

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 89237 / July 7, 2020

Admin. Proc. File No. 3-19142

In the Matter of the Application of
JONATHAN EDWARD GRAHAM
For Review of Action Taken by
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Jurisdiction to Review Association Action

Associated person of FINRA member firm filed an application for review of FINRA's refusal to remove certain information from his Central Registration Depository records. *Held*, application for review is dismissed because the Commission lacks jurisdiction.

APPEARANCES:

Frances Menzer, HLBS Law, for Jonathan Edward Graham.

Alan Lawhead and *Andrew Love* for the Financial Industry Regulatory Authority, Inc.

Appeal filed: April 11, 2019
Last brief received: July 29, 2019

Jonathan Edward Graham, formerly an associated person of several FINRA member firms, appeals FINRA’s refusal to remove from its Central Registration Depository (“CRD”) database four disclosures about him, including two civil judgments, a tax lien, and a personal bankruptcy. In February 2019, Graham requested that FINRA remove the disclosures from his CRD records on the ground that FINRA was required to do so pursuant to the Fair Credit Reporting Act (“FCRA”).¹ FINRA responded that CRD records are not subject to the FCRA, and thus it would not remove the information. Graham then filed an application for review under Section 19(d) of the Securities Exchange Act of 1934.² We dismiss Graham’s application for review because we lack jurisdiction to review FINRA’s action in this case under that provision.

I. Background

The Exchange Act requires FINRA to maintain a system for collecting and retaining registration information concerning its members and their associated persons.³ FINRA does so through the CRD system, which serves as the online registration and licensing database for the securities industry.⁴ Among other things, information disclosed by a registered representative on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”) is reported electronically to CRD.⁵ The disclosures that Graham seeks to remove here were reported to CRD because they were disclosed on Graham’s Form U4.

Although public investors do not have access to CRD, certain information in that system is available through BrokerCheck, a free online tool.⁶ FINRA’s rules set forth the services it offers with respect to the removal or revision of information disclosed on CRD and BrokerCheck. FINRA Rule 2080, for example, establishes the standards for expungement of certain customer dispute information from CRD not applicable here.⁷ Rule 8312 establishes a

¹ Pub. L. No. 91-508 § 601, 84 Stat. 1127-36 (1970), codified at 15 U.S.C. § 1681 *et seq.*

² *See* 15 U.S.C. § 78s(d).

³ *See* 15 U.S.C. § 78o-3(i).

⁴ *See Eric David Wanger*, Exchange Act Release No. 79008, 2016 WL 5571629, at *1 n.1 (Sept. 30, 2016).

⁵ *See Douglas J. Toth*, Exchange Act Release No. 58074, 2008 WL 2597566, at *3 n.8 (July 1, 2008), *aff’d*, 319 F. App’x 184 (3d Cir. 2009).

⁶ BrokerCheck enables public investors to research the professional backgrounds of current and former FINRA-registered broker-dealers and their representatives, as well as investment adviser firms and their representatives. *See Wanger*, 2016 WL 5571629, at *1 n.1.

⁷ *See* FINRA Rule 2080; *see also Notice of Filing of Proposed Rule Change*, Exchange Act Release No. 59771, 74 Fed. Reg. 18,411, 18,411-12 (Apr. 22, 2009) (noting that under the NASD predecessor rule that FINRA sought to incorporate into its rulebook as Rule 2080, only “customer dispute information,” a subset of the information reported in CRD, may be expunged),
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process to dispute the accuracy of information publicly disclosed through BrokerCheck, but not “information contained in the CRD system that is not disclosed through BrokerCheck.”⁸ And the information at issue here was not disclosed through BrokerCheck.⁹

Because FINRA’s rules did not appear to provide Graham with an avenue for obtaining the relief that he sought, Graham sent FINRA a cease and desist letter (the “Letter”) on February 12, 2019. In the Letter, Graham claimed that FINRA was violating the FCRA by reporting and maintaining four disclosures in CRD. Specifically, the Letter demanded that FINRA remove the following disclosures from Graham’s CRD record:

