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February 1, 2021

VIA ELECTRONIC MAIL

Vanessa A. Countryman, Secretary  
Securities and Exchange Commission 100 F. St., NE  
Room 10915  
Washington, D.C. 20549-1090  
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RE: In the Matter of the Application for Review of Shad Nhebi Clayton  
Administrative Proceeding No. 3-20192

Dear Ms. Countryman:

Enclosed please find FINRA's Motion to Dismiss Shad Nhebi Clayton's Application for Review and to Stay Briefing in the above-captioned matter.

Please contact me at (202) 728-8255 if you have any questions.

Sincerely,

/s/ Gary Dernelle

Gary Dernelle

Enclosures

cc: Shad Nhebi Clayton (via Email)

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

In the Matter of the Application of  
Shad Nhebi Clayton  
For Review of Action Taken by  
Financial Industry Regulatory Authority  
File No. 3-20192

**FINRA'S MOTION TO DISMISS SHAD NHEBI CLAYTON'S  
APPLICATION FOR REVIEW AND TO STAY BRIEFING**

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**FINRA’S MOTION TO DISMISS SHAD NHEBI CLAYTON’S  
APPLICATION FOR REVIEW AND TO STAY BRIEFING**

**I. INTRODUCTION**

Shad Nhebi Clayton (“Clayton”) requests that the Securities and Exchange Commission (“Commission”) review a nearly ten-year-old, final FINRA action. FINRA’s action stems from an investigation it commenced to determine whether Clayton violated securities industry rules and regulations by failing to disclose a regulatory action and tax liens or judgments on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”). As part of its investigation, FINRA sent to Clayton’s residential address as reflected in the Central Registration Depository (“CRD”®) two written requests that directed him to provide information and documents pursuant to FINRA Rule 8210.

Clayton did not respond in any manner to either of these requests. Consequently, on June 2, 2011, FINRA commenced an expedited proceeding under FINRA Rule 9552 to compel Clayton’s response. In a written notice sent to Clayton’s CRD address, FINRA informed Clayton that it intended to suspend him from associating in any capacity with any FINRA

member on September 6, 2011, unless he took corrective action or requested a hearing. Once suspended, and absent a written request that FINRA terminate his suspension on the ground of full compliance with FINRA's two requests for information and documents, FINRA further advised Clayton, FINRA would automatically bar him from the securities industry in three months.

On June 27, 2011, after Clayton did not take corrective action or request a hearing, FINRA suspended him. He did not thereafter request that FINRA terminate his suspension or provide the information and documents that FINRA twice requested. Accordingly, on September 6, 2011, FINRA sent written notice to Clayton's CRD address that FINRA had barred him, effective immediately, from associating in any capacity with any FINRA member.

Given these undisputed facts, FINRA moves to dismiss Clayton's application for review on two, independent grounds.<sup>1</sup> First, Clayton failed to avail himself of the procedures available to challenge FINRA's action under FINRA Rule 9552. He did not take corrective action in response to FINRA's notice that it intended to suspend him, he did not request a hearing, and he did not request that FINRA terminate his suspension on the ground that he complied fully with FINRA's two requests for information and documents. Clayton therefore failed to exhaust his administrative remedies before resorting to an appeal, and the Commission should dismiss his application for review. His claim that he did not receive any of the relevant correspondence FINRA sent to his CRD address is of no moment. Clayton received constructive notice of

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<sup>1</sup> FINRA also moves the Commission, under Rule 161 of the Commission's Rules of Practice, to stay the issuance of a briefing schedule while it considers FINRA's motion to dismiss Clayton's application for review. *See* 17 C.F.R. § 201.161. The Commission should evaluate first FINRA's dispositive motion before it considers the merits of Clayton's appeal.

FINRA's action, and the fact that he did not keep his CRD address current does not excuse his failure to challenge that action in a FINRA forum.

Second, Clayton's application for review is patently late. The time for Clayton to seek Commission review of FINRA's action passed nearly a decade ago. His claim that he was unaware of FINRA's action barring him from the securities industry is simply insufficient to establish the type of extraordinary circumstances that would warrant the Commission extending the statutory deadline to appeal FINRA's action by almost ten years. And in any event, his assertion that he learned of FINRA's action in 2017, more than three years ago, shows that Clayton did not promptly appeal that action when he claims he first learned of it. For these reasons, the Commission should dismiss Clayton's application for review as untimely.

