

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Release No. 79744 / January 5, 2017

ADMINISTRATIVE PROCEEDING  
File No. 3-17515

In the Matter of the Application of  
  
DAVID RICHARD KERR III  
  
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:

*David Richard Kerr III*, pro se.

*Alan Lawhead, Michael Grawaski, and Megan Rauch* for the Financial Industry Regulatory Authority, Inc.

Appeal filed: August 30, 2016  
Last brief received: September 21, 2016

David Richard Kerr III, formerly associated with AXA Advisors, LLC (“AXA”), a FINRA member firm, seeks review of FINRA action barring him from association with any FINRA member for failing to respond to its requests for information. FINRA requests that we dismiss Kerr’s application for review because he failed to exhaust his administrative remedies before FINRA.<sup>1</sup> For the reasons explained below, we dismiss Kerr’s application for review.

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<sup>1</sup> Kerr has not filed an opposition to FINRA’s motion.

## I. BACKGROUND

### A. FINRA requested information from Kerr in connection with his termination.

Kerr was associated with AXA for ten days between November 20 and 30, 2015. On December 15, 2015, AXA filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) noting that Kerr had been terminated for “[failing] to disclose a felony charge as stated in [a] Department of Justice report.” FINRA then commenced an inquiry to determine whether Kerr had failed to disclose a felony or other required information on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”).

On December 30, 2015, FINRA sent a letter to Kerr requesting, pursuant to FINRA Rule 8210, that he provide specified documents and information to FINRA by January 13, 2016.<sup>2</sup> FINRA sent the request by certified and first-class mail to Kerr’s address of record in its Central Registration Depository (“CRD”) system,<sup>3</sup> and to a second address apparently derived from a public records search. Only the certified mailings were returned to FINRA marked “unclaimed” and “unable to forward.” Kerr did not respond.<sup>4</sup>

On February 9, 2016, FINRA sent Kerr a second letter reiterating the request for a response and setting a new deadline of February 23. The letter warned Kerr that “[f]ailure to

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<sup>2</sup> See *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at \*1 n.1 (Feb. 8, 2016) (“Rule 8210 authorizes FINRA staff to require a person associated with a FINRA member to provide information with respect to any matter involved in an investigation, complaint, examination, or procedure.”); *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 “vitally important”).

<sup>3</sup> See Investor Publication, *Protect Your Money: Check Out Brokers and Investment Advisers* (“The Central Registration Depository (CRD) is a computerized database that contains information about most brokers, their representatives, and the firms they work for.”), available at <http://www.sec.gov/investor/brokers.htm>.

<sup>4</sup> In its motion to dismiss, FINRA states that, after the deadline to respond to the December 30 letter had passed, Kerr spoke with the FINRA investigator responsible for its inquiry. According to FINRA, Kerr sought and obtained an extension of time to respond until January 27, 2016, but did not respond by that date. FINRA’s investigator apparently never memorialized this conversation, and FINRA neither submitted a declaration from the investigator nor moved to adduce such evidence. As a result, FINRA’s statement in its brief is not part of the record on appeal, and we do not rely on it here. See Rule of Practice 420, 17 C.F.R. § 201.420 (requiring self-regulatory organizations to certify and file with the Commission “one copy of the record upon which the action complained of was taken”); cf. Rule of Practice 452, 17 C.F.R. § 201.452 (discussing submission of new evidence before the Commission).

comply with this request may subject you to disciplinary action.” FINRA served the letter on Kerr by certified and first-class mail to the same addresses as the December letter. Both certified mailings were returned “unclaimed” and “unable to forward.” Again, the first-class mailings were not. Kerr did not respond to the request or provide the requested information.

FINRA prepared a third request, dated March 16, 2016, explaining the nature of FINRA’s investigation, reiterating the request for a response, and warning that failure to comply “could expose [him] to sanctions, including a permanent bar from the securities industry.” This request instructed Kerr to respond by April 6, 2016. Rather than mailing this request, FINRA gave it to its contract process server, who was unable to effect personal service on Kerr despite multiple attempts.

