SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 74187 / February 2, 2015

Admin. Proc. File No. 3-15130

In the Matter of the Application of

MPHASE TECHNOLOGIES, INC.
c/o Frank C. Razzano, Esq.
Pepper Hamilton LLP
600 14th Street, N.W.
Washington, D.C. 20005-2004

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF ASSOCIATION ACTION DENYING REQUEST TO PROCESS CORPORATE ACTION

Registered securities association declined to process documents related to an issuer's proposed reverse stock split in the public interest because the issuer's corporate officers were the subject of a settled regulatory action involving securities laws violations. *Held*, review proceeding is *dismissed*.

APPEARANCES:

Frank Razzano and *Min Choi*, of Pepper Hamilton LLP, for mPhase Technologies, Inc.

Alan Lawhead, *Gary Dernelle*, and *Jante C. Turner*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: December 12, 2012
Last brief received: April 24, 2013

mPhase Technologies, Inc., an issuer of securities formerly quoted on the OTC Bulletin Board ("OTCBB"), appeals from FINRA's denial of mPhase's request that FINRA process and announce mPhase's reverse stock split on the OTCBB. FINRA found that mPhase's request was deficient and that processing the announcement was not in the public interest because mPhase's chief executive and chief operating officers were the subject of a "settled regulatory action related to . . . securities laws violations." mPhase does not dispute that its senior officers settled a Commission action in 2007 but argues that FINRA exceeded its regulatory authority in denying mPhase's request to process and announce its reverse stock split on the OTCBB. Based on an independent review of the record, we find that FINRA properly exercised its discretion in operating the OTCBB, relied on grounds that exist in fact, and denied mPhase's request in accordance with FINRA Rules and the purposes of the Securities Exchange Act of 1934. We accordingly dismiss the appeal.

I. Background

A. FINRA's operation of the OTCBB and processing of Company-Related Actions

FINRA owns and operates the OTCBB, an electronic inter-dealer quotation system that FINRA provides to its members that actively trade securities not listed on NASDAQ or a national securities exchange.[1] The OTCBB displays quotes, last-sale prices, and volume information for eligible equity securities. To be quoted on the OTCBB, an issuer's securities must be sponsored by a FINRA member and meet applicable quotation standards.[2] FINRA rules, including the 6000 Rule Series and Uniform Practice Code, govern the use and operation of FINRA's OTCBB service.[3]

As part of its operation of the OTCBB, FINRA processes requests to announce and publish certain corporate actions from issuers whose securities are quoted on the OTCBB.[4] These actions, generally referred to as "Company-Related Actions,"[5] include any stock

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1 *See, e.g., Palmworks, Inc.*, Securities Exchange Act Release No. 43294, 54 SEC 840, 2000 WL 1335343, at *1 (Sept. 15, 2000).

2 *See Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. to Allow Electronic Communications Networks and Alternative Trading Systems to Participate in the [OTCBB]*, Exchange Act Release 45915, 2002 WL 977530, at *1 (May 10, 2002); *OTCBB Frequently Asked Questions*, http://www.finra.org/Industry/Compliance/MarketTransparency/OTCBB/FAQ/ (all websites last visited on June 26, 2014).

3 *See* FINRA Rule 6000 and 11000 Series.

4 FINRA publishes these announcements on the OTCBB "daily list," available through OTCBB.com. FINRA Regulatory Notice 10-38, 2010 WL 3393960, at *1 (Sept. 27, 2010).

5 FINRA Rule 6490; *Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions) to Clarify Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities*

(continued…)

dividends, stock splits, or rights offerings, as well as "the issuance or change to a trading symbol or company name, merger, acquisition, dissolution or other company control transactions, bankruptcy or liquidation."[6] If FINRA elects to process an issuer's Company-Related Action, it will, in turn, announce the action on OTCBB's "Daily List," which "effectively announces the Company-Related Actions to the [OTC] market."[7]

In 2010, based on a "growing concern that FINRA's Company-Related Action processing services may potentially be used by certain parties to further fraudulent activities," FINRA proposed, and the Commission approved, FINRA Rule 6490 authorizing FINRA to deny an issuer's request that FINRA announce a Company-Related Action on the OTCBB under certain circumstances.[8] The Commission's 2010 Approval Order observed that, although "[h]istorically, FINRA has viewed its role in performing issuer-related functions as primarily ministerial" given its indirect relationship with issuers, Rule 6490 makes clear "the scope of its regulatory authority and . . . codif[ies] procedures that it will apply when reviewing requests to process Company-Related Actions."[9] The Rule authorizes FINRA's Department of Operations (the "Department") to conduct "in-depth reviews" of issuers' requests[10] and to deny a request upon finding that (1) the request is "deficient," based on a five-factor inquiry,[11] and (2) denial is "necessary for the

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and to Implement Fees for Such Services, Exchange Act Release No. 62434, 2010 WL 2641653, at *2 (July 1, 2010) (the "2010 Approval Order"); *see also* FINRA Regulatory Notice 10-38, 2010 WL 3393960, at *3 (Aug. 27, 2010).

6 FINRA Rule 6490 refers to the first category of Company-Related Actions as "SEA Rule 10b-17 Actions" and the second category as "Other Company-Related Actions." *Id.* *See* further discussion *infra* note 70 and accompanying text.

7 2010 Approval Order, *supra* note 5, at *1 n.7; *see also* FINRA Regulatory Notice 10-38, 2010 WL 3393960, at *1.

8 2010 Approval Order, *supra* note 5, at *2.

9 *Id.*

10 *Id.*

11 FINRA Rule 6490(d)(3). Under FINRA Rule 6490(d)(3), a Company-Related Action is "deficient" if "one or more" of the following factors exists:

> (1) FINRA staff reasonably believes the forms and all supporting documentation . . . may not be complete, accurate or with proper authority;
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> (2) the issuer is not current in its reporting requirements . . . to the SEC or other regulatory authority;
>
> (3) FINRA has actual knowledge that . . . officers [or] directors . . . connected to the issuer or the [Company-Related Action requested] . . . are the subject of a pending, adjudicated or settled regulatory action or investigation by a federal, state or foreign regulatory agency, or a self-regulatory organization; or a civil or criminal action related to fraud or securities laws violations;

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protection of investors, the public interest and to maintain fair and orderly markets."[12] An issuer may appeal any denial by the Department to a subcommittee of FINRA's Uniform Practice Code Committee ("UPCC Subcommittee") and that subcommittee's decision becomes FINRA's final decision in the matter.[13]

B. mPhase

1. mPhase's application with FINRA

On July 6, 2012, mPhase, an OTCBB-quoted corporation specializing in microfluidics, micro-electro-mechanical systems, and nanotechnology,[14] filed an application with FINRA requesting that it process a Company-Related Action—specifically, an announcement on the OTCBB that mPhase was issuing a 1-200 reverse stock split.[15] According to mPhase, the reverse stock split sought to increase the share price of its common stock by reducing the number of

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(4) a state, federal or foreign authority or self-regulatory organization has provided information to FINRA, or FINRA otherwise has actual knowledge indicating that the issuer, associated persons, officers, directors, transfer agent, legal adviser, promoters or other persons connected with the issuer or [Company-Related Action] may be potentially involved in fraudulent activities related to the securities markets and/or pose a threat to public investors; and/or

(5) there is significant uncertainty in the settlement and clearance process for the security.

[12] *Id.*; 2010 Approval Order, *supra* note 5, at *6.

[13] FINRA Rule 6490(e).

[14] mPhase Tech., Inc., Form 10-K for the year ended June 30, 2012, at 4, *available at* http://www.sec.gov/Archives/edgar/data/825322/000106299312003770/form10k.htm ("mPhase Form 10-K"). We take official notice of the information about mPhase provided in its Commission EDGAR filings and on the website of the Secretary of the State of Connecticut. *See* 17 C.F.R. § 210.323 (permitting official notice of "any material fact which might be judicially noticed by a [U.S.] district court" or "any matter in the public official records of the Commission") and Fed. R. Evid. 201(b) (stating that "judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned").

[15] mPhase is a New Jersey corporation with its principal place of business in Norwalk, Connecticut. Its common stock is registered with the Commission under Section 12(g) of the Securities Act, and at all times relevant to FINRA's action, was quoted on the OTCBB under the ticker symbol "XDSL." On March 26, 2013, during the pendency of mPhase's appeal, mPhase became ineligible for OTCBB quotation "due to quoting inactivity." *OTCBB Daily List*, http://www.otcbb.com/dailylist/ (search "XDSL"). mPhase's stock is currently quoted on the OTC Pink, operated by OTC Markets Group, Inc. *See OTC Markets Group's Company Directory*, http://www.otcmarkets.com/stock/XDSL/quote.

mPhase's outstanding shares from approximately 4.48 billion to 22.4 million.[16] mPhase explained that it has long refrained "from attempting to increase its stock price through a reverse [stock] split rather than through fundamentals flowing from its operations" but that market conditions and its recent failure to secure financing necessitated the action.

