

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



In the Matter of the Application of

Patrick H. Dowd

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority

File No. 3-18283

**FINRA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS DOWD'S
APPLICATION FOR REVIEW AND TO STAY BRIEFING SCHEDULE**

Andrew Love
Associate General Counsel

Megan Rauch
Assistant General Counsel

FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
202-728-8863

December 11, 2017

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	2
A. Dowd Failed to Exhaust His Administrative Remedies	2
B. FINRA Provided Dowd With Proper Notice of His Right to File an Appeal of FINRA’s Decision to the Commission	4
III. CONCLUSION.....	8

TABLE OF AUTHORITIES

<u>SEC Decisions and Releases</u>	<u>Page(s)</u>
<i>Manuel P. Asensio</i> , Exchange Act Release No. 62315,..... 2010 SEC LEXIS 2014 (June 17, 2010)	7
<i>James L. Bari, Jr.</i> , Exchange Act Release No. 48292,..... 56 S.E.C. 824 (2003)	7
<i>Norman S. Chen</i> , Exchange Act Release No. 65345,..... 2011 SEC LEXIS 3224 (Sept. 16, 2011)	3
<i>Ryan R. Henry</i> , Exchange Act Release No. 53957,..... 2006 SEC LEXIS 1333 (June 8, 2006)	6
<i>Robert J. Langley</i> , Exchange Act Release No. 50917,..... 57 S.E.C. 1125, 1132 (2004)	6
<i>Destina Mantar</i> , Exchange Act Release No. 77084,..... 2016 SEC LEXIS 464 (Feb. 8, 2016)	6
<i>Aliza A. Manzella</i> , Exchange Act Release No. 79851,..... 2017 SEC LEXIS 194 (Jan. 19, 2017)	5, 7
<i>Gilbert T. Martinez</i> , Exchange Act Release No. 69405, 2013 SEC LEXIS 1147 (Apr. 18, 2013)	4
<i>Kevin C. Murphy</i> , Exchange Act Release No. 79016,..... 2016 SEC LEXIS 3772 (Sep. 30, 2016)	6
<i>Ricky D. Mullins</i> , Exchange Act Release No. 71926,..... 2014 SEC LEXIS 1268 (Apr. 10, 2014)	4
<i>Christopher A. Parris</i> , Exchange Act Release No. 78669,..... 2016 SEC LEXIS 3075 (Aug. 24, 2016)	6
<i>Rooney A. Sahai</i> , Exchange Act Release No. 55046,..... 2007 SEC LEXIS 13 (Jan. 5, 2007)	3
<i>Mark Steven Steckler</i> , Exchange Act Release No. 71391,..... 2014 SEC LEXIS 283 (Jan. 24, 2014)	2, 4

Federal Statutes and Codes

15 U.S.C. § 78s4

FINRA Rules and Guidelines

FINRA Rule 8210 *passim*

FINRA Rule 91345

FINRA Rule 95524

FINRA Rule 95595

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

In the Matter of the Application of

Patrick H. Dowd

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority

File No. 3-18283

**FINRA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS DOWD'S
APPLICATION FOR REVIEW AND TO STAY BRIEFING SCHEDULE**

I. INTRODUCTION

Patrick Hugh Dowd's application for review should be dismissed because he failed to exhaust his administrative remedies in FINRA's forum and failed to timely appeal FINRA's action against him to the Commission. Despite receiving notice of these proceedings in accordance with FINRA rules, Dowd ignored numerous letters and notices from FINRA, failed to follow FINRA procedures to challenge his suspension, and defaulted. As a result, Dowd was barred from associating with any FINRA member. Then, more than six months after his time to appeal to the Commission had lapsed, Dowd filed his application for review.

Dowd does not provide any basis in his opposition that would excuse his failure to exhaust his administrative remedies or his untimeliness. Rather, he argues that responding to FINRA's Rule 8210 requests would have been futile and that FINRA did not provide "evidence that Dowd received" the Bar Notice and FINRA failed "to ensure delivery of the Bar Notice." Dowd's purported defenses fall flat and ignore well-established precedent that undermines each argument. The Commission should therefore dismiss this appeal.

