

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Release No. 79722 / January 3, 2017

Admin. Proc. File No. 3-17610

In the Matter of the Application of  
Behnam Halali  
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 after individual refused to appear for requested testimony. *Held*, application for review is *dismissed*.

APPEARANCES:

Behnam Halali, pro se.

Alan Lawhead and Jennifer Brooks, for FINRA.

Appeal filed: Sept. 30, 2016

Last brief received: Oct. 13, 2016

FINRA requests that we dismiss Behnam Halali's application for review of its action barring him from association with any FINRA member firm in any capacity.<sup>1</sup> Halali, an individual formerly associated with a FINRA member firm, was barred for failing to appear for testimony in connection with a FINRA investigation. Because we agree with FINRA that Halali failed to exhaust his administrative remedies, we grant its motion to dismiss.

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<sup>1</sup> Halali has not filed an opposition to FINRA's motion.

## I. Facts

### A. Allstate filed notices with FINRA in 2015 disclosing that it had fired Halali after he was indicted and that a customer had filed a complaint against him.

Allstate Financial Services fired Halali in December 2014 after learning that he had been named as a defendant in a criminal complaint in connection with a scheme to defraud a financial institution. After Allstate filed a Form U5 in January 2015 disclosing Halali's termination, it filed an amended Form U5 in October 2015 reporting that one of Halali's former customers had filed a complaint against him alleging that "the fees associated with the policy were not disclosed to him and he is disappointed in the performance of the policy."

### B. FINRA requested information from Halali in connection with the customer complaint.

On October 23, 2015, FINRA informed Halali that it was conducting an inquiry with respect to the customer complaint disclosed in the amended Form U5. FINRA stated that the purpose of the inquiry was to determine whether violations of the federal securities laws or self-regulatory organization ("SRO") rules had occurred. FINRA requested that, pursuant to FINRA Rule 8210, Halali provide a signed statement detailing the circumstances surrounding the customer complaint and copies of any relevant documents.<sup>2</sup>

After Halali provided a narrative summary of his relationship with the customer, FINRA sent him another letter on February 2, 2016, requesting additional information. FINRA stated that it had received information alleging that Halali had given the customer cash in connection with one of his life insurance policies. FINRA asked Halali whether he ever gave money to the customer and for copies of any relevant documents. In response to FINRA's inquiry regarding whether he gave the customer money, Halali responded: "No." Halali stated further that he did "not have any copies of anything related to [the customer's] file."

On April 28, 2016, FINRA informed Halali that its Preliminary Investigations Unit had completed its review with respect to the amended Form U5 filing and had determined to refer the matter to FINRA's Enforcement Department ("Enforcement"). Enforcement informed Halali's counsel on May 12, 2016, that it intended to take on-the-record testimony from Halali. Halali's counsel told Enforcement that Halali would not make himself available for the requested testimony.

Enforcement sent Halali's counsel a formal request on May 17, 2016, to take Halali's testimony on June 6, 2016. After Halali's counsel asked whether Enforcement intended to ask Halali about the federal criminal indictment, Enforcement responded that it did. Enforcement

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<sup>2</sup> See FINRA Rule 8210(a) (stating that "FINRA staff shall have the right" to require a "person associated with a member" to provide specified testimony, information, or documents); *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at \*6 (Nov. 8, 2007) (stating that because FINRA lacks subpoena power Rule 8210 is "vitaly important").

also informed Halali's counsel that, because FINRA is not a governmental agency, refusing to answer a question based on an assertion of the Fifth Amendment privilege against self-incrimination "constitutes a violation of FINRA Rule 8210 and may expose your client to sanctions, including a permanent bar from the securities industry."

Halali's counsel informed Enforcement that his recommendation was that Halali "ignore your requests and . . . not appear for any interrogation on any topic while asserting his Fifth Amendment right." Subsequently, Halali's counsel told Enforcement that, "for all the reasons I previously stated, my client WILL NOT APPEAR on June 6, 2016, or any other date set by you for his interrogation." Enforcement asked Halali's counsel whether he would accept service on behalf of Halali of a notice of suspension if Halali refused to appear for testimony. Halali's counsel said that he would. On May 27, 2016, Halali's counsel confirmed that "on advise [sic] of counsel, [Halali] will not be there" at the scheduled testimony.