## **II. FACTS**

### **A. Background**

Clayton registered as an investment company and variable contracts products representative of FINRA member PFS Investments, Inc. ("PFS"), on May 29, 2006. RP 71.<sup>2</sup> On January 24, 2011, PFS received notice from the Iowa Department of Insurance that Clayton's insurance license had been suspended due to an unpaid state debt. RP 1, 79-80. PFS thereafter terminated Clayton on March 3, 2011, because he failed to respond to the firm's request that he amend his Form U4.<sup>3</sup> RP 1, 71, 79.

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<sup>2</sup> "RP \_\_\_" refers to the page numbers in the certified record that FINRA filed with the Commission on February 1, 2021.

<sup>3</sup> Clayton has not since registered through another FINRA member. RP 71.



**B. Clayton Fails to Respond to Two Requests for Information and Documents Issued Pursuant to FINRA Rule 8210**

FINRA commenced an investigation after PFS filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) reporting Clayton’s termination. RP 1, 79-80. On March 16, 2011, FINRA sent Clayton the first of two written requests that directed him to provide information and documents pursuant to FINRA Rule 8210.<sup>4</sup> RP 1-2. This first request for information and documents advised Clayton that FINRA was conducting an inquiry to determine whether violations of securities industry rules and regulations had occurred. It appeared Clayton failed to timely disclose to PFS and FINRA, through the filing of an amended Form U4, the Iowa Department of Insurance regulatory action and outstanding liens or judgments that had been imposed on him. RP 1. The request directed Clayton to provide to FINRA, by April 15, 2011, the following information and documents: (1) a signed statement about the circumstances leading to his termination by PFS, including an explanation why he did not timely disclose the Iowa Department of Insurance regulatory action to PFS and FINRA and identifying any tax liens or judgments that had been imposed on him; (2) copies of all documents referring or relating to his termination by PFS, including any and all tax lien documents and any documents concerning his suspension by the Iowa Department of Insurance; and (3) any documents about any complaints regarding his employment with PFS that were either open or had been resolved during the prior three years. RP 1-2. FINRA sent the March 16, 2011 request

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<sup>4</sup> FINRA Rule 8210 requires persons subject to FINRA’s jurisdiction to provide information and documents to FINRA with respect to any matter involved in an investigation, complaint, examination, or proceeding. *See* FINRA Rule 8210(a) (2011) [The version of FINRA Rule 8210 that was in effect during the relevant period is attached as Appendix A.].

for information and documents by certified and first-class mail to Clayton's CRD address.<sup>5</sup> RP 1, 13, 55.

Clayton did not respond to FINRA's first request for information and documents in any manner. RP 3. Consequently, on April 20, 2011, FINRA sent a second, follow-up request pursuant to FINRA Rule 8210. RP 3-5. This second request for information and documents, which included a copy of the first request, directed Clayton to provide to FINRA the materials that it had previously requested by May 4, 2011.<sup>6</sup> RP 3-5. As it had with the first request for information and documents, FINRA sent the April 20, 2011 request by certified and first-class mail to Clayton's CRD address. RP 3, 13, 55.

Clayton did not respond to FINRA's second request for information and documents in any manner. RP 7.

**C. FINRA Bars Clayton After a FINRA Rule 9552 Action to Compel His Response to FINRA's Two Requests for Information and Documents**

After Clayton failed to respond to FINRA's two requests for information and documents, FINRA commenced an expedited action to compel his compliance with the requests under FINRA Rule 9552.<sup>7</sup> RP 7-12. On June 2, 2011, in accordance with FINRA Rule 9552(b),

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<sup>5</sup> A request for information or documents issued pursuant to FINRA Rule 8210 is deemed received by the person to whom it is directed by mailing or otherwise transmitting the request to the last known residential address of the person as reflected in CRD. *See* FINRA Rule 8210(d) (2011).

