SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 93760 / December 13, 2021

Admin. Proc. File No. 3-20192

In the Matter of the Application of

SHAD NHEBI CLAYTON

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Registered securities association barred individual in an expedited proceeding for failing to respond to requests for information. *Held*, application for review is dismissed.

APPEARANCES:

Shad Nhebi Clayton, pro se.

Alan Lawhead, *Jennifer Brooks*, and *Gary Dernelle*, for FINRA.

Appeal filed: December 21, 2020
Last brief received: February 25, 2021

Shad Nhebi Clayton, who was formerly associated with a FINRA member firm, appeals from a FINRA action barring him from association with any FINRA member firm for failing to respond to FINRA's requests for information and documents. FINRA moves to dismiss Clayton's application for review because he failed to exhaust his administrative remedies before FINRA and his application is untimely. Clayton opposes FINRA's motion. For the reasons explained below, we grant FINRA's motion and dismiss Clayton's application for review.

I. Background

Clayton was registered with FINRA member PFS Investments from May 2006 until PFS terminated him in January 2011. According to FINRA's Central Registration Depository ("CRD"), "a computerized database that contains information about most brokers, their representatives, and the firms they work for,"[1] PFS terminated Clayton because he "fail[ed] to respond to the firm's request for a Form U4 amendment." Form U4 is the form brokers use to register with FINRA member firms, and it must be kept current at all times.[2] PFS requested the amendment after it "received notice from the Iowa Department of Insurance that Mr. Clayton's insurance license was [suspended] due to an unpaid state debt." PFS filed with FINRA a Uniform Termination Notice for Securities Industry Regulation ("Form U5") in March 2011.

A. Clayton failed to respond to FINRA's requests for information.

On March 16, 2011, FINRA sent Clayton a letter explaining that it was "conducting an inquiry with respect to a Form U5 filing from PFS Investments Inc., which reported that [Clayton's] agent agreements were terminated for failing to respond to the Firm's request for an amended Form U4." FINRA requested that Clayton provide documents and information to FINRA by April 15, 2011. In the letter, FINRA reminded Clayton of his obligation to respond pursuant to FINRA Rule 8210. That rule requires a person associated with a FINRA member firm "to provide information orally, in writing, or electronically … with respect to any matter involved" in a FINRA investigation, complaint, examination, or proceeding.[3] FINRA sent the letter via both certified and first-class mail to Clayton's address of record in its CRD.[4]

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1 *Stephen Robert Williams*, Exchange Act Release No. 89238, 2020 WL 3820989, at *1 n.2 (July 7, 2020) (internal quotation marks and citation omitted).

2 *Louis Ottimo*, Exchange Act Release No. 83555, 2018 WL 3155025, at *2 (June 28, 2018).

3 *See* FINRA Rule 8210(a) (2011).

4 *See* FINRA Rule 8210(d) (2011) (providing that a notice "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 residential address of the person as reflected in the [CRD]"); *Destina Mantar*, Exchange Act Release No. 79851, 2017 WL 221653, at *3 (Jan. 19, 2017) (stating that it is the registered individual's obligation to keep the CRD address current) (citing *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *5, 7 (July 27, 2015)).

On April 20, 2011, FINRA sent Clayton a letter stating that it had not received any response to its March 2011 letter, and directing that "[t]he previously requested materials must arrive in this office on or before May 4, 2011." The letter enclosed a copy of the first request and reminded Clayton of his obligation to respond. It explained that a failure to comply could subject Clayton to disciplinary action. As with the previous month's letter, FINRA sent this letter via both certified and first-class mail to Clayton's address of record in its CRD.

Clayton did not respond to FINRA's letters or provide the requested information.

