

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 99422 / January 24, 2024

Admin. Proc. File No. 3-21002

In the Matter of the Application of

JAMES K. MERRILL

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:

James K. Merrill, pro se.

Celia Passaro, for FINRA.

Appeal filed: August 25, 2022
Last brief received: August 30, 2022

James K. Merrill, 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 Merrill’s application for review because he failed to exhaust his administrative remedies before FINRA. Merrill has made no filings since his application for review and thus has not opposed FINRA’s motion. We grant FINRA’s motion and dismiss Merrill’s application for review.

I. Background

A. Merrill failed to respond to FINRA’s request for documents and information.

Merrill was registered with FINRA member Independent Financial Group, LLC (“IFG”) until December 31, 2019. According to FINRA’s Central Registration Depository (“CRD”),¹ Merrill’s termination from IFG was voluntary as of the date of termination. However, on March 24, 2021, IFG filed with FINRA an amended Uniform Termination Notice for Securities Industry Regulation (“Form U5”), which stated that IFG was investigating whether Merrill had “moved assets from advisory accounts to retail brokerage accounts” and then traded “in the brokerage accounts,” causing the clients to pay higher fees due to commissions. The Form U5 also stated that IFG was “in the process of offering reimbursements to impacted clients.”² IFG also checked “yes” next to a question on the Form U5 asking whether Merrill was “under internal review for fraud or wrongful taking of property, or violating *investment-related* statutes, regulations, rules or industry standards of conduct.” (emphasis in original).

On January 19, 2022, FINRA sent Merrill a letter explaining that it was “conducting an examination with respect to” the internal review IFG disclosed in its Form U5. FINRA requested that Merrill provide documents and information to FINRA by February 2, 2022. FINRA also reminded Merrill of his obligation to respond pursuant to FINRA Rule 8210, which requires a person associated with a FINRA member firm “to provide information orally, in

¹ “The CRD contains the registration records of broker-dealer firms, branch offices, and their associated financial professionals, including their qualification, employment, and disclosure histories.” “Central Registration Depository (CRD),” *available at* <https://www.investor.gov/introduction-investing/investing-basics/glossary/central-registration-depository-crd> (last visited Jan. 22, 2024).

² Under Article V, Section 4(a)(1) of FINRA’s By-Laws, FINRA retains jurisdiction over a formerly registered person for at least two years after the effective date of termination of that person’s registration. Here, IFG’s filing of the amended Form U5 on March 24, 2021 (within two years of the original Form U5) recommenced the two-year period after the effective date of Merrill’s termination during which FINRA retained jurisdiction over Merrill. *See Continuing Obligation Notice*, NASD Notice 97-31, 1997 WL 1909798, at *2 (May 1, 1997) (stating that “even if a Form U-5 has been filed, . . . [t]he filing of an amended Form U-5 recommences the running of the two-year period, although the amendment must be filed within two years of the original Form U-5”)

writing, or electronically . . . with respect to any matter involved” in a FINRA investigation, complaint, examination, or proceeding.³

On February 4, 2022, FINRA sent Merrill a letter stating that it had not received any response to its earlier letter and directing that Merrill comply with FINRA’s request by February 24, 2022. The letter enclosed a copy of the first request and reminded Merrill of his obligation to respond. It explained that a failure to comply could subject Merrill to disciplinary action. Merrill did not respond to FINRA’s letters or provide the requested information.

B. FINRA initiated expedited suspension proceedings against Merrill.

After Merrill failed to respond to FINRA’s requests for information and documents, FINRA initiated expedited proceedings under FINRA Rule 9552 to suspend Merrill from association with any FINRA member.⁴ In a letter dated April 1, 2022 (the “Pre-Suspension Notice”), FINRA notified Merrill that, under Rule 9552, his failure to respond to FINRA’s January and February 2022 requests for information and documents would subject him to a suspension on April 25, 2022 (“the Suspension Date”).

The Pre-Suspension Notice enclosed copies of FINRA’s previous requests for information and documents and explained that the suspension would not take effect if Merrill complied with those requests before the Suspension Date. The notice explained that Merrill could request a hearing by the Suspension Date to challenge imposition of any such suspension—and that such a request would “stay the effective date of any suspension.” The notice further explained that, even if suspended, Merrill could still file a written request to terminate the suspension “on the ground of full compliance” with the Pre-Suspension Notice. But the notice warned Merrill that, under Rule 9552, he would be automatically barred on July 5, 2022, from associating with any FINRA member if he ultimately failed to respond within three months of the Pre-Suspension Notice.

C. FINRA suspended and then barred Merrill for failing to respond.

On April 11, 2022, Merrill emailed FINRA, stating that he had received the Pre-Suspension Notice and that he had been ill and unable to hire an attorney to represent him. Merrill attached to the email a 2021 letter his then-attorney had provided to IFG in connection with litigation between IFG and Merrill. Merrill stated that the letter “addresses [FINRA’s] examination questions.” And Merrill represented that he was “no longer in this business and

³ See FINRA Rule 8210(a).

⁴ Rule 9552 allows FINRA to initiate 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). The rule further states that a “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).

[was] wondering why [he] need[ed] to address the same questions that were addressed fully back when the [IFG] litigation was underway.”

