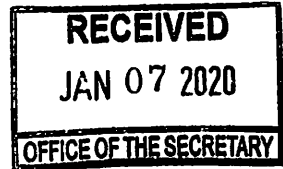


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**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**

In the Matter of the Application of

Falcon Technologies, Inc.

For Review of Denial of Company-Related Action by

FINRA

Administrative Proceeding No. 3-19575

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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January 6, 2020

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FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. INTRODUCTION

Falcon Technologies, Inc., an issuer quoted on OTC Pink,¹ appeals a FINRA decision that denied the issuer's request to process and announce a name and symbol change. FINRA denied Falcon Technologies's request pursuant to FINRA Rule 6490 – a rule that grants FINRA discretion to deny an issuer's request to process and announce company-related actions if the issuer has failed to file required periodic reports with the Commission or another regulatory authority.

Between June 2001 and December 2006, while it had a class of securities registered, Falcon Technologies failed to file 20 required periodic reports with the Commission. Falcon Technologies's failure to file those reports was still a deficiency when FINRA denied the issuer's request for company-related actions, and FINRA exercised that discretion concluding that doing so was necessary for the protection of investors and the public interest and for the maintenance of fair and orderly markets.

¹ OTC Pink is one of the tiers of OTC Market Group, Inc.'s OTC Link, which is an alternative trading system. *Positron Corp.*, Exchange Act Release No. 74216, 2015 SEC LEXIS 442, at *1 n.1 (Feb. 5, 2015).

FINRA's decision to deny Falcon Technologies's request for the name and symbol change was well-founded and correct. FINRA appropriately determined that Falcon Technologies's history of ignoring its periodic reporting requirements to the Commission evidenced a high degree of disregard for the importance of public disclosure, and FINRA properly concluded that it was in the public interest not to process or announce the issuer's company-related actions.

FINRA fulfilled its role as the gatekeeper of information for the protection of investors, the public interest, and the fair and orderly operation of the securities markets and satisfied the standard of review for the denial of an issuer's request for a name and symbol change. FINRA followed its rules, relied on grounds that are factually accurate, and applied its rules in a manner consistent with the Securities Exchange Act of 1934 ("Exchange Act"). The Commission therefore should dismiss Falcon Technologies's application for review.

II. BACKGROUND

A. FINRA's Review of Company-Related Actions

FINRA performs critical functions in the over-the-counter market.² *See Approval Order*, 2010 SEC LEXIS 2186, at *2-3; *see also Positron*, 2015 SEC LEXIS 442, at *4. The review, processing, and announcement of certain actions taken by issuers of over-the-counter securities

² The Commission approved FINRA Rule 6490 in July 2010. *See Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions)* ("Approval Order"), Exchange Act Release No. 62434, 2010 SEC LEXIS 2186, at *2-3 (July 1, 2010). Before FINRA Rule 6490 became effective, FINRA's role in processing company-related actions was primarily ministerial. *See Positron*, 2015 SEC LEXIS 442, at *6-7. FINRA proposed taking on a gatekeeper role when it proposed FINRA Rule 6490, and explained its concern that its company-related action processing services could be used by certain parties to further fraudulent activities. *See id.*

are included among FINRA's functions in the over-the-counter market. *See Approval Order*, 2010 SEC LEXIS 2186, at *2-3.

These actions, known as "company-related actions," include stock 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." *Positron*, 2015 SEC LEXIS 442, at *4. If FINRA elects to process an issuer's company-related action, FINRA will announce the action on its website in a document known as the "Daily List," which effectively announces the action to the over-the-counter market. *Id.*

B. Deficiency Determinations Under FINRA Rule 6490

Under FINRA Rule 6490, FINRA's Department of Operations (the "Department") may deny an issuer's request to process a company-related action.³ After conducting an in-depth review, the Department may deny a request if it finds: (1) the request is "deficient," based on a five-factor inquiry, and (2) if denial is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets." *mPhase Techs., Inc.*, Exchange Act Release No. 74187, 2015 SEC LEXIS 398, at *6 (Feb. 2, 2015).