2. mPhase officers Durando and Dotoli and their settlement with the SEC

Since mPhase's incorporation in 1996, Robert Durando has acted as its president and chief executive officer and Gustave Dotoli has acted as its chief operating officer. Durando and Dotoli both are on mPhase's board of directors and own 21.75% and 15.31% of the company's stock, respectively. In addition to their association with mPhase, Durando and Dotoli are officers of PacketPort.com, Inc., a Nevada corporation, of which Durando is the president and Dotoli the vice president. Durando is also majority owner of Microphase Corporation, a Connecticut corporation that is a part-owner of mPhase and provides mPhase with various administrative services. Microphase and Packetport both operate from the same business address as mPhase in Norwalk, Connecticut.[17]

On October 18, 2007, while they were officers of mPhase, Durando and Dotoli settled a Commission administrative proceeding (the "2007 Settlement Order"), in which they consented to findings that they violated several federal securities laws from 1999 to 2002.[18] The findings concerned violations related to their roles at Microphase and Packetport.com.[19] The 2007 Settlement Order stated that in early 1999 Durando and Dotoli acquired control of Linkon Corp., a failing Internet company.[20] In return for a cash infusion and settlement of Linkon's debt,

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16 "A reverse stock split reduces the number of shares and increases the share price proportionately." *Reverse Stock Split*, http://www.sec.gov/answers/reversesplit.htm. mPhase initially requested that FINRA process and announce a 1-100 reverse stock split on the OTCBB but later revised the split ratio to 1-200.

17 *See* mPhase Form 10-K, *supra* note 14, at 72, 116 (noting that mPhase leases office space from Microphase and also compensates Microphase for "use of accounting personnel," "research and development," and "specific projects on a project-by-project basis"). According to the Form 10-K, Durando is a controlling owner of Microphase through his ownership of a related holding company. *Id.* at 72.

18 *PacketPort.com, Inc.*, Order Instituting Cease-and-Desist Proceedings, Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Exchange Act Release No. 56672, 2007 WL 3033480, *1-2 (Oct. 18, 2007).

19 At the time, Durando was Packetport.com's chairman, president, and chief executive officer and Microphase's majority owner and chief operating officer. Dotoli was Packetport.com's secretary and a director on its board of directors. *Id.*

20 The 2007 Settlement Order stated that by May 1999 Linkon was in default on $1.9 million in debt notes, subject to an $802,500 civil judgment, and had ceased operations. *Id.* at *3.

Durando and Dotoli received stock in Linkon, which later became stock of PacketPort.com. The 2007 Settlement Order found that, in the course of this acquisition, (1) Durando, Dotoli, PacketPort.com, and Microphase offered or sold shares of PacketPort.com stock without a registration statement in effect in violation of Sections 5(a) and (c) of the Securities Act of 1933;[21] (2) Durando and Dotoli violated Exchange Act Section 16(a) and Rule 16a-3 by failing to timely file Forms 3 to reflect their beneficial ownership of more than ten percent of PacketPort.com's stock;[22] and (3) Durando violated Exchange Act Section 13(d) and Rule 13d-1 by failing to timely file a Schedule 13D after acquiring more than five percent of PacketPort.com's stock.[23]

The 2007 Settlement Order required Durando, Dotoli, Microphase, and Packetport.com to cease and desist from committing or causing future violations of the provisions they were found to have violated and ordered that Durando, Dotoli, and Microphase disgorge $150,000, $100,000, and $700,000, respectively, in ill-gotten gains.[24] The Commission also announced that it was withdrawing a parallel enforcement action pending in federal district court against respondents.[25] mPhase was not a party to the 2007 Settlement Order or the dismissed federal court action.

C. FINRA's denial of mPhase's request

On October 2, 2012, the Department notified mPhase that it had denied the company's request to process the reverse stock split pursuant to FINRA Rule 6490(d)(3) because mPhase's CEO and COO are the subject of a "settled regulatory action . . . related to fraud or securities laws violations" and that this misconduct "raised concerns for FINRA regarding the protection of

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21 15 U.S.C. § 77e(a) (prohibiting the "sale" of any securities, in interstate commerce, unless a registration statement is in effect as to the offer or sale of such securities or there is an applicable exemption from the registration requirements); *id.* § 77e(c) (prohibiting the "offer for sale" of any securities, unless a registration statement has been filed as to such securities or an exemption is available).

22 15 U.S.C. § 78p(a) and 17 C.F.R. § 240.16a-3 (requiring directors and persons owning more than 10% of a registrant's stock to file a Form 4 within two business days of the acquisition or disposition of the security).

23 15 U.S.C. § 78m(d) and 17 C.F.R. § 240.13d-1 (requiring any beneficial owner of more than 5% of any Exchange Act registered securities to disclose the extent of his or her ownership stake).

24 *PacketPort.com*, 2007 WL 3033480, at *5-6.

25 *SEC v. PacketPort.com, Inc.*, Litig. Release No. 20339, 2007 WL 3033485, *1-2 (Oct. 18, 2007); *see also SEC v. PacketPort.com, Inc.*, Civil Action No. 3:05cv1747 (filed Nov.15, 2005); *Packetport.com, Inc.*, Litig. Release No. 19465, 2005 WL 3068110 (Nov. 16, 2005).

investors."[26] The Department stated that, as a result of its findings, it would "cease processing documentation related to [mPhase's] Company-Related Action and would make no announcement on the [OTCBB's] Daily List."

mPhase appealed the Department's decision to the UPCC Subcommittee, arguing that the 2007 Settlement Order against Durando and Dotoli "should not *per se* constitute a 'deficiency' under" Rule 6490. It sought to explain the circumstances surrounding Durando's and Dotoli's prior misconduct by blaming their violations on erroneous legal advice. mPhase described the 2007 Settlement Order as involving only "technical violations" of the securities laws, not antifraud violations, and imposing "only" financial penalties, not bars against Durando and Dotoli. mPhase noted that the 2007 Settlement Order was entered "almost 5 years" ago and claimed that since that time neither officer had been the subject of any regulatory action.

The UPCC Subcommittee affirmed the Department's decision, finding mPhase's request deficient based on the 2007 Settlement Order and that processing the request "present[ed] a threat to the investing public or the maintenance of fair and orderly markets." The Subcommittee stated that it "consider[ed] the substantive allegations" of the 2007 Settlement Order, to which Durando and Dotoli consented, and found that the 2007 Settlement Order involved "several serious violations of the federal securities laws" and disgorgement of significant amounts of ill-gotten gains.

The UPCC Subcommittee also cited concerns related to Durando and Dotoli's current circumstances. It stated that Durando and Dotoli currently occupy "significant roles" at mPhase, presenting them with opportunities for abuse without any meaningful supervisory oversight. It "highlight[ed] [ongoing] connection[s] between mPhase and Microphase . . . and Packetport," finding that the three entities currently share the same business address in Norwalk and a common high-ranking official, Durando.[27] Given these facts, the Subcommittee rejected

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[26] On August 22, 2012, before the Department's denial, mPhase disclosed to Department staff that Durando and Dotoli were subject to the 2007 Settlement Order by providing a copy of the Commission's 2007 press release announcing the settlement. *PacketPort.com*, 2007 WL 3033485. The record also shows that the Department conducted its own background investigation of the company and its officers, which is reflected in the record as a series of undated "screen shots" of various database searches. These materials include a screen shot of and the URL to the 2007 Settlement Order, but not the entire document. Pursuant to 17 C.F.R. § 210.323, we take official notice of the entire 2007 Settlement Order, a document that is publicly available on the Commission's website.

[27] A "business inquiry" search of "Microphase," "PacketPort.com," and "mPhase Technologies" on the Connecticut Secretary's Secretary of State's website confirms this conclusion. *See* Connecticut Secretary of the State Business Inquiry, http://www.concord-sots.ct.gov/CONCORD/online?sn=PublicInquiry&eid=9740 (searching each entity). FINRA also attached this information, which mPhase does not contest, to its opposition brief for our consideration.

mPhase's claim that the age of the settlement and asserted recent compliance served as any mitigation. This appeal followed.[28]

II. Analysis

Exchange Act Section 19(f) governs our review of a self-regulatory organization's denial of access to services.[29] Here, FINRA denied mPhase's request for FINRA to process and announce a reverse stock split on FINRA's OTCBB. Under Section 19(f), we must dismiss mPhase's appeal of this denial if we find that (i) the specific grounds on which FINRA based its denial exist in fact, (ii) the denial was in accordance with FINRA rules, and (iii) those rules are, and were applied in a manner consistent with the purposes of the Exchange Act.[30] FINRA's denial meets these criteria.

