

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

In the Matter of the Application of

James K. Merrill

For Review of Action Taken by FINRA

File No. 3-21002

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

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I. INTRODUCTION

This matter involves James K. Merrill's failure to respond to FINRA's request for information and FINRA's subsequent bar of Merrill through an expedited proceeding. When Merrill's former firm filed an amended Uniform Termination Notice for Securities Industry Registration ("Form U5") disclosing an internal inquiry into possible misconduct by Merrill, FINRA opened an investigation and directed Merrill to provide related information. Merrill did not respond to those requests for information. Consequently, FINRA initiated an expedited proceeding against Merrill and instructed him that he could provide the requested information or request a hearing, and that if he did neither he would be suspended and ultimately barred from associating with any FINRA member in any capacity. Merrill did not fully comply with FINRA's request, nor did he ask for a hearing.

The record is unequivocal that Merrill received FINRA's requests for information and notices in connection with the expedited proceeding. Indeed, Merrill responded to FINRA during the expedited proceeding, acknowledging the receipt of the notice of suspension.

Nonetheless, Merrill did not respond to FINRA’s repeated warnings about being suspended and did not ask for a hearing. Because he failed to avail himself of FINRA’s administrative remedies available to him, Merrill’s application for review by the Commission should be dismissed.¹

II. PROCEDURAL AND FACTUAL BACKGROUND

A. FINRA Requests Information from Merrill

Merrill was registered with FINRA member Independent Financial Group, LLC (“IFG”) until December 31, 2019. (RP 113.)² Merrill’s CRD indicates that his termination from IFG was voluntary. (*Id.*)

On March 24, 2021, IFG filed an amended Form U5 (the “Amendment”) disclosing that Merrill was the subject of an internal review. Specially, the Amendment stated that IFG was investigating whether Merrill “moved assets from advisory accounts to retail brokerage accounts and then conducted trades in the brokerage accounts . . . resulting in higher charges (from commissions) to the clients.” (RP 1-6.) IFG further disclosed that it was “in the process of offering reimbursement to impacted clients.” (RP 6.)

The Amendment prompted an investigation by FINRA and, on January 19, 2022, FINRA sent Merrill a FINRA Rule 8210 request for information concerning the Amendment, Merrill’s

¹ FINRA requests, pursuant to Commission Rule of Practice 161, that the Commission stay briefing in this matter while this motion is pending. *See* 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive argument that Merrill’s appeal should be dismissed for failure to exhaust administrative remedies before it reaches the underlying substance of this appeal.

² “RP ___” refers to the page numbers in the certified record, which FINRA filed on August 30, 2022.

dealings with certain customers, and other related matters.³ (RP 9-17.) FINRA sent the request to the home address listed for Merrill in FINRA’s Central Registration Depository⁴ (“CRD[®]”) (the “CRD Address”), to a second address identified for Merrill (the “Carlsbad Address”)⁵, and by electronic mail to Merrill’s email address. (RP 9.) The request asked Merrill to respond by February 2, 2022. (*Id.*)

The FINRA Rule 8210 request explained, “[u]nder FINRA Rule 8210, [Merrill was] obligated to respond to [the] request fully, promptly, and without qualification.” (RP 11.) The request also warned Merrill that “[a]ny failure . . . to satisfy these obligations could expose

³ Merrill is subject to FINRA’s jurisdiction because he was a person registered with FINRA, and the FINRA Rule 8210 request and FINRA Rule 9552 notices were served during the period when FINRA retained jurisdiction over him pursuant to the FINRA By-Laws. Article V, Section 4(a)(i) of FINRA’s By-Laws provides that FINRA retains jurisdiction over a formerly registered person for at least two years after the effective date of termination of that person’s registration, based upon, among other types of conduct, such person’s failure, while subject to FINRA’s jurisdiction, to provide information requested by FINRA. Moreover, Article V, Section 4(a)(i) of the FINRA By-Laws also provides that the filing of an amendment to a notice of termination within two years of the original notice shall recommence the running of the two-year period. *See David Kristian Evansen, Exchange Act Section 75531, 2015 SEC LEXIS 3080, at *16 n.36 (July 27, 2015)* (noting that FINRA may retain jurisdiction for longer than two years if there are pending disciplinary complaints or an amended Form U5 is filed). Here, IFG filed a Form U5 terminating Merrill’s registration on December 31, 2019. (RP 113.). IFG filed the Amendment on March 24, 2021, less than two years after the original Form U5 filing. (RP 1-6.) While the original Form U5 indicated that Merrill’s termination was voluntary, the Amendment disclosed IFG’s internal inquiry and provided a materially different explanation for IFG’s termination of Merrill. As a result, the two-year period during which FINRA retained jurisdiction over Merrill recommenced running as of March 24, 2021, and continued until March 24, 2023. Accordingly, the January 19, 2022 FINRA Rule 8210 request and the subsequent notices sent pursuant to FINRA Rule 9552 were all sent while Merrill was still subject to FINRA’s jurisdiction, and Merrill was required to provide the requested information.