FINRA Rule 6490 sets forth the five factors under which the Department may deny a request. *See* FINRA Rule 6490(d)(3). Subsection one allows the Department to deny an issuer's request if "the forms and all supporting documentation . . . may not be complete, accurate or with proper authority." FINRA Rule 6490(d)(3)(1). Subsection two, the subsection at issue here,

³ In considering an issuer's request to process a company-related action, the Department may request additional information in order to complete its review of the request. *See* FINRA Rule 6490(b)(4); *Approval Order*, 2010 SEC LEXIS 2186, at *9.

requires the issuer to be current in its applicable reporting obligations to the Commission or another regulatory authority. *See* FINRA Rule 6490(d)(3)(2).⁴

Following a Department determination that a request to process a company-related action is deficient, the Department provides written notice of the deficiency to the issuer. *See Approval Order*, 2010 SEC LEXIS 2186, at *11; FINRA Rule 6490(d)(4). FINRA Rule 6490 also provides an issuer with a right to appeal from a Department deficiency determination. *See* FINRA Rule 6490(e).

A three-person subcommittee comprised of current or former industry members of FINRA’s Uniform Practice Code Committee (“UPCC Subcommittee”) thoroughly reviews and decides all appeals.⁵ *See id.* On appeal to the UPCC Subcommittee, the issuer may offer additional supporting documentation in support of its request. *See id.* The appeal process is swift for the issuer. The UPCC Subcommittee meets each month and must issue a written

⁴ Subsection three allows the Department to deny an issuer’s request if “FINRA has actual knowledge that the issuer, associated persons, officers, directors, transfer agent, legal adviser, promoters or other persons connected to the issuer” or the company-related action “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.” FINRA Rule 6490(d)(3)(3). Subsection four allows the Department to deny the issuer’s request if FINRA knows or a government authority or regulator has given FINRA information indicating that persons connected with the issuer “may be potentially involved in fraudulent activities related to the securities markets []or pose a threat to public investors.” FINRA Rule 6490(d)(3)(4). Finally, the fifth factor – that there “is significant uncertainty in the settlement and clearance process for the security” – requires the Department to evaluate information provided by entities that clear or settle securities transactions. FINRA Rule 6490(d)(3)(5).

⁵ The Uniform Practice Code Committee provides the framework of rules governing broker-dealers for the settlement of non-exchange listed securities quoted or traded in the over-the-counter market. *See Approval Order*, 2010 SEC LEXIS 2186, at *6 n.8.

decision within three business days of its consideration of the appeal. *See id.* The UPCC Subcommittee’s decision constitutes FINRA’s final action. *See id.*

III. FACTS

In February 1991, Falcon Technologies incorporated in Oregon under the name International Business Development, Ltd. RP 19.⁶ Seven years later, in June 1998, International Business Development entered into a plan of reorganization with a Canadian corporation named Novamex Diagnostic Ltee. or Novamex Diagnostic, Ltd. RP 131. At that time, Falcon Technologies operated as Novamex USA Ltd. and focused its operations on “developing and marketing testing kits used to detect pathogenic bacteria, viral diarrhea, and gestation in a nonclinical setting.” RP 103, 131.

A. Falcon Technologies, as Novamex USA, Fails to File 20 Periodic Reports with the Commission

On June 30, 2000, Falcon Technologies, as Novamex USA, filed a Form 10-SB with the Commission to register shares of its common stock.⁷ *See* EDGAR Search Results for Novamex USA Ltd., CIK # 0001117705, attached as Appendix A. By registering this distribution of common stock with the Commission, Novamex USA became a reporting issuer under the Exchange Act, and, accordingly, was required to file quarterly and annual reports with the Commission.

⁶ “RP” refers to the record page in the certified record. “Br.” refers to the brief that Falcon Technologies filed with the Commission on December 3, 2019.

⁷ The Form 10-SB provides for the registration of securities for small businesses pursuant to Section 12(g) of the Securities Exchange Act of 1934 (“Exchange Act”). Falcon Technologies filed two amendments to the Form 10-SB in July 2000 and April 2001, respectively. *See* Appendix A.

Novamex USA filed quarterly periodic reports with the Commission from September 2000 to the period ending in March 2002. *See* Appendix A. Novamex USA did not file quarterly periodic reports for 14 periods between September 2002 and December 2006, and it never made any annual periodic filing with the Commission. *See* Appendix A.

