BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application for Review of

Robert L. Bryant, III

File No. 3-19892

FINRA'S RESPONSE TO APPLICANT'S SUPPLEMENTAL BRIEF

I. INTRODUCTION

Pursuant to the Commission's Order Requesting Additional Briefing dated May 26, 2021, FINRA files this response to Robert L. Bryant, III's supplemental brief. Bryant urges the Commission to disregard the purpose of the 30-day deadline set forth in Section 19(d)(2) of the Securities Exchange Act of 1934 ("Exchange Act") and the Commission's precedent applying the 30-day deadline in similar circumstances and accept his late appeal. The Commission should reject Bryant's arguments and find that he was required to file his appeal within 30 days of receiving FINRA's September 29, 2017 disqualification notice (the "SD Notice"). Because Bryant filed his appeal more than 2.5 years after he received the SD Notice and has failed to show extraordinary circumstances for his late appeal, the Commission should dismiss Bryant's appeal as untimely.

Bryant does not dispute that he received a copy of the SD Notice when FINRA issued it. Nor does he dispute that where an applicant receives notice of an SRO action, the Commission has repeatedly held that the SRO's failure to file notice of its action pursuant to Exchange Act Section 19(d)(1) does not extend the 30-day deadline to file an appeal pursuant to Exchange Act Section 19(d)(2) and Commission Rule of Practice 420. Instead, he argues that the SD Notice

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did not notify him that he could appeal to the Commission. He asserts that this fact purportedly distinguishes his late-filed appeal from late appeals previously rejected as untimely by the Commission.

The Commission should reject this argument. The Commission has consistently held that an SRO's failure to file notice of a final action with the Commission does not extend an applicant's 30-day deadline to appeal. Contrary to Bryant's assertion, the Commission's holdings in those cases have not depended, either explicitly or implicitly, upon the applicant being told that it had a right to appeal. For example, in *Orbixa Technologies*, Exchange Act Release No. 70893, 2013 SEC LEXIS 3588 (Nov. 15, 2013), the applicant challenged NYSE's termination of a data access agreement and reinvoicing applicant for underpayments pursuant to the agreement. Although the applicant had notice of NYSE's termination and reinvoicing, NYSE did not file notice of its action with the Commission.

Nonetheless, the Commission found that applicant's appeal was untimely because it did not file its appeal until more than a year after it received notice of the action and failed to demonstrate that extraordinary circumstances warranted extending applicant's 30-day deadline. *Id.* at *9-10. The Commission did not condition its holding on NYSE providing notice to applicant when it terminated the agreement and reinvoiced it that it could appeal NYSE's action to the Commission.[1] Rather, the Commission found that the applicant failed to file its appeal within 30 days of receiving notice of NYSE's action and that NYSE's failure to file notice of the action with the Commission did not extend applicant's appeal deadline.

[1] This makes perfect sense. Presumably, NYSE did not view its action as one requiring notice to the Commission pursuant to Exchange Act Section 19(d)(1). As such, NYSE would not have informed applicant when it terminated the agreement and reinvoiced it for underpayments that applicant could appeal NYSE's determination to the Commission.

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Likewise, in *Boston Options Exchange Group, LLC*, Exchange Act Release No. 59927, 2009 SEC LEXIS 1567 (May 14, 2009), the Commission—interpreting provisions of the Exchange Act with language similar to Sections 19(d)(1) and (2)—held that the 30-day deadline to appeal an action by a securities information processor ("SIP") that prohibited or limited access to services applied despite the SIP failing to file notice of its action with the Commission. The SIP did not file a notice with the Commission because the SIP did not view its action as prohibiting or limiting services. *Id.* at *10 n.7. Despite the SIP's failure to file notice with the Commission, the Commission rejected applicant's appeal as untimely because it did not seek review within 30 days of notice of any action by the SIP. *Id.* at *14. The Commission's holding did not depend upon applicant being notified that it could appeal the SIP's action, but simply that the applicant had received notice of the SIP's action and it failed to file is appeal of the action within 30 days.

