

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 71926 / April 10, 2014

Admin. Proc. File No. 3-15769

In the Matter of the Application of

Ricky D. Mullins  
Westlake, TX 76262  
and  
Southlake, TX 76092

for Review of Disciplinary Action Taken by FINRA

**ORDER GRANTING  
MOTION TO DISMISS  
APPLICATION FOR REVIEW**

Ricky D. Mullins, formerly a registered representative associated with M & W Financial, Inc., a former FINRA member firm, seeks review of a FINRA disciplinary action. FINRA barred Mullins from associating with any FINRA member in any capacity, effective January 24, 2014, because he failed to comply with requests, made pursuant to FINRA Rule 8210,<sup>1</sup> that he appear for additional on-the-record testimony. On March 11, 2014, FINRA filed a motion to dismiss Mullins's application for review, arguing that Mullins failed to exhaust his administrative remedies. For the reasons set forth below, we have determined to grant FINRA's motion and dismiss the appeal.

**I. Background**

**A. Mullins failed to appear for an on-the-record interview requested by FINRA pursuant to FINRA Rule 8210.**

On October 10, 2012, FINRA received an anonymous complaint involving Mullins and Guardian Direct Energy Programs, Inc., a broker-dealer that Mullins founded in May 2009 to

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<sup>1</sup> FINRA Rule 8210(a)(1) states, in relevant part, that FINRA staff has the right to "require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically . . . 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."

promote and sell interests in oil and gas operations.<sup>2</sup> The complaint stated that, from December 2011 through October 2012, Guardian Direct had promoted an offering that sold limited partnership interests in certain oil and gas operations to the investing public, and that the offering might be a fraudulent scheme that was "[r]aising money with new offerings to keep past partnerships out of default."

After receiving the complaint, FINRA initiated an investigation into the offering. As part of its investigation, Mullins appeared for on-the-record-testimony, pursuant to FINRA Rule 8210, in FINRA's Dallas, Texas district office on May 2, 2013. At the conclusion of the on-the-record-testimony, Mullins agreed that he would supply FINRA with additional information and documents and provide additional testimony at a later date.

FINRA sent Mullins several follow-up Rule 8210 requests, including one request for information and documents sent on September 3, 2013 that stated, "It is possible that the staff will need to request your presence at a second on-the-record interview. In consideration of past scheduling difficulties, please provide possible dates and times of your availability." Although Mullins responded to the Rule 8210 request with written answers to questions and supporting documents, he did not provide dates on which he would be available for a second on-the-record interview. Instead, he wrote, "Odds are that I won't go on the record again until after the SEC is done with me. I understand that I will be subject to sanctions."

On October 9, 2013, FINRA sent Mullins a Rule 8210 request that he appear for on-the-record testimony in FINRA's district office in Dallas, Texas on October 18, 2013. The request cautioned Mullins, "If you fail to appear and testify at the ORT [on-the-record testimony] you may be subject to a FINRA disciplinary action and the imposition of sanctions, including a bar from the securities industry, suspension, censure, and/or fine."

FINRA sent this request by first class and certified mail to Mullins's Westlake, Texas address of record in the Central Registration Depository ("CRD"), which he was required to keep current,<sup>3</sup> and to an alternate address in Southlake, Texas that was listed in a LexisNexis public

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<sup>2</sup> Mullins served as Guardian Direct's Chief Executive Officer and Chief Compliance Officer, and registered with FINRA as the firm's Direct Participation Programs Principal, Direct Participation Programs Representative, and Operations Professional. Mullins associated with Guardian Direct until February 2013, when the firm filed a Form BDW (Uniform Request for Broker-Dealer Withdrawal) to cease operations and terminate its registration with FINRA.