A. The grounds on which FINRA based its denial of mPhase's request exist in fact.

FINRA Rule 6490(d)(3) requires FINRA to conduct a two-step analysis in determining whether to process a Company-Related Action request. First, FINRA must assess whether the issuer's request is deficient. As the Rule states, FINRA's deficiency determination "shall" be based "solely . . . [on] one or more" of the five enumerated factors, including as relevant here, that FINRA has "actual knowledge . . . that officers [or] directors . . . connected to the issuer or [the Company-Related Action] . . . are the subject of a . . . settled regulatory action . . . related to fraud or securities laws violations."[31] Second, in the event that FINRA deems an issuer's request deficient, FINRA then "may determine" not to process the issuer's request if it finds that denial "is necessary for the protection of investors, the public interest and to maintain fair and orderly markets."[32]

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28 As part of its appeal, mPhase filed a motion to amend its reply brief filed with the Commission, requesting that the Commission strike two footnotes contained in that brief. mPhase's motion, which FINRA does not oppose, is granted.

29 15 U.S.C. § 78s(f) (authorizing Commission review of SRO action that prohibits or limits "any person with respect to access to services offered by the [SRO]"); *see also Intelispan, Inc.*, Exchange Act Release No. 42738, 2000 WL 511471, at *2 (May 1, 2000), *vacated*, 2000 WL 1424830 (May 30, 2000).

30 *Fog Cutter Capital Grp., Inc. v. SEC*, 474 F.3d 822, 825 (D.C. Cir. 2007). We previously found that FINRA Rule 6490 "is consistent with the [Exchange] Act and the rules and regulations thereunder applicable to a national securities association." 2010 Approval Order, *supra* note 5, at *5 (explaining that FINRA Rule 6490 is consistent with Exchange Act Sections 15A(b)(5) and (6)). Exchange Act Section 19(f) further requires that we set aside FINRA's action if we find that it imposes an undue burden on competition. 15 U.S.C. § 78s(f). mPhase does not claim, nor does the record suggest, that FINRA's action imposes such a burden.

31 FINRA Rule 6490(d)(3)(3).

32 FINRA Rule 6490(d)(3).

1. mPhase's Company-Related Action was deficient under FINRA Rule 6490(d)(3).

mPhase's request was deficient under FINRA Rule 6490(d)(3) because FINRA had "actual knowledge . . . that officers [or] directors . . . connected to" mPhase "are the subject of a . . . settled regulatory action . . . related to . . . securities laws violations."[33] Durando, mPhase's CEO, and Dotoli, its COO, are both officers and directors of mPhase. And their 2007 Settlement Order involved violations of the federal securities laws, specifically, Securities Act Section 5 and Exchange Act Sections 13 and 16 and Rules 13d-1 and 16a-3. The record also establishes that FINRA had actual knowledge of the 2007 Settlement Order as a result of its background investigation of mPhase's officers and information supplied by mPhase.

2. FINRA found that denying mPhase's request was necessary for the protection of investors, the public interest, and to maintain fair and orderly markets under FINRA Rule 6490(d)(3).

FINRA Rule 6490(d)(3) states that "where [a Company-Related Action] is deemed deficient," FINRA "may determine" not to process the request if doing so is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets."[34] The Rule's use of the permissive term "may" vests FINRA with discretionary authority in deciding whether to process and announce a deficient Company-Related Action request on the OTCBB.[35] In the similar context of delisting appeals, we have long stated that "[t]o the extent that discretion enters into [FINRA's decision to deny inclusion on its systems] . . . the discretion in question is [FINRA's], not ours,"[36] and as in those cases, we will not substitute our judgment for FINRA's unless its decision is unsupported by the record.[37]

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33 FINRA Rule 6490(d)(3)(3).

34 *Id.*

35 *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706 (1983) (stating that, absent "indications of legislative intent to the contrary," "the word 'may,' when used in a statute, usually implies some degree of discretion"). The 2010 Approval Order lends further support for this reading and included, with approval, the following explanation by FINRA of the operation of Rule 6490: "[W]hen the Department reasonably believes that an issuer . . . has triggered one of the explicitly enumerated factors, . . . it would *have the discretion* not to process any such actions that are incomplete or when it determines that not processing such an action is necessary for the protection of investors." 2010 Approval Order, *supra* note 5, at *6 (emphasis added).

36 *Tassaway, Inc.*, Exchange Act Release No. 11291, 45 SEC 706, 1975 WL 160383, at *2 (Mar. 13, 1975) (discussing oversight of the OTC markets by FINRA, then the NASD).

37 *E.g., Cleantech Innovations, Inc.*, Exchange Act Release No. 69968, 2013 WL 3477086, at *6 & n.43 (July 11, 2013) (stating that "we are not free to substitute our discretion for NASDAQ's" but setting aside decision because "the record does not show that the grounds on which NASDAQ relied in delisting CleanTech exist in fact"); *Eagle Supply Grp., Inc.*, Exchange

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Here, we find that the specific grounds on which FINRA based its findings that mPhase's action posed a threat to investors and market integrity exist in fact. Durando's and Dotoli's previous misconduct was serious. Durando and Dotoli consented to an order finding that they violated the registration and disclosure provisions of the federal securities laws, which are fundamental to the securities industry and the protection of investors. Securities Act Sections 5(a) and (c) prohibit the offer and sale of a security without a registration statement, the essential purpose of which is to "'protect investors by promoting full disclosure of information thought necessary to informed investment decisions.'"[38] Exchange Act Section 16(a) and rules thereunder are designed to apprise "investors of security transactions by insiders," so that "abuses resulting from the use of inside information may be averted."[39] The disclosures required by Exchange Act Section 13(d) and its rules "alert[] the marketplace to every large, rapid aggregation or accumulation of securities . . . , which might represent a potential shift in corporate control," as in a corporate takeover.[40] Failure to comply with these core registration and disclosure obligations deprives investors of information necessary to make informed investment decisions, and thus, to protect themselves against potential fraud.[41]

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Act Release No. 39800, 1998 WL 133847, at *4 (remanding to NASD for a more definitive statement on its reasoning for denying issuer's inclusion on the NASDAQ SmallCap Market).

[38] *World Trade Fin. Corp.*, Exchange Act Release No. 66114, 2012 WL 32121, at *7 (Jan. 6, 2012) (quoting *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953)), *petition denied*, 739 F.3d 1243 (9th Cir. 2014).

[39] *Securities and Exchange Commission Release Notice*, Exchange Act Release No. 2253, 1939 WL 37795, at *1 (Sept. 20, 1939); *see also Interpretive Release on Rules Applicable to Insider Reporting and Trading*, Exchange Act Release No. 18114, 1981 WL 31301, at *1 (Sept. 24, 1981) ("The intent of [Exchange Act Section 16(b)] is to deprive officers, directors and substantial stockholders of the incentive to utilize their positions to trade in the securities of their companies on the basis of inside information.").

[40] *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (explaining that a violator of Exchange Act Section 13(d) improperly benefits by purchasing stock at an artificially low price, because disclosure of a "holding in excess of five percent of a company's stock suggests to the rest of the market a likely takeover and therefore may increase the price of the stock").

