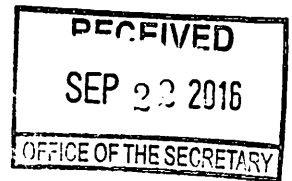


**HARD COPY**

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**



In the Matter of the Application of

David Richard Kerr, III

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority

File No. 3-17515

**FINRA'S MOTION TO DISMISS KERR'S APPLICATION FOR REVIEW AND  
TO STAY BRIEFING SCHEDULE**

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September 21, 2016

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**FINRA'S MOTION TO DISMISS KERR'S APPLICATION FOR REVIEW AND  
TO STAY BRIEFING SCHEDULE**

**I. INTRODUCTION**

David Richard Kerr's application for review should be dismissed because he failed to avail himself of FINRA procedures. Kerr failed to respond to three FINRA Rule 8210 requests for information concerning possible failures to disclose information on his Uniform Application for Securities Industry Registration or Transfer ("Form U4"). FINRA thereafter initiated an expedited proceeding against Kerr and notified him that he would be suspended unless he complied with the requests for information. FINRA also notified Kerr that he had the opportunity to request a hearing to contest the imposition of the suspension or seek termination of the suspension based on full compliance to avoid the automatic bar. Kerr ignored FINRA's numerous notices and did not take any action required by FINRA rules to contest FINRA's impending bar. Rather, more than one week after his bar took effect, Kerr sought to lift his suspension. His request is untimely, and well-standing Commission precedent establishes that he does not qualify for appellate review.

The Commission has consistently held that a party is required to exhaust his administrative remedies before resorting to an appeal, and those who fail to exercise their rights to review under FINRA rules cannot claim that they have exhausted their administrative remedies. Kerr took no corrective action in response to any of the requests or notices he received during the applicable time period. As a result, he failed to exhaust the administrative remedies available to him under FINRA rules. The Commission therefore should dismiss his application for review.<sup>1</sup>

## II. FACTUAL BACKGROUND

Kerr was associated with AXA Advisors, LLC (“AXA Advisors” or the “Firm”) from November 20-30, 2015. (RP 118.)<sup>2</sup> On December 15, 2015, AXA Advisors filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) terminating Kerr for his “[f]ailure to disclose a felony charge as stated in the Department of Justice Report.” (RP 1.) FINRA subsequently initiated an investigation to determine whether Kerr failed to disclose a felony or other required information on his Form U4. (RP 21.)

### A. The December 30, 2015 Request for Information

As part of FINRA’s investigation, on December 30, 2015, Stephanie Sofer, a FINRA investigator, sent Kerr a letter requesting information pursuant to FINRA Rule 8210.<sup>3</sup> (RP 21-

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<sup>1</sup> FINRA requests, pursuant to Commission Rule of Practice 161, that the Commission stay issuance of a briefing schedule in this matter while this motion is pending. The Commission should first evaluate the dispositive argument that Kerr’s appeal should be dismissed on procedural grounds before it reaches the underlying substance of this appeal.

<sup>2</sup> “RP \_\_\_” refers to the page numbers in the certified record filed by FINRA on September 21, 2016.

<sup>3</sup> FINRA Rule 8210 requires persons subject to FINRA’s jurisdiction to provide documents and written information to FINRA with respect to any matter involved in an investigation. The

[Footnote cont’d on next page]

22.) The letter recited that FINRA was conducting an inquiry with respect to the Form U5 filed by AXA Advisors that Kerr failed to disclose a felony charge and sought information concerning a criminal event, State of New York tax liens, and a civil judgment to determine whether Kerr properly disclosed information on his Form U4. (RP 21.) The letter warned Kerr that the failure to fully comply with the request “could expose you to sanctions, including a permanent bar from the industry.” (RP 22.) The letter asked Kerr to respond no later than January 13, 2016. (RP 21.) FINRA sent the request by certified and first-class mail to Kerr’s address of record contained in the Central Registration Depository (“CRD”®), 10 East Lake St., Skaneateles, NY, 13152 (the “CRD Address”)<sup>4</sup>, and an additional, alternative address. (RP 1, 21.)