On April 14, 2022, FINRA responded by email that Merrill’s email and attachments were not responsive to FINRA’s Rule 8210 request and warned Merrill that he “must respond to each Rule 8210 request” to avoid being suspended and barred. FINRA then extended Merrill’s deadline for complying with the request to May 9, 2022. Merrill neither responded to FINRA’s requests nor requested a hearing by the extended deadline.

On May 10, 2022, FINRA notified Merrill in a letter (the “Suspension Notice”) that he had been suspended from associating in any capacity with a FINRA member. The Suspension Notice advised Merrill that he could file a written request to terminate the suspension based on full compliance with the Pre-Suspension Notice but reiterated that, if Merrill did not do so by July 5, 2022, FINRA would automatically bar him under FINRA Rule 9552(h). Merrill again did not respond.

On July 5, 2022, FINRA notified Merrill in a letter that he was barred from association with any FINRA member effective immediately. Merrill subsequently filed this application for review of FINRA’s action.

II. Analysis

FINRA asks us to dismiss this application for review because Merrill did not exhaust his administrative remedies for challenging the suspension before FINRA. We agree. As we have repeatedly held, applicants who fail to exhaust administrative remedies before FINRA forfeit any future challenge to FINRA’s actions before the Commission.⁵ Such an administrative-exhaustion requirement “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.”⁶ And it “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.”⁷ Dismissing Merrill’s application furthers those interests here.

As the Pre-Suspension and Suspension Notices explained, Merrill had two options for avoiding a suspension: (1) responding to FINRA’s requests for information and documents or (2) requesting a hearing. Merrill did neither. And once Merrill was suspended, he still had the option of fully complying with the Pre-Suspension Notice and requesting that FINRA terminate

⁵ *Potomac Cap. Mkts., LLC*, Exchange Act Release No. 91172, 2021 WL 666510, at *2 (Feb. 19, 2021); *see also Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 WL 3584177, at *4 (July 25, 2018) (holding that “we will not consider an application for review of FINRA action if that applicant failed to exhaust FINRA’s procedures for contesting the sanction”) (internal quotation marks omitted); *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 WL 1683913, at *3 (Apr. 18, 2013) (similar).

⁶ *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 622 (2d Cir. 2004).

⁷ *Id.* at 621.

the suspension based on that compliance. But Merrill did not do that either. Instead, he waited until FINRA barred him for failing to take those steps, at which point Merrill sought Commission review of the bar.

Merrill does not dispute that he failed to exhaust his administrative remedies or otherwise oppose FINRA's motion to dismiss. Merrill has thus waived any arguments against dismissal.⁸ And, we note, Merrill's application for review raised claims that he could have raised with FINRA.⁹ Indeed, FINRA rules required Merrill to raise such claims before FINRA in the first instance to challenge the suspension.¹⁰ Doing so would have allowed FINRA to evaluate Merrill's claims and provide a record for us to review.¹¹ Given Merrill's failure to raise these

⁸ Cf. *Canady v. SEC*, 230 F.3d 362, 362-63 (D.C. Cir. 2000) (upholding Commission's conclusion that respondent "waived [a] defense by failing to argue it"); *Anthony Fields*, Exchange Act Release No. 74344, 2015 WL 728005, at *19 & n.115 (Feb. 20, 2015) (explaining that "arguments for reversal not made in the opening brief" are subject to waiver).

⁹ Merrill's application for review asserted that FINRA did not provide sufficient time for him to respond to his requests due to health concerns and that FINRA provided "no explanation as to what was wrong" when it rejected as unresponsive a letter previously written by Merrill's attorney. Merrill also attached a two-page document that he described as his "answers to FINRA's original questions."

¹⁰ FINRA Rule 9552 (providing procedures for requesting a hearing to contest a suspension). Merrill's application also asserted that he "has no interest in continuing to work with any FINRA related firms" and that FINRA's bar continues "to sully a pristine reputation earned over a more than 40-year business career." But Merrill did not raise these arguments in opposition to FINRA's motion to dismiss. See *supra* note 8 and accompanying text.

¹¹ See, e.g., *Dowd*, 2018 WL 3584177, at *5 (explaining that, "[i]n bypassing FINRA's process for explaining his conduct, [applicant] prevented FINRA from considering his defenses and from developing a record from which we could review the merits of those defenses"); *Jonathan Roth Ellis*, Exchange Act Release No. 80312, 2017 WL 1103694, at *4 (Mar. 24, 2017) (requiring respondent to present merits arguments first to FINRA before raising them on appeal of administrative expulsion) *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *5 (Mar. 1, 2013) (rejecting respondent's attempts to demonstrate compliance with FINRA's document requests in brief before the Commission where respondent failed to request a hearing or termination of suspension pursuant to FINRA rules before appealing).

claims before FINRA and his subsequent failure to challenge FINRA's motion to dismiss because of that failure, we find no justification for departing from our exhaustion requirements.

Accordingly, we grant FINRA's motion to dismiss.

An appropriate order will issue.¹²

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

Vanessa A. Countryman
Secretary

¹² 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
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ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION TAKEN BY
REGISTERED SECURITIES ASSOCIATION

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

ORDERED that this application for review filed by James K. Merrill is dismissed.

By the Commission.

Vanessa A. Countryman
Secretary