

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 80312 / March 24, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17741

In the Matter of the Application of

JONATHAN ROTH ELLIS

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Individual appealed FINRA’s decision to bar his association with its members for failing to respond to requests for information. *Held*, application for review is dismissed.

APPEARANCES:

Jonathan Roth Ellis, *pro se*.

Alan Lawhead and *Celia Passaro* for the Financial Industry Regulatory Authority, Inc.

Appeal filed: December 20, 2016

Last brief received: January 10, 2017

Jonathan Roth Ellis, formerly an associated person of 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 has moved to dismiss Ellis’s application for review because he failed to exhaust his administrative remedies.¹ For the reasons discussed below, we dismiss Ellis’s application for review.

¹ Ellis has not filed an opposition of FINRA’s motion to dismiss.

I. Background

Ellis joined the securities industry in August 2015 when he registered as an associated person of FINRA member Pruco Securities, LLC (“Pruco”). On April 26, 2016, Pruco terminated Ellis’s employment and filed with FINRA a Uniform Termination Notice for Securities Industry Regulation (“Form U5”). After receiving Pruco’s Form U5, FINRA instituted an investigation into the circumstances surrounding Ellis’s termination.

A. Ellis did not respond to multiple requests for information from FINRA.

On May 26, 2016, FINRA sent Ellis a request for documents and information pursuant to FINRA Rule 8210.² FINRA served this letter by certified and first class mail to Ellis’s address of record listed in the Central Registration Depository (“CRD”)³ in New York. FINRA’s letter explained that failure to respond to the letter by June 9, 2016, “could expose [him] to sanctions, including a permanent bar from the securities industry.”⁴ The letter also reminded Ellis of his continuing obligation to update his CRD address. The record is ambiguous as to whether the certified mailing was delivered to the CRD address,⁵ but the first class mailing was not returned to FINRA. Ellis did not respond to this letter.

² See FINRA Rule 8210(a) (authorizing FINRA to “require a member, a person associated with a member, or any other person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically” whenever it is gathering information related to an investigation, complaint, proceeding, or examination); see also *Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 WL 3306105, at *6 (finding Rule 8210 to be “vitally important” to FINRA investigators “[b]ecause [FINRA] lacks subpoena power”).

³ 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>.

⁴ Even though FINRA terminated Ellis’s registration on May 25, 2016, FINRA’s By-Laws provide that all associated persons are subject to FINRA’s jurisdiction for at least two years following the termination of their registration. Article V, Section 4(a)(i).

⁵ The certified mailing was apparently not returned to FINRA. The U.S. Postal Service’s online tracking information indicates that it was “undelivered” because the “delivery status [was] not updated.” According to the U.S. Postal Service, a mailing will be marked “delivery status not updated” if it does not timely receive a “clock-stopping scan”—such as “delivered,” “attempted/notice left,” “refused,” or “forwarded”—within fourteen hours of being marked as “out for delivery.” We take official notice of the U.S. Postal Service’s explanations for tracking-information codes, available at https://about.usps.com/publications/pub97/pub97_i.htm. See 17 C.F.R. § 201.323 (stating that the Commission can take official notice of any material fact that might be judicially noticed by a district court of the United States); *Trout Point Lodge, Ltd. v.*

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On June 17, 2016, FINRA served Ellis a second letter by certified and first class mail to his same CRD address. The letter reiterated that FINRA requested information from Ellis and extended Ellis's time to respond to June 29, 2016. FINRA's second letter again stressed the importance of his obligation to respond, and it enclosed a copy of the first letter. The certified mailing was returned to FINRA marked "unclaimed," but the first class mailing was not returned. Ellis did not respond to this letter either.

B. FINRA barred Ellis for failing to respond to its requests for information.

FINRA initiated expedited proceedings against Ellis pursuant to Rule 9552(a).⁶ On August 19, 2016, FINRA sent Ellis a letter (the "Pre-Suspension Notice") informing him that a continued failure to respond to the information requests would subject him to a suspension from associating with any FINRA member firm, effective September 12, 2016. FINRA explained that Ellis could avoid the suspension if he fully complied with the earlier requests for information before the suspension date; requested a hearing to contest the suspension before the suspension date, which would "stay the effective date of any suspension";⁷ or, once suspended, filed a written request to terminate the suspension "on the ground of full compliance."⁸ FINRA further explained that if it suspended Ellis and he failed to request termination of the suspension within three months of the issuance of the Pre-Suspension Notice, he would be barred from association with any FINRA member, effective November 22, 2016.