<sup>6</sup> FINRA's second request for information and documents warned Clayton that his failure to comply with FINRA's requests could subject him to FINRA disciplinary action. RP 3.

<sup>7</sup> If 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, . . . 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

[Footnote continued on next page]

FINRA sent written notice by FedEx, overnight delivery and first-class mail to Clayton's CRD address informing him that FINRA intended to suspend him from associating with any FINRA member in any capacity because he had failed to respond to FINRA's two requests for information and documents.<sup>8</sup> RP 7-12, 13, 55. The notice informed Clayton that his suspension would take effect on June 27, 2011, unless he took corrective action by complying fully with FINRA's requests by that date.<sup>9</sup> RP 7. The notice also advised Clayton that he could request a hearing under FINRA Rule 9552(e) prior to the suspension date.<sup>10</sup> RP 7. Finally, the notice informed Clayton that, if suspended, he could request that FINRA terminate the suspension on the ground of full compliance with FINRA's two requests for information and documents.<sup>11</sup> RP

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[cont'd]

21 days after service of the notice will result in suspension of membership or of association of the person with any member.

FINRA Rule 9552(a) (2011) [The version of FINRA Rule 9552 in effect during the relevant period is attached as Appendix B.].

<sup>8</sup> FINRA Rule 9552(b) requires FINRA to serve a person with a notice of suspension in accordance with FINRA Rule 9134. FINRA Rule 9552(b) (2011). FINRA Rule 9134 permits service on a natural person by personal service, mail, or courier service at the person's residential address as reflected in CRD. FINRA Rule 9134 (a)-(b). Personal service and service by courier or express delivery is complete upon delivery. FINRA Rule 9134(b)(3). Service by mail is complete upon mailing. *Id.*

<sup>9</sup> FINRA's notice included copies of FINRA's March 16, 2011, and April 20, 2011 requests. RP 9-11.

<sup>10</sup> FINRA Rule 9552(e) allows a person served with a notice of suspension under FINRA Rule 9552 to file a written request for a hearing with FINRA's Office of Hearing Officers. FINRA Rule 9552(e) (2011). Such request, however, must be made before the effective date of the notice. *Id.*

<sup>11</sup> "A member or person subject to a suspension pursuant to [FINRA Rule 9552] may file a written request for termination of the suspension on the ground of full compliance with the notice or decision." FINRA Rule 9552(f) (2011). Other than by settlement, FINRA Rule

[Footnote continued on next page]

8. Failure to do so within a period of three months, FINRA warned Clayton, would result in a default and his automatic bar from the securities industry on September 6, 2011.<sup>12</sup> RP 8.

Clayton did not take corrective action or request a hearing by the suspension date. RP 21. Accordingly, on June 27, 2011, FINRA sent written notice by FedEx, overnight delivery and first-class mail to Clayton's CRD address that he had been suspended from associating in any capacity with any FINRA member.<sup>13</sup> RP 17, 21-24, 55. The notice of Clayton's suspension informed him that he could file a written request that FINRA terminate his suspension on the ground of full compliance with FINRA's two requests for information and documents.<sup>14</sup> RP 21. Failure to do so by September 6, 2011, FINRA again warned Clayton, would result in a default and his automatic bar from the securities industry.<sup>15</sup> RP 21.

Clayton did not comply with FINRA's March 16, 2011, and April 20, 2011, requests for information and documents, and at no time did he request that FINRA terminate his suspension. Therefore, on September 6, 2011, FINRA sent Clayton written notice that FINRA had barred

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[cont'd]

9552(f) provides the *only* means by which a person suspended under FINRA Rule 9552 may request that the suspension be terminated. *See Christopher A. Parris*, Exchange Act Release No. 78669, 2016 SEC LEXIS 3075, at \*6 (Aug. 24, 2016).

<sup>12</sup> "A member or person who is suspended under [FINRA Rule 9552] 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." FINRA Rule 9552(h) (2011).

<sup>13</sup> FINRA also sent the notice by FedEx, overnight delivery and first-class mail to two additional addresses FINRA found for Clayton by conducting a public records search. RP 19, 21, 24-27.

<sup>14</sup> *See supra* note 11.