This rationale applies to the instant case. When it issued the SD Notice, FINRA did not view it as an action that required notifying the Commission pursuant to Exchange Act Section 19(d)(1). Nonetheless, Bryant received a copy of the SD Notice when it was issued. He could have filed a timely appeal, irrespective of the SD Notice's failure to spell this out. Bryant, however, chose not to file his appeal within 30 days of receiving notice.[2] The Commission

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[2] Bryant argues that FINRA consistently informed him that a FINRA eligibility proceeding was the proper channel to challenge the SD Notice. *See* Bryant's Brief, at 2-3. FINRA's views on how to challenge a statutory disqualification notice, however, have no bearing on the Commission's determination whether such a notice is reviewable under the Exchange Act or Bryant's ability to timely seek the Commission's review of a disqualification notice. Moreover, Bryant's intermittent attempts to get FINRA to vacate the SD Notice—which FINRA consistently rejected beginning shortly after it issued the SD Notice in September 2017 through and until May 2020—do not support Bryant's request to have the Commission review his late-filed appeal. *See* Executed Supplemental Affidavit filed with Bryant's March 2, 2021 Brief. If anything, these efforts, which often included Bryant's attorney, show that instead of promptly

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should reject Bryant's unfounded argument that had FINRA filed the SD Notice with the Commission, he might have had "at least some modicum of notice that the SD Notice could be deemed to trigger the need for immediate appeal." Bryant's Brief, at 3. The Commission precedent discussed above did not hinge upon the applicant being told, either directly or indirectly, that it could appeal to the Commission, and Bryant does not explain how FINRA filing the SD Notice with the Commission would have made any difference to his decision to wait more than 2.5 years to file this appeal.[3] Further, Section 19(d)(2)'s requirement that FINRA file with the Commission notice of a final action serves to give the Commission an opportunity to, on its own, review the action. *See Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 SEC LEXIS 641, at *9 n.10 (Mar. 1, 2013) (stating that the purpose of Section 19(d)(2)'s requirement that FINRA file notice of the action with the Commission is so that it can determine "whether to review the sanction on its own motion"). While the Commission arguably was deprived of this opportunity when FINRA issued the SD Notice, Bryant was not. Consequently, he should have filed his appeal by the end of October 2017—not in June 2020.

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seeking Commission review of the SD Notice after FINRA first rejected his attempts to vacate it, he tried on several occasions over the course of 2.5 years to get the answer that he wanted by raising new arguments and approaching different FINRA staff. *Cf. Pennmont Secs.*, Exchange Act Release No. 61967, 2010 SEC LEXIS 1353, at *20-21 (Apr. 23, 2010) ("Applicants elected to pursue their objections in the federal courts rather than filing an application for review with the Commission. Having made this election, Applicants cannot complain at this stage about the consequences of their choices."). Simply put, Bryant does not provide any legitimate explanation why he waited until June 4, 2020, to file his appeal.

[3] Exchange Act Rule 19d-1, which governs SRO notices filed pursuant to Exchange Act Section 19(d)(1), does not require that an SRO state in any notice filed with the Commission that a party has a right to appeal the SRO's action and must do so within 30 days. *See, e.g.*, 17 C.F.R. §§ 240.19d-1(d), (f) (setting forth required contents of notices).

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IV. CONCLUSION

To effectuate the purpose of affording finality to SRO actions and encouraging parties to timely seek Commission review of SRO actions, the Commission should read Exchange Act Section 19(d)(2) and Rule of Practice 420(b) as requiring an applicant to file an appeal within 30 days after the date an SRO files notice of its action with the Commission *or* the notice is received by an applicant. The Commission has previously followed this approach, and Bryant has provided no legitimate reason to deviate from this well-reasoned precedent. Bryant waited more than 31 months after receiving the SD Notice to seek Commission review. This is the antithesis of a timely appeal, and Bryant has not demonstrated that extraordinary circumstances justify his choice to delay seeking Commission review. FINRA respectfully requests that the Commission dismiss this appeal.

Respectfully submitted,

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June 23, 2021

CERTIFICATE OF COMPLIANCE

I, Andrew Love, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

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CERTIFICATE OF SERVICE

I, Andrew Love, certify that on this 23rd day of June 2021, I caused a copy of FINRA's Response to Applicant's Supplemental Brief, in the matter of Application for Review of Robert L. Bryant, III, Administrative Proceeding No. 3-19892, to be filed through the SEC's eFAP system and served by electronic mail on:

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