FINRA served the Pre-Suspension Notice by certified and first class mail to his CRD address in New York, as well as two other addresses in Indiana and Texas. Although those other addresses were not listed in the CRD, FINRA searched public records for Ellis's other potential addresses before serving the Pre-Suspension Notice. The tracking information for the certified mailing sent to the CRD address reflects that it was "lost," while the certified mailing sent to the Indiana address was returned to FINRA marked "return to sender[;] not deliverable as

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Handshoe, 729 F.3d 481, 490 n.12 (5th Cir. 2013) (federal courts may take judicial notice of government websites).

⁶ See Rule 9552(a) (stating that "FINRA staff may provide written notice" to a person who fails to provide information that "the failure to take corrective action within 21 days of service of the notice will result in suspension . . . of association of the person with any member").

⁷ See Rule 9552(d) (stating that a suspension "shall become effective 21 days after service of the [Pre-Suspension Notice], unless stayed by a request for a hearing pursuant to Rule 9559"); see also Rule 9559(c)(1) (stating that "a timely request for a hearing shall stay the effectiveness" of a Pre-Suspension Notice issued under Rule 9552).

⁸ See Rule 9552(f) (stating that "[a] member or person subject to a suspension pursuant to this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision").

addressed[;] unable to forward.” The certified mail sent to the Texas address was delivered at the residence, but the signature of the recipient who claimed it there does not appear to be Ellis’s. The first class mailings were not returned to FINRA. Ellis did not respond to the Pre-Suspension Notice.

On September 14, 2016, FINRA sent Ellis a letter (the “Suspension Notice”) suspending Ellis and warning him that he would be automatically barred from association with any FINRA member if he did not file a written request with FINRA to terminate the suspension by November 22, 2016.⁹ FINRA served the Suspension Notice by certified and first class mail both to Ellis’s CRD address in New York and the Texas address. The online tracking information for the certified mailing to the New York address indicated that the mailing was “lost” and the “delivery status [was] not updated,” and the certified mailing to the Texas address was returned to FINRA “unclaimed” because “no authorized recipient [was] available” at the time of delivery. The first class mailings were not returned. Ellis did not respond to the Suspension Notice and did not file a written request to terminate the suspension before November 22.

On November 22, 2016, FINRA sent Ellis a letter (the “Bar Notice”) explaining that effective immediately he was barred from association with any FINRA member. FINRA served the Bar Notice by certified and first class mail both to Ellis’s CRD address in New York and the Texas address. The certified mailing to the New York address was returned to FINRA marked “undelivered,” and the online tracking information reflects that the mailing’s “delivery status [was] not updated.” The certified mailing to the Texas address was returned to FINRA unclaimed after the maximum hold time expired. The first class mailings were not returned.

On December 20, 2016, Ellis filed an application with the Commission for review of FINRA’s action barring him from association with any FINRA member. Ellis’s application for review indicated that the Texas address was his current address. He acknowledged receiving the Bar Notice at the Texas address, but claimed that it was the only letter he actually received from FINRA. Although Ellis stated that he was willing to cooperate with FINRA, he did not provide any of the requested information to either FINRA or the Commission. FINRA moved to dismiss Ellis’s application for failure to exhaust administrative remedies.

⁹ See Rule 9552(h) (stating that any associated 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”).

II. Analysis

A. Ellis failed to exhaust his administrative remedies.

We dismiss Ellis's application for review because he failed to exhaust his administrative remedies before FINRA. As the Second Circuit has stated, imposing 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."¹⁰ "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."¹¹ As a result, we will not consider an application for review of FINRA action where "[the] applicant failed to exhaust FINRA's procedures for contesting the sanction at issue."¹² 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."¹³

We find, and Ellis does not dispute, that he failed to exhaust his administrative remedies before FINRA prior to filing his application for review with the Commission. FINRA provided Ellis the opportunity to avail himself of FINRA's administrative process by: (1) "taking corrective action" by timely producing the information FINRA requested; (2) "requesting a hearing in response to the notice of suspension"; or (3) "filing for termination of the suspension."¹⁴ By failing to take any of these steps, Ellis failed to exhaust his administrative remedies and lost the ability to challenge FINRA's actions in this appeal.¹⁵

¹⁰ *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)).

¹¹ *Id.* at 621.

¹² *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).

¹³ *Li-Lin Hsu*, Exchange Act Release No. 78899, 2016 WL 5219504, at *2 (Sept. 21, 2016) (internal quotations omitted).

¹⁴ *Id.* at *2 (quoting *Lenahan*, 2014 WL 456403, at *2).

¹⁵ *See Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 WL 1683913, at *3 (Apr. 18, 2013) (discussing the Commission's "well-established precedent" in dismissing appeals where the applicant failed to exhaust his administrative remedies before FINRA).