- A November 2003 personal bankruptcy filing, for which Graham received a discharge of his debts in February 2004 (Occurrence # 1403263);
- A March 2008 civil judgment against Graham of \$54,360.70, which he satisfied in May 2011 (Occurrence # 1687573);
- A September 2009 civil judgment against Graham of \$408,615, which he satisfied in January 2012 (Occurrence #1796198); and
- A September 2010 tax lien of \$2,769.78, filed by the IRS against Graham, which he satisfied in December 2010 (Occurrence #1688857).

In demanding that this information be removed from his CRD record, Graham asserted that FINRA is a “consumer reporting agency,” that an associated person’s CRD report is a “consumer report” for employment purposes, and that the information set forth in the four disclosures may

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approved by Order Approving Proposed Rule Change as Amended, Exchange Act Release No. 59987, 74 Fed. Reg. 26,902 (June 4, 2009).

⁸ FINRA Rule 8312 Supplemental Material .02(f); *see Order Approving a Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure)*, Exchange Act Release No. 62476, 2010 WL 2712887 (July 8, 2010), 75 Fed. Reg. 41,254, 41,255 (July 15, 2010). Graham states that had he tried to use Rule 8312 to dispute the accuracy of this information, FINRA would have denied the request as “ineligible” because it is not disclosed through BrokerCheck.

⁹ *See Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records).

not be included in a consumer report because each disclosure “antedate[s] the report by more than” a statutorily specified numbers of years.¹⁰

On March 13, 2019, FINRA responded to the Letter, stating that it could not expunge the four disclosures. FINRA noted that none of the four disclosures appeared in BrokerCheck, rejected Graham’s assertions that FINRA and CRD are subject to the FCRA, reminded Graham of FINRA’s obligations under the Exchange Act to collect and maintain information concerning registered representatives and former registered representatives, and informed Graham that the four disclosures were required to be reported on Form U4 pursuant to FINRA’s By-Laws. FINRA concluded that “[t]he only way to obtain expungement of these archived disclosures from CRD is for Mr. Graham to obtain orders of expungement . . . from the relevant agencies or courts themselves.” Graham did not seek such relief, and he has suggested in his brief to the Commission that doing so would be inconvenient and “not a viable option.”

On April 11, 2019, Graham filed an application for review asking that the Commission order FINRA “to take action regarding Graham’s request for relief related to” the four disclosures “pursuant to [FINRA’s] obligations under the FCRA.” Graham asserted that he has “exhausted his administrative remedies through FINRA.” We directed the parties to file briefs addressing whether we have jurisdiction to review Graham’s application.¹¹

II. Analysis

Graham offers two arguments in support of his position that the Commission has jurisdiction: that FINRA has prohibited or limited his access to its services, and that our review is necessary to vindicate his purported rights under the FCRA given the absence of any other mechanism for doing so. But Graham did not pursue and was thus not denied access to any service that FINRA offers, and the fact that FINRA does not offer a mechanism for seeking removal from CRD of the information Graham wants removed does not provide us with jurisdiction. We lack jurisdiction where Congress has not expressly authorized it. And

¹⁰ 15 U.S.C. § 1681c(a)(1)-(3), (a)(5) (prohibiting a “consumer reporting agency [from] mak[ing] any consumer report containing” information about certain bankruptcies, civil judgments, tax liens, and “other adverse item[s] of information” that “antedate[s] the report by more than” a certain number of years); *see also id.* 1681a(f) (defining a “consumer reporting agency” as including “any person which, for . . . fees, dues, or on a cooperative basis, . . . regularly . . . assembl[es] or evaluat[es] . . . information on consumers for the purpose of furnishing consumer reports to third parties”); *id.* § 1681a(d)(1) (defining a “consumer report” as including a “written . . . communication of information by a consumer reporting agency bearing on a consumer’s . . . character, general reputation, [or] personal characteristics, . . . which is used . . . as a factor in establishing the consumer’s eligibility for— . . . (B) employment purposes”).