[41] The importance of these provisions undermines mPhase's attempt to characterize their violations as merely "technical" in nature. *E.g.*, *Owen V. Kane*, Exchange Act Release No. 23827, 48 SEC 617, 1986 WL 626043, at *5 (Nov. 20, 1986) (rejecting claim that respondent's violations were mere "technical" violations because "[t]he registration provisions [of Securities Act Section 5] are a keystone of the entire system of securities regulation, and set forth basic requirements for the protection of investors" (internal punctuation and citation omitted)), *aff'd*, 842 F.2d 194 (8th Cir. 1988); *see also SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 607 (S.D.N.Y. 1993) (stating that "[Exchange Act] Section 13(d) is not a mere 'technical' reporting provision; it is, rather, the 'pivot' of a regulatory scheme that may represent 'the only
(continued…)

FINRA concluded that the imposition of $950,000 in disgorgement against Durando, Dotoli, and Microphase further highlighted the gravity of their past misconduct. The conclusion that the misconduct was grave also is supported by the 2007 Settlement Order's entry of cease-and-desist orders against Durando, Dotoli, Microphase, and Packetport.com. A cease-and-desist order cannot be entered unless the "person is violating, has violated, or is about to violate any provision of"[42] the securities laws, rules, or regulations and there is "some risk of future violations."[43]

FINRA also based its denial on its ongoing regulatory concerns about mPhase, Durando, and Dotoli, which mPhase does not contest on appeal. As FINRA found, Durando's and Dotoli's current positions as CEO and COO provide them "with substantial authority, placing them in roles with minimal supervisory oversight and presenting opportunities for abuse."[44] FINRA also found it troubling that mPhase continued to be associated with Packetport and Microphase, both of which are subject to the 2007 Settlement Order and continue to operate from the same business address as mPhase, and in the case of Microphase, remains a part-owner of mPhase. mPhase's briefs on appeal do not contest these findings and conclusions, and we find these uncontested grounds for FINRA's denial exist in fact.[45]

(…continued)
way that corporations, their shareholders and others can adequately evaluate . . . the possible effects of a change in substantial shareholdings'" (citations omitted)).

[42] 15 U.S.C. §§ 77h-1(a), 78u-3(a); *see also* S. Rep. 101-337 (1990) (explaining that "a cease-and-desist order is an administrative remedy that directs a person to refrain from engaging in conduct or a practice which violates the laws").

[43] *E.g., Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *19 (Dec. 11, 2009) (citing *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 WL 47245, at *24 (Jan. 19, 2001) ("We believe that there must be some likelihood of future violations whenever we issue a cease-and-desist order."), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002)), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010).

[44] *Cf., e.g., Stuart K. Patrick*, Exchange Act Release No. 32314, 51 SEC 419, 1993 WL 172847, at *2 (May 17, 1993) ("Supervision, by its very nature, cannot be performed by the employee himself.").

[45] *See* Commission Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (requiring that "[e]ach exception to the findings or conclusions being reviewed shall be stated succinctly"); c*f. NLRB v. Konig*, 79 F.3d 354, 356 n.1 (3d Cir. 1996) (uncontested findings on appeal accepted as true); *NLRB v. Tenn. Packers, Inc.*, 344 F.2d 948, 949 (6th Cir. 1965) ("Since respondent's brief failed to challenge the Board's order on the merits, that issue is considered . . . abandoned . . . ."). Information available on the Secretary of State of Connecticut's website confirms the companies' continued connection. *See supra* note 27 and accompanying text.

3. FINRA properly considered the findings of the 2007 Settlement Order in reaching its decision.

We reject mPhase's contention on appeal that FINRA improperly considered the factual findings set forth in the 2007 Settlement Order as a basis for its denial. mPhase cites to provisions in the 2007 Settlement Order stating that Durando and Dotoli neither "admitt[ed] or den[ied] the findings therein" and that "[t]he findings . . . [were] not binding on any other person or entity . . . [in] any other proceeding" and points out that mPhase was not a party to the 2007 Settlement Order.[46]

We find that FINRA properly considered the underlying factual findings of Durando and Dotoli's 2007 Settlement Order in assessing its interest in protecting investors and market integrity. By including a settled securities-related action as one of the specific grounds for deeming a Company-Related Action deficient in Rule 6490, FINRA made "a basic public interest determination about the seriousness" of such an action.[47] FINRA, as a general matter, has considered prior settlements in weighing the public interest in other contexts, such as in the evaluation of whether a person subject to a statutory disqualification should be permitted to return to the securities industry[48] and in assessing prior disciplinary history as part of its sanction analysis in a disciplinary action.[49] FINRA is required by Rule 6490(d)(3) to determine whether denying the Company-Related Action requested is "necessary for the protection of investors, the public interest, and maintenance of fair and orderly markets." FINRA must be able to consider

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[46] mPhase did not make this claim before the UPCC Subcommittee; rather it urged the opposite position—that the Subcommittee review the findings of the 2007 Settlement Order and find that the order involved only "technical" violations. It asserted that the "purpose of FINRA Rule 6490 . . . is to enable FINRA to review the activities of parties related to the Company-Related Action that are subject to a prior consent decree." FINRA contends that mPhase has waived its new argument because Rule 6490(e) required it to "set forth with specificity any and all defenses" before the UPCC Subcommittee. We nonetheless consider mPhase's argument, in our discretion, as part of our review of FINRA's action.

[47] *See, e.g., Marshall E. Melton*, Investment Advisers Act Release No. 2151, 56 SEC 760, 2003 WL 21729839, at *7 (July 25, 2003) (stating that, by making an injunction a specific ground for commencing a follow-on proceeding, Congress intended that the allegations underlying a consent injunction be considered in the subsequent proceeding); *see also Michael Batterman*, Advisers Act Release No. 2334, 2004 WL 2785527, at *5 (Dec. 3, 2004) (same).

[48] *See, e.g., Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at *7 (Mar. 19, 2013) (sustaining FINRA's consideration of state consent order); *LaJolla Capital Corp.*, Exchange Act Release No. 41755, 1999 WL 624046, at *7 n.31 (Aug. 18, 1999) (same). mPhase attempts to distinguish *Weiss* because the *Weiss* consent order did not provide that the order was "not binding" on any other party but as discussed, *infra* text accompanying note 56, the provisions in the 2007 Settlement Order did not bar FINRA's consideration of it here.

[49] *See, e.g., Midas Sec., LLC*, Exchange Act Release No. 66200, 2012 WL 169138, at *16 (Jan. 20, 2012); *Wendell D. Beldon*, Exchange Act Release No. 47859, 2003 WL 21088079, at *5 (May 14, 2003).

the findings underlying the prior settlement to properly weigh the issuer's interests in having its action processed against those of the investing public.[50] We believe that consideration of the factual predicate for the settlement, rather than the existence of the settlement alone, is a necessary element of this analysis—both with respect to the issuer, which may seek to explain the circumstances of the past action, as mPhase did below, and the public, which may be adversely affected by a decision to deny or approve an announcement on the OTCBB.[51]

We have taken a similar approach in our follow-on administrative proceedings that are based on the entry of a consent injunction.[52] In a follow-on proceeding, we routinely consider the facts of the injunctive action in determining whether it is in the public interest to impose a remedial sanction against an enjoined individual. But, where the injunction is based on consent, often there are no court-ordered findings from which to assess the public interest.[53] We have accordingly "adopted the policy in administrative proceedings based on consent injunctions that the injunctive allegations may be given considerable weight in assessing the public interest."[54] This conclusion is predicated on "our belief that Congress, having made an injunction a [specific] ground for commencing a proceeding, [did not intend] for the parties to conduct the proceeding as if the injunction had never been entered, disregarding the allegations underlying the injunction."[55]

We find no error in FINRA's consideration of the settlement's findings in deciding that it was necessary for the protection of investors and market integrity to deny mPhase's Company-Related Action request. Several courts construing the "neither admit nor deny" provision and the provision stating that the findings are "not binding" on other parties have held that such provisions do not preclude the admissibility of the findings of the settled order in a subsequent

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50 FINRA Rule 6490(d)(3) (requiring that FINRA determine after finding a deficiency factor whether denial is "necessary for the protection of investors, the public interest, and maintenance of fair and orderly markets").

51 As noted, mPhase's earlier position urged the Subcommittee to consider the facts of the 2007 Settlement Order. *See supra* note 46.

52 *E.g.*, Advisers Act Sections 203(e)(4) and 203(f), 15 U.S.C. §§ 80b-3(e)(4) and (f), and Exchange Act Sections 15(b)(4)(C) and 15(b)(6)(A)(iii), 15 U.S.C. §§ 780(b)(4)(C) and (b)(6)(A)(iii).

53 *Melton*, 2003 WL 21729839, at *2.

54 *Id.*; *see also Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *10 (Dec. 12, 2013), *petition denied*, 773 F.3d 89 (D.C. Cir. 2014); *Ralph LeBlanc*, Exchange Act Release No. 48254, 2003 WL 21755845, at *1 (July 30, 2003); *Michael J. Markowski*, Exchange Act Release No. 44086, 55 SEC 21, 2001 WL 267660, at *2 (Mar. 20, 2001), *petition denied*, 2002 WL 1932001 (D.C. Cir. Apr. 25, 2002) (unpublished); *Charles Phillip Elliott*, Exchange Act Release 31202, 50 SEC 1273, 1992 WL 258850, at * 3 (Sept. 17, 1992), *aff'd*, 36 F.3d 86 (11th Cir. 1994).