⁴ FINRA Rule 8210(d) provides that an information request under the rule is deemed received by a formerly registered person by mailing it to the last known residential address of the person as reflected in CRD.

⁵ The Carlsbad Address is the address Merrill used for this appeal and which he has acknowledged as his home address since 2019. (RP 107-10.) The January 19, 2022, FINRA Rule 8210 request was delivered by certified mail to the Carlsbad Address. (RP 14, 16.)

[Merrill] to sanctions, including a permanent bar from the securities industry.” (*Id.*) Merrill did not respond to the request.

About two weeks later, on February 4, 2022, FINRA sent Merrill a second letter enclosing the January 19, 2022, FINRA Rule 8210 request and asking him to provide the requested information by February 24, 2022. (RP 19-23.) The second request contained the same warnings about the consequences of failing to provide the requested information. (RP 19, 22.) As before, FINRA sent the request to Merrill’s CRD Address, the Carlsbad Address, and electronically to his email address. (RP 19.) Merrill did not respond to the second letter.

B. The Pre-Suspension Notice

Almost two months after mailing the second letter, on April 1, 2022, FINRA sent Merrill a notice of suspension pursuant to Rule 9552 (the “Pre-Suspension Notice”), notifying him that he would be suspended effective April 25, 2022 (the “Suspension Date”) for failing to respond to the FINRA Rule 8210 request.⁶ (RP 33-34.) Copies of the January 19, 2022 request and the February 4, 2022 letter were enclosed with the Pre-Suspension Notice. The Pre-Suspension Notice informed Merrill that he could avoid the suspension by complying with the FINRA Rule 8210 request by the Suspension Date. (RP 33-39.) The Pre-Suspension Notice also stated that Merrill could request a hearing under FINRA Rule 9552(e) before the Suspension Date, and that

⁶ FINRA Rule 9552(a) provides, in part, 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 . . . 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.

such a request would stay imposition of the suspension. (RP 33-34.) The Pre-Suspension Notice further stated that once the suspension became effective, Merrill could file a written request for termination of the suspension on the grounds of full compliance with the FINRA Rule 8210 request, but that if he failed to do so by July 5, 2022, he would be automatically barred from associating with any FINRA member in any capacity. (RP 34.)

Prior to sending the Pre-Suspension Notice, FINRA conducted a LEXIS search for Merrill's address which indicated that the Carlsbad Address was Merrill's then-current home address. (RP 29-30.) FINRA sent the Pre-Suspension Notice by certified mail and first-class mail to the Carlsbad Address and to the CRD Address.⁷ (RP 33.) FINRA also emailed a copy of the Pre-Suspension Notice to Merrill. (RP 33, 41, 43.)

Merrill neither complied with the Pre-Suspension Notice by producing the requested information nor requested a hearing. Instead, Merrill sent an email to FINRA on April 11, 2022, confirming receipt of the Pre-Suspension Notice and claiming that he had been ill and unable to hire an attorney to represent him. (RP 57, 59-70.) In his email, Merrill questioned the necessity of responding to FINRA's request because he had "exited the [securities] business." (RP 69-70.) Merrill attached to his email a letter his attorney had sent to IFG in 2021, purportedly in response to IFG's internal review and related to litigation between Merrill and IFG. (RP 59-68.)⁸ Neither Merrill's email nor the attached letter responded to FINRA's information requests.

