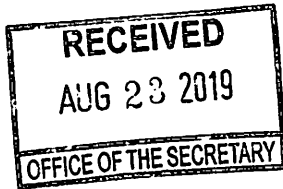


**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**



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

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

**I. INTRODUCTION**

The Financial Industry Regulatory Authority ("FINRA") moves to dismiss the application for review filed by Brendan D. Feitelberg. FINRA barred Feitelberg after conducting an expedited proceeding because he failed to respond to two FINRA requests for information and documents. The Commission should dismiss Feitelberg's application for two, independent reasons. First, Feitelberg's application for review is untimely. FINRA barred Feitelberg in November 2018, yet he failed to file his appeal until nearly six months past the 30-day appeal deadline established by the Securities Exchange Act of 1934 ("Exchange Act"). Second, Feitelberg failed to exhaust his administrative remedies. In accordance with FINRA Rule 9552, Feitelberg received several notices that warned him that FINRA would suspend, and eventually bar, him unless he provided FINRA with the information and documents it had requested. Those notices also advised him of the consequences of his failure to respond to FINRA's requests. Feitelberg does not dispute that he received FINRA's notices. Rather than responding or

informing the staff why he could not, Feitelberg opted to ignore FINRA's numerous notices. Feitelberg did not provide FINRA with any requested information, and he did not take any action to prevent his bar from the securities industry. By failing to take corrective action by producing the information and documents requested under FINRA Rule 8210, requesting a hearing prior to his suspension, or requesting a termination of his suspension and providing full compliance with FINRA's outstanding Rule 8210 requests before his bar was to take effect, Feitelberg forfeited his right to challenge this action before the Commission. The Commission should therefore dismiss Feitelberg's application for review.<sup>1</sup>

## **II. PROCEDURAL AND FACTUAL BACKGROUND**

Feitelberg was associated with United Planners' Financial Services of America A Limited Partner ("United Planners"), a FINRA member firm, from May 4, 2017, to April 11, 2018. United Planners filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") on April 12, 2018, reporting that it terminated Feitelberg because he "did not disclose a state tax lien which violated a Consent Order with the [State] of [Massachusetts] that was entered into in July 2017." RP 129.<sup>2</sup> It was United Planners' filing of the Form U5 that initiated FINRA's investigation.<sup>3</sup>

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<sup>1</sup> Pursuant to Commission Rule of Practice 161, FINRA requests that the Commission stay the briefing schedule in this matter while this motion is pending. 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive arguments that Feitelberg's appeal should be dismissed on procedural grounds before it reaches the underlying substance of this appeal.

<sup>2</sup> "RP \_\_" refers to the page numbers in the certified record filed by FINRA on July 5, 2019.

<sup>3</sup> Feitelberg currently is not associated with a FINRA member firm.

#### **A. FINRA Requests that Feitelberg Provide Information and Documents**

On April 26, 2018, FINRA sent Feitelberg a written request for information and documents pursuant to FINRA Rule 8210.<sup>4</sup> RP 33-34. The request sought from Feitelberg information concerning his alleged failure to disclose a tax lien, and it asked that he provide to FINRA a signed statement responding to the allegations, copies of all documents related to the matter, and state whether there were any additional reportable financial events that he had failed to timely disclose. RP 33. The request further asked that Feitelberg confirm whether there were any complaints regarding his employment at United Planners that were open or resolved within the three years prior to his termination, and if so, to provide additional documentation. RP 33. FINRA requested that Feitelberg provide a written response to FINRA by May 10, 2018. RP 33. The April 26, 2018 request informed Feitelberg that, among other things, he was obligated to respond “fully, promptly, and without qualification” to FINRA’s request, and warned that “any failure on [his] part to satisfy these obligations could expose [him] to sanctions, including a permanent bar from the securities industry.” RP 33.