<sup>15</sup> *See supra* note 12.

him, effectively immediately, from associating in any capacity with any FINRA member.<sup>16</sup> RP 33-34. The bar notice, which FINRA sent by FedEx, overnight delivery and first-class mail to Clayton's CRD address, advised him that he could seek an appeal of FINRA's action by filing an application for review with the Commission within 30 days of his receipt of the notice.<sup>17</sup> RP 29, 33-34, 35.

**D. Clayton Files an Application for Review Nearly Ten Years After He Is Barred**

Clayton did not file an application for review with the Commission within the 30-day appeal period. On December 21, 2020, the Commission nevertheless received from Clayton an application seeking the Commission's review of FINRA's nearly ten-year-old action barring him from the securities industry.<sup>18</sup> RP 55-63. In his application, Clayton admits that FINRA sent all of the relevant correspondence related to the FINRA Rule 9552 proceeding at issue to his CRD address, which he implicitly acknowledges he had a duty to keep current but never updated.<sup>19</sup> RP 55. Clayton, however, claims that he was "completely unaware" of FINRA's action because he was in the midst of a separation and divorce from his wife, and she did not provide him with

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<sup>16</sup> See *supra* note 12.

<sup>17</sup> FINRA also sent the bar notice by FedEx, overnight delivery and first-class mail to two additional addresses FINRA found for Clayton by conducting a public records search. RP 31-32, 33-34, 36-40.

<sup>18</sup> On December 30, 2020, the Commission acknowledged receiving Clayton's application for review, which was dated November 18, 2020. RP 55, 65-66. Clayton, however, did not serve FINRA with a copy of the application. FINRA therefore requested and received a copy of it from the Commission on January 4, 2021.

<sup>19</sup> Clayton states in his application for review that he "take[s] full responsibility" for his failure to amend his Form U4 to update his CRD address. RP 55. Indeed, Clayton's CRD address today is the same as it was in 2011. RP 13, 17, 29, 97.

any of this correspondence. RP 55. Clayton asserts that he first learned of FINRA’s action barring him from the securities industry in 2017. RP 55.

### **III. ARGUMENT**

The Commission should dismiss Clayton’s application for review for two, independent reasons—he failed to exhaust the administrative remedies FINRA provided him before he appealed FINRA’s final action to the Commission, and his application for review, which he filed nearly ten years after the 30-day appeal period ended, is blatantly untimely.

#### **A. Clayton Failed to Exhaust His FINRA Remedies**

The Commission should dismiss Clayton’s application for review because he did not exhaust the administrative remedies FINRA provided him before he resorted to an appeal. “Exhaustion of administrative remedies is a general prerequisite to judicial review of any administrative action.” *Hedley v. United States*, 594 F.2d 1043, 1044 (5th Cir. 1979). The Commission has therefore long held that it “will not consider an application for review if the applicant failed to exhaust FINRA’s procedures for contesting the sanction at issue.” *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at \*5 (May 6, 2010).

FINRA’s June 2, 2011 written notice informing Clayton that it intended, pursuant to FINRA Rule 9552, to suspend him from associating in any capacity with any FINRA member clearly advised him of the process by which he could challenge FINRA’s action under its rules. RP 7-8. The notice explained that Clayton could: (1) take corrective action by complying with FINRA’s March 16, 2011, and April 20, 2011 requests for information and documents by the June 27, 2011 suspension date; (2) request a hearing under FINRA Rule 9552(e) before his suspension took effect; or (3) if suspended, file a written request under FINRA Rule 9552(f) that

FINRA terminate his suspension on the ground that he complied fully with FINRA's two requests for information and documents. RP 7-8.

Clayton did none of these things. He therefore failed to exhaust his administrative remedies before FINRA. *See Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 SEC LEXIS 1875, at \*13 (July 25, 2018) ("His only response was to file an application for review with the Commission after he was barred."); *Lin-Lin Hsu*, Exchange Act Release No. 78899, 2016 SEC LEXIS 3585, at \*7 (Sept. 21, 2016) ("Because Hsu did none of these things, she failed to exhaust her administrative remedies.").