¹¹ *Jonathan E. Graham*, Exchange Act Release No. 85857, 2019 WL 2103146 (May 14, 2019).

Graham’s failure to obtain the relief that he seeks from FINRA does not itself confer such jurisdiction. Because Graham has not established that Exchange Act Section 19(d) authorizes us to exercise jurisdiction to review his claims, we dismiss his application for review.

A. FINRA did not limit Graham’s access to any service it offers.

Exchange Act Section 19(d) authorizes us to review actions taken by a self-regulatory organization (“SRO”) such as FINRA only in specific circumstances.¹² One such circumstance is where an SRO prohibits or limits any person in respect to access to services offered by that SRO or member thereof.¹³ “To determine whether FINRA’s actions prohibited or limited access to services under the meaning of Section 19(d), we consider whether FINRA has denied or limited the applicant’s ability to utilize one of the fundamentally important services offered by the SRO, and whether the services at issue were not merely important to the applicant but were central to the function of the SRO.”¹⁴ Graham contends that his appeal fits within Section 19(d) because FINRA denied or limited access to its services in two ways. We disagree.¹⁵

First, Graham argues that FINRA denied him access to its “fundamentally important” arbitration service by “determin[ing] that [his] claim is ineligible for FINRA arbitration.” But Graham did not file an arbitration claim or otherwise request access to that service. FINRA therefore did not deny him access or determine that a claim that he filed was ineligible for

¹² 15 U.S.C. § 78s(d); *see also Chicago Bd. Options Exch. v. SEC*, 889 F.3d 837, 841 (7th Cir. 2018) (affirming the Commission’s decision that it lacked jurisdiction because its authority under Section 19(d) to review SRO actions “extends only to limited circumstances”).

¹³ The Exchange Act provides three other jurisdictional bases for Commission review of an SRO action: if the action imposes a final disciplinary sanction on a member of the SRO or an associated person; if the action denies membership or participation to the applicant; or if the action bars a person from becoming associated with a member. *See* 15 U.S.C. § 78s(d). Graham does not contend that we have jurisdiction under any of these alternate bases for Commission review. *See Citadel Sec. LLC*, Exchange Act Release No. 78340, 2016 WL 3853760, at *3 n.18 (July 15, 2016) (“We will not exercise jurisdiction on a basis [applicants] disclaim.”), *aff’d sub nom.*, *Chicago Bd. Options Exch. v. SEC*, 889 F.3d 837 (7th Cir. 2018).

¹⁴ *WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 WL 5245244, at *5 n.28 (Sept. 9, 2015) (citations omitted).

¹⁵ In addition to Section 19(d), Graham invokes Commission Rule of Practice 420, 17 C.F.R. § 201.420(a), which provides that a person aggrieved by the actions specified in Section 19(d) may file an application for review with the Commission. *See Lawrence Gage*, Exchange Act Release No. 54600, 2006 WL 2987058, at *3 (Oct. 13, 2006) (“The grounds for Commission jurisdiction enumerated in Rule 420(a) are the same as those described in Section 19(d)(1) of the Exchange Act.”). Given our disposition of Graham’s appeal, we do not address FINRA’s argument that Graham is not an “aggrieved” person within the meaning of Rule 420.

arbitration. Indeed, in Graham’s view the information at issue cannot be removed through an arbitration claim. Graham may thus have believed that FINRA would not grant him access to the arbitration forum had he filed such a claim. Although Graham may have been correct in this belief, declining to request access to services offered by an SRO based on a “belie[f] that [access] will not be granted is not the same as receiving a denial.”¹⁶