FINRA sent the request by certified and first-class mail to Feitelberg’s address of record as contained in the Central Registration Depository (“CRD”<sup>8</sup>), which FINRA confirmed as Feitelberg’s current mailing address by a public records database search conducted on April 18, 2018. RP 2. The return receipt from the U.S. Postal Service showed that the certified mailing

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<sup>4</sup> 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).

was “unclaimed” on May 29, 2019, and returned to FINRA. RP 35. The U.S. Postal Service did not return the first-class mailing.

On May 9, 2019, Feitelberg acknowledged in an email to FINRA that he received and thus had actual notice of FINRA’s April 26, 2018 request. RP 38. Instead of responding promptly, however, Feitelberg twice requested that FINRA extend the deadline for his response. RP 37-38. FINRA granted the first extension request on May 9, 2019, which set a new deadline for Feitelberg to respond on May 24, 2018. RP 38. On May 23, 2018, Feitelberg nevertheless sought a second extension, claiming that “they shut down my server and email” and he needed to “consult [his] lawyer on this matter.” RP 37. FINRA granted Feitelberg’s second extension request, which extended the deadline for his response to June 13, 2018. RP 37. Feitelberg did not file a response to FINRA’s April 26, 2018 request for information and documents by the June 13, 2018 deadline. Nor did he seek any further extensions to respond to FINRA’s requests.

**B. FINRA Issues a Second Request for Information and Documents**

On July 24, 2018, FINRA sent Feitelberg a second, written request for the information and documents pursuant to FINRA Rule 8210. The second request included a copy of FINRA’s April 26, 2018 request. informed Feitelberg that FINRA did not receive the requested information and documents, and warned that “[f]ailure to comply with this request may subject [Feitelberg] to disciplinary action.” RP 41.

FINRA sent the second request, which set a deadline for Feitelberg’s response of August 3, 2018, by certified and first-class mail to Feitelberg’s CRD Address and by email at the same address that Feitelberg used to email FINRA and request two extensions. RP 41, 43. The return receipt provided that the certified letter arrived at Feitelberg’s address on July 27, 2018, but that



“no authorized recipient [was] available.”<sup>5</sup> RP 42. The U.S. Postal Service did not return the first-class letter. Again, Feitelberg did not respond to FINRA’s July 24, 2018 request for information and documents by the August 3, 2018 response deadline.

**C. FINRA Takes Expedited Action for Feitelberg’s Failures to Respond**

Because Feitelberg failed to respond in any manner to two FINRA requests for information and documents, FINRA commenced an expedited action against him under FINRA Rule 9552.<sup>6</sup> On August 20, 2018, FINRA provided Feitelberg written notice (the “Pre-Suspension Notice”) that it intended to suspend him from associating with any FINRA member in any capacity for his failure to respond to FINRA’s April 26, 2018, and July 24, 2018 requests, copies of which FINRA provided with the Pre-Suspension Notice. RP 47-48.

The Pre-Suspension Notice informed Feitelberg that FINRA would suspend him on September 13, 2018, unless he took corrective action by complying fully with FINRA’s April 26, 2018, and July 24, 2018 requests for information and documents by the suspension date. RP 47. The Pre-Suspension Notice further explained that Feitelberg could make a written request for a hearing pursuant to FINRA Rule 9552(e), which if made before the suspension date would stay

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<sup>5</sup> A reminder to “schedule redelivery” was the last transaction history detail inserted for the certified mailing. RP 42.

<sup>6</sup> FINRA Rule 9552(a) states that “[i]f a member, person associated with a member or person subject to FINRA’s jurisdiction fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the FINRA By-Laws or FINRA rules, or fails to keep its membership application or supporting documents current, FINRA staff may provide written notice to such member or person specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in suspension of membership or of association of the person with any member.”

the effective date of any suspension.<sup>7</sup> RP 47. The Pre-Suspension Notice advised Feitelberg that, if suspended, he could request that FINRA terminate his suspension pursuant to FINRA Rule 9552(f) on the ground that he complied fully with FINRA's outstanding requests for information and documents.<sup>8</sup> RP 48. The Pre-Suspension Notice stressed that, failure to request termination of the suspension within three months would result in Feitelberg's automatic bar from the securities industry on November 23, 2018, pursuant to Rule 9552(h).<sup>9</sup> RP 48.