55 *Melton*, 2003 WL 21729839, at *8.

proceeding, so long as they are not adduced to establish liability against a party.[56] In assessing mPhase's request, FINRA did not invoke the findings of the prior proceeding to establish any liability against mPhase, which was not a party to the 2007 Settlement Order, and FINRA imposed no sanction or penalty against mPhase. Rather, FINRA's denial of mPhase's request is but one of the several collateral consequences created by Durando's and Dotoli's settlement and consent to sanctions.[57]

Nor can it be said that 2007 Settlement Order was "binding" or had "legal force" on the outcome here, as mPhase suggests.[58] FINRA gave mPhase an opportunity to dispute the relevance of the 2007 Settlement Order to the Company-Related Action requested. Although FINRA ultimately found the 2007 Settlement Order, together with its ongoing concerns about mPhase, necessitated denial of its request, the 2007 Settlement Order did not require FINRA to deny the request. Rather, FINRA considered a number of factors in addition to the settlement in

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[56] *Cf., e.g., Option Res. Grp. v. Chambers Dev. Co.*, 967 F. Supp. 846, 848-49 (W.D. Pa. 1996) (allowing "findings, including the opinions and conclusions" from Commission administrative settlement into evidence in separate civil suit against non-settling party under Fed. R. Evid. 803(8)(C), even though settlement was "not binding" on any other person or entity); *SEC v. Pentagon Capital Mgmt. PLC*, No. 08 Civ. 3324, 2010 WL 985205, at *3-4 (S.D.N.Y. Mar. 17, 2010) (unreported) (holding that "factual findings" contained in Commission settled orders were admissible in subsequent litigation so long as "offered for a purpose other than to establish liability" (citing *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981))); *see also SEC v. Das*, No. 8:10-CV-102, 2010 WL 4615336, at *7 n.5 (D. Neb. Nov. 4, 2010) (unreported) (permitting use of an unrelated settlement order as precedent because "the SEC's findings in the administrative decision are still soundly reasoned"); *but see Carpenters Health & Wealth Fund v. Coca-Cola Co.*, No. 1:00-CV-2838-WBH, 2008 WL 9358563, at *4-5 (Apr. 23, 2008) (holding that settled order was inadmissible as hearsay under Fed. R. Evid. 408).

[57] *See DHB Capital Grp., Inc.*, Exchange Act Release No. 37069, 52 SEC 740, 1996 WL 164315, at *3 (Apr. 5, 1996) ("[FINRA]'s decision to deny inclusion [of DHB on NASDAQ]—based in part on the fact that, upon finding that Brooks committed serious securities law violations, we barred him (with his consent) from the industry—is a collateral consequence of Brooks' misconduct . . . [and] a proper exercise of the [FINRA]'s authority under its Qualification Requirements By-Law.").

For example, although mPhase was not a party to the 2007 Settlement Order, the entry of the settlement had the collateral consequence of requiring mPhase to disclose the settlement for the next ten years in its periodic filings with the Commission—a requirement mPhase asserts in its briefs it has met since the entry of the 2007 Settlement Order. Item 401(f) of Reg. S-K, 17 C.F.R. § 229.401(f) (requiring disclosure of a director's, nominee's, or executive officer's involvement in specific legal proceedings "that are material to an evaluation of the ability or integrity" of such a person).

[58] *See P.R. Tel. Co. v. Sprintcom, Inc.*, 662 F.3d 74, 96 (1st Cir. 2011) (defining "the word 'binding' . . . as 'having legal force'" (quoting *Black's Law Dictionary* 190 (9th ed. 2009))).

determining that denial was necessary to protect the investing public or the maintenance of fair and orderly markets.[59]

4. There is no credible evidence that FINRA considered the allegations of the dismissed federal complaint in reaching its decision.

We also reject mPhase's claim that FINRA improperly considered the allegations of the Commission's federal suit against Durando and Dotoli, a case mPhase asserts was dismissed with prejudice in connection with entry of the 2007 Settlement Order.[60] mPhase cites to evidence in the record showing that the dismissed complaint was reviewed by a Department of Operations "examiner" during the background investigation of mPhase. It contends that, because the case was dismissed, FINRA should not be able to use the dismissed complaint as a basis for its denial.

mPhase's claim is meritless. Although the dismissed complaint is part of FINRA's record before us and listed in the examiner's materials, it is the decision of the UPCC Subcommittee—not the Department's examiner—that constitutes the final action of FINRA subject to our review.[61] mPhase cites to no part of the Subcommittee decision evidencing that the Subcommittee considered the dismissed complaint in denying mPhase's Company-Related Action request.[62] Rather, as discussed, the Subcommittee based its denial on the 2007 Settlement Order and its ongoing concerns about mPhase and its continued association with Durando and Dotoli, all of which amply support denial.

For the foregoing reasons, we find that the grounds on which FINRA based its denial to process mPhase's Company-Related Action request existed in fact.

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59 FINRA Rule 6490(d)(3); *see also supra* note 51 and accompanying text.

60 In its briefs, mPhase cites to the district court order dismissing the case for a failure to prosecute, *SEC v. PacketPort.Com, Inc.*, No. 3:05 CV 1747, 2007 WL 911900, at *7 (D. Conn. Mar. 21, 2007), but that order was vacated by the court's later decision on reconsideration. *SEC v. PacketPort.Com, Inc.*, 2007 WL 1521583, at *9 (D. Conn. May 23, 2007). As discussed, the Commission withdrew that federal action in connection with the entry of the 2007 Settlement Order. *PacketPort.com*, 2007 WL 3033485, at *1 (D. Conn. Oct. 18, 2007).

61 FINRA Rule 6490(e); *cf. Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 WL 3306103, at *8 (Nov. 8, 2007) ("'[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of [FINRA] which is subject to Commission review.'" (quoting *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 n.17 (Nov. 8, 2006))), *petition denied*, 316 F. App'x 865 (11th Cir. 2008).

62 Although the dismissed complaint involved some of the same registration and disclosure charges found in the 2007 Settlement Order, it primarily involved allegations that Durando and Dotoli ran a pump-and-dump scheme to fraudulently obtain over $9 million in illicit profits from investors. Complaint, *SEC v. PacketPort.com, Inc.*, Civil Action No. 3:05cv1747 (filed Nov.15, 2005), *available at* http://www.sec.gov/litigation/complaints/comp19465.pdf. None of those fraud charges was a basis for the Subcommittee's denial.

B. FINRA's denial of mPhase's request was in accordance with its rules.

FINRA, a registered national securities association, adopted Rule 6490 pursuant to Exchange Act Section 15A(b).[63] That provision authorizes FINRA to adopt rules that, among other things, are "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, [and] processing transactions in securities" and, in general, "to protect investors and the public interest."[64] As we stated in the 2010 Approval Order, FINRA adopted Rule 6490 in furtherance of these statutory principles based on FINRA's growing concern that its OTCBB services could be used for fraudulent practices.[65] We concluded that the Rule was designed to protect "the OTC marketplace and investors in OTC Securities" by permitting FINRA to deny a Company-Related Action request when there are "certain indicators of potential fraud."[66]

The plain language of FINRA Rule 6490(d)(3) makes clear FINRA's authority to deny a Company-Related Action in the circumstances presented here. Among the five deficiency factors that may form the basis for FINRA's denial is whether it has "actual knowledge" of a settled regulatory action against the issuer's officers for securities laws violations. If "one or more" of these factors is present, FINRA has the discretion to deny a request if denial is "necessary for the protection of investors, the public interest, and maintenance of fair and orderly markets."[67] As discussed, FINRA's denial satisfied these requirements.[68]

mPhase contends that FINRA exceeded its authority under FINRA Rule 6490. It argues that FINRA's ability to deny a Company-Related Action request under the Rule is proscribed by Section 10(b) of the Exchange Act and Rule 10b-17 thereunder, which mPhase claims are "the enabling statute and SEC Rule" for FINRA Rule 6490, and require that the company only give timely notice of its reverse stock split to FINRA.[69] Thus, according to mPhase, because it gave

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63 2010 Approval Order, *supra* note 5, at *5.

64 15 U.S.C. § 78*o*-3(b)(6); *see also Fog Cutter*, 474 F.3d at 824 (discussing Exchange Act Section 15A(b) and stating that, "[a]s a self-regulatory organization, [FINRA] must maintain rules to protect investors and the public interest").

65 2010 Approval Order, *supra* note 5, at *2 (stating that FINRA proposed Rule 6490 "in furtherance of its authority to adopt rules to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest").

66 *Id.*

67 *See supra* note 35 and accompanying text (discussing FINRA's discretionary authority).