<sup>3</sup> As part of the registration process, associated persons are required to sign and file with FINRA a Form U4, which obligates them to keep a current address on file with FINRA at all times. *Perpetual Sec., Inc.* Exchange Act Release No. 56613, 2007 SEC LEXIS 2353, at \*35 (Oct. 4, 2007); *Nazmi C. Hassanieh*, Exchange Act Release No. 35029, 52 SEC 87, 1994 SEC LEXIS 3862, at \*8 (Nov. 30, 1994). A notice issued pursuant to Rule 8210 is deemed received by such person when mailed to the individual's last known CRD address. FINRA Rule 8210(d). This requirement also applies, as here, to former members and associated persons. *See* NASD

records database as his "current address." FINRA also sent this request to an email address that Mullins had provided to FINRA staff. The certified mail return receipts for the CRD and alternate addresses contained the same signature, but the signature was illegible. In addition, the certified mail receipt for the CRD address noted that the alternate address was the correct address of delivery. The first-class mailings were not returned.

Mullins responded approximately one hour after he received the emailed copy of the request to appear. In a reply email, Mullins notified FINRA, "I won't be appearing." On October 18, 2013, the day of the scheduled testimony, Mullins did not appear. FINRA staff went on the record to document that Mullins did not appear to provide testimony as requested in the October 9, 2013 letter.

## **B. FINRA sanctioned Mullins.**

After suspending Mullins and warning him of the consequences of noncompliance, FINRA barred Mullins from association with any FINRA member firm for his failure to comply with the Rule 8210 request to appear for an on-the-record interview. First, on October 21, 2013, FINRA notified Mullins in writing, pursuant to FINRA Rule 9552, that it intended to suspend him from associating with any FINRA member firm in any capacity on November 14, 2013, unless he took corrective action before that date by complying with the FINRA Rule 8210 requests to appear for on-the-record testimony.<sup>4</sup> The notice advised Mullins that he could

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(...continued)

Notice to Members 97-31, 1997 NASD LEXIS 35, at \*1-2 (May 1997) (reminding associated persons to keep a current mailing address with NASD "[f]or at least two years *after* an individual has been terminated by the filing of . . . [a] Form U5") (emphasis in original).

<sup>4</sup> FINRA Rule 9552(a) states that if an associated person fails to provide the staff with requested information or testimony pursuant to FINRA rules, FINRA staff may provide written notice to the associated 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 [a] suspension." FINRA Rule 9552(b) provides for service of a notice of suspension in accordance with FINRA Rule 9134, which permits service by both mail and courier service at an individual's residential address as reflected in the CRD.

FINRA served the October 21 notice on Mullins by Federal Express Overnight Delivery and first-class mail to Mullins's CRD and alternate addresses used in sending the earlier Rule 8210 requests. FINRA also sent the notice to Mullins's email address. The Federal Express Overnight Delivery to the CRD address was returned to FINRA. The Federal Express Overnight Delivery to the alternate address was delivered on October 22, 2013. The first-class mailings were not returned. Mullins did not respond to the October 21 notice or otherwise contact FINRA to schedule or appear for on-the-record testimony.

request a hearing to contest the imposition of the suspension which, if timely made, would stay the effective date of the suspension.<sup>5</sup> The notice warned Mullins that, if the suspension was imposed, FINRA would automatically bar him from associating with any member firm in any capacity on January 24, 2014, unless he requested termination of the suspension based on full compliance with the original request to appear.<sup>6</sup>

Second, on November 14, 2013, FINRA notified Mullins in writing that, as of that date, he was suspended from associating with any FINRA member firm in any capacity.<sup>7</sup> The notice advised Mullins that an automatic bar would be imposed on January 24, 2014 if he did not fully comply with the notice of suspension, which required him to fully respond to FINRA's request to appear for on-the-record testimony and file a written request to terminate his suspension.

Mullins took no action to challenge his suspension or otherwise attempt to comply with the request to appear, and the automatic bar from associating with any FINRA member firm in any capacity took effect on January 24, 2014. On that date, FINRA sent Mullins a letter notifying him that he was barred and could appeal its decision by filing an application for review with the Commission.<sup>8</sup> This timely application for review followed.