FINRA sent the Pre-Suspension Notice to Feitelberg's CRD Address by certified and first-class mail.<sup>10</sup> RP 47. The certified mail receipt indicated that the U.S. Postal Service returned the certified mailing to FINRA as "unclaimed." RP 52-53. The first-class mailing was not returned to FINRA. Feitelberg did not respond to the Pre-Suspension Notice, and he did not answer FINRA's outstanding requests for information and documents.

**D. 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, 2018, and July 24, 2018 requests for information and documents by the suspension date.

Accordingly, on September 13, 2018, FINRA sent Feitelberg written notice (the "Suspension

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<sup>7</sup> The Pre-Suspension Notice provided Feitelberg with the address of FINRA's Office of Hearing Officers where he could direct a request for a hearing. RP 47.

<sup>8</sup> FINRA Rule 9552(f) states in part, "[a] member or person subject to a suspension pursuant to this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision."

<sup>9</sup> FINRA Rule 9552(h) states, "[a] member or person who is suspended under this Rule and fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred."

<sup>10</sup> 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.

Notice”) that he was suspended, effective immediately, from associating with any FINRA firm in any capacity. RP 57-58. The Suspension Notice advised Feitelberg that he could file, under FINRA Rule 9552(f), a written request that FINRA terminate his suspension because he complied fully with FINRA’s outstanding information and document requests. RP 57. It also reiterated that, if Feitelberg failed to seek a termination of his suspension by November 23, 2018, FINRA would automatically bar him from the securities industry under FINRA Rule 9552(h). RP 57.

FINRA sent the Suspension Notice to Feitelberg’s CRD Address by certified and first-class mail.<sup>11</sup> The certified mail receipt indicates 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 did not respond to the Suspension Notice.

**E. FINRA Bars Feitelberg in Accordance with FINRA Rule 9552(h)**

Feitelberg did not challenge his suspension in the months leading up to November 23, 2018 or comply in any manner with FINRA’s April 26, 2018, 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, from associating with any FINRA member in any capacity in accordance with FINRA Rule 9552(h). RP 65-66. The Bar Notice informed Feitelberg that he could appeal FINRA’s action by filing an application for review with the Commission within 30 days of his receipt of the notice. RP 65. FINRA sent the

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<sup>11</sup> A public records database search FINRA conducted on September 10, 2018, confirmed that Feitelberg’s current mailing address remained consistent with the CRD address to which FINRA sent the Suspension Notice. RP 55-56.

Bar Notice to Feitelberg's CRD address by certified and first-class mail.<sup>12</sup> 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.

**F. Feitelberg Responds to the Bar Notice More Than Five Months after FINRA Sent It**

More than five months after FINRA barred him, Feitelberg hired an attorney who contacted FINRA on his behalf to inquire about the possibility of FINRA lifting his bar. On May 9, 2019, FINRA requested by email that Feitelberg's counsel confirm he represented Feitelberg with regard to the matter so that it could send "copies of FINRA correspondence previously sent" to Feitelberg. RP 70. After Feitelberg's counsel confirmed his representation of Feitelberg, on May 10, 2019, FINRA emailed Feitelberg's counsel copies of the FINRA's April 26, 2018, and July 24, 2018 requests for information and documents, as well as the Pre-Suspension, Suspension, and Bar Notices. RP 69.

On May 13, 2019, Feitelberg's counsel emailed FINRA providing Feitelberg's response, with attachments, to FINRA's April 26, 2018 request and explaining that his delayed response was because he was ill, hospitalized, and his recovery "was extensive and lasted several months." RP 81-92. Feitelberg, however, did not provide FINRA with any documentation, such as a doctor's note or medical instructions, for his health condition. By letter dated May 24, 2019, FINRA informed Feitelberg's counsel that it had received his May 13, 2019 email. RP 93.