II. ARGUMENT

A. Dowd Failed to Exhaust His Administrative Remedies

The Commission is precluded from considering Dowd's application for review because he failed to follow the requisite procedural steps as a condition of applying for Commission review. Dowd does not deny receiving FINRA's requests for information, the Pre-Suspension Notice, or the Suspension Notice, and explicitly acknowledged that he received the August 11, 2017 request for information.¹ (RP 39-40.) In any event, Dowd is deemed to have received all FINRA correspondence sent to him at his CRD address.² See *Mark S. Steckler*, Exchange Act Release No. 71391, 2014 SEC LEXIS 283, at *10-11 (Jan. 24, 2014). Dowd thus had notice of FINRA's requests for information, the consequences of failing to respond to those requests, the suspension that was entered, the means of challenging the suspension, and the consequences of not challenging the suspension. Dowd could have previously provided the information at issue, requested a hearing, or contested the suspension during the three-month suspension period. He took none of these steps, and thus failed to exhaust his administrative remedies and lost the ability to challenge FINRA's actions in this appeal.

In his opposition, Dowd attempts to excuse his failure to exhaust his administrative remedies by asserting that "it would have been futile for Dowd to have responded to FINRA's requests for information." Opp. at 7. But Dowd cannot invoke the Commission's appellate jurisdiction now when he did not make arguments in opposition before a FINRA adjudicator.

¹ Although Dowd acknowledges that "FINRA provided a notification to [him] on or about March 27, 2017 indicating he was barred," Dowd now asserts that he did not timely receive notice of his right to file an application for review with the Commission. Opp. at 6-7; RP 39-40.

² It is undisputed that FINRA sent all of the correspondence to Dowd at his CRD address. (RP 1-5, 7-13, 15-21, 25-27, 31-34, 45, 47.)

As an initial matter, it is well established that if an associated person is unable to provide the information requested in a FINRA Rule 8210 request, there remains a duty to explain that inability. *See Rooney A. Sahai*, Exchange Act Release No. 55046, 2007 SEC LEXIS 13, at *13 (Jan. 5, 2007). Rather than explain why he could not respond, Dowd ignored the FINRA Rule 8210 requests in their entirety. Dowd's argument also conveniently ignores that three of the four requests in the FINRA Rule 8210 requests sought a *written* statement from Dowd, not documents. (RP 2.) It defies logic that Dowd would need allegedly inaccessible files located at his former firm to "meaningfully" respond to FINRA's requests to provide a written statement about the basis of his termination, an explanation as to why he submitted annuity applications that were not signed by his clients, and a statement about the existence of any other recent complaints. (RP 2.)

By failing to respond to the FINRA Rule 8210 requests in any manner, Dowd frustrated FINRA's investigation about his termination for submitting inaccurate and falsified annuity applications. Dowd then ignored FINRA's numerous notices, failed to follow FINRA procedures to challenge his suspension, and defaulted. Dowd could have attempted to explain his noncompliance with the information requests by requesting a hearing and contesting the suspension during the three-month suspension period. Instead, he failed to respond in any manner in FINRA's forum. Dowd has not provided any basis that would excuse his failure to participate in FINRA's forum. *See Norman S. Chen*, Exchange Act Release No. 65345, 2011 SEC LEXIS 3224, at *6, 11 (Sept. 16, 2011) ("Chen has not asserted, nor does the record show, any justification for his failure to comply with FINRA's information requests or follow FINRA's procedures to contest the action.").

By failing to avail himself of the remedies available to him to contest his suspension and impending bar, Dowd failed to exhaust his administrative remedies. Therefore, the Commission should dismiss his application for review. *See, e.g., Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268, at *13-14 (Apr. 10, 2014) (relying on “well-established precedent” when dismissing application for review in a FINRA Rule 9552 proceeding where applicant failed to request a hearing or take corrective action in FINRA’s forum); *Mark S. Steckler*, 2014 SEC LEXIS 283, at *8 (same); *Gilbert T. Martinez*, Exchange Act Release No. 69405, 2013 SEC LEXIS 1147, at *15 (Apr. 18, 2013) (same).

