SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97623 / May 31, 2023

Admin. Proc. File No. 3-21267

In the Matter of the Application of

NANCY KIMBALL MELLON

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF FINRA ACTION

Former registered representative of FINRA member firm filed an application for review of FINRA action barring her from association with any FINRA member. *Held*, application for review is *dismissed* as untimely.

APPEARANCES:

Nancy Kimball Mellon, pro se.

Alan Lawhead, *Andrew Love*, and *Colleen Durbin*, for FINRA.

Appeal filed: December 29, 2022
Last brief received: January 20, 2023

Nancy Kimball Mellon, a former registered representative of Wells Fargo Clearing Services, LLC, a FINRA member, seeks review of FINRA action barring her from associating with any FINRA member for, among other things, conversion and the failure to respond truthfully to FINRA's requests for information. FINRA moves to dismiss Mellon's appeal as untimely. For the reasons below, we grant FINRA's motion.

I. Background

A. FINRA barred Mellon based on findings that she violated various FINRA rules.

This case originated when FINRA launched an investigation of Mellon after Wells Fargo, in 2016, terminated her and filed a Uniform Termination Notice for Securities Industry Registration (a Form U5). As a result of that investigation, FINRA brought a disciplinary proceeding against her in which it found that Mellon had converted $4,300 from Wells Fargo through the submission of false reimbursement requests.[1] According to FINRA, "Mellon knowingly caused her assistant to file false expense reports to obtain reimbursement for expenses she had not paid" and an additional amount as to which "she had no legitimate claim." This misconduct, FINRA found, violated FINRA Rule 2010, which requires that members and associated persons "observe high standards of commercial honor and just and equitable principles of trade." FINRA further found that Mellon's actions caused Wells Fargo to violate recordkeeping requirements under FINRA Rules 4511 and 2010.[2]

Additionally, FINRA found that, during its investigation, Mellon falsely represented to FINRA staff that she was unable to obtain copies of documents related to the false reimbursement requests when she knew that the bank would provide the documents upon request. FINRA found that, "[r]ather than attempting to obtain the requested documents, Mellon purposefully took steps to prevent their production." Mellon's actions, according to FINRA, violated its Rule 8210, which allows FINRA staff to obtain information from members and their associated person in connection with investigations and examinations, along with Rule 2010.[3] Based on these various findings of violation, FINRA imposed three separate bars.

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[1] *Dep't of Enforcement v. Mellon*, Complaint No. 2017052760001 (Oct. 18, 2022).

[2] An associated person violates FINRA Rule 2010 when he or she violates any other FINRA rule. *See, e.g.*, *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *8 n.29 (July 2, 2013) (observing the Commission's "long-standing and judicially-recognized policy" that "a violation of another Commission or NASD rule or regulation constitutes a violation of NASD Rule 2110," the predecessor to FINRA Rule 2010).

[3] As noted, a violation of any other FINRA rule also constitutes a violation of 2010. In addition, providing false information to FINRA in response to a Rule 8210 request constitutes an independent violation of Rule 2010. *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 WL 3891311, at *7 (Aug. 22, 2008) (finding that respondent engaged in an independent violation of predecessor to Rule 2010 by providing false information in response to NASD informational request).

B. Mellon did not appeal until more than two months after she was barred, prompting FINRA to move for dismissal.

On October 18, 2022, FINRA transmitted its decision in this matter to Mellon.[4] In its transmittal letter, FINRA informed Mellon that she could appeal the decision and that, "[t]o do so, she must file an application for review with the SEC within 30 days of receipt of this decision." FINRA's letter also provided the Commission's mailing address (where the application should be sent) and related instructions for filing an appeal. On the day she received FINRA's decision, Mellon e-mailed counsel for FINRA that she intended to appeal. The following day, she again e-mailed counsel for FINRA, writing that she "will be filing an appeal with the SEC regarding the decision." Later on October 19, 2022, Mellon communicated again with FINRA staff and, in response, the staff advised her that any submission pertinent to her appeal should be sent to the Commission.

On November 24, 2022, Mellon sent another e-mail to FINRA, asking that disclosure of the bars that had been imposed in the matter be removed from her BrokerCheck report because of her pending appeal.[5] FINRA counsel responded to Mellon that FINRA had not received notice from the Commission acknowledging her appeal. When Mellon asked where she should send her appeal, FINRA staff provided, on November 25, 2022, an additional copy of the October 18, 2022 transmittal letter for its decision, which, as noted, explained how to file an appeal.

On December 29, 2022, Mellon finally filed an application for review with the Commission. Mellon's filing occurred more than two months after FINRA notified her of its decision (and provided her instructions about how to appeal), and more than one month after FINRA staff again provided her instructions on how to pursue an appeal. Mellon never sought or obtained an extension to the filing deadline.