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<sup>12</sup> A search of a public records database confirmed that, as of November 20, 2018, Feitelberg's current mailing address was the CRD address to which FINRA sent the Bar Notice. RP 63-64.

FINRA apprised counsel, however, that Feitelberg failed to respond to two FINRA requests for information and documents issued under FINRA Rule 8210, and he had failed also to request a hearing or take corrective action in light of the Pre-Suspension Notice and the Suspension Notice. RP 93. Moreover, FINRA informed counsel that, as provided in the Bar Notice, Feitelberg had 30 days to appeal FINRA's action barring him, an appeal which he failed to pursue timely with the Commission. RP 93. FINRA informed Feitelberg's counsel that Feitelberg "failed to exhaust his administrative remedies," and thus FINRA would not consider lifting Feitelberg's bar. RP 94.

#### **G. Feitelberg Files an Untimely Application for Commission Review**

On June 21, 2009, almost seven months after FINRA barred him, Feitelberg submitted an application requesting the Commission to review FINRA's action barring him from associating with any FINRA member. RP 123-26. In his application for review, Feitelberg claims that he became ill and was hospitalized in August 2018. RP 123. Feitelberg further claims that he was not aware of FINRA's action barring him until he returned to work in February 2019. RP 123.

### **III. ARGUMENT**

The Commission should dismiss Feitelberg's application for review for two, independent reasons. First, it is time barred. Feitelberg filed his appeal nearly seven months after his bar took effect, which is well beyond the 30-day appeal deadline established by the Exchange Act. Second, Feitelberg failed to exhaust his administrative remedies by either promptly providing FINRA the information and documents it requested or requesting a hearing. By ignoring numerous written requests and notices from FINRA, failing to follow FINRA procedures to

challenge his suspension, and doing nothing to prevent his bar from the securities industry, Feitelberg forfeited his ability to challenge FINRA's action.

The excuses that Feitelberg raises in his significantly late application for review fail and the Commission should reject them. Feitelberg's medical circumstance, albeit unfortunate, neither excuses his failure to exhaust his remedies before FINRA, nor does it fall within the narrowly construed extraordinary circumstances exception for his untimely appeal. Moreover, Feitelberg's belated attempt to comply with FINRA's requests for information and documents, and FINRA's denial of his request for reconsideration, are not events that warrant extending the appeal deadline. Feitelberg's application for review is untimely and he failed to exhaust his administrative remedies. The Commission should dismiss the appeal.

**A. Feitelberg's Application for Review Should Be Dismissed as Untimely**

Section 19(d)(2) of the Exchange Act provides that any person aggrieved by a final FINRA action must file an application for review with the Commission "within 30 days" after the date the notice of the action was filed with the Commission and received by the aggrieved person applying for review. 15 U.S.C. § 78s(d)(2). SEC Rule of Practice 420 is the "exclusive remedy" for seeking an extension of the 30-day appeal period. 17 C.F.R. § 201.420(b). That rule provides that the Commission will allow the filing of a late application for review only upon "a showing of extraordinary circumstances," *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, at \*7 & n.9 (May 20, 2008), which is "narrowly construed and applied only in limited circumstances." *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 SEC LEXIS 641, at \*10 (Mar. 1, 2013).

Feitelberg's appeal is woefully late and the Commission should dismiss it. FINRA effected service of the Bar Notice when it mailed the notice to Feitelberg's CRD address on

November 23, 2018. *See* FINRA Rule 9134; FINRA Rule 9552(b). FINRA’s service provided him with constructive notice of FINRA’s action and “started the running of the appeal period.” *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at \*16 (Feb. 8, 2016). The appeal period therefore ran from FINRA’s service date on November 23, 2018, to the deadline for appeal, December 27, 2018. *See id.* & n.21. Feitelberg did not did not move to extend the appeal deadline. Therefore, Feitelberg’s application for review, dated June 21, 2019, is nearly six months past the 30-day appeal deadline.