Graham disputes that this is a case in which he “refus[ed] to avail himself” of a service that FINRA offers. He asserts instead that he “cannot even proceed with his claim at all” because FINRA’s rules have effectively denied him access to its arbitration service. He cites FINRA Rules 2080 and 8312, which he claims provide no “internal mechanism” for challenging or removing the information at issue and thus prohibit him from accessing “the arbitration forum” to obtain the relief he seeks.¹⁷ Whether Graham chose not to pursue a service that FINRA offers, or whether FINRA does not provide the service that Graham seeks, we lack jurisdiction just the same.¹⁸ Section 19(d) authorizes review of a prohibition or limitation of access to services; it does not authorize review where the SRO has not prohibited or limited the applicant’s access to a service that it offers, or where the applicant seeks review of a purported denial of access to services that the SRO does not offer.¹⁹

Second, Graham argues that FINRA denied him access to its fundamentally important “disclosure” system. But Graham does not object that he has been prohibited or limited from accessing the information disclosed in CRD or BrokerCheck. He instead says that “FINRA’s refusal to comply with” the FCRA denied him access to a disclosure service that is “[p]roperly maintain[ed]” and “fair, complete, and accurate.” Graham cannot establish jurisdiction by challenging the manner in which FINRA maintains the system that it offers; he must show that he has been denied access to that system. His claim that FINRA must comply with the FCRA is irrelevant to whether FINRA has denied him access to a service that it offers.²⁰ Graham’s claim

¹⁶ *WD Clearing*, 2015 WL 5245244, at *4 (finding that the Commission lacked jurisdiction because “FINRA had not yet taken any action to limit or prohibit access to its services”).

¹⁷ *See supra* notes 7-9 and accompanying text.

¹⁸ *See* 15 U.S.C. § 78s(d)(1) (referring to action that “prohibits or limits any person in respect to access to services *offered* by [the SRO] or member thereof”) (emphasis added).

¹⁹ *See Constantine Gus Cristo*, Exchange Act Release No. 86018, 2019 WL 2338414, at *4 (June 3, 2019) (finding no jurisdiction over purported denial of access to services that FINRA “does not offer” and noting that applicant had “chosen not to avail himself of the procedure FINRA offers” by “refus[ing] to file an arbitration claim”) (citing *WD Clearing, LLC*, 2015 WL 5245244, at *5 n.28); *see also Wanger*, 2016 WL 5571629, at *4 (finding that applicant failed to establish the existence of jurisdiction where he “d[id] not identify any services to which he ha[d] been denied access by virtue of FINRA’s BrokerCheck disclosure”).

²⁰ *See Beatrice J. Feins*, Exchange Act Release No. 33374, 1993 WL 538913, at *3 n.14 (Dec. 23, 1993) (declining to reach the applicant’s claim that the SRO’s action violated the

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goes to the merits of FINRA’s determination that CRD records are not subject to the FCRA and “do[es] not create jurisdiction for us under Exchange Act Section 19(d).”²¹

B. Graham’s claim that there is no mechanism for obtaining the relief that he seeks does not mean that we have jurisdiction under Section 19(d).

Aside from arguing that his appeal fits under Section 19(d), Graham claims that we should exercise jurisdiction because otherwise he cannot obtain the relief he seeks. Although Graham offers two arguments in support of this basis for jurisdiction, neither has merit.

First, Graham contends that we should exercise jurisdiction because it is “not a viable option” to seek expungement from the relevant agencies or courts as FINRA suggested. He says that doing so would be “far more complicated, expensive, and time-consuming” than pursuing FINRA arbitration; that doing so would violate FINRA’s rules requiring arbitration of industry disputes;²² and that if he did so FINRA “would almost certainly request dismissal . . . for failure to exhaust all administrative remedies.” But the fact that seeking expungement from the relevant agencies or courts may be complicated, expensive, and time-consuming does not provide us with jurisdiction. And Graham’s arguments that he must arbitrate to comply with FINRA’s rules and to exhaust administrative remedies are facially inconsistent with his assertions that FINRA’s rules do not authorize arbitration of his claims.²³ Graham offers no further evidence, authority, or explanation for these arguments’ relevance to his appeal.