68 In addition to meeting these substantive requirements, we find, as mPhase does not dispute, that FINRA properly followed the procedures set forth in Rule 6490(d) and (e) in disposing of mPhase's request. *Michael Stegawski*, Exchange Act Release No. 59326, 2009 WL 223618, at *6 (Jan. 30, 2009).

69 17 C.F.R § 240.10b-17. Specifically, Exchange Act Rule 10b-17 requires issuers to give

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sufficient notice of its stock split to FINRA, there is no basis for FINRA to deny processing and announcing its Company-Related Action on the OTCBB.

We disagree. As discussed, the enabling statute for FINRA Rule 6490 is Exchange Act Section 15A(b). Although we recognize that FINRA Rule 6490 cross references Exchange Act Rule 10b-17, we reject the contention that, because of this, FINRA may refuse to process a reverse stock split *only* if a company fails to timely give FINRA notice. Rule 6490 refers to Exchange Act Rule 10b-17 because, under subsection (b) of Rule 6490, issuers requesting to effectuate a Company-Related Action that is enumerated by Exchange Act 10b-17—*e.g.*, a reverse stock split—must provide FINRA with advance notice of the action consistent with the "timelines specified" by Exchange Act Rule 10b-17.[70] FINRA does not contest that such notice was made here. But mPhase's compliance with one part of Rule 6490 (subsection (b)) does not alter the fact that the 2007 Settlement Order triggered one of the five deficiency factors set forth in another part of the Rule (subsection (d)(3)).

mPhase raises additional textual arguments regarding Rule 6490(d)(3) to assert that FINRA possesses only "ministerial" power to process Company-Related Actions, despite statements to the contrary in the 2010 Approval Order.[71] Specifically, mPhase cites subsection (d)(3)(1), which allows FINRA to deem a Company-Related Action deficient if "FINRA staff reasonably believes the forms and all supporting documentation, in whole or in part, may not be complete, accurate or with proper authority."[72] mPhase also cites subsection (d)(3)(2), which allows FINRA to deem a Company-Related Action deficient if "the issuer is not current in its reporting requirements, if applicable, to the SEC or other regulatory authority."[73] mPhase claims these subsections address only instances where the issuer failed to disclose information to

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FINRA, in a timely fashion, information relating to: (1) a dividend or other distribution in cash or in kind; (2) a stock split or reverse split; and (3) a rights or other subscription offering. Under Rule 10b-17, the issuer is required to provide this information to FINRA no later than 10 days before the record date or, in case of a rights subscription or other offering if such 10 days advance notice is not practical, on or before the record date, and in no event later than the effective date of the registration statement to which the offer relates. Pursuant to Rule 10b-17(b)(3), comparable notice given by the issuer of an exchange-listed security in accordance with the procedures of the national securities exchange upon which a security of such issuer is registered satisfies this requirement. *Id.*

70 FINRA Rule 6490(b)(2). As noted, *supra* note 6, Rule 6490 refers to Company-Related Actions enumerated under Exchange Act Rule 10b-17 as "SEA Rule 10b-17 Actions." In contrast, those corporate actions not enumerated by Exchange Act Rule 10b-17 (*i.e.*, "Other Company-Related Actions") must adhere to the timelines set by FINRA. FINRA Rule 6490(b)(3). Aside from this distinction, Rule 6490 treats all Company-Related Actions equally.

71 *See supra* text accompanying notes 9-14.

72 FINRA Rule 6490(d)(3)(1).

73 FINRA Rule 6490(d)(3)(2).

FINRA in its Company-Related Action application, and as a result, subsection (d)(3)(3) only allows FINRA to deny a request if the issuer failed to inform FINRA of the prior settled action.[74]

These arguments fail. Subsection (d)(3)(2) says nothing about nondisclosure of information to FINRA.[75] The fact that subsection (d)(3)(1) addresses an incomplete or inaccurate request has no bearing on subsection (d)(3)(3). It is a widely accepted principle of construction that, where a statute or regulation includes particular language in one section but omits it in another, the disparate inclusion or exclusion was intentional and purposeful.[76] Here, it would make little sense to apply the same basis for a deficiency under subsection (d)(3)(1) to the remaining four deficiency factors provided in the Rule. This is particularly true given that each factor constitutes a separate, independent ground for deeming a request deficient, a point made clear by the express language of Rule 6490(d)(3) stating that a request is deficient if FINRA finds "one or more of the [deficiency] factors" exists.

Equally unavailing is mPhase's contention that Rule 6490(d)(3)(3)'s requirement that FINRA have "actual knowledge" of a settled regulatory action means that FINRA can deny requests only when: (i) the issuer failed to disclose the settled action in its application and (ii) FINRA independently becomes aware of the settled action. mPhase's contention is premised on its argument—rejected above—that Rule 6490(d)(3) is a mere notice provision. Nor do we find that the Rule's use of the term "actual knowledge" compels this interpretation. Although "actual knowledge" is not defined by the Rule, the term has a common legal definition: that the actor has "'[d]irect and clear'" awareness of a particular fact.[77] And we find no expressed

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[74] mPhase's brief erroneously cites "subsections (d)(1) and (d)(2)" for this claim when the factors it paraphrases are from (d)(3)(1) and (d)(3)(2) of the Rule.

[75] FINRA Rule 6490(d)(3)(2) (defining this factor as when "the issuer is not current in its reporting requirements, if applicable, to the SEC or other regulatory authority").

[76] *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("'Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v United States*, 464 U.S. 16, 23 (1983))); *In the matter of the claim for award in connection with SEC v. Advanced Tech. Grp. Ltd.*, Exchange Act Release No. 70772, 2013 WL 5819623, at *7 n.21 (Oct. 13, 2013) (discussing the "well-established canon of statutory construction expression *unius est exclusion alterius*, or the expression of one thing implies the exclusion of others" (collecting cases)).

[77] *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052, 1080 (D.N.M. 2010) (quoting *Black's Law Dictionary* 250 (9th ed. 2009)); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 948 (W.D. Tex. 2008) (same); *see also United States v. Spinney*, 65 F.3d 231, 236 (1st Cir. 1995) (explaining that "[a]ctual knowledge . . . suggests the presence of particular evidence which, if credited, establishes conclusively that the person in question knew of the existence of the fact in question").

"[L]egal terms used in framing a [regulation] are ordinarily presumed to have been intended to convey their customary legal meaning," unless a "contrary direction" is provided. *United Tech., Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir. 1994) (citing

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intention by FINRA to construe "actual knowledge" alternatively, as mPhase asserts. Requiring that FINRA have "actual knowledge" of a settled regulatory action—established here by the information mPhase provided FINRA and FINRA's background investigation—serves the important policy objective of ensuring that FINRA has an adequate, justifiable basis before denying an issuer's Company-Related Action request.[78]

mPhase further asserts that FINRA may not reject its Company-Related Action request because the 2007 Settlement Order did not involve fraud, an element that it contends is necessary. But subsection (d)(3)(3) explicitly uses the disjunctive "or," in providing that the previously settled action be "related to fraud *or* securities laws violations"—thus either basis suffices for deeming a request deficient.[79] As discussed, the 2007 Settlement Order resolving the case against Durando and Dotoli for violations of the registration and disclosure requirements constituted a sufficient basis for FINRA's deficiency determination here.

Accordingly, based on the foregoing reasons, we find that FINRA's denial was in accordance with FINRA Rules.

C. FINRA applied its rules in a manner consistent with the Exchange Act.

FINRA applied its rules in a manner consistent with the purposes of the Exchange Act. FINRA designed the OTCBB in response to the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, where Congress directed the creation of "automated quotation systems for penny stocks . . . [t]o add visibility and regulatory and surveillance data to that market."[80] In enacting this legislation, Congress amended the federal securities laws by

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Bradley v. United States, 410 U.S. 605, 609 (1973)); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . ."); *United States v. McGoff*, 831 F.2d 1071, 1078 (D.C. Cir. 1987) (same).

78 *Spinney*, 65 F.3d at 236. Similar use of the term by FINRA is found in FINRA Rule 8210(d), requiring FINRA staff to follow certain procedures when they have "actual knowledge" of an out-of-date or inaccurate mailing address in the Central Registration Depository.