More than a week after the deadline to respond has passed, Kerr, via telephone, asked Sofer on January 22, 2016, for an extension to comply with the December 30, 2015 FINRA Rule 8210 request. Sofer agreed and orally extended the deadline to respond to January 27, 2016. Even with an extended response deadline, Kerr did not provide the information requested in the December 30, 2015 FINRA Rule 8210 request.

**B. The February 9, 2016 Request for Information**

On February 9, 2016, FINRA investigator Sofer made a second written request pursuant

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[cont’d]

rule “provides a means, in the absence of subpoena power, for the [association] to obtain from its members information necessary to conduct investigations.” *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at \*13 (Nov. 14, 2008) (internal quotations omitted), *aff’d* 347 F. App’x 692 (2d Cir. 2009), *cert. denied*, 599 U.S. 1102 (2010). A person who fails to respond to a request issued under FINRA Rule 8210 impedes FINRA’s ability to detect misconduct and protect the investing public. *Id.* at \*13-14.

<sup>4</sup> As of this filing, CRD still lists the CRD Address as Kerr’s current address. (RP 115.) Kerr’s application for review also provides the CRD Address as his mailing address. (RP 102.)

to FINRA Rule 8210 for information. (RP 25.) The second request instructed Kerr to answer FINRA's questions in the December 30, 2015 request. (RP 25.) The second request also warned Kerr that "[f]ailure to comply with this request may subject you to disciplinary action." (RP 25.) Sofer sent the second request by certified and first-class mail to the CRD Address and the alternative address, and set a response deadline of February 23, 2016. (RP 25.) Kerr did not respond to the FINRA Rule 8210 request or provide the requested information.

**C. The March 14, 2016 Request for Information**

On March 14, 2016, FINRA investigator Sofer prepared a third written request pursuant to FINRA Rule 8210 for information. (RP 29-30.) The third request recited that FINRA was conducting an inquiry about the Form U5 filed by AXA Advisors and the possibility that Kerr may have failed to disclose a March 19, 2013 tax lien on his Form U4. (RP 29.) The letter warned Kerr that the failure to fully comply with the request "could expose you to sanctions, including a permanent bar from the securities industry." (RP 29.) The letter instructed Kerr to respond no later than April 4, 2016. (RP 29.) FINRA, despite using a contract process server, was unable to personally serve the March 16, 2016 letter on Kerr. (RP 35.)

**D. April 6, 2016 Request for Information**

On April 6, 2016, FINRA investigator Sofer prepared a fourth written request pursuant to FINRA Rule 8210 for the information. (RP 31-32.) The fourth request was identical to the third request, but it was dated April 6, 2016, changed the response deadline, and was addressed to the alternative address (not the CRD address). (RP 31.) Like the third request, the fourth request recited that FINRA was conducting an inquiry about the Form U5 filed by AXA Advisors and the possibility that Kerr may have failed to disclose a March 19, 2013 tax lien on his Form U4. (RP 31.) The letter warned Kerr that the failure to fully comply with the request "could expose

you to sanctions, including a permanent bar from the securities industry.” (RP 31.) The letter instructed Kerr to respond no later than April 18, 2016. (RP 31.) FINRA, through a process server, personally served the April 6, 2016 letter on Kerr at the CRD Address on April 6, 2016. (RP 33, 35.) Kerr did not respond to the FINRA Rule 8210 request or provide the requested information.

**E. The April 27, 2016 Pre-Suspension Notice**

Given Kerr’s silence, FINRA’s Department of Enforcement (“Enforcement”) sought to elicit a response to the outstanding FINRA Rule 8210 requests from Kerr by bringing an expedited proceeding that could result in FINRA suspending him from associating with any FINRA member firm. (RP 49-50); *see* FINRA Rule 9552.<sup>5</sup> On April 27, 2016, David Camuzo, an Enforcement director, warned Kerr in a letter (the “Pre-Suspension Notice”) that FINRA planned to suspend him on May 23, 2016 for his failure to respond to the FINRA Rule 8210 requests for information. (RP 49.)