On January 6, 2023, FINRA moved to dismiss Mellon's appeal as untimely. Later that day, Mellon sent a short e-mail to the Commission in which she made statements about the underlying facts of her case but did not address the substance of FINRA's motion or otherwise explain why her application for review should be considered despite her failure to comply with the applicable filing deadline. On January 19, 2023, FINRA filed a reply in support of its motion and, on January 20, 2023, Mellon filed a sur-reply in which, for the first time, she offered an explanation for the untimeliness of her appeal.[6]

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[4] On the same date, FINRA also provided the Commission with notice of its decision against Mellon.

[5] "BrokerCheck is a free online tool that enables public investors to research the professional backgrounds of current and former FINRA-registered broker-dealers and their representatives, as well as investment adviser firms and their representatives." *Eric David Wagner*, Exchange Act Release No. 79008, 2016 WL 5571629, at *1 n.1 (Sept. 30, 2016).

[6] Rule of Practice 154(b), 17 C.F.R. § 201.154(b), provides that briefs in opposition to a motion shall be filed within five days after service of the motion. Mellon never sought or obtained an extension of time in which to respond to FINRA's motion. Further, the Rules of Practice "do not contemplate the filing of a sur-reply." *Blackbook Capital, Inc.*, Exchange Act

II. Analysis

Under Section 19(d)(2) of the Securities Exchange Act of 1934, a person seeking to appeal FINRA disciplinary action must file an application for review within 30 days after the date that notice of the action "was filed with [the Commission] and received by such aggrieved person, or within such longer period as [the Commission] may determine."[7] Rule of Practice 420(b) similarly provides that an applicant "must" file an application for review within 30 days "after the notice of the determination is filed with the Commission and received by the aggrieved person applying for review."[8] We have routinely dismissed appeals for failing to comply with the 30-day filing deadline.[9]

Under Rule of Practice 420(b), we may, however, extend the filing deadline upon a showing that "extraordinary circumstances" justify the delay.[10] But we have held that the "extraordinary circumstances exception to the 30-day filing deadline is to be narrowly construed and applied only in limited circumstances," because "strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief."[11] And while "[u]nmet

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Release No. 97027, 2023 WL 2351451, at *5 n.23 (Mar. 2, 2023). Mellon therefore waived any argument raised for the first time in her sur-reply brief. *See Shlomo Sharbat*, Exchange Act Release No. 93757, 2021 WL 5907832, at *7 (Dec. 13, 2021) (applying waiver rules applicable to reply briefs to sur-reply brief); *see also* Rule of Practice 450(b), 17 C.F.R. § 201.150(b). Nevertheless, in the exercise of our discretion, and given that FINRA did not object to the filing of a sur-reply, we have considered this brief in determining whether the circumstances Mellon identifies justify an exception to the filing deadline under our Rules of Practice. *Cf. Sharbat*, 2021 WL 5907832, at *7 n.9 (exercising discretion pursuant to Rule of Practice 100(c), 17 C.F.R. § 201.100(c), to consider sur-reply brief where opposing party did not object).

7 15 U.S.C. § 78s(d)(2).

8 17 C.F.R. § 201.420(b).

9 *See, e.g.*, *McBarron Capital LLC*, Exchange Act Release No. 81785, 2017 WL 4335069, at *2 (Sept. 29, 2017) (dismissing application for review filed 28 days after deadline); *Rogelio Guevara*, Exchange Act Release No. 78134, 2016 WL 3440196, at *2 (June 22, 2016) (dismissing application for review filed 17 days after deadline); *John Vincent Ballard*, Exchange Act Release No. 77452, 2016 WL 1169072, at *2 (Mar. 26, 2016) (dismissing application for review filed 21 days after deadline); *cf. Brian J. Ourand*, Investment Advisers Act Release No. 4482, 2016 WL 4258138, at *2 (Aug. 12, 2016) (dismissing petition for review of initial decision filed 24 days after deadline).

10 17 C.F.R. § 201.420(b).

11 *Ballard*, 2016 WL 1169072, at *3 (quoting *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *3 (Mar. 1, 2013) (internal quotation marks omitted)); *see also See PennMont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *4 (Apr. 23, 2010) ("[A]n extraordinary circumstance under Rule of Practice 420(b) may be shown where the reason for the failure timely to file was beyond the control of the applicant that causes the delay.").

deadlines may cut off substantive rights to review," we have recognized that "this is their function."[12]

When considering whether to excuse late filings, we look at whether "'the failure timely to file was beyond the control of the applicant,' such as through 'attorney misconduct or mental incapacity which prevented the party from making a timely filing.'"[13] Based on our review of the record, we cannot find any basis for concluding that Mellon's failure to file a timely appeal was the result of circumstances beyond her control, nor can we find any other factors that would otherwise establish the requisite extraordinary circumstances.