FINRA prepared a fourth request, dated April 6, 2016, which was identical to the March 16 request except that it instructed him to respond by April 18. FINRA again gave this request to its process server rather than mailing it. On April 6, 2016, FINRA’s contract process server successfully effected personal service on Kerr by handing him the request. Kerr did not respond to the request or provide the requested information by April 18.

**B. FINRA barred Kerr for failing to respond to its requests for information.**

In a letter dated April 27, 2016 (the “Pre-Suspension Notice”), FINRA notified Kerr that his continued failure to respond would subject him to a suspension on May 23, 2016.<sup>5</sup> FINRA’s letter explained that “the suspension will not take effect” if he complied fully with the earlier requests for information by May 23; that he could request a hearing to contest the suspension by May 23, which would “stay the effective date of any suspension”;<sup>6</sup> and that if suspended he could file a written request to terminate the suspension “on the ground of full compliance.”<sup>7</sup> The Pre-Suspension Notice further explained that if FINRA suspended Kerr and he “fail[ed] to request termination of the suspension within three months” of April 27, he would be barred from

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<sup>5</sup> See FINRA Rule 9552(a) (providing that “[i]f a . . . 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, . . . FINRA staff may provide written notice to such . . . 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 [the] membership or of association of the person with any member”).

<sup>6</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>7</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”).

association with any FINRA member, effective August 1, 2016.<sup>8</sup> FINRA served the Pre-Suspension Notice on Kerr by certified and first-class mail to the same addresses as its previous letters. It is unclear whether or not Kerr claimed the certified mailings;<sup>9</sup> in any event, the first-class letters were not returned to FINRA. Kerr did not respond to the Pre-Suspension Notice or provide the requested information by May 23.

On May 23, 2016, FINRA sent a letter (the “Suspension Notice”) to Kerr explaining that he was suspended, effective immediately, from association with any FINRA member firm in any capacity. The Suspension Notice advised that Kerr could file a written request to terminate the suspension based on full compliance with the Pre-Suspension Notice, but reiterated that if Kerr did not do so before August 1 he would be automatically barred pursuant to Rule 9552. FINRA sent the Suspension Notice by certified and first-class mail to the same addresses as the previous letters. Both certified mailings were returned “unclaimed” and “unable to forward,” but the first-class letters were not returned. Kerr did not respond to the Suspension Notice and did not file a written request to terminate the suspension before August 1.

FINRA notified Kerr in an August 1, 2016 letter (the “Bar Notice”) that he was barred effective immediately. FINRA served the Bar Notice on Kerr by certified and first-class mail to his CRD address. Only the certified mailing was returned unclaimed to FINRA.

**C. FINRA denied Kerr’s request to terminate his suspension because he submitted it after he was already barred.**

After his bar became effective, Kerr sent FINRA a letter, dated August 9, 2016, and bearing his CRD address as the return address, requesting a termination of his suspension. Kerr wrote that he did not “intentionally fail to respond” to FINRA’s Rule 8210 requests and acknowledged that he had “receive[d] some of the letters that were sent to [him]” and spoken to FINRA staff involved in the inquiry. He further explained that he had sought clarification from AXA about the subject of FINRA’s inquiry, and that after he purportedly received no response he “turn[ed] [his] focus to [his] day-job” instead of following up with FINRA. His letter also observed that he provided AXA with all the information he thought he had to disclose based on his prior experience applying for association with other firms.

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<sup>8</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”).

<sup>9</sup> Although it is undisputed that most of the certified mailings were returned to FINRA, it is unclear from the record whether all were. For example, a certified mail receipt bearing Kerr’s signature suggests that he claimed from the post office on May 13 two copies of a mailing sent April 27, well before the May 23 deadline for responding. But it is unclear whether those receipts were in fact for the copies of the Pre-Suspension Notice.

FINRA responded by letter dated August 23, 2016, explaining that Kerr's letter was untimely and therefore insufficient to terminate the suspension or vacate the bar. On August 30, 2016, Kerr sent the Commission a copy of his August 9, 2016 letter to FINRA, which the Commission's Office of the Secretary treated as an application for review of FINRA's bar. FINRA subsequently moved to dismiss Kerr's application for review.

