

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 81788 / September 29, 2017

Admin. Proc. File No. 3-17963

In the Matter of the Application of

BRUCE ZIPPER

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Associated person of FINRA member sought to withdraw from a Letter of Acceptance, Waiver, and Consent he entered into with FINRA. *Held*, application for review is dismissed.

APPEARANCES:

Bruce Zipper, pro se.

Alan Lawhead and *Colleen Durbin* for FINRA.

Appeal filed: April 24, 2017

Last brief received: June 8, 2017

Bruce M. Zipper, the president of FINRA member firm Dakota Securities International (“Dakota”), entered into a Letter of Acceptance, Waiver, and Consent (the “AWC”) with FINRA in which he consented to a fine and three month suspension from association for certain misconduct. After he sought unsuccessfully before FINRA to withdraw from the AWC, he filed an application for review with the Commission. We construe Zipper’s application as asking us to set aside his AWC, obtain discovery from FINRA, and initiate an investigation into FINRA’s conduct surrounding the negotiation of the AWC. FINRA moves to dismiss the application. As

explained below, we grant FINRA’s motion and dismiss this review proceeding because Zipper’s AWC is not appealable, he is not entitled to the relief he seeks, and his application is untimely.¹

I. Background

A. Zipper entered into the AWC following FINRA’s examination of Dakota in 2015.

FINRA’s Department of Member Regulation (“Member Regulation”) conducted an examination of Dakota in 2015. On August 10, 2015, Member Regulation sent Zipper an Examination Disposition Letter (the “EDL”) about the results of its examination. As relevant here, Member Regulation found that Dakota had failed to ensure that Zipper and another associated person had updated their Uniform Applications for Securities Industry Registration and Transfer (“Forms U4”). Member Regulation said it would caution Dakota for that misconduct rather than refer it to FINRA’s Department of Enforcement (“Enforcement”), but noted that the caution “does not address, limit, or in any other way impact” other investigations. Zipper later denied receiving the EDL at the time, and said he was unaware that Member Regulation thought a caution was the appropriate response to Dakota’s misconduct.

Following the EDL, Enforcement twice requested under FINRA Rule 8210 that Zipper appear for testimony under oath and provide information and documents with respect to Zipper’s failure to update his Form U4 to include three judgments or liens against him.² Enforcement subsequently presented Zipper with a draft AWC in which Zipper would agree that he “willfully omitted to state a material fact on a Form U4” and that “this omission makes me subject to a statutory disqualification with respect to association with a member.” Zipper would also “specifically and voluntarily” waive the right to appeal the AWC to the Commission or to a U.S. Court of Appeals. And he would consent to a three-month suspension from association in all capacities and a \$5,000 fine. Zipper accepted the AWC on April 1, 2016, and FINRA’s National Adjudicatory Council Review Subcommittee accepted the AWC on April 22, 2016.

Although Zipper knew or should have known from reviewing the AWC before signing it that his suspension subjected him to a statutory disqualification, he told FINRA afterwards that he had not realized that was so, or that Dakota would have to submit a membership continuance application detailing the terms of his proposed continued association with Dakota.³ On May 5, 2016, Zipper exchanged emails with Kevin Rosen, the FINRA counsel with whom he had negotiated the AWC. Zipper said that he would not have agreed to the AWC had he known he

¹ Given this disposition, we deny FINRA’s motion to stay the briefing schedule as moot.

² See FINRA Rule 8210(a) (requiring persons subject to FINRA’s jurisdiction to provide testimony, information, or documents in connection with FINRA investigations); *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”).

³ See *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 WL 2887272, at *2 (June 26, 2014) (describing statutory disqualifications and FINRA’s eligibility proceedings).

would be subject to a statutory disqualification. Rosen directed Zipper's attention to the AWC's language pertaining to the statutory disqualification, and reminded him that they discussed it during settlement negotiations. Zipper then denied that he had understood that he would have to file a membership continuance application to remain associated with Dakota after his suspension, and he sought to "withdraw[]" from the AWC. Rosen again explained that Zipper had been made aware of the statutory disqualification and membership continuance application issues. Rosen also informed him that "[t]he AWC is final and not subject to your withdrawal." Zipper's 90-day suspension ran from May 31, 2016, to August 31, 2016.