Mellon identifies what she describes as "extenuating" circumstances, which she claims "made life exceptionally hectic" during and after the filing period and made it difficult to meet the deadline: "family's move, final exams in graduate school and administrative difficulties navigating the SEC website."[14] But she fails to explain why these circumstances qualify as "extraordinary," provide any evidentiary support for this claim, or identify any precedent where we have waived the filing deadline under similar circumstances. For example, Mellon provides no basis for us to conclude how or why her move prevented her from meeting the filing deadline.[15] She does not identify any particular reason for why taking academic exams should excuse her delay. And she links her holiday travel to Thanksgiving and Christmas, which occurred after the filing deadline, and thus could not have prevented her from complying with it.

Finally, Mellon's assertion that she had difficulty navigating the Commission website is undermined by the instructions provided in FINRA's October 18, 2022 transmittal letter—and

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12 *Aliza Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at *4 (Feb. 8, 2016) (quoting *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 WL 1826641, at *2 (May 8, 2014) (citation omitted)).

13 *6D Global Techs., Inc.*, Exchange Act Release No. 81604, 2017 WL 4054123, at *3 (Sept. 13, 2017) (quoting *PennMont Sec.*, 2010 WL 1638720, at *4 (internal alterations omitted)); *see also Brendan D. Feitelberg*, Exchange Act Release No. 89365, 2020 WL 4196029, at *5 (July 21, 2020) (finding extraordinary circumstances where applicant's sworn affidavit indicated that her illness prevented the filing of a timely application and where applicant "acted promptly to file an appeal as soon as reasonably practicable after he recovered").

14 Much of Mellon's arguments, both in her initial response to the motion to dismiss and subsequent sur-reply, focus on attacking the merits of the underlying FINRA action. As we have held, "the measure of whether an untimely application presents an extraordinary circumstance is not simply the relative weight of the arguments presented on appeal—otherwise, the 'extraordinary circumstances' requirement would be read out of [Rule 420]." *PennMont Sec.*, 2010 WL 1638720, at *5. And we find that none of Mellon's merits arguments, which she could have raised in a timely appeal, present extraordinary circumstances warranting review.

15 *See, e.g.*, *Ourand*, 2016 WL 4258138, at *3 (finding that applicant's "relocation from Illinois to Florida" was not an extraordinary circumstance).

subsequent communications—about what she needed to do.[16] She even acknowledges having had "multiple, very helpful discussions" with staff from our Secretary's Office, which facilitated her eventual filing of an application, but she fails to explain why she did not seek such assistance at an earlier point. Nor does Mellon's pro se status exempt her from complying with the Commission's deadlines. As we have held, "'[w]e expect even unrepresented parties to comply with our rules,' and '[p]arties, including those appearing *pro se*, are obligated to familiarize themselves with the Rules of Practice.'"[17]

In short, even accepting Mellon's vague assertions that she was busy during the month she had to file her appeal, she has not shown how those circumstances prevented her from doing so.[18] To the contrary, her repeated interaction with FINRA staff during this time indicates that she had the time and ability to communicate regarding her intention to challenge the FINRA action.[19] Given Mellon's failure to establish the requisite extraordinary circumstances to justify her late filing, we grant FINRA's motion to dismiss.

An appropriate order will issue.

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

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16 *See Ballard*, 2016 WL 1169072, at *3 (dismissing untimely application in part based on fact that FINRA advised applicant that it needed to file its appeal within 30-day deadline).

17 *Ourand*, 2016 WL 4258138, at *3 (quoting *Ballard*, 2016 WL 1169072, at *3); *see also Ballard* 2016 WL 1169072, at *3 (noting that "[t]he filing deadline is clearly set forth in our rules" and that that "an applicant need not identify every contention or argument in an application for review appealing an SRO decision").

18 We have held that, "even 'when circumstances beyond the applicant's control give rise to the delay' in appealing, the applicant must 'demonstrate that he or she promptly arranged for the filing of the appeal as soon as reasonably practicable.'" *Kenneth Joseph Kolquist*, Exchange Act Release No. 82202, 2017 WL 5969252, at *4 (Dec. 1, 2017).

19 *See Kolquist*, 2017 WL 5969252, at *4 (finding no showing of extraordinary circumstances where, during the appeal period, applicant sent two additional correspondences to FINRA" yet did not file a timely application for review).

UNITED STATES OF AMERICA
before the
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ORDER DISMISSING APPLICATION FOR REVIEW

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

ORDERED that FINRA's motion to dismiss the application for review filed by Nancy Kimball Mellon is granted and the application is hereby dismissed.

By the Commission.

Vanessa A. Countryman
Secretary