Clayton does not, and cannot, dispute any of the foregoing facts. He does not claim that he complied with FINRA's requests for information and documents or otherwise cooperated with FINRA's investigation. He also does not claim that he attempted to challenge his suspension and bar through the process FINRA provided him. Clayton instead blames his failure to contest FINRA's action on a claim that he did not receive from his estranged wife any of the relevant correspondence that FINRA sent to him. RP 55. This assertion, however, provides no justification for Clayton's failure to avail himself of FINRA's administrative remedies. All of the written requests and notices that FINRA issued in connection with the FINRA action that Clayton now appeals were deemed received by him when FINRA sent them to his CRD address.<sup>20</sup> *See also Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 SEC LEXIS 283, at \*10-11 (Jan. 24, 2014) ("Steckler stated that he did not receive the FINRA correspondence . . . because he was unable to receive mail per the policy of the residence at which he was residing temporarily. But the Rule 8210 requests were deemed to have been received by Steckler when FINRA properly served him at his address on file with CRD."). As

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<sup>20</sup> *See supra* notes 5, 8.

Clayton seemingly concedes in his application for review, he had a responsibility under FINRA rules to update his CRD address if it was no longer current. RP 55; *see Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 SEC LEXIS 1147, at \*15 (Apr. 18, 2013). The fact that Clayton did not do so is not a defense nor an excuse for his failure to avail himself of the opportunity to challenge FINRA’s action in a FINRA forum. *See Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at \*12 (Feb. 8, 2016) (“Manzella’s assertion that she did not ‘physically take receipt’ of the July 2014 letter or the prior requests for information does not excuse her failure to exhaust.”); *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 4624, at \*13 n.12 (Apr. 10, 2014) (“Even if Mullins had argued that he did not receive certain FINRA correspondence because he no longer received correspondence at the CRD address . . . that argument would have no merit.”); *Steckler*, 2014 SEC LEXIS 283, at \*10 (rejecting as an excuse for a failure to exhaust administrative remedies applicant’s claim that “he did not receive the FINRA correspondence in a timely manner because he was unable to receive mail per the policy of the residence at which he was residing temporarily”); *Martinez*, 2013 SEC LEXIS 1147, at \*15 (“[W]e have repeatedly held that not doing so is no defense to a failure to respond.”).

FINRA Rule 9552 provides FINRA an important procedural mechanism to address violations of FINRA Rule 8210 expeditiously.<sup>21</sup> *See Parris*, 2016 SEC LEXIS 3075, at \*4. As the Commission has emphasized in the context of FINRA Rule 9552 proceedings, “[i]t is clearly

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<sup>21</sup> FINRA Rule 8210 is “a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations.” *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at \*13 (Nov. 14, 2008), *aff’d*, 347 F. App’x 692 (2d Cir. 2009). A failure to respond to a FINRA Rule 8210 request impedes FINRA’s ability to detect misconduct that threatens the investing public. *See Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285, at \*46 (Apr. 1, 2016).



proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review.” *Martinez*, 2013 SEC LEXIS 1147, at \*11 (quoting *MFS Sec. Corp. v. SEC*, 56 S.E.C. 380, 393 (2003)). Because Clayton failed to exhaust his administrative remedies, he forfeited his ability to appeal FINRA’s action to the Commission. *See Dowd*, 2018 SEC LEXIS 1875, at \*13 (“We have held repeatedly that applicants who fail to exhaust administrative remedies before FINRA thereby forfeit any future challenge to FINRA’s actions before the Commission.”). The Commission should therefore dismiss Clayton’s application for review.