B. FINRA continued to investigate other misconduct after Zipper entered into the AWC.

After Zipper served his suspension, Enforcement informed him by phone that it was continuing to investigate other potential matters in connection with the examination of Dakota in 2015. On November 16, 2016, Zipper wrote Angela Brunelle, his contact in FINRA's Boca Raton office, an email stating that he believed that by agreeing to the AWC he "made a deal with FINRA enforcement . . . to settle the issues confronting Bruce Zipper and Dakota Securities relating to [the 2015 FINRA] exam." In this email, Zipper acknowledged his awareness of the EDL for the first time and asked Brunelle to "furnish the author" of the EDL.⁴

The next day, Enforcement counsel Gerard Murphy sent Zipper a letter reiterating the earlier phone conversation and requesting that he appear for an on-the-record interview about an exception uncovered in the 2015 examination relating to Dakota's noncompliance with FINRA Rule 3310 (Anti-Money Laundering Compliance Program). Zipper told Brunelle that he believed his AWC had "resolve[d] ALL issues" and that "FINRA [is] now renegeing on the agreement." The record does not indicate whether anyone at FINRA responded to this assertion.

In a letter dated January 27, 2017, Zipper wrote to Yvette Panetta, the FINRA Deputy District Director who authored the EDL, to ask about FINRA's different treatment of him and Dakota. Panetta responded in a letter dated February 10, 2017, explaining that the EDL was "specific to the examination of Dakota," while the AWC dealt with Zipper's individual misconduct as revealed by the information Zipper provided under Rule 8210 in late 2015, which FINRA treated as a separate examination.

C. Zipper filed an application for review a year after entering into the AWC.

On April 16, 2017, more than a year after FINRA accepted the AWC, Zipper filed an application for review with the Commission. Zipper argues that he entered into his AWC with a misunderstanding of what issues his AWC was resolving, and without knowing that Member Regulation viewed Dakota's misconduct as less serious than his own. He also asserts that

⁴ Zipper's application for review asserted that he learned about the EDL for the first time in the fall of 2016 when he "requested certain papers relating to the FINRA Exam . . . for [his] files."

FINRA is engaged in a cover up and is “hell bent on destroying both [him] and [his] firm.” Zipper asks that we “review” his “case,” compel FINRA’s Boca Raton office to provide him with internal emails and other communications, and initiate an investigation into FINRA. FINRA moves to dismiss.

II. Analysis

We dismiss Zipper’s application for review because Zipper’s AWC contains a valid and enforceable appellate waiver, Zipper is not entitled to the remaining relief he requests, and in any case his application for review is untimely.

A. Zipper waived his right to appellate review in his AWC.

Although Zipper’s application for review does not clearly specify the relief he seeks, we construe it as a request to set aside his AWC because he contends that he signed the AWC with incomplete information and asks us to “review” his “case.”⁵ FINRA contends that we are “preclude[d]” from reviewing the AWC because it contains an appellate waiver: Zipper “specifically and voluntarily waive[d]” his right “[t]o appeal any such decision to . . . the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.” FINRA’s rules specify that an AWC waives the respondent’s right to appeal to the Commission and to further judicial review.⁶ Approving those rules, we said that “a respondent may not ‘appeal’ any final action contained in an AWC . . . that has been accepted by [FINRA].”⁷ We conclude, consistent with this authority, that an appellate waiver in an otherwise valid AWC is presumptively enforceable.⁸

Zipper’s AWC is valid and enforceable, and his appellate waiver is binding.⁹ The record does not support Zipper’s contention that he executed the AWC based on a misunderstanding. The AWC specified that he had “read and underst[oo]d” its provisions, could “ask questions

⁵ 15 U.S.C. § 78s(e)(1)(B).