79 Emphasis added. *Accord Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *4 (Feb. 13, 2009) ("The statutes use the disjunctive 'or,' meaning that any one basis in the statute is sufficient to establish our authority to proceed."), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

80 Pub. L. No. 101-429, 104 Stat. 931 (1990) (codified in the Exchange Act at 15 U.S.C. § 78q-2); *see also Order Approving and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 3 and 4 to Proposed Rule Change Relating to the OTC Bulletin Board Service*, Exchange Act Release No. 38456, 1997 WL 152011, at *1, 4 (Mar. 31, 1997) (the "1997 Approval Order") ("While the potential for trading abuses is greater [on the OTCBB
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"issu[ing] legislative directives with the intention of curbing the pervasive fraud and manipulation of the penny stock market."[81] FINRA Rule 6490 furthers these objectives by authorizing FINRA to deny processing and announcing a Company-Related Action on the OTCBB when it finds deficiencies with respect to an issuer's Company-Related Action, including "indicators of potential fraud," and that denial is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets."[82]

Here, FINRA found that Durando's and Dotoli's settlement of federal securities laws violations and consent to sanctions, continued association with entities involved in that settlement, and mPhase's lack of supervisory oversight of Durando and Dotoli made denial of the company's request necessary to protect investors and the market integrity of the OTCBB. As we have stated in the context of FINRA's delisting of securities from its automated systems, investors in OTCBB securities are "entitled to assume that securities [on FINRA's] system meet the system's standards, and that the risk associated with investing in [OTCBB securities] is market risk rather than the risk that the promoter or other persons exercising substantial influence over the issuer is acting in an illegal manner."[83]

mPhase contends that FINRA lacks authority to deny its Company-Related Action request because FINRA has "no direct jurisdiction over issuers." But mPhase's argument ignores

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than on NASDAQ], these abuses can be reduced by according more transparency. . . . [T]he additional transparency from the OTCBB should assist the NASD in its surveillance efforts.").

81 *Report to Accompany the Penny Stock Reform Act of 1990*, H.R. Rep. No.101-617 (1990), reprinted in 1990 U.S.C.C.A.N. 1408, 1990 WL 256465.

82 2010 Approval Order, *supra* note 5, at *2 n.9 (citing, *e.g.*, *Andros Isle, Corp.*, Order of Suspension of Trading, File No. 500-1 (Mar. 13, 2008), *available at* http://www.sec.gov/litigation/suspensions/2008/34-57486-o.pdf (suspending trading in 26 Pink Sheet securities and finding that "[c]ertain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation")).

83 *JJFN Servs., Inc.*, Exchange Act Release No. 39343, 53 SEC 335, 1997 WL 722029, at *3 (Nov. 21, 1997) (internal quotation marks omitted) (declining to list issuer's securities on the SmallCap Market because promoter and "key person" of the issuer was previously convicted of filing a false tax return); *see also Fog Cutter Capital Grp., Inc.*, Exchange Act Release No. 52993, 58 SEC 1049, 2005 WL 3500274, at *5 (Oct. 31, 2005) (denying issuer's listing on NASDAQ after guilty plea by issuer's key executive and largest shareholder), *petition denied*, 474 F.3d 822, 825 (D.C. Cir. 2007); *DHB Capital*, 1996 WL 164315, at *3 (denying issuer's listing on the SmallCap Market based on consent injunction entered against controlling shareholder, officer, and director).

the critical role that FINRA occupies in regulating the OTC market.[84] FINRA is the owner and operator of the OTCBB and as a result has "direct authority for the activities related . . . to the OTCBB."[85] With this comes an obligation to oversee the OTCBB and "protect the integrity of the market it is charged with maintaining."[86]

mPhase further contends that FINRA's denial is time-barred because the 2007 Settlement Order is over five years old and "the five-year [statute of] limitations period " of 28 U.S.C. § 2462 "has clearly passed."[87] The five-year statute of limitations set forth in 28 U.S.C. § 2462 applies only to "an action or proceeding for the enforcement of any civil fine, penalty, or forfeiture."[88] FINRA did not institute this action, it is not a disciplinary action, and FINRA does not seek imposition of a fine, penalty, or forfeiture.[89] Rather, this action arises solely from

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[84] As one court has observed, "[t]he joint roles taken by [FINRA] and the SEC in the regulation of OTC securities reflects a congressional intent 'to establish a "cooperative regulation" where securities associations would regulate themselves under the supervision of the SEC.'" *Lang v. French*, 154 F.3d 217, 221 (5th Cir. 1998) (quoting *Jones v. SEC*, 115 F.3d 1173, 1179 (4th Cir. 1997) (quoting 115 S. Rep. No. 75-1455, at 3-4 (1938) and H.R. Rep. No. 75-2307, at 4-5 (1938) (legislation authorizing creation of SROs))).

[85] *Notice of Filing of Proposed Rule Change to Align the Reporting Requirements and Dissemination Protocols for OTC Equity Transactions Involving Foreign Securities with All Other OTC Equity Securities*, Exchange Act Release No. 57986, 2008 WL 2971915, at *2 (June 18, 2008) (citing Exchange Act Release No. 52508 (Sept. 26, 2005), 70 F.R. 57,346 (Sept. 30, 2005)).

[86] *Air L.A., Inc.*, Exchange Act Release No. 34491, 1994 WL 413098, at *2 (Aug. 3, 1994) (order denying stay of delisting from NASD's SmallCap Market); *see also* 1997 Approval Order, *supra* note 80, at *4 (stating that "the operation of the OTCBB places a concomitant responsibility on [FINRA] to surveil" that facility for abuse).

[87] 28 U.S.C. § 2462 (providing that "any proceeding for enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued").

[88] *Cf. Weiss*, 2013 WL 1122496, at *10 ("FINRA merely denied [the applicant's] 'relief from a previously existing disqualification'"; it did not impose additional penalty.); *Dennis Milewitz*, Exchange Act Release No. 40254, 53 SEC 701, 1998 WL 409449, at *4 (July 23, 1998) ("NASD's consideration of the applicant's disciplinary history prior to the statutory disqualification, including misconduct for which sanctions were imposed previously, does not amount to a further penalty for that prior misconduct." (collecting cases)).

[89] *Pac. Stock Exch.'s Options Floor Post X-17*, Exchange Act Release No. 31666, 51 SEC 261, 1992 WL 400646, at *4 (Dec. 29, 1992) ("We . . . have interpreted the term 'disciplinary' to refer to action responding to an alleged violation of an Exchange rule or Commission statute or rule or action 'in which punishment or sanction is sought or intended.'" (quoting *Tague Sec. Corp.*, Exchange Act Release 18510, 47 SEC 743, 1982 WL 32205, at *2 (Feb. 25, 1982))).

mPhase's request that FINRA provide it services on the OTCBB.[90] In any event, we have long held that FINRA, a private organization, is not subject to the requirements of 28 U.S.C. § 2462, applicable to government agencies.[91]

mPhase argues that FINRA's denial was inconsistent with the Exchange Act because it "amount[s] to a *de facto* and improper officer and director bar." mPhase is incorrect. As discussed, FINRA's denial imposed no sanction. FINRA's refusal to announce mPhase's Company-Related Action was a prophylactic measure designed to prevent potential fraud or abuse from occurring through use of the OTCBB, and it had no further reach than announcement on that particular FINRA facility.[92] Although mPhase contends that FINRA's denial effectively bars Durando and Dotoli from acting as officers and directors, we note that both remain officers and directors of mPhase and mPhase's stock continues to trade in the OTC market and is currently quoted on the OTC Pink, an alternative inter-dealer quotation system.[93]

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[90] We note that mPhase's current § 2462 claim contradicts its previous statement before FINRA that the 2007 Settlement Order was "almost five years old," which is a more accurate factual statement: The 2007 Settlement Order was entered on October 18, 2007, mPhase filed its application with FINRA on July 6, 2012, and FINRA's Department denied the application on October 2, 2012. Thus, even if we assume *arguendo* that the application or denial somehow served as "commence[ment]" of an action under 28 U.S.C. § 2462, that action would have started within the five-year limitations period. *Cf. Birkelbach v. SEC*, 751 F.3d 472, 479-80 (7th Cir. May 2, 2014) (finding that, even if § 2462 applied to FINRA disciplinary actions, "sufficient violative conduct" took place within the five-year period preceding action).

[91] *William D. Hirsch*, Exchange Act Release No. 43691, 54 SEC 1068, 2000 WL 1800614 at *5 (Dec. 8, 2000) ("We have consistently held that no statute of limitations applies to the disciplinary actions of . . . self-regulatory organizations."); *Shamrock Partners, Ltd.*, Exchange Act Release No. 40663, 53 SEC 1008, 1998 WL 786953, at *5 n.15 (Nov. 12, 1998) ("The five-year statute of limitations discussed in *SEC v. Johnson*, 87 F.3d 484 (D.C. Cir. 1996), . . . does not apply to NASD proceedings."); *Henry James Faragalli*, Exchange Act Release No. 37991, 52 SEC 1132, 1996 WL 683707, at *10 & n.36 (Nov. 26, 1996) ("[I]t is well established that no statute of limitations applies to [SRO] actions . . . [because] SROs are not subject to the requirements applicable to a government agency.").