**B. Clayton’s Application for Review Is Untimely**

The Commission should also dismiss Clayton’s application for review because it is untimely. Section 19(d)(2) of the Securities Exchange Act of 1934 (“Exchange Act”) provides that a person aggrieved by a final FINRA action imposing a disciplinary sanction must file an application for review with the Commission “within thirty days after the date such notice [of action] was . . . received by such aggrieved person, or within such longer period as [the Commission] may determine.” 15 U.S.C. §78s(d)(2). Rule 420(b) of the Commission’s Rules of Practice further provides that the Commission “will not extend this 30-day period, absent a showing of extraordinary circumstances.”<sup>22</sup> *Id.*

There is no dispute that Clayton did not file his application for review within the statutory appeal period. FINRA sent written notice to Clayton on September 6, 2011, that it had barred him under FINRA Rule 9552(h). Because FINRA sent the bar notice by FedEx, overnight delivery and first-class mail to Clayton’s CRD address, FINRA provided Clayton with

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<sup>22</sup> 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).

constructive notice of its action, which started the running of the 30-day period within which he was required to file an appeal.<sup>23</sup> *See also Manzella*, 2016 SEC LEXIS 464, at \*16. Clayton, however, did not file his application for review with the Commission until December 21, 2020, almost ten years after the deadline to appeal FINRA's action had lapsed. It is therefore, without question, untimely.

Clayton did not seek an extension of the appeal deadline and he has not demonstrated any extraordinary circumstances that justify the filing of his application for review late. The extraordinary circumstances exception within Commission Rule of Practice 420 is “narrowly construed and applied only in limited circumstances.” *PennMont Sec.*, Exchange Act Release No. 61967, 2010 SEC LEXIS 1353, at \*16 (Apr. 23, 2010). Thus, as the Commission has long held, an applicant seeking to demonstrate extraordinary circumstances must establish that the reason for filing an untimely application for review “was beyond the control of the applicant.” *Id.* at \*18.

Although Clayton asserts in his application for review that he was completely unaware of FINRA's action, his claim that his estranged wife did not provide him with a copy of the bar notice does not establish extraordinary circumstances justifying his failure to timely appeal FINRA's action. FINRA properly served the bar notice on Clayton by sending it by FedEx, overnight delivery and first-class mail to Clayton's CRD address, and Clayton does not claim otherwise. *See Mullins*, 2014 SEC LEXIS 4624, at \*13. As Clayton implicitly concedes in his application for review, it was his responsibility to update his CRD address under FINRA rules. RP 55; *see Martinez*, 2013 SEC LEXIS 1147, at \*15. His failure to do so, an action well within his control, simply does not excuse the late filing of his application for review. *Cf. Manzella*,

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<sup>23</sup> *See supra* note 8.

2016 SEC LEXIS 464, at \*12; *Martinez*, 2013 SEC LEXIS 1147, at \*15; *Perpetual Sec., Inc.*, Exchange Act Release No. 56613, 2007 SEC LEXIS 2353, at \*35 (Oct. 4, 2007) (“Huang was required to keep her CRD address current, and she must bear the consequences of her failure to do so.”).

Moreover, were Clayton to establish that extraordinary circumstances gave rise to his untimely application, something he has not shown, he remained obligated to promptly appeal FINRA’s action to the Commission as soon as was reasonably practicable after he learned of it. *See PennMont Sec.*, 2010 SEC LEXIS 1353, at \*19 (“An applicant whose application is delayed as a result of extraordinary circumstances remains under an obligation to proceed promptly in pursuing appellate recourse.”). In this respect, it is significant that Clayton asserts in his application for review that he first learned of FINRA’s action barring him from the securities industry in 2017, more than three years before he filed his appeal with the Commission. RP 55. Thus, even under the facts as Clayton presents them, he did not promptly pursue his appeal, which provides further justification for the Commission to dismiss his late-filed application for review. *See Kenneth Joseph Kolquist*, Exchange Act Release No. 82202, 2017 SEC LEXIS 3749, at \*14 (Dec. 1, 2017) (“Even assuming the reason for Kolquist’s failure to appeal the Bar Notice to the Commission . . . was beyond his control, Kolquist has not shown that he appealed as soon as reasonably practicable thereafter.”).

As the Commission has held repeatedly, strict compliance with the filing deadlines established by the Exchange Act and the Commission’s Rules of Practice facilitates finality and encourages parties to seek relief from final FINRA actions in a timely manner. *See Kolquist*, 2017 SEC LEXIS 3749, at \*15. Although unmet appeal deadlines may cut off substantive rights to review, that is the very function they serve. *See id.* Clayton has not provided the Commission

with any basis for accepting his application for review nearly ten years after it was due. The Commission should therefore dismiss it as untimely. *See Edward J. Jakubik*, Exchange Act Release No. 61541, 2010 SEC LEXIS 1014, at \*17 (Feb. 18, 2010) (“Jakubik offers various challenges to [FINRA’s] actions and decision in the prior proceeding, but fails to present the kind of circumstances required to justify an extension of the appeal filing deadline, particularly given the extreme delay [of five years] in the filing of his appeal.”).