⁶ See FINRA Rule 9216(a)(1) (authorizing the Department of Enforcement or the Department of Market Regulation to prepare and request execution of “a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive,” among other things, “any right of appeal to . . . the SEC, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted”); FINRA Rule 9270(d)(1)(A) (specifying that by submitting an offer of settlement, a respondent waives “any right of appeal to . . . the SEC, and the courts, or any right otherwise to challenge or contest the validity of the order issued, if the offer of settlement and order of acceptance are accepted”).

⁷ *Order Approving Proposed Rule Change*, File No. SR-NASD-97-28, Exchange Act Release No. 38908, 1997 WL 441929, at *38 n.198 (Aug. 7, 1997).

⁸ See *McCall v. U.S. Post Office*, 839 F.2d 664, 666-67 (Fed. Cir. 1988) (concluding that a federal agency may enforce an appellate waiver in an agreement forbearing disciplinary action).

⁹ We need not decide whether an AWC may ever be challenged as unenforceable.

about it,” had “agreed to its provisions voluntarily,” and had only been induced to sign by “the terms set forth herein and the prospect of avoiding the issuance of a Complaint.”¹⁰ The AWC also made clear that he would be subject to a statutory disqualification and that he would waive his appellate rights. And it focused on his own misconduct in not updating his Form U4—not Dakota’s misconduct related to Forms U4, or either of their misconduct related to other exceptions FINRA found in its Dakota examination. Nor did it purport to preclude FINRA from examining Zipper or Dakota with respect to those other exceptions. Despite Zipper’s assertion that he did not receive the EDL before entering into the AWC, he offers no evidence that FINRA misled him about how serious it considered his misconduct and Dakota’s misconduct respectively. For these reasons, we find that Zipper’s AWC is binding and that he waived his right to appeal the AWC to the Commission.¹¹

B. Zipper is not entitled to the relief he requests.

Zipper claims that FINRA is covering up its inconsistent treatment of him and Dakota and asks for discovery from FINRA about this alleged cover-up and for an “investigation as to what is going on.” We construe Zipper’s assertions that FINRA is covering up its attempts to “destroy[]” him as an allegation that it is biased against him. We have previously rejected requests for discovery related to unsubstantiated allegations that FINRA is biased,¹² and do so again here because Zipper has failed to substantiate any claim of bias.

Zipper also asks us to “do [our] own investigation.” Section 19(h)(1) of the Securities Exchange Act of 1934 authorizes us to institute public administrative proceedings against a registered securities association that has not complied with its own rules or satisfied its

¹⁰ Cf. Restatement (Second) of the Law of Contracts § 157 cmt. b (“Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms.”); see also *Notice of Filing of a Proposed Rule Change*, File No. SR-NASD-97-28, Exchange Act Release No. 38545, 1997 WL 211525, at *54 (Apr. 24, 1997) (explaining that an AWC is an agreement to “resolve the matter in a pre-complaint environment”).

¹¹ FINRA says that it “assume[s] *arguendo*,” but does not “conced[e],” that we have jurisdiction under Exchange Act Section 19(d) to review Zipper’s appeal of his AWC. See 15 U.S.C. § 78s(d) (authorizing us to review a final disciplinary sanction imposed by FINRA). In light of our disposition, we too assume without deciding that jurisdiction exists. Cf. FINRA Rule 9270(g) (explaining that an “order of acceptance” by FINRA of an AWC “shall constitute final disciplinary action of FINRA”); *Sky Capital LLC*, Exchange Act Release No. 55828, 2007 WL 1559228, at *3 (May 30, 2007) (assuming that an AWC is a “final disciplinary sanction” but that the respondents had “waived their rights to appeal to the Commission”).

