Feitelberg stated that undersigned counsel has researched each member in question and FINRA appears to have not permanently barred any of them. Brief in Support at n.10. FINRA does not dispute this in its Response.

cases are identical, FINRA fails to explain why the central holding of these cases—that actual notice is critical—ought not to apply here.[5]

Finally, FINRA offers a new explanation for its actions on appeal, which makes remand appropriate because "FINRA's assertion in its motion to dismiss is no substitute for FINRA providing an explanation in the record." *Destina Mantar* 2017 WL 221653 at *4. FINRA repeatedly makes much of the fact that Mr. Feitelberg has not provided it with any evidence to support his [redacted] and suggests Mr. Feitelberg's [redacted] might not excuse his delay. Of course, FINRA has never asked for any evidence, nor provided Mr. Feitelberg with any sort of hearing or proceeding to offer such evidence. And whether Mr. Feitelberg's [redacted] was such that the delay was appropriate is exactly the sort of factual question that makes remanding for further proceedings appropriate.

III. CONCLUSION

"The fundamental requisite of due process of law is the opportunity to be heard. And the 'right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Greene* 456 U.S. at 449 (internal citations omitted) (internal quotations omitted). FINRA fails to explain why under the law it ought to be able to bar Mr. Feitelberg for life from his industry when he lacked actual notice of the disciplinary proceeding. Its attempts to put this issue beyond the review of the Commission are also uncompelling. Thus, for the foregoing reasons, as well as those outlined in the original Brief in Support, the Commission should rescind Mr. Feitelberg's bar and remand this matter back to FINRA for further proceedings.

[5] FINRA also notes—as Mr. Feitelberg acknowledged in his Brief in Support—that Mr. Feitelberg had notice of the original questions. But, FINRA fails to explain why it disagrees with Mr. Feitelberg and instead believes knowledge of the original questions, rather than the disciplinary proceeding is determinative.

Respectfully submitted this 9th day of October, 2019.

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Dated: October 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that Applicant's REPLY BRIEF BY MEMBER BRENDAN FEITELBERG IN SUPPORT OF HIS APPLICATION FOR REVIEW has been sent to the following parties entitled to notice as follows:

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This 9th day of October, 2019.

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