#### **IV. CONCLUSION**

FINRA commenced an expedited proceeding under FINRA Rule 9552 to compel Clayton’s compliance with two FINRA Rule 8210 requests for information and documents. During that FINRA proceeding, Clayton did not take corrective action by producing the requested information and documents prior to his suspension. He also did not request a hearing to contest FINRA’s action on the merits. Finally, he did not file a written request to terminate his suspension on the ground that he complied fully with FINRA’s requests for information and documents. As a result, Clayton defaulted, and FINRA barred him.

The Commission should dismiss Clayton’s application for review. Clayton failed to exhaust FINRA’s procedures for contesting its action against him, and he therefore failed to exhaust his administrative remedies. His application is also untimely. Clayton’s failure to pursue an appeal to the Commission within the 30-day appeal period is not disputed, and he has not shown that any extraordinary circumstances exist to effectively extend the deadline for him to file an application seeking the Commission’s review of FINRA’s action by nearly ten years.

Respectfully submitted,

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February 1, 2021

# Appendix A

# 8210. Provision of Information and Testimony and Inspection and Copying of Books

[The Rule](#)[Notices](#)

**Past version: effective from Dec 29, 2010 - Feb 24, 2013.**

**To view other versions open the versions dropdown on the right.**

## **(a) Authority of Adjudicator and FINRA Staff**

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

(1) require a member, person associated with a member, or person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding; and

(2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding.

## **(b) Other SROs and Regulators**

(1) FINRA staff may enter into an agreement with a domestic federal agency, or subdivision thereof, or foreign regulator to share any information in FINRA's possession for any regulatory purpose set forth in such agreement, provided that the agreement must require the other regulator, in accordance with the terms of the agreement, to treat any shared information confidentially and to assert such confidentiality and other applicable privileges in response to any requests for such information from third parties.

Any such agreement with a foreign regulator must also meet the following conditions:

(A) the other regulator party to the agreement must have jurisdiction over common regulatory matters; and

(B) the agreement must require the other regulator to reciprocate and share with FINRA information of regulatory interest or concern to FINRA.

(2) FINRA staff may exercise the authority set forth in paragraph (a) for the purpose of an investigation, complaint, examination, or proceeding conducted by another domestic or foreign self-regulatory organization, association, securities or contract market, or regulator of such markets with which FINRA has entered into an agreement providing for the exchange of information and other forms of material assistance solely for market surveillance, investigative, enforcement, or other regulatory purposes.

## **(c) Requirement to Comply**

No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.

## **(d) Notice**

A notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to:

(1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository; and

(2) any other more current address of the member or the person known to the Adjudicator or FINRA staff who is responsible for mailing or otherwise transmitting the notice.

### **(e) Electronic Interface**

In carrying out its responsibilities under this Rule, FINRA may, as appropriate, establish programs for the submission of information to FINRA on a regular basis through a direct or indirect electronic interface between FINRA and members.

### **(f) Inspection and Copying**

A witness, upon proper identification, may inspect the official transcript of the witness' own testimony. Upon written request, a person who has submitted documentary evidence or testimony in a FINRA investigation may procure a copy of the person's documentary evidence or the transcript of the person's testimony upon payment of the appropriate fees, except that prior to the issuance of a complaint arising from the investigation, FINRA staff may for good cause deny such request.

### **(g) Encryption of Information Provided in Electronic Form**

(1) Any member or person who, in response to a request pursuant to this Rule, provides the requested information on a portable media device must ensure that such information is encrypted.

(2) For purposes of this Rule, a "portable media device" is a storage device for electronic information, including but not limited to a flash drive, CD-ROM, DVD, portable hard drive, laptop computer, disc, diskette, or any other portable device for storing and transporting electronic information.