[92] *Cf., e.g., United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997) (describing Exchange Act Rule 14e-3(a) as "[a] prophylactic measure, because its mission is to prevent . . . [and it] encompasses more than the core activity prohibited").

[93] *See supra* note 15. *Cf. Millenia Hope, Inc.*, Exchange Act Release No. 42739, 2000 WL 511439, at *1 (May 1, 2000) (denying stay of OTCBB delisting and stating that "the deletion [from the OTCBB] means only that there will be no prices for those securities quoted on the OTCBB," not that the securities must cease trading); *Cleantech Innovations, Inc.*, Exchange Act Release No. 66064, 2011 WL 6811202, at *3 (Dec. 28, 2011) (same).

For similar reasons, we reject mPhase's related arguments that are based on this contention, including that FINRA's action improperly intrudes on New Jersey corporate law, that the Commission is collaterally estopped from affirming an officer and director bar, and that

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Finally, we reject mPhase's argument, made only in its application for review, that FINRA "improperly applied [FINRA Rule 6490] retroactively to punish conduct that occurred prior to the enactment of [Rule 6490]." mPhase has since abandoned this argument in subsequent briefs; in any event, we find it meritless. The United States Supreme Court has observed that "[a] statute 'is not made [impermissibly] retroactive merely because it draws upon antecedent facts for its operation.'"[94] Rather, a statute is impermissibly retroactive "when such application would 'tak[e] away or impai[r] vested rights acquired under existing laws, or creat[e] a new obligation, impos[e] a new duty, or attac[h] a new disability, in respect to transactions or considerations already past.'"[95] The Court has explained that statutes imposing requirements on previously convicted or sanctioned individuals to "address[] dangers that arise postenactment" are not impermissibly retroactive.[96] Even where application of such statutes could be construed to "unsettle expectations and impose burdens on past conduct," those statutes are not impermissibly retroactive because they "target a present danger."[97]

FINRA's action was not impermissibly retroactive for two independent reasons. First, FINRA considered the 2007 Settlement Order, along with its ongoing concerns about mPhase, to make a present determination of risk to investors and the public generally. Although FINRA drew on information predating Rule 6490's adoption, FINRA did so as part of a process in which it assessed the *present* risks posed by mPhase's request for public announcement on the OTCBB.[98] Under FINRA's process, while the existence of the 2007 Settlement Order caused mPhase's request to be deficient under FINRA Rule 6490(d)(3), FINRA, consistent with its Rule, allowed mPhase an opportunity to explain why the company's request should be processed

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imposing a bar denies Durando and Dotoli due process. FINRA's denial of an announcement on the OTCBB and our affirmance of that decision imposes no bar; nor does the denial prevent mPhase from effectuating its corporate action outside of the OTCBB.

94 *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269 (1994) (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)); *see also Martin v. Hadix*, 527 U.S. 343, 357-58 (1998) ("The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" (quoting *Landgraf*, 511 U.S. at 270)).

95 *Vartelas v. Holder*, 132 S. Ct. 1479, 1487 (2012) (quoting *Langraf*, 511 U.S. at 283) (holding that statutes authorizing prospective remedies may consider conduct pre-dating the statute without a genuinely retroactive effect).

96 *Id.* at 1489 n.7; *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *13 (July 12, 2013) (holding that it is proper to consider respondent's conduct predating Dodd-Frank Act in assessing future risk to investing public).

97 *Vartelas*, 132 S. Ct. at 1489 (discussing various examples); *see also United States v. Shoulder*, 738 F.3d 948, 958 (9th Cir. 2012).

98 *Landgraf*, 511 U.S. at 270 n.24.

nonetheless.[99] Yet, after weighing the arguments and materials mPhase submitted against the perceived interests of the public, FINRA concluded that announcement of mPhase's reverse stock split on the OTCBB at this time posed too great a risk for the investing public and market integrity.[100] And as discussed, FINRA's assessment of that risk is supported by the record.

Second, nothing in FINRA's application of Rule 6490 impairs rights mPhase possessed when it acted, increases its liability for past conduct, or imposes new duties with respect "to transactions already completed."[101] mPhase has not asserted, nor do we find, that it had a vested right in having FINRA process and announce its Company-Related Actions.[102] mPhase filed its application more than two years after the adoption of Rule 6490. When mPhase did so, it was clear that its officers' 2007 Settlement Order could be a basis for FINRA to deny the request. FINRA's action therefore did not affect mPhase's reliance interest or settled expectations in having FINRA announce its corporate actions on the OTCBB.

mPhase also did not incur any new liability, duty, or disability from its own conduct predating Rule 6490's adoption because it was neither a party to the 2007 Settlement Order nor was it subject to any of its sanctions.[103] mPhase, in effect, is claiming an impermissible

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99 *See supra* note 51 and accompanying text; *accord Boniface v. Dep't of Homeland Sec.*, 613 F.3d 282, 288 (D.C. Cir. 2010). In *Boniface*, the Court of Appeals for the D.C. Circuit rejected a similar retroactivity challenge, upholding the Transportation Security Administration's ("TSA") application of a new regulation to deny licensing of a hazardous materials endorsement ("HME") to a commercial trucker based on an event predating the regulation, the trucker's thirty-year-old conviction for transporting hazardous materials. The court reasoned that the TSA's denial did not trigger "any of the effects deemed retroactive [by the Supreme Court] in *Landgraf* because it does not bar an applicant with a disqualifying conviction from obtaining an HME but rather creates 'an evidentiary presumption' that an applicant with a disqualifying conviction in his past poses a security threat in the present; the applicant may rebut that presumption through the waiver process." *Id.* The presence of a deficiency factor here operated analogously.

100 *Boniface*, 613 F.3d at 288; *Adm'rs of the Tulane Educ. Fund v. Shalala*, 987 F.2d 790, 798 (D.C. Cir. 1993) (finding that regulations at issue had no retroactive effect because they "contemplate only the use of past information for subsequent decisionmaking").

101 *Landgraf*, 511 U.S. at 280.

102 *See, e.g.*, *Empresa Cubaexport v. Dept. of Treasury*, 638 F.3d 794, 799 (D.C. Cir. 2011) (holding that company had no vested right to perpetual renewal of its trademark; stating that "[a] law that merely 'upsets expectations based in prior law' . . . does not trigger the presumption against retroactivity" (quoting *Landgraf*, 511 U.S. at 269)); *Goodyear Tire & Rubber Co. v. Dep't. of Energy*, 118 F.3d 1531, 1536-38 (Fed. Cir. 1997) (holding that DOE's application of 1992 product eligibility rule was not retroactive because applicant had no vested right to have the pre-1992 rule applied and no vested right to have its claims approved).

103 *See, e.g., Ohio Head Start Assoc. v. U.S. Dept. of Health and Human Svcs.*, 873 F. Supp. 2d 335, 347-48 (D.D.C. 2012) (discussing U.S. Supreme Court precedent and concluding that the principal focus for determining whether to allow "regulations [to] use antecedent information in

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retroactive effect based on an antecedent event that relates only to the conduct of its officers. We have not found, nor has mPhase cited to, any authority suggesting that a statute or regulation is impermissibly retroactive when it triggers an outcome based on the earlier misconduct of a *different* person or entity. Accordingly, for all these reasons, we find that FINRA's denial was not impermissibly retroactive.

Based on the foregoing, we find that FINRA properly denied mPhase's Company-Related Action request and, accordingly, dismiss mPhase's appeal.

An appropriate order will issue.[104]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN); Commissioners GALLAGHER and PIWOWAR, dissenting.

Brent J. Fields
Secretary

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making future decisions lies in the notion of imposing a 'liability' versus denying an individual a future 'benefit'" (citations omitted)), *aff'd*, 510 F. App'x 1 (D.C. Cir. 2013) (per curiam).

[104] 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. 74187 / February 2, 2015

Admin. Proc. File No. 3-15130

In the Matter of the Application of

MPHASE TECHNOLOGIES, INC.
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Pepper Hamilton LLP
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Washington, D.C. 20005-2004

For Review of Action Taken by

FINRA

ORDER DISMISSING REVIEW PROCEEDINGS

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

ORDERED that the application for review filed by mPhase Technologies, Inc., is hereby dismissed.

By the Commission.

Brent J. Fields
Secretary