There are no extraordinary circumstances warranting the Commission’s acceptance of Feitelberg’s late-filed application. Over a period of several months, FINRA sent Feitelberg written requests for information and documents under FINRA Rule 8210 and notices related to the expedited proceedings it brought against him under FINRA Rule 9552, which resulted in his bar from the securities industry on November 23, 2018. Feitelberg does not deny receiving each of these written requests and notices, but offers only that he should not be barred “for the offense of not opening his mail,” which he claims happened in February 2019 when he “returned to work” after an illness.<sup>13</sup> RP 124. But even if this is true, Feitelberg did not take any action to seek an extension of the appeal filing deadline, and instead waited an additional six months to file an application of review with the Commission. Feitelberg’s purported belated discovery of

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<sup>13</sup> In his application for review, Feitelberg claims he “never received the Bar Letter in November.” RP 123 n.1. He, however, does not deny that he received service of the Bar Notice at his current mailing address as provided in CRD. Indeed, as the record facts attest, FINRA sent the Bar Notice to Feitelberg’s CRD address by certified mail, which the U.S. Postal Service delivered upon receiving a signature for the mailing on November 30, 2018, and by first class mail, which was not returned to FINRA. RP 65-68. Contrary to Feitelberg’s claim, he received notice of FINRA’s action barring him. *See Christine D. Memet*, Exchange Act Release No. 83711, 2018 SEC LEXIS 1876, at \*14 (July 25, 2018) (finding that an applicant receives proper notice of each mailing under FINRA’s rules when they are sent to the applicant’s residential address as reflected in CRD).

his bar does not excuse his untimely appeal.<sup>14</sup> *Rogelio Guevara*, Exchange Act Release No. 78134, 2016 SEC LEXIS 2233, at \*8 (Jun. 22, 2016) (finding the delayed collection of FINRA’s bar notice does not excuse the failure to file a timely appeal).

Feitelberg was required to file an application for review with the Commission within 30 days after service of the Bar Notice. He, however, did not file his appeal until nearly seven months later, and he did so without ever seeking from the Commission an extension of the filing deadline. His claim that he simply failed to open his mail because of illness does not give rise to the type of extraordinary circumstances that warrant that Commission review of his untimely application. *See Kenneth Joseph Kolquist*, Exchange Act Release No. 82202, 2017 SEC LEXIS 3749, \*13 (Dec. 1, 2017) (finding no extraordinary circumstance or substantive evidence that respondent’s ██████████ prevented him from filing a timely an application for review or seeking a filing extension). As the Commission has previously held, “strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief.” *Ceballos*, 2013 SEC LEXIS 641, at \*10. “[P]arties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed.” *See id.* (citation omitted). 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

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<sup>14</sup> Feitelberg claims in his application for review that his appeal is timely because he filed it within 30 days of FINRA informing him, on May 24, 2019, that it would not undo the bar imposed on him on November 23, 2018, pursuant to FINRA Rule 9552(h). He is mistaken. FINRA’s denial to reconsider lifting the bar is not an action that is reviewable by the Commission and thus does not serve, as Feitelberg suggests, to reset the 30-day appeal deadline. *Cf. Warren B. Minton*, 55 S.E.C. 1170, 1176 (2002) (declining jurisdiction to review FINRA’s denial of Minton’s motion to set aside a default because it imposed no new sanctions); *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1098 (1998) (“The fact that Van Alstyne may have been affected adversely by the NAC’s denial does not transform the denial into a reviewable NASD order.”).



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

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

The Commission should dismiss Feitelberg's application for review for a second, independent reason: he failed to follow FINRA procedures, and consequently, failed to exhaust his administrative remedies. As the Commission has long held, it "will not consider an application for review if the applicant failed to exhaust FINRA's procedures for contesting the sanction at issue." *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 administrative remedies and FINRA barred him for failing to respond to FINRA's Rule 8210 request). The precedent in this area is well-settled. *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); *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); *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).