The Pre-Suspension Notice stated that Kerr could avoid imposition of the suspension if he took corrective action by complying with the FINRA Rule 8210 requests by May 23, 2016. (RP 49.) The Pre-Suspension Notice further explained that Kerr had the opportunity to request a hearing to contest the imposition of the suspension (which would stay the effective date of any suspension), and to seek termination of the suspension “on the ground of full compliance” with

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<sup>5</sup> FINRA Rule 9552(a) states that “[i]f a member, person associated with a member or person subject to FINRA’s jurisdiction fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the FINRA By-Laws or FINRA rules, or fails to keep its membership application or supporting documents current, FINRA staff may provide written notice to such member or 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 suspension of membership or of association of the person with any member.”



the Pre-Suspension Notice. (RP 49-50.) The Pre-Suspension Notice stressed not only that Kerr could seek to terminate his suspension, but also that if he failed to request termination of the suspension within three months, he would be in default, and barred, on August 1, 2016. (RP 50.)

FINRA sent the Pre-Suspension Notice by certified and first-class mail to the CRD Address and the alternative address. (RP 37, 49.) Kerr did not take corrective action by complying with the FINRA Rule 8210 requests and did not request a hearing to contest the imposition of the suspension.

**F. The May 23, 2016 Suspension Notice**

Because Kerr failed to take any action in response to the Pre-Suspension Notice, on May 23, 2016, Camuzo notified Kerr in a letter (the “Suspension Notice”) that he was suspended, effective immediately, from association with any FINRA member firm in any capacity. (RP 57.) The Suspension Notice advised Kerr that he could file a written request to terminate the suspension based on fully complying with the Pre-Suspension Notice, and reiterated the warning that Kerr’s failure to seek termination of the suspension by August 1, 2016 would result in a default and an automatic bar pursuant to FINRA Rule 9552. (RP 57.); *see also* FINRA Rule 9552(h).<sup>6</sup>

FINRA sent the Suspension Notice by certified and first-class mail to the CRD Address and the alternative address. (RP 57.) Kerr did not file a written request to terminate the suspension.

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<sup>6</sup> Rule 9552(h) states, “A member or person who is suspended under this Rule 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.”

**G. The August 1, 2016 Bar Notice**

In the three months following the Pre-Suspension Notice, Kerr did not provide the requested information or challenge his suspension. Accordingly, on August 1, 2016, Jasmine Shergill, an Enforcement Senior Attorney, notified Kerr that he was in default, and barred, effective immediately (the “Bar Notice”). (RP 61-62.) FINRA sent the Bar Notice by certified and first-class mail to the CRD Address. (RP 61.)

**H. Kerr’s August 9, 2016 Response**

In a letter dated August 9, 2016, which FINRA received August 19, 2016, Kerr sought to address his failure to respond to FINRA and his failure to disclose information, and requested that FINRA lift his suspension. (RP 63-74.) By letter dated August 23, 2016, Shergill, on behalf of FINRA, notified Kerr that his August 9, 2016 letter was insufficient to terminate the suspension or vacate the bar imposed on him on August 1, 2016. (RP 75-77.)

Kerr thereafter submitted an application for review of this matter to the Commission. (RP 101-14.)

**III. ARGUMENT**

The Commission should dismiss Kerr’s application for review because Kerr failed to exhaust his administrative remedies by providing the requested information or requesting a hearing. Despite receiving notice of these proceedings in accordance with FINRA rules, Kerr ignored numerous letters and notices from FINRA, failed to follow FINRA procedures to challenge his suspension, and defaulted. Kerr thus failed to exhaust his administrative remedies, and the Commission should dismiss this appeal.

**A. Kerr Failed to Exhaust His Administrative Remedies**

The Commission is precluded from considering Kerr's application for review because he failed to follow FINRA procedures to challenge his suspension, and consequently, failed to exhaust his administrative remedies. The precedent in this area is well-settled. *See, e.g., Darren M. Smith*, Exchange Act Release No. 75705, 2015 SEC LEXIS 3368 (Aug. 14, 2015) (dismissing applicant's appeal for failure to exhaust administrative remedies when FINRA barred applicant under FINRA Rule 9552 for failing to respond to FINRA Rule 8210 requests); *Marcos A. Santana*, Exchange Act Release No. 74138, 2015 SEC LEXIS 312, at \*11 (Jan. 26, 2015); *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 SEC LEXIS 1147, at \*11-15 (Apr. 18, 2013) (same); *Norman 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); *Gary A. Fox*, 55 S.E.C. 1147, 1149-50 (2002) (same).