B. FINRA Provided Dowd With Proper Notice of His Right to File an Appeal of FINRA’s Decision to the Commission

Dowd’s untimely filing of his application for review provides an independent and compelling basis for dismissing his appeal. It is undisputed that Dowd filed his application for review on November 7, 2017— more than seven months after FINRA notified him that he was barred from associating with any FINRA member and more than six months after his time to appeal to the Commission had lapsed. *See* 15 U.S.C. § 78s(d)(2). Dowd has not demonstrated extraordinary circumstances necessary to extend the deadline.

In his opposition, Dowd argues that FINRA failed to ensure that he received timely the Bar Notice and FINRA had reason to believe that he did not receive it. *Opp.* at 7. Dowd’s argument misstates the facts and FINRA’s service obligations. It is undisputed that FINRA mailed all of the correspondence in this matter to Dowd at the CRD Address, which correspondence he is deemed to have received. *See, e.g., Steckler*, 2014 SEC LEXIS 283, at *10-11. Dowd does not dispute that he received the FINRA Rule 8210 requests, the Pre-Suspension Notice, or the Suspension Notice. Indeed, Dowd actually acknowledges in his notice of appeal that he received the August 11 FINRA Rule 8210 Request and that “FINRA provided

[the Bar Notice] to Dowd on or about March 27, 2017”—i.e., the date of the Bar Notice. (RP 39-40.)

When FINRA sent the Bar Notice to Dowd at the CRD Address by first-class and certified mail, as expressly permitted under FINRA’s rules, Dowd received constructive notice of the action. *See* FINRA Rules 9134(a), (b)(1), 9559(s); *see also* *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at *16 (Feb. 8, 2016) (“FINRA’s service by mail to Manzella’s CRD address provided her with constructive notice of the action, which started the running of the appeal period.”).

Moreover, prior to mailing the Bar Notice, FINRA staff searched a comprehensive public records database in LexisNexis to determine Dowd’s current mailing address, which FINRA staff determined was the CRD Address.³ (RP 29-30, 47.) While it is true that the certified mailing of the Bar Notice was returned to FINRA as unclaimed, the first-class mailing of the Bar Notice was not returned—a fact that goes unmentioned by Dowd in his opposition. Considering that its public records database search reflected that the CRD Address was Dowd’s current address, the fact that the first-class mailing was not returned, and the fact that the certified mailing was the first and only unclaimed or returned mailing in the record, FINRA did not, as suggested by Dowd, have actual knowledge that Dowd’s CRD Address was out of date or have reason to believe that Dowd did not receive the Bar Notice.

Dowd asserts that the “Commission regularly remands cases back to FINRA when there is reason to believe that the applicant did not received the mailed notification.” Opp. at 6. Dowd

³ As of the November 20, 2017, CRD still reflected that Dowd’s current address is the CRD Address, as it was throughout its investigation and the expedited proceeding. (RP 45, 47.) Dowd has never asserted in any filing before the Commission that he no longer resides at this address or did not receive correspondence at this address.

overstates this Commission precedent; regardless, each of the cases that he cites in support is inapposite. For example, in *Destina Mantar*, the Commission remanded an expedited proceeding to FINRA where all of FINRA's information requests and notices were sent to Mantar's CRD address, but each of the certified mailings was returned to FINRA as "not deliverable as addressed" and Mantar asserted that she did not receive any of FINRA's inquiries or notices and only learned about them two weeks after FINRA had barred her. Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at *5, 7 (Feb. 8, 2016). The Commission's holding is factually distinguishable from the current matter and does not support a remand in this instance where Dowd explicitly acknowledges that he received the August 11 information request and does not even contest that he failed to receive any correspondence other than the certified mailing of the Bar Notice.⁴