An aggrieved party, like Feitelberg, is required to exhaust his administrative remedies before resorting to an appeal. Those who fail to exercise their rights to administrative review cannot claim that they have exhausted their administrative remedies. *Royal Sec. Corp.*, 36 S.E.C. 275, 277 n.3 (1955). Federal courts, as well as the Commission, have applied the exhaustion doctrine with equal force to FINRA proceedings. *See Lang v. French*, 154 F.3d 217, 220 (5th Cir. 1998) (holding that “[NASD] disciplinary orders are reviewable by the [Commission] after administrative remedies within the NASD are exhausted”); *Swirsky v. NASD*, 124 F.3d 59, 62 (1st Cir. 1997) (same).

For several months, Feitelberg repeatedly neglected to pursue his administrative remedies to prevent or challenge his suspension. The facts show that Feitelberg was fully aware of FINRA’s requests for information and documents. Feitelberg simply chose not to respond to these requests, despite FINRA’s warnings therein that his failure to respond could result in proceedings whereby FINRA would impose serious sanctions on him, including a bar.

Because he failed to comply with FINRA requests, FINRA commenced an expedited proceeding against him under FINRA Rule 9552. FINRA advised Feitelberg in the Pre-Suspension Notice that FINRA would suspend him, unless he took corrective action by complying with FINRA’s outstanding requests for information and documents or, alternatively, requesting a hearing under FINRA Rule 9552(e) by the suspension date.

Feitelberg, however, did not take corrective action, nor did he request a hearing. Accordingly, FINRA suspended Feitelberg. FINRA’s Suspension Notice clearly advised Feitelberg of his right, under FINRA Rule 9552(f), to request that FINRA terminate his suspension on the ground that he had fully complied with FINRA’s requests for information and documents. RP 57-58.

Feitelberg nevertheless neither requested the termination of his suspension nor provided complete compliance with FINRA's Rule 8210 requests that would support lifting his suspension. Consequently, pursuant to FINRA Rule 9552(h), FINRA deemed Feitelberg in default and barred him from associating with any FINRA member in any capacity. RP 65-66.

The proper exhaustion of administrative remedies requires a firm or individual to use all the procedural steps available under FINRA's rules, and to do so properly so that FINRA can address the issues on the merits. *See Memet*, 2018 SEC LEXIS 1876, at \*9 & n.12 (citing *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)). FINRA's procedures for challenging a suspension and avoiding a bar imposed under FINRA Rule 9552 provide several options. Feitelberg could have: (1) taken corrective action by producing the documents or information requested under FINRA Rule 8210 by the suspension date; (2) made a written request for a hearing prior to the suspension date; or (3) filed a written request for termination of a suspension and provide full compliance with any outstanding request for information and documents prior to the date a bar is set to take effect. *See Lin-Lin Hsu*, Exchange Act Release No. 78899, 2016 SEC LEXIS 3585, at \*7 (Sept. 21, 2016). Feitelberg, however, did none of these things, and he thus failed to exhaust the administrative remedies.

The exhaustion requirement enables an "orderly review of FINRA actions by 'promot[ing] the development of a record' by FINRA 'in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review.'" *Dowd*, 2018 SEC LEXIS 1875, at \*11 (citations omitted). By failing to take action in accordance with FINRA rules, Feitelberg forfeited his ability to challenge the actions of FINRA before the Commission. *See Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at \*6 (May 6, 2010) (finding in a Rule 9552 proceeding that "FINRA's actions

were in accordance with its rules and the purposes of the Exchange Act [when] rules set forth the procedures for suspending and ultimately barring individuals who fail to supply requested information or take corrective action”); *David I. Cassuto*, 56 S.E.C. 565, 570-72 (2003) (dismissing application for review because of applicant’s failure to ask for a hearing or to move for reinstatement after suspension in NASD action stemming from failure to respond to Rule 8210 requests for information).