An aggrieved party—such as Kerr—is required to exhaust his administrative remedies before resorting to an appeal, and those who fail to exercise their rights to administrative review cannot claim that they have exhausted their administrative remedies. *See Royal Sec. Corp.*, 36 S.E.C. 275, 277 n.3 (1955). This doctrine applies with equal force to FINRA proceedings. *See Lang v. French*, 154 F.3d 217, 220 (5th Cir. 1998) (holding that “[NASD] disciplinary orders are reviewable by the [Commission] after administrative remedies within the NASD are exhausted”); *Swirsky v. NASD*, 124 F.3d 59, 62 (1st Cir. 1997) (noting that the court “agree[s] with other circuits that have considered the question,” and concluded that the doctrine of exhaustion of administrative remedies applies in NASD disciplinary actions).

Despite FINRA serving Kerr with three FINRA Rule 8210 requests<sup>7</sup>, the Pre-Suspension Notice, the Suspension Notice, and the Bar Notice, Kerr repeatedly chose not to pursue his administrative remedies to prevent or challenge his suspension. (RP 21, 25, 29, 31, 49, 57, 61.) He chose not respond to three FINRA Rule 8210 requests, in which he was informed that a failure to respond could result in serious sanctions, including a bar. (RP 21, 25, 31.) Then, after issuance of the Pre-Suspension Notice, Kerr had the opportunity to take corrective action by complying with the FINRA Rule 8210 requests or, alternatively, to request a hearing and set forth the reasons why he believed his suspension should be set aside. (RP 49.) But Kerr did neither. After issuance of the Suspension Notice, Kerr had the opportunity to seek termination of the suspension prior to the automatic bar going to effect. (RP 57.) Again, Kerr did nothing. Accordingly, pursuant to FINRA Rule 9552(h), Kerr was barred. (RP 61.); *see also* FINRA Rule 9552(h).

By failing to take any action in accordance with FINRA rules and as directed by the Pre-Suspension and Suspension Notices, Kerr defaulted, and forfeited his ability to challenge the actions of FINRA before the Commission. *See Martinez*, 2013 SEC LEXIS 1147, at \*15 (relying on “well-established precedent” and dismissing application for review in a FINRA Rule 9552 proceeding where applicant failed to request a hearing or take corrective action by complying with FINRA Rule 8210 requests); *Chen*, 2011 SEC LEXIS 3224, at \*10 (finding that applicant’s conduct ““amounted to a complete failure to respond and [FINRA] acted consistently with the purposes of the Exchange Act in imposing the bar””); *Profeta*, 2010 SEC LEXIS 1563,

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<sup>7</sup> Despite considerable effort, FINRA was unable to personally serve Kerr with the third FINRA Rule 8210 request. (RP. 29-30, 35.) As a result, Kerr only received or was deemed to have received three FINRA Rule 8210 requests. (RP. 21, 25, 31, 33.) *See infra* Part III.B.

at \*6 (finding in a FINRA Rule 9552 proceeding that “FINRA’s actions were in accordance with its rules and the purposes of the Exchange Act [when] rules set forth the procedures for suspending and ultimately barring individuals who fail to supply requested information or take corrective action”).

Kerr could have provided the information at issue, requested a hearing, or contested the suspension during the three-month suspension period, as detailed in the Pre-Suspension Notice and as provided by FINRA rules. (RP 49.) He took none of these steps. Instead, more than a week after Kerr’s suspension converted to a bar, Kerr requested that his suspension be lifted. (RP 63-74.) FINRA correctly determined that Kerr’s response was insufficient to vacate the bar and his response—more than seven months after the original FINRA Rule 8210 request—was too late. (RP 75-77.)