B. FINRA served Ellis in accordance with its rules, and Ellis has not demonstrated that FINRA knew he did not receive the Pre-Suspension or Suspension Notices.

Ellis argues that he lacked notice of FINRA’s proceeding against him because FINRA sent all of the letters other than the Bar Notice to an “outdated address.” FINRA Rule 8210(d) deems a formerly registered person to have “received” notice of a mailing if FINRA sent it to the person’s “last known residential address . . . as reflected in the [CRD].”¹⁶ And as a formerly registered person, Ellis was obligated to keep his CRD address current.¹⁷ We have held that “not doing so is no defense to a failure to respond” to a request for information.¹⁸ Because FINRA sent every notice and request for information to Ellis’s CRD address, he is deemed to have received notice of FINRA’s proceeding against him and his options for avoiding a bar.¹⁹

In any case, FINRA also attempted to serve Ellis at two other addresses—one of which Ellis acknowledges to be his current address. FINRA Rule 9134(b) provides that if FINRA has “actual knowledge” that a person’s current address is somewhere other than what is listed in the CRD, FINRA must deliver a duplicate copy to this other address.²⁰ In such situations, “where duplicate service is required, service is complete when the duplicate service is complete,”²¹ and service of the duplicate copy is “complete upon mailing.”²² Because FINRA had “actual knowledge” of Ellis’s Indiana and Texas addresses from searching public records before sending the Pre-Suspension Notice, it served duplicate copies of that notice to those addresses. And because someone signed for the certified mailing sent to the Texas address, it was reasonable for FINRA to continue mailing Ellis’s notices—including the Suspension Notice and Bar Notice—to that address. The first class mailings with those notices sent to that address were not returned. Indeed, in his application for review, although Ellis denied receiving the Pre-Suspension and Suspension Notices, he confirmed that the Texas address was his current address. He also

¹⁶ FINRA Rule 8210(d); *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *7 (July 27, 2015) (“[W]hen the Rule 8210 requests and disciplinary complaints were mailed to [his] CRD address they were deemed to have been received there, whether or not [he] actually receive[d] them.”) (internal quotations and citation omitted).

¹⁷ *See* NASD Notice to Members 97-31, 1997 WL 1909798, at *2 (May 1997) (reminding registered persons under FINRA’s jurisdiction of their obligation to keep their address current in order to assist with Rule 8210 investigations and that serious consequences, including sanctions, can result from a failure to notify about an address change).

¹⁸ *Martinez*, 2013 WL 1683913, at *3.

¹⁹ *See id.*

²⁰ FINRA Rule 9134(b)(1).

²¹ FINRA Rule 9552(b).

²² FINRA Rule 9134(b)(3).

conceded that he received the Bar Notice at that address. FINRA served the notices consistent with its rules.²³

C. Ellis's remaining arguments lack merit.

Ellis next asserts that "FINRA has the option to send correspondence by email." Although FINRA may provide notice of its proceedings by email, it is not required to do so.²⁴ Here, the record reflects that FINRA did not have Ellis's email address.

Ellis also argues that his exchange of emails with a state regulator led him to believe that he was "fully compliant with any investigation." He argues further that his "termination" was "ungrounded and lacked the proper notice." These arguments go to the merits of his violation of FINRA Rule 8210, however, and we do not consider them because he did not timely present them in the first instance to FINRA through its administrative process.²⁵

Finally, Ellis says that he is "willing to fully cooperate with the SEC and FINRA." But he has not provided FINRA with responses to any of its requests for information. Ellis's belated

²³ See *Dennis A. Pearson Jr.*, Exchange Act Release No. 54913, 2006 WL 3590274, at *6 n.32 (sustaining bar for failing to respond to requests for information where applicant did not show that NASD was aware its information requests and notices were not reaching applicant).

²⁴ See FINRA Rule 9552(b) (allowing FINRA to serve a pre-suspension notice on a person "in accordance with Rule 9134, [permitting service through first class mail or first class certified mail to be delivered at the person's CRD address] or by facsimile or email").

²⁵ 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").

desire to cooperate does not excuse his failure to exhaust his administrative remedies. Although Ellis “had the burden of seeking an extension of time to respond to the information requests or to seek a stay of the suspension,” he did not do so.²⁶

An appropriate order will issue.²⁷

By the Commission (Acting Chairman PIWOWAR and Commissioner STEIN).

Brent J. Fields
Secretary

²⁶ *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at *4 (Feb. 8, 2016).

²⁷ 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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In the Matter of the Application of

JONATHAN ROTH ELLIS

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 Jonathan Roth Ellis be, and it hereby is, dismissed.

By the Commission.

Brent J. Fields
Secretary