## II. ANALYSIS

We dismiss Kerr's application for review because he failed to exhaust his administrative remedies before FINRA. As the Second Circuit has stated, an 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>10</sup> "Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised."<sup>11</sup> As a result, we will not consider an application for review of FINRA action "if [the] applicant failed to exhaust FINRA's procedures for contesting the sanction at issue."<sup>12</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>13</sup>

It is undisputed that Kerr did not follow FINRA's procedural steps for challenging his suspension and avoiding a bar. Kerr was given the opportunity to avail himself of FINRA's administrative process by: (1) "taking corrective action" by producing the information FINRA requested in a timely manner; (2) "requesting a hearing in response to the notice of suspension"; or (3) "filing for termination of the suspension."<sup>14</sup> By failing to take any of these steps, Kerr

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<sup>10</sup> *MFS Sec. 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)).

<sup>11</sup> *Id.* at 621.

<sup>12</sup> *Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 WL 4656403, at \*2 (Sept. 19, 2014) (quoting *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 WL 1390384, at \*3 (Apr. 10, 2014), and citing other authority).

<sup>13</sup> *Li-Lin Hsu*, Exchange Act Release No. 78899, 2016 WL 5219504, at \*2 (Sept. 21, 2016) (quoting *MFS Sec. Corp.*, Exchange Act Release No. 47626, 2003 WL 1751581, at \*5 & n.29 (Apr. 3, 2003), *aff'd*, 380 F.3d 611 (2d Cir. 2004)).

<sup>14</sup> *Id.* at \*2 (quoting *Lenahan*, 2014 WL 4656403, at \*2).

failed to exhaust his administrative remedies and lost the ability to challenge FINRA's actions in this appeal.<sup>15</sup>

In *Marcos A. Santana*, we held that an applicant who did not dispute that he knew about the requests for information and who failed to respond until “after [his] bar was already effective” had “failed to exhaust the[] FINRA requirements for challenging the suspension and bar.”<sup>16</sup> So too here.

Kerr had actual notice of at least one Rule 8210 request because he received the April 6 letter by personal service.<sup>17</sup> That letter specified the documents and information FINRA was requesting and warned that Kerr could be “permanent[ly] bar[red] from the securities industry” if he failed to respond to the request. Kerr also acknowledges that he “receive[d] some of the letters that were sent” and that he also spoke with FINRA staff about their requests. And FINRA sent the Pre-Suspension, Suspension, and Bar Notices to Kerr's CRD address—where Kerr lived

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<sup>15</sup> See, e.g., *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 WL 1683913, at \*3 (Apr. 18, 2013) (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).

<sup>16</sup> *Marcos A. Santana*, Exchange Act Release No. 74138, 2015 WL 327678, at \*3 (Jan. 26, 2015); cf. *Curtis Steven Culver*, Exchange Act Release No. 75774, 2015 WL 5047648, at \*3 n.10 (Aug. 27, 2015) (finding applicant's response to Rule 8210 requests in his application for review “irrelevant given his failure to exhaust the administrative remedies available under FINRA”).

<sup>17</sup> See FINRA Rule 8210(d) (providing that a Rule 8210 request directed at a “person subject to FINRA's jurisdiction who was formerly associated with a member in an unregistered capacity,” such as Kerr, “shall be deemed received by the person upon personal service, as set forth in Rule 9134(a)(1)”; Rule 9134(a)(1) (establishing that “personal service” can be accomplished by, *inter alia*, handing the documents to the individual). Kerr was associated with AXA from November 20 to November 30, 2015, but not in a registered capacity. After November 30, he was a formerly associated person in an unregistered capacity. Such a person remains subject to FINRA's jurisdiction with respect to “conduct that commenced prior to . . . termination” and requests for information pertaining to that conduct, if FINRA brings a complaint within “two years after the date upon which such person ceased to be associated with the member.” FINRA By-Laws of the Corporation, art. V, § 4, ¶ (a) & (a)(iii). All of FINRA's information requests and administrative actions in this case occurred well within the two-year window.

and received mail.<sup>18</sup> Indeed, none of the first class mailings FINRA sent to the CRD address was returned,<sup>19</sup> and Kerr put the CRD address as the return address on his August 9 letter.