⁷ The certified mailing to the Carlsbad Address was delivered. (RP 45.)

⁸ The copy of this letter included in the certified record is dated August 18, 2022. This date is not correct. The letter was provided to FINRA in Word document format and it may be that the date automatically updated. A copy of the letter was provided to FINRA by Merrill on April 11, 2022. (RP 69.) In his email to FINRA attaching the letter, Merrill represents that the letter was sent to IFG in 2021. (*Id.*)

Three days later, FINRA responded to Merrill's email, explaining that the letter he provided was not responsive to FINRA's request for information. (RP 71.) FINRA's email cautioned Merrill that he "must respond to each Rule 8210 request in order to avoid being suspended and barred." (*Id.*) To facilitate Merrill's compliance with FINRA's request, FINRA extended the effective date for Merrill's suspension to May 9, 2022 (the "Extended Suspension Date"). (*Id.*) Merrill did not produce the requested information by the Extended Suspension Date.

C. The Suspension Notice

On May 10, 2022, FINRA sent Merrill a letter (the "Suspension Notice") notifying him that, because he had not complied with the Pre-Suspension Notice, he was suspended from associating with any FINRA member in any capacity effective May 9, 2022.⁹ (RP 75-77.) The Suspension Notice reminded Merrill that he could file a written request to terminate the suspension pursuant to FINRA Rule 9552(f) on the grounds of full compliance with the Pre-Suspension Notice, and that if he failed to do so, he would be barred automatically on July 5, 2022.¹⁰ (RP 75-76.) Merrill did not provide the requested information or request termination of the suspension.

D. The Bar Notice

On July 5, 2022, FINRA sent Merrill a letter (the "Bar Notice") confirming that, in accordance with FINRA's previous notices to him, Merrill was barred from associating with any FINRA member in any capacity on July 5, 2022. (RP 93-95.) As with the previous notices,

⁹ The Suspension notice was sent to the CRD Address, the Carlsbad Address, and Merrill's email address. (RP 75, 77, 79.)

¹⁰ FINRA Rule 9552(h) provides that a person suspended under FINRA Rule 9552 who fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be barred.

FINRA sent the Bar Notice to Merrill's CRD address, the Carlsbad Address, and his email address.¹¹ (RP 93, 95, 97, 101.) Approximately one month later, Merrill filed this appeal with the Commission. (RP 107-10.)

III. ARGUMENT

The Commission should dismiss the Application for Review because Merrill failed to exhaust the administrative remedies available to him in FINRA's forum. Merrill neither provided the information requested, nor requested a hearing or the termination of his suspension.

The Commission is precluded from considering Merrill's Application for Review because he failed to follow FINRA procedures, and consequently, failed to exhaust his administrative remedies. As the Commission has emphasized, "[i]t is clearly 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." *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268, at *9 (Apr. 10, 2014) (internal quotation marks omitted). The Commission has repeatedly held that requiring respondents to exhaust their administrative remedies before FINRA is necessary to FINRA's important regulatory functions, promotes development of the record, allows FINRA the opportunity to correct any error in its earlier decisions, and promotes the efficient resolution of disputes between FINRA and its members. *See, e.g., Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 SEC LEXIS 3503, at *6-7 (Sept. 19, 2014) (citing *MFS Sec. Co. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004)).

The precedent with respect to FINRA Rule 9552 expedited proceedings is well settled, and the Commission has consistently dismissed applications for review when respondents failed

¹¹ The Bar Notice was delivered by certified to the Carlsbad Address. (RP 101.)

to exhaust their administrative remedies under FINRA Rule 9552. *See, e.g., Shad Nhebi Clayton*, Exchange Act Release No. 93760, 2021 SEC LEXIS 3657, at *6-11 (Dec. 13, 2021) (dismissing applicant’s appeal for failure to exhaust administrative remedies when FINRA barred applicant under Rule 9552 for failing to respond to Rule 8210 requests); *Steven Robert Williams*, Exchange Act Release No. 89238, 2020 SEC LEXIS 2828, at *8-11 (July 7, 2020) (same); *Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 SEC LEXIS 1875, at *9-13 (July 25, 2018) (same).

