

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 74138 / January 26, 2015

Admin. Proc. File No. 3-16190

In the Matter of the Application of

Marcos A. Santana
New York, NY 10034

for Review of Disciplinary Action Taken by FINRA

ORDER GRANTING MOTION TO DISMISS APPLICATION FOR REVIEW

Marcos A. Santana, formerly a registered representative associated with J.P. Morgan Securities LLC ("J.P. Morgan" or the "Firm"), seeks review of a Financial Industry Regulatory Authority ("FINRA") disciplinary action. FINRA barred Santana from associating with any FINRA member in any capacity, effective September 2, 2014, because he failed to respond to three requests for information issued pursuant to FINRA Rule 8210.¹ On October 20, 2014, FINRA filed a motion to dismiss Santana's application for review, arguing that Santana failed to exhaust his administrative remedies. Santana did not respond to the motion. For the reasons set forth below, we have determined to grant FINRA's motion and dismiss the appeal.

¹ 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 person subject to the Association's jurisdiction to provide information orally, in writing, or electronically . . . with respect to any matter involved in the investigation."

I. Background

A. Santana failed to respond to three FINRA Rule 8210 requests for information.

Santana was associated with J.P. Morgan from October 1, 2012 until November 15, 2013. FINRA opened an inquiry and requested information from Santana pursuant to FINRA Rule 8210 after J.P. Morgan filed a Uniform Termination Notice for Securities Industry Registration on Form U5,² reporting that it terminated Santana for "access[ing] bank customer information without a legitimate business purpose and fail[ing] to protect customer information in an alleged attempt to commit fraud."

On December 23, 2013, FINRA sent the first request for information to Santana pursuant to Rule 8210, requesting among other things that he provide a signed statement responding to the allegations in the Form U5 that he accessed bank customer information without a legitimate business purpose and specifically addressing whether he had "ever owned a credit card 'skimming device.'" It also requested copies of all correspondence and memoranda referring or relating to the matter, and information about other complaints, if any, during his employment at the Firm. FINRA set a January 6, 2014 deadline for responding and reminded Santana of his obligation under Rule 8210 to respond "fully, promptly, and without qualification." It notified Santana that "any failure on your part to satisfy these obligations could expose you to sanctions, including a permanent bar from the securities industry."

FINRA sent Santana a second Rule 8210 request on January 7, 2014, asking for the same information as its earlier letter. This second request set a response deadline of January 21, 2014 and warned Santana that failure to comply could subject him to disciplinary action.

FINRA sent Santana a third Rule 8210 request on January 22, 2014, asking for the same information as the prior two requests. This third request set a response deadline of February 5, 2014 and once again reminded Santana that failure to comply could subject him to disciplinary action.

Santana failed to respond to these Rule 8210 requests. FINRA sent each request by both first-class and certified mail to Santana's address of record contained in the Central Registration Depository (the "CRD"), which Santana is required to keep current.³ Claim notices for the first

² Broker-dealers, investment advisers, and issuers of securities must file a Form U5 with FINRA to terminate the registration of an individual associated with such broker-dealer, investment adviser, or issuer.

³ 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.*, Securities Exchange Act Release No. 56613, 2007 WL 2892696, at *9 (Oct. 4, 2007); *Nazmi C. Hassanieh*, Exchange Act Release No. 35029, 52 SEC 87, 1994 WL 681723, at *3 (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); *see also* NASD Notice to Members 97-31, 1997 WL 1909798, at *1-2 (May 1, 1997) (reminding

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two certified mailings were left at this address on December 26, 2013 and January 9, 2014, respectively, and delivery was confirmed for both by signed return receipt on January 15, 2014. None of the three first-class mailings were returned.

B. FINRA suspended and then barred Santana for his failure to respond.

After Santana failed to respond, FINRA's Department of Enforcement, in a May 27, 2014 letter, notified him that he would be suspended from associating with any FINRA member in any capacity on June 20, 2014.⁴ The notice informed Santana that he could take corrective action to prevent the automatic suspension, request a hearing in response to the notice, or, if suspended, request termination of the suspension on the ground of full compliance. The notice warned Santana that if he failed to request termination of the suspension within three months, FINRA would automatically bar him from associating with any member firm in any capacity on September 2, 2014.⁵ Santana never responded to the notice, nor did he answer the outstanding requests for information.

On June 20, 2014, FINRA sent Santana a letter informing him that, as of that date, he was suspended from associating with any FINRA member in any capacity.⁶ That letter reminded Santana that an automatic bar would be imposed on September 2, 2014 if he did not request

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registered persons to keep a current mailing address with NASD "[f]or at least two years *after* an individual registration has been terminated by the filing of . . . [a] Form U5") (emphasis in original).

FINRA also sent the second and third Rule 8210 requests by first-class and certified mail to a Lawrence, New York address. Both of these certified mailings were returned unclaimed.

⁴ FINRA Rule 9552(a) states that if an associated person fails to provide the staff with requested information pursuant to FINRA rules, the association may provide written notice "specifying the nature of the failure and stating that a failure to take corrective action within 21 days after service of the notice will result in [a] suspension."

⁵ 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.