Although Feitelberg claims that he suddenly became ill and was ultimately hospitalized in August 2018, he has not provided supporting documentation that a health issue prevented him from responding to FINRA’s requests for information. More importantly, although he had actual notice of FINRA’s requests for information and documents, which informed him of the consequences of a failure to respond, Feitelberg never informed FINRA staff of his medical circumstance, and he did not 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 and internal quotation marks omitted); *Curtis Steven Culver*, Exchange Act Release No. 75774, 2015 SEC LEXIS 3541, at \*10-11 (Aug. 27, 2015) (finding unsubstantiated personal problems do not excuse an application’s failure to respond); *PAZ Secs., Inc.*, 58 S.E.C. 859, 872 (2005) (same).

As noted in FINRA’s request letters, FINRA Rule 8210 requires prompt, full compliance without qualification. *See e.g.*, RP 33. If Feitelberg could not meet the deadline to respond to FINRA’s requests because of a medical condition, he was obligated—as he had done before when he emailed FINRA and sought an extension twice—to contact the investigator and explain

why he was unable to do so. *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’s purported medical circumstance does not excuse his repeated failures to respond to FINRA’s requests.<sup>15</sup>

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.”). By failing to exhaust his administrative remedies before seeking relief from the Commission, Feitelberg has forfeited his opportunity to challenge FINRA’s action. The Commission should dismiss the appeal.<sup>16</sup>

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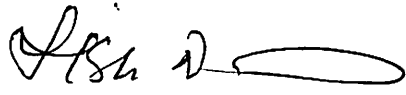
<sup>15</sup> Moreover, Feitelberg’s submission of information and documents after he was barred is not an exhaustion of his administrative remedies. Indeed, supplying information and documents requested under FINRA Rule 8210 *after* FINRA’s final action impedes the ability for FINRA to conduct its investigations fully and expeditiously. *PAZ*, 58 S.E.C. at 871. The Commission should therefore find, as it did previously, that Feitelberg’s belated response to FINRA’s requests for information and documents is “irrelevant given his failure to exhaust the administrative remedies available under FINRA.” *Culver*, 2015 SEC LEXIS 3541, at \*10 n.10.

<sup>16</sup> Feitelberg’s claim that FINRA barring him is punitive is premature. The cases he cites, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), and *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), have no relevance to the issues addressed in our motion to dismiss Feitelberg’s application for review. The threshold procedural questions in this case are whether Feitelberg’s appeal is timely under Section 19(d)(2) of the Exchange Act, and whether the Commission should dismiss the application for review because Feitelberg failed to exhaust the administrative remedies made available to him by FINRA.

#### 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

August 22, 2019

**CERTIFICATE OF SERVICE**

I, Lisa Jones Toms, certify that on this 22nd day of August 2019, I caused a copy of FINRA's Motion to Dismiss Feitelberg's Application for Review and to Stay Briefing Schedule, in the matter of Application for Review of Brendan D. Feitelberg, Administrative Proceeding No. 3-19214, to be served by messenger on:

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

and via FedEx overnight delivery on:

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 Commission by messenger and on the applicant by FedEx due to the distance between the office of FINRA and the applicant.



Lisa Jones Toms  
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Financial Industry Regulatory Authority

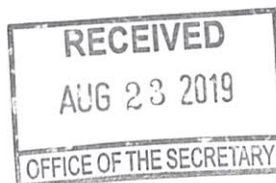
**Lisa Jones Toms**  
Associate General Counsel

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

August 22, 2019

**BY MESSENGER**

Vanessa A. Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Room 10915  
Washington, DC 20549-1090



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

Dear Ms. Countryman:

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

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Jones Toms", followed by a long, horizontal, sweeping flourish.

Lisa Jones Toms

Enclosures

cc: Robert Fisher, Esq.  
Scott Seitz, Esq.