B. FINRA suspended and then barred Clayton for failing to respond to its requests.

After Clayton failed to respond to FINRA's requests for information and documents, FINRA initiated expedited proceedings under FINRA Rule 9552 to suspend Clayton from association with any FINRA member.[5] In a letter dated June 2, 2011 (the "Pre-Suspension Notice"), FINRA notified Clayton that his failure to respond to FINRA's March and April 2011 requests for information and documents would subject him to a suspension on June 27, 2011 ("the Suspension Date"). The Pre-Suspension Notice enclosed copies of the Rule 8210 requests that FINRA had previously sent by certified and first-class mail. It also explained that "the suspension w[ould] not take effect" if Clayton were to "take corrective action by complying with the requests before the Suspension Date," but that Clayton "may still be subject to a disciplinary action for [his] failure to respond timely to a request for information under FINRA Rule 8210"; that Clayton could request a hearing under FINRA Rule 9552(e) to contest the suspension by the Suspension Date, which would "stay the effective date of any suspension"; and that if suspended Clayton could file a written request to terminate the suspension "on the ground of full compliance" with the Pre-Suspension Notice, but that a failure to do so within a period of three months of the date of the Pre-Suspension Notice would result in FINRA barring Clayton on September 6, 2011, from associating with any FINRA member. FINRA sent the Pre-Suspension Notice to Clayton by FedEx overnight delivery and first-class mail to the CRD address.

Clayton did not respond to the Pre-Suspension Notice and failed to take corrective action or request a hearing by the Suspension Date. On June 27, 2011, FINRA notified Clayton in a letter (the "Suspension Notice") that he had been suspended from associating in any capacity with a FINRA member. The Suspension Notice advised Clayton that he could file a written request to terminate the suspension based on full compliance with the Pre-Suspension Notice, but

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[5] *See* FINRA Rule 9552(a) (2011) (setting forth procedures for expedited proceedings based on the "failure to provide information or keep information current"); *see also Mantar*, 2017 WL 221653, at *4 (noting that "expedited proceedings and disciplinary proceedings are 'two [separate] avenues' for addressing" failures to respond to information requests (alteration in original) (quoting *Christopher A. Parris*, Exchange Act Release No. 78669, 2016 WL 4446331, at *2 (Aug. 24, 2016))). FINRA initiates expedited proceedings by sending an individual a notice "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." FINRA Rule 9552(a). "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).

reiterated that if Clayton did not do so by September 6, 2011, FINRA would automatically bar him under FINRA Rule 9552(h). FINRA send the notice by FedEx overnight delivery and first-class mail to Clayton's CRD address. Clayton did not respond to the notice, seek to terminate his suspension, or comply with FINRA's requests for information.

On September 6, 2011, FINRA notified Clayton in a letter (the "Bar Notice") that he was barred from association with any FINRA member effective immediately. The Bar Notice informed Clayton that he could appeal FINRA's action by filing an application for review with the Commission within thirty days of receipt of the notice. FINRA sent the Bar Notice by FedEx overnight delivery and first-class mail to Clayton's address of record in its CRD.

C. Over nine years later, Clayton filed an application for review with the Commission.

On December 21, 2020, more than nine years after FINRA imposed the bar, Clayton sent the Commission a letter seeking to appeal FINRA's action. In the letter, Clayton acknowledged that FINRA sent the 2011 correspondence to his "primary residence," which was Clayton's "official address of record" at the time, but he contended that, because of "extenuating circumstances beyond [his] control," he did not become aware of FINRA's 2011 correspondence—or the bar imposed against him—until "late summer of 2017." On February 1, 2021, FINRA filed a motion with the Commission to dismiss Clayton's application for review because he failed to exhaust his administrative remedies and his application was untimely. Clayton opposes FINRA's motion.

II. Analysis

A. Clayton failed to exhaust his administrative remedies.

We will not review the action of a self-regulatory organization ("SRO") like FINRA if the applicant failed to exhaust the SRO's administrative remedies.[6] Courts have upheld our administrative-exhaustion requirement because it "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."[7] The administrative-exhaustion requirement "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."[8] "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."[9]

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6 *See, e.g., Williams*, 2020 WL 3820989, at *4.

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

8 *Id.*

9 *Id*.