⁶ 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 CRD address. FINRA Rule 9134(a) – (b)(1). FINRA served the May 27, 2014 and June 20, 2014 written notices on Santana by overnight courier service and first-class mail to the same CRD address it used in sending the earlier Rule 8210 requests. A June 18, 2014 Lexis public records search confirmed that Santana's CRD address was his then-current mailing address.

termination of the suspension within three months of the May 27, 2014 notice of suspension. FINRA did not receive a response.

Pursuant to FINRA Rule 9552(h), Santana was barred from association with any FINRA member in any capacity on September 2, 2014. On that same date, FINRA sent Santana written notice of the bar, which also informed him that any appeal to the Commission must be filed within thirty days of receipt of the notice.⁷

C. Santana appealed the bar.

Santana filed an application for review with the Commission on October 6, 2014. In his application, Santana claims that he attempted to respond to FINRA on August 15, 2014, but that FINRA never received his letter. Attached to his application are his response to the FINRA 8210 requests ("8210 Response") and a receipt purporting to show that the 8210 Response was scanned at a Staples Copy Center on August 15, 2014. In moving to dismiss Santana's application for review, FINRA argues that the relevant issue is not whether Santana failed to respond to the Rule 8210 requests, but rather whether Santana "forfeited his ability to challenge FINRA's actions before the Commission" because he failed to follow FINRA procedures for challenging his suspension.

II. Analysis

We find that Santana failed to exhaust his administrative remedies. 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."⁸ On this basis, we consistently 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."⁹ Holding otherwise would severely hinder the self-regulatory capabilities of the SROs

⁷ FINRA sent the bar notice by certified and first-class mail to the same CRD address it used in sending the earlier notices. FINRA also sent the bar notice to a Lawrence, New York address that an August 27, 2014 Lexis public records listed as Santana's then-current mailing address.

⁸ *MFS Sec. Corp.*, Exchange Act Release No. 47626, 56 SEC 380, 2003 WL 1751581, at *5 & n.29 (Apr. 3, 2003) (citing *Royal Sec. Corp.*, Exchange Act Release No. 5171, 36 SEC 275, 1955 WL 43159, at *2 (May 20, 1955)), *aff'd*, 380 F.3d 611 (2d Cir. 2004).

⁹ *See, e.g., Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 WL 265812, at *2 (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); *Norman Chen*, Exchange Act Release No. 65345, 2011 WL 4336720, at *2, *4 (Sept. 16, 2011) (same); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 WL 1840609, at *2-3 (May 6, 2010) (same); *Jeffrey A. King*, Exchange Act Release No. 52571, 2005 WL 2481485, at *2-3 (Oct. 7, 2005) (same); *see also MFS Sec.*, 2003 WL 1751581, at *5-6 (refusing
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and prevent the efficient resolution of disputes between SROs and their members.¹⁰ 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.¹¹

In this case, FINRA specified the procedural requirements for contesting the suspension and bar. It also explained the consequences for failing to follow the 8210 requirements. FINRA repeatedly reminded Santana that he was obligated to provide full, prompt, and unqualified responses to its 8210 requests and warned that any failure to satisfy these obligations could result in a permanent bar from the securities industry. FINRA then sent pre-suspension and suspension notices explaining that he would automatically be barred on September 2, 2014 if he did not timely request termination of his suspension based on full compliance with his 8210 obligations. The pre-suspension notice also explained the procedures for requesting termination, which included a requirement that Santana seek a FINRA hearing.

Santana failed to exhaust these FINRA requirements for challenging the suspension and bar. We find that he did not timely request termination of the suspension from FINRA based on full compliance. As we have explained, in order to request termination under FINRA Rule 9552(f) and ultimately to preserve the right to Commission review, a suspended individual is required to send a timely request to FINRA in the first instance.¹² In his application for review, Santana claims that he "signed, notarized and sent" the 8210 Response on August 15, 2014 and includes records purporting to support this claim. But even if we construe the 8210 Response as a request for termination, Santana acknowledges in his application that the letter was "never received" by FINRA, and further, the documents he attaches to his application fail to show that

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to consider applicant's denial of access to services claim because applicant failed to exhaust New York Stock Exchange's procedures).

¹⁰ *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004).

¹¹ *Id.*

¹² *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *5 (Mar. 1, 2013).

he timely sent this request to FINRA. Rather than demonstrating that it was signed, notarized and sent to FINRA on August 15 as he claims, the 8210 Response is dated September 2, and was notarized on September 3—after Santana's bar was already effective.¹³ Under these circumstances and given the well-established precedent discussed above, we see no basis for denying FINRA's motion to dismiss.

Accordingly, IT IS ORDERED that FINRA's motion to dismiss the application for review filed by Marcos A. Santana is GRANTED.

By the Commission.

Brent J. Fields
Secretary

¹³ We note that, even if Santana had sent the 8210 Response on August 15 as he claims, it does not appear to satisfy the procedural requirements for terminating a suspension, which include full compliance. Santana's 8210 Response did not fully answer the Rule 8210 requests. For instance, Santana failed to state whether he ever owned a credit card "skimming device," failed to provide any correspondence or memoranda referring or relating to the matter, and failed to state whether there were any complaints regarding his employment at the Firm. Nor does Santana provide any explanation, either in the 8210 Response or in his application for review, for his failure to respond in a timely manner to the December 23, 2013, January 7, 2014, or January 22, 2014 Rule 8210 requests or to the May 27, 2014 pre-suspension notice.