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<sup>5</sup> FINRA Rule 9559(c) provides, in part, that, "[u]nless the Chief Hearing Officer or the Hearing Officer assigned to the matter orders otherwise for good cause shown, a timely request for a hearing shall stay the effectiveness of a notice issued under Rule 9551 through 9556."

<sup>6</sup> FINRA Rule 9552(f) permits a suspended individual to file a written request for termination of the suspension on the ground of full compliance with the notice of suspension. FINRA Rule 9552(h) provides that a suspended person who fails to request termination of the suspension within three months of issuance of the original notice of suspension will be barred automatically.

<sup>7</sup> FINRA served the November 14 notice on Mullins by Federal Express Overnight Delivery and first-class mail to Mullins's CRD and alternate addresses. FINRA also sent the notice to Mullins's email address. The Federal Express Overnight Delivery to the CRD address was returned to FINRA. The Federal Express Overnight Delivery to the alternate address was delivered on November 18, 2013. The first-class mailings were not returned.

Mullins responded approximately one hour after he received the emailed copy of the November 14 notice. In his email reply to FINRA, Mullins stated, "Can you please stop sending mail to the [Westlake] address? I haven't lived there in months. The [Southlake] address is accurate."

<sup>8</sup> As with its other notices, FINRA sent the January 24, 2014 notice to Mullins by Federal Express Overnight Delivery and first-class mail to Mullins's CRD and alternate addresses. FINRA also sent the notice to his email address. The Federal Express Overnight Delivery to the CRD address was returned to FINRA. The Federal Express Overnight Delivery to the alternate address was delivered on January 27, 2014. The first-class mailings were not returned.

## II. Analysis

Given Mullins's failure to contest the sanction before FINRA, we must dismiss Mullins's appeal to avoid undermining the important self-regulatory functions of FINRA. We have emphasized that "[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."<sup>9</sup> On this basis, we repeatedly have held that "we will not consider an application for review if the applicant failed to exhaust FINRA's procedures for contesting the sanction at issue."<sup>10</sup> As the Second Circuit has reasoned:

Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised. Moreover, like other administrative exhaustion requirements, the SEC's promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review. It also provides SROs with the opportunity to correct their own errors prior to review by the Commission. The SEC's exhaustion requirement thus promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations.<sup>11</sup>

The October 9, 2013 Rule 8210 request warned Mullins that his failure to appear for on-the-record testimony on October 18, 2013 may subject him to a FINRA disciplinary action and the imposition of sanctions, including a bar from the securities industry, suspension, censure, and/or fine. Mullins acknowledged that his failure to appear could subject him to sanctions, but nonetheless informed FINRA, "I won't be appearing."

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<sup>9</sup> *MFS Secs. Corp.*, Exchange Act Release No. 47626, 2003 SEC LEXIS 789, at \*22 & n.29 (Apr. 3, 2003) (citing *Royal Secs. Corp.*, Exchange Act Release No. 5171, 36 SEC 275, 1955 SEC LEXIS 94, at \*5 (May 20, 1955)), *aff'd*, 380 F.3d 611 (2d Cir. 2004).

<sup>10</sup> *E.g.*, *Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 SEC LEXIS 283, at \*8 (Jan. 24, 2014) (dismissing applicant's appeal for failure to exhaust administrative remedies where FINRA barred applicant under Rule 9552 for failing to respond to Rule 8210 information requests); *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 SEC LEXIS 1147, at \*11-15 (Apr. 18, 2013) (same); *Norman S. Chen*, Exchange Act Release No. 65345, 2011 SEC LEXIS 3224, at \*6, 11 (Sept. 16, 2011) (same); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at \*5, 8 (May 6, 2010) (same); *see also MFS Secs. Corp.*, 2003 SEC LEXIS 789, at \*21-26 (refusing to consider applicant's denial of access to services claim because applicant failed to exhaust New York Stock Exchange's procedures).