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federal Age Discrimination Act of 1975 and New York State’s Human Rights Law because the claims under these statutes “are outside our jurisdiction, and redress, if any, under these statutes must be pursued in other forums”); *see also Russell A. Simpson*, Exchange Act Release No. 40960, 1998 WL 801399, at *4 n.13 (Nov. 19, 1998) (“Because we lack review jurisdiction, we do not consider the merits of Simpson’s allegations of rule violations.”).

²¹ *Cristo*, 2019 WL 2338414, at *6 (finding argument that broker committed “constitutional violations” that could not “be resolved by FINRA arbitrators” did not create jurisdiction); *see also Orbixa Techs., Inc.*, Exchange Act Release No. 70893, 2013 WL 6044106, at *5 n.20 (Nov. 15, 2013) (recognizing that, because the Commission lacked jurisdiction under Section 19(d), it lacked the ability to review applicant’s contention that SRO violated Exchange Act rules).

²² Under FINRA’s rules, an associated person’s failure to submit certain industry-related disputes to arbitration “may be deemed conduct inconsistent with just and equitable principles of trade and a violation of [FINRA] Rule 2010.” FINRA IM-13000. FINRA disputes that its rules would require arbitration of requests for expungement directed to the relevant agencies or courts. We express no opinion on whether or how those rules apply here.

²³ *See supra* text accompanying notes 16-17.

Second, Graham asks us to redress FINRA’s “absolute lack of any mechanism” under its rules for the relief he seeks.²⁴ The lack of a mechanism for the relief he seeks does not confer jurisdiction. Even if Graham were correct that he has no other venue for relief, that would not confer jurisdiction where Congress has not authorized it.²⁵ Section 19(d) does not authorize us to review SRO action because an applicant claims “extraordinary circumstances” or “compelling reasons.”²⁶ “SRO action is not reviewable merely because it adversely affects the applicant.”²⁷

We therefore dismiss the application for review. An appropriate order will issue.²⁸

By the Commission (Chairman CLAYTON and Commissioners PEIRCE, ROISMAN, and LEE).

Vanessa A. Countryman
Secretary

²⁴ We note that 15 U.S.C. §§ 1681n, 1681o, and 1681p provide a private right of action to enforce a liability under the FCRA and that 15 U.S.C. § 1681s provides for civil enforcement actions to enforce compliance with the FCRA. *See generally Owner-Operator Independent Driver Ass’n Inc. v. Usis Commercial Servs., Inc.*, 410 F. Supp. 2d 1005 (D. Colo. 2005) (discussing the different forms of relief available in private actions and government enforcement actions). Given our disposition, we express no view on FINRA’s argument that it has not violated the FCRA and is not a “consumer reporting agency” within the meaning of the FCRA.

²⁵ *John Boone Kincaid*, Exchange Act Release No. 87384, 2019 WL 5445514, at *4 (Oct. 22, 2019) (stating that the “alleged importance or necessity of our review does not confer jurisdiction where we have determined that Congress has not authorized it”).

²⁶ *Allen Douglas Sec., Inc.*, Exchange Act. Release No. 50513, 2004 WL 2297414, at *2 n.14 (Oct. 12, 2004).

²⁷ *Wanger*, 2016 WL 5571629 at *5 (quoting *Citadel Sec.*, 2016 WL 3853760, at *5).

²⁸ 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.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 89237 / July 7, 2020

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In the Matter of the Application of
JONATHAN EDWARD GRAHAM
For Review of Action Taken by
FINRA

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION TAKEN BY
REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the application for review filed by Jonathan Edward Graham is dismissed.

By the Commission.

Vanessa A. Countryman
Secretary