We find, and Clayton does not dispute, that he failed to exhaust his administrative remedies before FINRA. The Pre-Suspension and Suspension Notices described the administrative process for avoiding imposition of a suspension or bar: (1) "tak[ing] corrective action" by providing the information FINRA requested prior to the Suspension Date; (2) "requesting a hearing" in response to the Pre-Suspension Notice; or (3) "fil[ing] a written Request for Termination of the Suspension on the ground of full compliance" with the Pre-Suspension Notice. Clayton does not assert that he did any of these things. We have previously stated that applicants who do not avail themselves of FINRA's administrative processes thereby forfeit any future challenge to FINRA's actions before the Commission.[10]

Clayton asserts that he "was completely unaware of all attempts by FINRA to contact [him]," because an "unamicable situation" between Clayton and his then-wife required Clayton to "refrain from occupying or entering [his] primary address"—that is, his address of record in CRD, which Clayton acknowledges to have been his "official address" on file with FINRA. Clayton further asserts that, given various factors causing him mental or physical duress in 2011, "it never occurred to [him] to update [his] U4 or notify FINRA" that he may not be able to receive correspondence at his CRD address. But we have emphasized repeatedly that it is the registered individual's obligation to keep the CRD address current.[11] That is because FINRA's rules permit it to serve a natural person by personal service, U.S. Postal Service mail, or courier service at the person's last known residential address as reflected in the CRD.[12] Service by courier or express delivery is complete upon delivery, and service by mail is complete upon mailing.[13] FINRA's rules do not require it to confirm receipt.[14] As a result, a person generally cannot avoid the exhaustion requirement "by failing to receive or claim mail properly sent to [his] address."[15]

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10 *Williams*, 2020 WL 3820989, at *4; *accord Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 WL 4656403, at *2 (Sept. 19, 2014) (dismissing application for review where applicant failed to exhaust administrative remedies under Rule 9552); *see also MFS Sec.*, 380 F.3d at 621 (recognizing as "valid" the Commission's frequent application of an exhaustion requirement in its review of SRO actions) (citing *Gary A. Fox*, Exchange Act Release No. 46511, 2002 WL 31084725, at *2 (Sept. 18, 2002) (dismissing application for review of bar imposed for failing to comply with Rule 8210 for failing to exhaust administrative remedies)).

11 *See, e.g.*, *Mantar*, 2017 WL 221653, at *3; *Perpetual Secs., Inc.*, Exchange Act Release No. 56613, 2007 WL 2892696, at *9 (Oct. 4, 2007).

12 *See* FINRA Rule 9134(a)(1)–(3), (b)(1); FINRA Rule 9552(b).

13 FINRA Rule 9134(b)(3).

14 *See* FINRA Rule 9134(b)(3); *Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, 2006 WL 3590274, at *5 & n.30 (Dec. 11, 2006) (holding that the rules of NASD, FINRA's predecessor, did "not require that receipt be acknowledged by the addressee").

15 *Christine D. Memet*, Exchange Act Release No. 83711, 2018 WL 3584178, at *4 (July 25, 2018).

Although we have occasionally remanded bars imposed in expedited proceedings where it was unclear from the record whether the applicant actually received any of FINRA's requests for information or notices of sanctions, we have done so where the applicant provided FINRA with the information it requested upon learning of the requests.[16] For example, in *Destina Mantar*, we remanded where the record established that Mantar may have lacked actual notice of FINRA's request for information until the date her bar became effective, Mantar responded to FINRA's requests two weeks later and before her appeal to the Commission, and FINRA did not provide an explanation as to why barring her in an expedited proceeding was appropriate notwithstanding her response to FINRA.[17] This case is not like *Mantar*.

We have also remanded in situations where the record did not contain sufficient information to determine if FINRA complied with its service rules,[18] where the record raised questions about whether FINRA was aware that its requests and notices were not reaching the respondent,[19] and where the evidence indicated that another person had taken the requests and notices intended for the applicant and rendered them inaccessible to the applicant.[20] The facts here are not analogous. As discussed above, FINRA properly served its requests and notices by sending them to the CRD address via FedEx overnight delivery and first-class mail. The record also lacks any evidence that FINRA knew Clayton may not have received its requests and notices. Indeed, the record shows that before FINRA sent the Suspension and Bar Notices, it conducted public record searches that confirmed that the CRD address was Clayton's current address. And there is no evidence that Clayton's wife or any other person took the notices sent to Clayton's CRD address or that Clayton was otherwise unable to obtain them.