(3) For purposes of this Rule, "encrypted" means the transformation of data into a form in which meaning cannot be assigned without the use of a confidential process or key. To ensure that encrypted information is secure, a member or person providing encrypted information to FINRA staff pursuant to this Rule shall (a) use an encryption method that meets industry standards for strong encryption, and (b) provide the confidential process or key regarding the encryption to FINRA staff in a communication separate from the encrypted information itself.

Amended by SR-FINRA-2010-021 eff. Dec. 29, 2010.  
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.  
Amended by SR-FINRA-2008-056 eff. Nov. 6, 2008.  
Amended by SR-NASD-98-57 eff. March 26, 1999.  
Amended by SR-NASD-97-81 eff. Jan. 16, 1998 (formerly Rule 4615).  
Amended by SR-NASD-97-28 eff. Aug. 7, 1997.  
Amended by SR-NASD-96-46 eff. May 9, 1997.  
Amended by SR-NASD-96-14 eff. Aug. 13, 1996.  
Amended eff. Apr. 15, 1992.  
Sec. 4 redesignated Sec. 5 eff. Sept. 1, 1969.

**Selected Notices:** 86-36, 92-19, 96-58, 99-16, 08-57, 10-59.

### **VERSIONS**

Dec 29, 2010 - Feb 24, 2013



# Appendix B

## 9552. Failure to Provide Information or Keep Information Current

**Past version: effective from Mar 25, 2010 - Mar 29, 2012.**

**To view other versions open the versions dropdown on the right.**

### **(a) Notice of Suspension of Member, Person Associated with a Member or Person Subject to FINRA's Jurisdiction if Corrective Action is Not Taken**

If 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.

### **(b) Service of Notice of Suspension**

FINRA staff shall serve the member or person with such notice in accordance with Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member.

### **(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the FINRA action. The notice shall state when the FINRA action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the FINRA action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

### **(d) Effective Date of Suspension**

The suspension referenced in a notice issued and served under this Rule shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

### **(e) Request for Hearing**

A member or person served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the FINRA action.

### **(f) Request for Termination of the Suspension**

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. Such request shall be filed with the head of the FINRA department or office that issued the notice or, if another FINRA department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the FINRA department or office that is so designated. The head of the appropriate department or office may grant relief for good cause shown.

### **(g) Settlement Procedure**

Uncontested offers of settlement shall be permitted under this Rule and shall conform to the requirements of Rule 9270, except that, if an uncontested offer of settlement, made under Rule 9270(e) after a hearing on the merits has begun, is accepted by the Hearing Officer, the Hearing Officer shall issue the order of acceptance, which shall constitute final FINRA action. Contested offers of settlement shall not be considered in proceedings initiated under this Rule.

### **(h) Defaults**

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.

### **(i) Notice to Membership**

FINRA shall provide notice of any final FINRA action taken under this Rule in the next notice of Disciplinary and Other FINRA Actions.

Amended by SR-FINRA-2009-076 eff. March 25, 2010.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.

Adopted by SR-NASD-2003-110 eff. June 28, 2004.

**Selected Notices:** 04-36, 08-57, 10-13.

[◀ 9551. FAILURE TO COMPLY WITH PUBLIC COMMUNICATION STANDARDS](#)

[UP](#)

[9553. FAILURE TO PAY FINRA DUES, FEES AND OTHER CHARGES ▶](#)

## VERSIONS

Mar 25, 2010 - Mar 29, 2012

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**CERTIFICATE OF COMPLIANCE**

I, Gary Dernelle, certify that this brief complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 4,617 words.

Respectfully submitted,

/s/ Gary Dernelle

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February 1, 2021

**CERTIFICATE OF SERVICE**

I, Gary Demelle, certify that on this 1st day of February, 2021, I caused FINRA's Motion to Dismiss the Application for Review of Shad Nhebi Clayton and to Stay Briefing, Administrative Proceeding No. 3-20192, to be served by electronic service on:

Vanessa A. Countryman, Secretary  
Securities and Exchange Commission  
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and

Shad Nhebi Clayton

[REDACTED]  
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Respectfully submitted,

/s/ Gary Demelle

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