**C. FINRA barred Halali after he informed it that he would not appear for testimony.**

On May 27, 2016, Enforcement notified Halali that he would be suspended from associating with any FINRA member in any capacity on June 20, 2016, unless he took corrective action before that date, because he failed to provide information to FINRA in accordance with FINRA Rule 8210.<sup>3</sup> The notice stated that Halali could request a hearing before the suspension date and that a timely request for a hearing would stay the effective date of any suspension.<sup>4</sup>

The notice provided that if Halali was suspended he could file a written request for termination of the suspension on the ground of full compliance.<sup>5</sup> If Halali failed to request termination of the suspension within three months, he would be automatically barred from associating with any FINRA member on September 1, 2016.<sup>6</sup> Halali did not respond to the notice, state that he would appear for testimony, or request a hearing.

On June 20, 2016, Enforcement notified Halali that, effective that day, he was suspended from associating with any FINRA member in any capacity. Enforcement reminded Halali that he could file a written request for termination of the suspension on the ground of full

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<sup>3</sup> See FINRA Rule 9552(a) (stating that if a "person associated with a member" fails to provide information requested pursuant to FINRA rules then FINRA staff may provide written notice to such person "specifying the nature of the failure and stating that failure to take corrective action within 21 days after service of the notice will result in suspension of membership or association of the person with any member").

<sup>4</sup> See FINRA Rule 9552(e) (stating that a "request for a hearing shall be made before the effective date of the notice," which is 21 days after service of the notice).

<sup>5</sup> See FINRA Rule 9552(f) (stating that the person "may file a written request for termination of the suspension on the ground of full compliance with the notice").

<sup>6</sup> See FINRA Rule 9552(h) (stating that 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").

compliance, but that if he failed to request termination of the suspension he would be automatically barred from associating with any FINRA member effective September 1, 2016. Halali did not request termination of the suspension, and on September 1, 2016, Enforcement notified Halali that, effective that day, he was barred from association with any FINRA member.

Enforcement sent the May 27, June 20, and September 1 notices to Halali's counsel by certified and first-class mail.<sup>7</sup> The certified mailings were all delivered, and the record contains no indication that the first-class mailings were returned. On September 30, 2016, Halali filed an application for review with the Commission.

## II. Analysis

We dismiss Halali's application for review because he failed to exhaust his administrative remedies before FINRA. "We will not consider an application for review if that applicant failed to exhaust FINRA's procedures for contesting the sanction at issue."<sup>8</sup> We have explained that 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 review."<sup>9</sup>

The record establishes that Halali did not follow these procedural steps. Halali was given the opportunity to avail himself of FINRA's administrative process through taking corrective action, requesting a hearing in response to the notice of suspension, or filing for termination of the suspension. Halali failed to exercise his rights at any stage of the process before FINRA. Indeed, he took no action before FINRA in response to any of the notices that he received. His only response to the notices was to file an application for review with the Commission after he was barred. This attempt to bypass FINRA's process is not a proper avenue for Commission review. Because Halali failed to take advantage of the opportunities for compliance and review that FINRA provided him, he failed to exhaust his administrative remedies before FINRA.<sup>10</sup>

The Second Circuit has recognized that the 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."<sup>11</sup> This rationale applies here. Given that FINRA suspended, and eventually

<sup>7</sup> Enforcement also sent the May 27 and June 20 notices to Halali's counsel by email.

<sup>8</sup> *Li-Lin Hsu*, Exchange Act Release No. 78899, 2016 WL 5219504, at \*2 (Sept. 21, 2016) (alterations and citations omitted).

<sup>9</sup> *Id.* (citations omitted).

<sup>10</sup> *See, e.g., Rogelio Guevera*, Exchange Act Release No. 78134, 2016 WL 3440196, at \*3 (June 22, 2016).