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16 *See, e.g.*, *Mantar*, 2017 WL 221653, at *5; *see also Brendan D. Feitelberg*, Exchange Act Release No. 89365, 2020 WL 4196029, at *7 (July 21, 2020) ("We find that a remand is warranted here for similar reasons as in *Mantar*. Like Mantar, Feitelberg is challenging a bar imposed in an expedited proceeding. Also like Mantar, it appears that Feitelberg did not receive FINRA's second Rule 8210 request or any of its notices. As did Mantar, Feitelberg responded to FINRA's requests once he learned of the bar and before he filed his application for review.").

17 2017 WL 221653, at *5.

18 *Kevin M. Murphy*, Exchange Act Release No. 79016, 2016 WL5571633, at *4 (Sept. 30, 2016); *James A. Bari, Jr.*, Exchange Act Release No. 48292, 2003 WL 21804686, at *2 (Aug. 6, 2003).

19 *Robert J. Langley*, Exchange Act Release No. 50917, 2004 WL 2973866, at *3 (Dec. 22, 2004); *see also* FINRA Rule 9134(b)(1) (stating that, if FINRA staff had "actual knowledge" that the CRD residential address was "out of date," it was required to serve duplicate copies at the person's last known residential address and the person's CRD business address).

20 *Ryan R. Henry*, Exchange Act Release No. 53957, 2006 WL 1565128, at *3 (June 8, 2006) (citing evidence that applicant's grandmother "signed for a number of communications" from NASD that were "discovered . . . while going through [her] things after her death").

Here, Clayton had notice of the proceeding because FINRA served him properly.[21] Yet Clayton failed to request a hearing before he was suspended, request termination of the suspension after he was suspended, or provide the requested documents and information to FINRA at any point of the proceeding.[22] Accordingly, we dismiss Clayton's application for review because he failed to exhaust his administrative remedies before FINRA.[23]

B. Clayton's remaining arguments are unavailing.

Clayton appears to argue that a bar is unwarranted because neither the initial requests for information nor the bar are "connected to any type of misconduct or violation of an ethical standard." But these arguments go to the merits of the bar, and we decline to address them because Clayton failed to exhaust his administrative remedies before FINRA.[24] We note that we

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[21] *See Memet*, 2018 WL 3584178, at *4; *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at *3-4 & n.20 (Feb. 8, 2016).

[22] *See, e.g., Lenahan*, 2014 WL 4656403, at *2 (stating that applicant "was given the opportunity to avail herself of FINRA's administrative process" by taking corrective action, requesting a hearing, or filing for termination of the suspension, yet "failed to exercise her rights at any stage of the process before FINRA and, thus, failed to exhaust her administrative remedies"); *cf. Mahon v. U.S. Dep't of Agric.*, 485 F.3d 1247, 1261-62 (11th Cir. 2007) (finding that petitioner was barred from seeking judicial review of denial of agency's claim for disaster relief because agency's regulations required that a request for internal agency review of denial be made within 30 days of denial and personally signed by the individual seeking review and although the individual's attorney requested internal agency review within the 30-day deadline the individual did not request internal agency review until nine days after the deadline); *Lewis v. Potter*, No. 6:9-570-HFF-WMC, 2009 WL 4823893, at *4-5 (D.S.C. Dec. 14, 2009) (dismissing complaint for plaintiff's failure to exhaust administrative remedies where he failed to timely file internal agency appeal, despite his argument that he never received notice of the action to be appealed because it was sent to the wrong address, where notice was sent to plaintiff's address of record and he knew of his obligation to notify agency if he changed addresses).

[23] Because we find that Clayton failed to exhaust his administrative remedies, we need not address whether Clayton's application for review was untimely or whether extraordinary circumstances justify allowing Clayton to file an untimely application for review. We note that it does not appear that FINRA filed a notice with the Commission under Exchange Act Section 19(d)(1) of its action barring Clayton. *See generally Robert L. Bryant III*, Exchange Act Release No. 92036, 2021 WL 2182224, at *1 (May 26, 2021) (directing the parties to address whether "the deadline for filing an application for review of FINRA action is affected by the date that FINRA files notice of the action with the Commission under Exchange Act Section 19(d)(1) and whether the failure to file such notice . . . prevents the filing deadline from beginning to run").