The record establishes that, despite having actual notice of the proceedings against him,¹² Merrill did not provide all the requested information, did not request a hearing, and did not request termination of his suspension. By failing to fully respond to FINRA’s requests for information or requesting a hearing, Merrill failed to exhaust his administrative remedies and therefore is precluded from challenging FINRA’s action before the Commission. *See, e.g., Mullins*, 2014 SEC LEXIS 1268, at *13-14 (relying on “well-established precedent” when dismissing an application for review in a FINRA Rule 9552 proceeding when applicant failed to request a hearing or take corrective action in FINRA’s forum); *Gregory 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

¹² The record establishes that FINRA properly served the information requests and expedited proceeding notices pursuant to FINRA Rules 8210(d) and 9134 by mailing them to Merrill at his CRD Address. FINRA also sent these documents to another address it discovered, the Carlsbad Address, which Merrill acknowledges in the Notice of Appeal was his home address during the relevant period. (RP 107-10.) The record contains signed certified mail receipts for certain deliveries to the Carlsbad Address. (RP 14, 16, 45, 101.) Indeed, Merrill responded by email acknowledging receipt of the Pre-Suspension Notice, from an email address to which all the notices were also sent. (RP 57, 59-70.) *See Williams*, 2020 SEC LEXIS 2828, at *9-10 (finding applicant had actual notice of the proceedings where the record contained certified mail receipts for the notices and where the notices were sent to an email address from which the applicant communicated with FINRA).

Exchange Act [when] rules set forth the procedures for suspending and ultimately barring individuals who fail to supply requested information or take corrective action”). The Commission, accordingly, should dismiss the application for review.

Merrill’s attempt to provide some information purportedly responsive to the FINRA Rule 8210 request by attaching it to his notice of appeal to the Commission does not remedy his failure to exhaust FINRA’s administrative remedies. Merrill’s brief responses fall far short of responding to FINRA’s information requests. (RP 9-10, 109-10.) For example, Merrill does not provide a statement summarizing his dealings with several customers, does not explain his understanding of certain investment-related subjects, and provides no documents to support his written responses. (*Id.*) In any event, the Commission has consistently held that it “will grant a motion to dismiss an application for review of a bar imposed pursuant to a FINRA expedited proceeding where the applicant . . . knew about the requests for information and yet failed to respond until after [his] bar was already effective.” *Kalid Morgan Jones*, Exchange Act Release No. 80635, 2017 SEC LEXIS 1403, at *14 (May 9, 2017) (internal quotations omitted); *see also David Richard Kerr III*, Exchange Act Release No. 79744, 2017 SEC LEXIS 76 at *12-16 (Jan. 5, 2017) (dismissing an appeal for failure to exhaust administrative remedies in a FINRA expedited proceeding where the applicant knew about the requests but failed to respond until after the bar was effective); *Curtis Steven Culver*, Exchange Act Release No. 75774, 2015 SEC LEXIS 3541, at *10 n.10 (Aug. 27, 2015) (dismissing the appeal of a bar imposed in an expedited proceeding where the applicant attached responsive information to his notice of appeal and explaining that while applicant’s “application for review may respond in part to the Rule 8210 requests, his untimely response is irrelevant given his failure to exhaust the administrative remedies available under FINRA”).

IV. CONCLUSION

Merrill's application for review should be dismissed because he chose not to exhaust FINRA's administrative remedies available to him. While the Commission resolves the preliminary issues raised by this motion, it should stay the briefing schedule.

Respectfully submitted,

/s/ Celia Passaro

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Dated: August 30, 2022

CERTIFICATE OF SERVICE

I, Celia Passaro, certify that on this 30th day of August 2022, I caused FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule, in the matter of the Application for Review of James Kirby Merrill, Administrative Proceeding No. 3-21002, to be filed through the SEC's eFAP system on and a copy by electronic service on:

James K. Merrill
[REDACTED]
[REDACTED]
[REDACTED]

Respectfully submitted,

/s/ Celia Passaro

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CERTIFICATE OF COMPLIANCE

I, Celia Passaro, certify that this FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule complies with the Commission's Rules of Practice by omitting or redacting any sensitive personal information described in Rule of Practice 151(e).

Respectfully submitted,

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