<sup>11</sup> *MFS Secs. Corp. v. SEC*, 380 F.3d 611, 622 (2d Cir. 2004); *see also id.* at 621 (finding "valid" the Commission's frequent application of "an exhaustion requirement in its review of disciplinary actions by SROs") (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))).

barred, Halali for failing to comply with Rule 8210 and that Halali failed to contest that sanction before FINRA, we dismiss Halali's application for review to avoid undermining the important self-regulatory functions that FINRA undertakes.<sup>12</sup>

Halali's attempts to invoke the Fifth Amendment in response to FINRA's requests that he appear for testimony pursuant to Rule 8210 do not justify his failure to exhaust. "[I]nterrogation by [an SRO] in carrying out its own legitimate investigatory purposes does not trigger the privilege against self-incrimination."<sup>13</sup> This is because "[m]ost of the provisions of the Fifth Amendment, in which the self-incrimination clause is imbedded, are incapable of violation by anyone except government in the narrowest sense."<sup>14</sup> And it "has been found, repeatedly, that [FINRA] itself is not a government functionary."<sup>15</sup> Accordingly, we have held repeatedly that Rule 8210's requirement that persons associated with FINRA member firms provide information in response to FINRA's requests does not impinge on the privilege against self-incrimination.<sup>16</sup> Indeed, Enforcement informed Halali that the Fifth Amendment did not apply because FINRA was not a governmental agency and that asserting the Fifth Amendment could lead to a bar.

To the extent Halali believed that the Fifth Amendment privilege against self-incrimination should nonetheless apply to FINRA's requests that he testify, he failed to avail himself of FINRA's procedures for establishing this claim. "We have held that, if state action is established, an associated person otherwise subject to Rule 8210 may refuse information requests based on the Fifth Amendment."<sup>17</sup> But Halali did not request a hearing where he could assert this or any other basis for invoking the Fifth Amendment. And his failure to do so means that we

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<sup>12</sup> *Darren M. Smith*, Exchange Act Release No. 75705, 2015 WL 4863348, at \*3 (Aug. 14, 2015). Halali also did not file a response to FINRA's motion to dismiss. His failure to "respond to a dispositive motion within the time provided" provides an additional, and independent, reason for us to dismiss the review proceeding. *See* Rule of Practice 155(a)(2), 17 C.F.R. § 201.155(a)(2); *accord Smith*, 2015 WL 4863348, at \*4 n.18.

<sup>13</sup> *United States v. Solomon*, 509 F.2d 863, 867 (2d Cir. 1975) (Friendly, J.).

<sup>14</sup> *Id.*

<sup>15</sup> *D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002).

<sup>16</sup> *See, e.g., Frank W. Leonesio*, Exchange Act Release No. 23524, 1986 WL 625415, at \*4 (Aug. 11, 1986).

<sup>17</sup> *Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 WL 5693099, at \*7 (Sept. 29, 2015); *see also id.* at \*7 n.24 (finding that "state-action defenses related to the loss of employment apply only when a private entity both engages in state action *and* forces an individual to choose between testifying and losing his employment") (emphasis in original).

have no record on which to evaluate such a claim.<sup>18</sup> Halali's application for review must be dismissed for failing to exhaust his administrative remedies.<sup>19</sup>

An appropriate order will issue.

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields  
Secretary

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<sup>18</sup> See *MFS Secs. Corp.*, 380 F.3d at 621 (finding that the 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”).

<sup>19</sup> Cf. *Romano*, 2015 WL 5693099, at \*8 (dismissing proceeding on the merits where respondent requested a hearing in response to the notice that he would be suspended for failing to provide requested information but then failed to participate in the hearing or proffer specific testimony or evidence that would have established state action).

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
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In the Matter of the Application of  
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For Review of Action Taken by  
FINRA

ORDER DISMISSING APPLICATION FOR REVIEW

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

ORDERED that the application for review filed by Behnam Halali be, and it hereby is,  
dismissed.

By the Commission.

Brent J. Fields  
Secretary