¹² *Asensio & Co., Inc.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *15 & n.85 (Dec. 20, 2012); see, e.g., *John Montelbano*, Exchange Act Release No. 47227, 2003 WL 147562, at *12 (Jan. 22, 2003) (rejecting discovery request because respondent is “not entitled to go on a fishing expedition in the hope that something might turn up to aid his defense”).

obligations under the Exchange Act to enforce its rules and the federal securities laws.¹³ But Section 19(h)(1) does not authorize a private litigant’s petition to initiate proceedings; as we have said, “the case initiating document” in a Section 19(h)(1) proceeding is an “order instituting proceedings, not [a] [p]etition” filed by a private litigant.¹⁴ We therefore deny the request insofar as it cannot be adjudicated in the appeal before us.¹⁵

C. Zipper’s application for review is untimely.

Zipper’s untimely filing of his application for review provides an independent basis for dismissing his appeal.¹⁶ Exchange Act Section 19(d)(2) provides that appeals from actions of self-regulatory organizations must be filed by the aggrieved person “within thirty days after the date such notice was . . . received by [the] aggrieved person, or within such longer period as [the Commission] may determine.”¹⁷ Rule of Practice 420(b) provides that the Commission “will not extend this 30-day period, absent a showing of extraordinary circumstances.”¹⁸

Zipper did not file his application for review within thirty days after receiving notice that FINRA had accepted the AWC. The AWC was accepted on April 22, 2016, and he filed his application for review nearly one year later on April 16, 2017. Zipper responds that his application was timely because he tried to withdraw from the AWC “the very next day after it was signed,” but this does not change the fact that he did not file his application for review *with the Commission* within thirty days.¹⁹ Even if the thirty-day period began to run from February 10, 2017, the date of the letter Zipper received from Panetta explaining the difference between the EDL and the AWC,²⁰ the application for review would still be untimely; Zipper waited more

¹³ 15 U.S.C. § 78s(h); *see, e.g., NASD, Inc.*, Exchange Act Release No. 37538, 1996 WL 447193 (Aug. 8, 1996) (order instituting public proceedings pursuant to Exchange Act Section 19(h)(1), making findings, and imposing remedial sanctions).

¹⁴ *Citadel Secs.*, Exchange Act Release No. 78340, 2016 WL 3853760, at *4 (July 15, 2016).

¹⁵ In furtherance of our FINRA oversight responsibilities, Zipper’s application for review has been referred to the appropriate staff for such action as may be appropriate. *See BFG Secs., Inc.*, Exchange Act Release No. 44627, 2001 WL 865449, at *1 n.1 (July 31, 2001).

¹⁶ *See Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at *4 (Feb. 8, 2016) (dismissing application for review as untimely as well as for the “independent” reason that the applicant failed to exhaust administrative remedies before FINRA).

¹⁷ 15 U.S.C. § 78s(d)(2).

¹⁸ 17 C.F.R. § 201.420(b).

¹⁹ Zipper disputes the date on which he purportedly sought to withdraw from the AWC, but his application for review would be untimely even if we credited Zipper’s factual assertion.

²⁰ We neither find nor mean to imply that the 30-day period started to run with this letter.

than two and a half months after receiving it to file his application for review. Zipper never sought an extension of the filing deadline, and now provides no justification for his untimely filing.

As we have repeatedly observed, “‘strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief.’ Unmet deadlines may cut off substantive rights to review, but this is their function.”²¹ Because Zipper has not shown that extraordinary circumstances excuse his delay, we find his application for review untimely.²²

An appropriate order will issue.²³

By the Commission (Chairman CLAYTON and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

²¹ *Manzella*, 2016 WL 489353, at *4 (quoting *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 WL 1826641, at *2 (May 8, 2014) (citation omitted)).

²² *See Kalid Morgan Jones*, Exchange Act Release No. 80635, 2017 WL 1862331, at *5-6 (May 8, 2017) (declining to review an application filed three months late where no extraordinary circumstances existed to excuse the untimely filing).

²³ 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. 81788 / September 29, 2017

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In the Matter of the Application of

BRUCE ZIPPER

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 Bruce Zipper be, and it hereby is, dismissed.

By the Commission.

Brent J. Fields
Secretary