[24] *See, e.g., Williams*, 2020 WL 3820989, at *5 ("[The applicant] cannot argue about the merits of the bar since he did not timely raise these issues in the first instance to FINRA through its administrative process."); *Khalid Morgan Jones*, Exchange Act Release No. 80635, 2017 WL 1862331, at *5 (May 9, 2017) ("Jones cannot argue about the merits of the bar since he did not timely raise the issue in the first instance to FINRA through its administrative process by, for

have previously held that associated persons of FINRA member firms cannot refuse to comply with information requests that they consider to be unimportant and that the nature of the requested information does not mitigate a failure to respond to Rule 8210 requests.[25]

Clayton also states that he holds life insurance licenses in several states and has passed the "SIE entrance exam," and that it therefore would be "a grave injustice" to bar him until he files a MC-400 Membership Continuance Application.[26] Again, we do not consider the appropriateness of the bar. We note that bars do not expire when individuals subject to them file a MC-400 Membership Continuance Application; FINRA member firms file such applications for permission to associate with individuals notwithstanding the fact that the individuals are subject to a bar from associating with a FINRA member firm.[27]

Finally, we decline to consider the various arguments Clayton makes with respect to the MC-400 Membership Continuation Application process. These arguments are premature at this time. Clayton could raise these arguments in an appeal to the Commission in the event that FINRA were to deny an MC-400 Membership Continuance Application filed on his behalf.[28]

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example, requesting a hearing in response to the Pre-Suspension Notice"); *Edward J. Jakubik, Jr.*, Exchange Act Release No. 61541, 2010 WL 589808, at *2 n.14 (Feb. 18, 2010) (declining to address applicant's arguments about the appropriateness of a bar because he "failed to exhaust his administrative remedies and … his appeal [wa]s untimely").

25 *PAZ Secs., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at *7 (Apr. 11, 2008) (sustaining bar for failure to respond to Rule 8210 requests despite applicants' argument that "the information NASD requested of them was 'mundane'" and "issued in connection with a 'routine examination' that had nothing to do with any customer or even any securities transaction" because "NASD information requests that do not concern potentially injurious conduct or conduct of potential monetary benefit to respondents are nonetheless important").

26 The reference to the "SIE entrance exam" appears to be the Securities Industry Essentials (SIE) Exam administered by FINRA "for prospective securities industry professionals." *See* Securities Industry Essentials® (SIE®) Exam, *available at* https://www.finra.org/registration-exams-ce/qualification-exams/securities-industry-essentials-exam. According to FINRA's website, "[t]his introductory-level exam assesses a candidate's knowledge of basic securities industry information," and "[p]assing the SIE alone does not qualify an individual for registration with a FINRA member firm or to engage in securities business." *Id.*

27 *See* 15 U.S.C. § 78c(a)(39); FINRA By-Laws, Art. III, § 3(d) (providing that FINRA may grant relief from the ineligibility to associate if it determines that relief is consistent with the public interest and the protection of investors); FINRA Rules 9521-27 (setting forth procedures for a member firm to sponsor the proposed association of a person subject to disqualification).

28 *See, e.g., Bruce Zipper*, Exchange Act Release No. 84334, 2018 WL 4727001, at *11–12 (Oct. 1, 2018) (reviewing applicant's arguments challenging the fairness of FINRA's denial of a membership continuance application); *id.* at *3 ("Exchange Act Section 19(f) governs our review of FINRA's denial of a membership continuance application." (citing 15 U.S.C. § 78s(f))).

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Accordingly, we grant FINRA's motion to dismiss.

An appropriate order will issue.[29]

By the Commission (Chair CLAYTON and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

[29] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93760 / December 13, 2021

Admin. Proc. File No. 3-20192

In the Matter of the Application of

SHAD NHEBI CLAYTON

For Review of Action Taken by

FINRA

ORDER DISMISSING APPEAL OF ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the appeal filed by Shad Nhebi Clayton be, and it hereby is, dismissed.

By the Commission.

Vanessa A. Countryman
Secretary