<sup>11</sup> *MFS Secs. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004).

The October 21, 2013 notice stated that FINRA intended to suspend Mullins on November 14, 2013, unless he took corrective action by complying with the Rule 8210 requests. The notice also stated, alternatively, that Mullins could request a hearing, which would have stayed the effectiveness of the suspension. But Mullins did not take corrective action or request a hearing. The October 21 and November 14 notices further informed Mullins that, after the suspension took effect, he could request its termination based on full compliance. As noted, Mullins took no action in response to the notices and allowed the bar to take effect.

In his application for review, Mullins stated that he requested a postponement of his on-the-record testimony until after the Commission completed its investigation of him and Guardian Direct because "the matter is being actively disputed." But the record contains no evidence that Mullins made such a request. After receiving the October 9, 2013 Rule 8210 request, Mullins twice communicated with FINRA. On October 9, 2013, Mullins emailed FINRA to inform the staff that he would not be appearing for testimony. And, on November 14, 2013, Mullins emailed FINRA asking that the staff refrain from sending him correspondence to his CRD address. Neither email to FINRA requested a postponement or otherwise sought to reschedule his on-the-record testimony scheduled for October 18, 2013.

FINRA properly served Mullins with the October 9, 2013 Rule 8210 request to appear and the suspension notices, and Mullins does not claim otherwise.<sup>12</sup> Mullins does not dispute that he failed to appear for his on-the record testimony. Nor does he dispute that he failed to challenge the resulting disciplinary sanction through FINRA's appeal procedures. Under these

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<sup>12</sup> Even if Mullins had argued that he did not receive certain FINRA correspondence because he no longer received correspondence at the CRD address—and, as discussed, there is ample evidence that he did receive the notices at issue—that argument would have had no merit. As noted, it was Mullins's responsibility to update his CRD address, as expressly required by FINRA rules, and we have repeatedly held that not doing so is no defense to a failure to respond. *See, e.g., Edward J. Jakubik*, Exchange Act Release No. 61541, 2010 SEC LEXIS 1014 at \*16 (Feb. 18, 2010) (finding that applicant was deemed to have received FINRA's default decision that was properly served at his CRD address); *Robert J. Langley*, Exchange Act Release No. 50917, 57 SEC 1125, 2004 SEC LEXIS 3048 at \*9 (Dec. 22, 2004) ("Rule 8210(d) does not require NASD to take any affirmative action to track down a registered representative who has failed to provide NASD with a current address"); *Warren B. Minton Jr.*, Exchange Act Release No. 46709, 55 SEC 1170, 2002 SEC LEXIS 2712 at \*13 (Oct. 23, 2002) (holding that registered representatives have a "continuing duty" to notify NASD of address changes) (citing cases); *Ashton Noshir Gowadia*, Exchange Act Release No. 40410, 53 SEC 786, 1998 SEC LEXIS 1887 at \*11 (Sept. 8, 1998) (finding that registered representative's assumption that member firm had updated his CRD address does not mitigate representative's failure to do so); *Hassanieh*, 1994 SEC LEXIS 3862 at \*9 (noting that the obligation to keep CRD address current is crucial to NASD's investigative efforts because, otherwise, investigations "could easily be avoided by an individual's moving without leaving a forwarding address").

circumstances, and given the well-established precedent discussed above, we see no basis for denying FINRA's motion to dismiss.<sup>13</sup>

Accordingly, IT IS ORDERED that FINRA's motion to dismiss the application for review filed by Ricky D. Mullins is GRANTED.

By the Commission.

Jill M. Peterson  
Assistant Secretary

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<sup>13</sup> Mullins requests that the Commission "prevent FINRA from publicizing this action." But, under NASD Interpretive Material 8310-3 (Release of Disciplinary Complaints, Decisions, and Other Information), FINRA may release to the public information about any decision issued pursuant to Rule 9550 involving the suspension or bar of an associated person.