⁴ The others cases cited by Dowd are equally unpersuasive. Opp. at 6 n.2; cf. *Kevin C. Murphy*, Exchange Act Release No. 79016, 2016 SEC LEXIS 3772, at*3-8, 15 (Sep. 30, 2016) (remanding expedited proceeding to FINRA where all of FINRA's information requests sent by certified and first-class mail to the CRD address and a second address were returned and where the pre-suspension notice and suspension notice sent by certified and first-class mail to the CRD address were returned, but not sent—nor explained in the record why FINRA did not send—to a third address provided in a public records search that FINRA performed at the time it sent the suspension notice); *Christopher A. Parris*, Exchange Act Release No. 78669, 2016 SEC LEXIS 3075, at *13-18 (Aug. 24, 2016) (setting aside FINRA's order to bar Parris where he timely requested termination of his suspension and FINRA's bar notice did not acknowledge that Parris had requested termination of his suspension); *Ryan R. Henry*, Exchange Act Release No. 53957, 2006 SEC LEXIS 1333, at *12 (June 8, 2006) (remanding expedited proceeding to FINRA to resolve certain facts surrounding correspondence sent to Henry's CRD address, where Henry no longer lived, and signed for by his grandmother who passed away shortly thereafter, and later first-class mailings of multiple suspension notices sent to the CRD address were returned as undeliverable); *Robert J. Langley*, Exchange Act Release No. 50917, 57 S.E.C. 1125, 1132 (2004) (remanding expedited proceeding to FINRA where the record is unclear but establishes that many of NASD's mailings by certified mail, first-class mail, and FedEx to the CRD address and a second address were returned as undeliverable and that a telephone conversation occurred between the applicant and FINRA staff of which the details are unclear); *James L. Bari, Jr.*, Exchange Act Release No. 48292, 56 S.E.C. 824, 827 (2003) (remanding expedited proceeding to FINRA where the record contained no evidence to support NASD's assertion that it mailed its

Other than the unclaimed certified mailing of the Bar Notice, Dowd offers no other reason, let alone extraordinary circumstances, to extend the appeal period. *See Manuel P. Asensio*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014, at *21 (June 17, 2010), *aff'd*, 447 F. App'x 984 (11th Cir. 2011) (providing that “extraordinary circumstances” exist where the “applicant’s failure timely to file was beyond the control of the applicant”). Dowd should not be permitted to escape the consequences of an untimely application for review by refusing to accept mail. *Cf. Manzella*, 2016 SEC LEXIS 464, at *12 (“Manzella’s assertion that she did not ‘physically take receipt’ of the July 2014 letter or the prior requests for information does not excuse her failure to exhaust. She cannot escape the consequences of her failure to comply or exhaust by refusing to accept mail.”). The Commission should reject Dowd’s, at best, incomplete and insufficient justification for his untimely filing.⁵

III. CONCLUSION

It is undisputed that FINRA properly served Dowd with the two FINRA Rule 8210 requests, the Pre-Suspension Notice, the Suspension Notice, and the Bar Notice. Despite

correspondence “to the most current residential address” or that the address to which it mailed the correspondence was Bari’s CRD address). Unlike these cases, FINRA mailed the Bar Notice to Dowd at the CRD Address, confirmed that the CRD Address was Dowd’s last known address prior to mailing the Bar Notice by searching a comprehensive public records database, and only the certified mailing of the Bar Notice was returned to FINRA as unclaimed. (RP 29-30, 31, 33-34-37, 45, 47).

⁵ But even if the Commission were to extend Dowd’s appeal deadline and deem his application for review timely, the Commission nonetheless would be obligated, based on well-established precedent, to dismiss Dowd’s appeal on the separate procedural ground that he failed to exhaust his administrative remedies. Despite knowing about FINRA’s information requests and proceedings, Dowd never communicated with FINRA or pursued his administrative remedies during the suspension period. As a result, Dowd defaulted and was barred as of the date of the Bar Notice, so he is precluded from obtaining Commission review. It is thus irrelevant, for purposes of whether Dowd failed to exhaust his administrative remedies, whether Dowd had actual receipt of the Bar Notice.

receiving notice of these proceedings, Dowd failed to respond and to avail himself of the remedies available to him to contest his suspension and bar. Thereafter, Dowd failed to timely appeal FINRA's action to the Commission. Dowd fails to provide any reason based in law or fact that would excuse his failure to exhaust his administrative remedies or untimeliness. Therefore, the Commission should dismiss Dowd's application for review.

Respectfully submitted,

By: 
Megan Rauch
FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006

December 11, 2017