Despite actual knowledge of the consequences of not responding to FINRA's requests before the specified deadline, Kerr did not timely respond to FINRA's requests for information. Although he responded after his bar became effective, FINRA explained that Kerr's August 9 letter requesting termination of the suspension was untimely and therefore insufficient to terminate the suspension or vacate the bar. We find that Kerr's August 9 letter, even if it contained all the information that FINRA requested, did not preserve his ability to obtain review because Kerr knew he had to respond but sent his response after the bar was already effective.<sup>20</sup>

Although Kerr has not opposed FINRA's motion to dismiss, he contends in his application for review that AXA's Form U5 was incorrect because he in fact disclosed all required information on his Form U4 and that he did not "intentionally fail to respond" to FINRA's requests for information. These arguments go to the merits of his violation of FINRA Rule 8210, however. Because he did not timely present them in the first instance to FINRA through its administrative process, we do not consider them.<sup>21</sup>

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<sup>18</sup> See FINRA Rule 9552(b) (allowing pre-suspension, suspension, and bar notices to be served by any method permitted under FINRA Rule 9134, even for persons subject to FINRA's jurisdiction because they are formerly associated with a member in an unregistered capacity); FINRA Rules 9134(b)(3), (c) (providing for service by mail or by a traceable courier service).

<sup>19</sup> There is also some evidence in the record that Kerr may have picked up the certified mailings sent to him at that address. See *supra* note 9.

<sup>20</sup> See *Calvin David Fox*, Exchange Act Release No. 54840, 2006 WL 3455114, at \*1-3 (Nov. 30, 2006) (dismissing for failure to exhaust administrative remedies where applicant had actual notice of NYSE Hearing Panel's decision but failed to appeal it to the NYSE Board of Directors until after the deadline for doing so had expired); cf. *Darren M. Smith*, Exchange Act Release No. 75705, 2015 WL 4863348, at \*4 (Aug. 14, 2015) (dismissing for failing to exhaust administrative remedies where applicant had actual notice of the requests for information and purportedly sent a letter in response but knew that FINRA did not receive his letter); *Norman Chen*, Exchange Act Release No. 65345, 2011 WL 4336720, at \*3 (Sept. 16, 2011) (dismissing for failure to exhaust his administrative remedies where applicant had actual notice of the requests for information but requested a hearing after the deadline for doing so).

<sup>21</sup> See *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 WL 1840609, at \*3 (May 6, 2010) (dismissing for failure to exhaust administrative remedies and refusing to consider "[a]pplicant's reasons for not responding to FINRA's letters" because 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").

Kerr also asserts that he did not respond because he was researching the underlying subject matter of FINRA’s inquiry and in the meantime had “turn[ed] [his] focus to [his] day-job.” But Kerr’s purported need to secure information to respond to FINRA does not excuse his failure to exhaust his administrative remedies because he “had the burden of seeking an extension of time to respond to the information requests or to seek a stay of the suspension.”<sup>22</sup>

An appropriate order will issue.<sup>23</sup>

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

Brent J. Fields  
Secretary

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<sup>22</sup> *Manzella*, 2016 WL 489353, at \*4.

<sup>23</sup> 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.

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Washington, D.C.

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ADMINISTRATIVE PROCEEDING  
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In the Matter of the Application of  
  
DAVID RICHARD KERR III  
  
For Review of Action Taken by  
  
FINRA

ORDER DISMISSING APPEAL OF ACTION TAKEN BY REGISTERED SECURITIES  
ASSOCIATION

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

ORDERED that the appeal filed by David Richard Kerr III be, and it hereby is,  
dismissed.

By the Commission.

Brent J. Fields  
Secretary