Kerr in turn filed his application for review by the Commission. (RP 101-14.) But in order to preserve the right to Commission review, Kerr needed to respond to FINRA by August 1, 2016. He did not do so. “It 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 the review.” *Fox*, 55 S.E.C. at 1150 (internal citation omitted). Here, Kerr sent FINRA his August 9, 2016 letter, which was not received by FINRA until August 19, 2016, *after* his bar was already effective. In his application for review, Kerr asserts that he disclosed all required information on his Form U4, which was the subject of the FINRA Rule 8210 requests. But even if that were true, that does not mitigate Kerr’s failure to comply with FINRA’s administrative procedures or preserve his right for Commission review. *See Profeta*, 2010 SEC LEXIS 1563, at \*7- 8 (“Applicant chose not to respond to FINRA’s letters to raise these issues or request a hearing to challenge his impending sanction, and therefore cannot

complain at this stage about the consequence of his choice.”). And Kerr could have offered the same explanation in response in the FINRA Rule 8210 requests, requested a hearing, or contested the suspension. He did not do so. Kerr’s failure to participate in FINRA proceedings means that he does not qualify for appellate review by the Commission. *Cf. Santana*, 2015 SEC LEXIS 312, at \*11 (dismissing applicant’s appeal when he sent FINRA his request for termination of his suspension after his bar was already effective.)

**B. FINRA Provided Kerr with Proper Notice of These Proceedings**

FINRA properly served Kerr with three FINRA Rule 8210 requests, the Pre-Suspension Notice, the Suspension Notice, and the Bar Notice. (RP 21, 25, 31, 49, 57, 61.) Kerr, a formerly registered person,<sup>8</sup> was deemed to have received all FINRA correspondence sent to the “last known residential address,” as reflected in FINRA records. *See* FINRA Rule 8210(d) (providing that any request for information “shall be deemed received” when it is transmitted to the “last known residential address of the person as reflected in [CRD]”); Rule 9134(b)(1) (“Papers served on a natural person may be served at the natural person’s residential address, as reflected in the [CRD], if applicable.”); Rule 9552(b) (“FINRA staff shall serve the . . . person with such notice . . . in accordance with Rule 9134”). The record demonstrates that FINRA complied with the applicable rules. *See Smith*, 2015 SEC LEXIS 3368, at \*7 n.7. FINRA sent the first two FINRA Rule 8210 requests, the Pre-Suspension Notice, the Suspension Notice, and the Bar Notice to the CRD Address, of which Kerr is deemed to have received. (RP 1, 21, 25, 37, 49, 57, 61.) And Kerr had actual notice of the final FINRA Rule 8210 request which FINRA personally

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<sup>8</sup> Kerr was previously registered as a general securities representative from October 2007 to March 2008. (RP 118.) His CRD number is 5422704. (RP 115.)

served. (RP 31, 33.) Indeed, in his application for review, Kerr acknowledges that he “did receive some of the letters,” but he chose not to respond. (RP 102.)

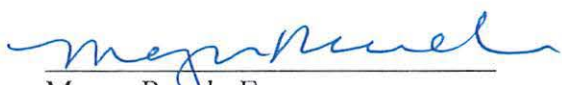
\* \* \* \* \*

It is undisputed that Kerr, despite receiving notice of these proceedings in accordance with FINRA rules, did not properly invoke FINRA’s administrative procedures for challenging his suspension. Accordingly, the Commission should dismiss this appeal.

#### **IV. CONCLUSION**

Kerr failed to provide to FINRA information requested pursuant to FINRA Rule 8210 and, consequently, was suspended. Kerr then ignored numerous FINRA notices and failed to avail himself of FINRA administrative procedures to terminate the suspension. As a result, Kerr defaulted, and was barred, in accordance with FINRA procedures. Kerr took no corrective action in response to any of the requests or notices he received during the applicable time period. As a result, Kerr failed to exhaust his administrative remedies. Accordingly, the Commission should dismiss Kerr’s application for review.

Respectfully submitted,

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September 21, 2016

**CERTIFICATE OF SERVICE**

I, Megan Rauch, certify that on this 21st day of September, 2016, I caused the original and three copies of the Motion to Dismiss the Application for Review and to Stay Briefing Schedule in the matter of Application for Review of David Richard Kerr, III, Administrative Proceeding No. 3-17515, to be served by messenger on:

Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F St., NE  
Room 10915  
Washington, DC 20549-1090

and via certified mail and electronic mail on:

David Richard Kerr, III

[REDACTED]  
Skaneateles, NY  
[REDACTED]

Different methods of service were used due to the distance between the offices of FINRA and Applicant.

Respectfully submitted,



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