B. Novamex USA Transitions Operations, Terminates Its Ongoing Obligation to File Periodic Reports, and Becomes Falcon Technologies

In May 2007, Novamex USA transitioned its operations to become a “provider of specialty contracting services throughout the Western United States.” RP 20. In documentation submitted to the UPCC Subcommittee, Falcon Technologies explained that its operations were focused on “program management, engineering, construction, maintenance[,] and installation services for telecommunications providers” RP 20. In connection with the transition to the telecommunications industry, Novamex USA completed several company-related actions, including a name change to Falcon Technologies, symbol change to FLCN, and a 1-100 reverse stock split. RP 104. These company-related actions became effective in June 2007.

Around this same time, Novamex USA also terminated its ongoing obligation to file periodic reports. On May 15, 2007, Novamex USA filed a Form 15 to terminate its securities registration and status as a reporting company under the Exchange Act.⁸ RP 488-90. Novamex USA filed the Form 15 by certifying that it had complied with Exchange Act Rules 12g-4(a)(1)(i) and 12h-3(b)(1)(i), which apply to issuers whose securities are held by less than 300 shareholders. RP 490. Novamex USA’s Form 15 certified that the issuer had 53 shareholders as of the date of the filing. RP 490.

⁸ The Form 15 is the Commission’s Certification and Notice of Termination of Registrant Under Section 12(g) of the Securities Exchange Act of 1934 or Suspension of Duty to File Reports Under Sections 13 and 15(d) of the Securities Exchange Act of 1934.

C. Falcon Technologies Begins Operating as a Medical Hemp Company

In February 2019, Falcon Technologies redomiciled in Wyoming. RP 20. In March 2019, Falcon Technologies filed documentation with the Oregon Secretary of State Corporation Division to change its name from Falcon Technologies to Eco-Growth Strategies, Inc. RP 132, 177-78. Falcon Technologies stated that the name change reflected the issuer's "mov[e] away from a telecom infrastructure business to the medical/utility use of hemp and related products." RP 455.

IV. PROCEDURAL HISTORY

A. Falcon Technologies's Request for a Name and Symbol Change

In January 2019, Falcon Technologies submitted a request for the Department to process and announce a name change to Eco-Growth Strategies and a symbol change to ECGS, EGSI, or ECOI. RP 1-6. In connection with its request, Falcon Technologies submitted documents relating to its corporate history and board of director and shareholder approval for the company-related actions. RP 1-26. The Department asked Falcon Technologies to provide additional information and to respond to several clarifying questions concerning the company-related actions, which Falcon Technologies did.

B. FINRA's Department of Operations Denies Falcon Technologies's Request

After reviewing all the information, the Department determined that Falcon Technologies's request was deficient, and the Department denied it. RP 459-61. The Department's denial was based on FINRA Rule 6490(d)(3)(2), which gives FINRA discretion to decline an issuer's request to process and announce a company-related action if the "the issuer is not current in its reporting requirements . . . to the [Commission] or other regulatory authority[.]" RP 459; FINRA Rule 6490(d)(3)(2).

The Department explained the basis of its denial in writing. RP 459-61. In its deficiency determination, the Department stated that Falcon Technologies was not current in its reporting requirements to the Commission because it had failed to file 20 mandatory periodic reports – 14 quarterly periodic reports for the periods between September 2002 and December 2006, and six annual reports for the periods between June 2001 and June 2006. RP 459-60. The Department concluded that denying the request was “necessary for the protection of investors, the public interest, and to maintain fair and orderly markets[.]” RP 459.

C. The UPCC Subcommittee Affirms the Denial of Falcon Technologies’s Request

Falcon Technologies appealed the Department’s decision to the UPCC Subcommittee. RP 479-94. After a de novo review, the UPCC Subcommittee affirmed the Department’s denial of Falcon Technologies’s request for a name and symbol change. RP 503-07. The UPCC Subcommittee found that Falcon Technologies did not file the 20 periodic reports cited in the Department’s deficiency determination, and, consequently, that Falcon Technologies was not current in its reporting requirements to the Commission. RP 505. The UPCC Subcommittee agreed with the Department that denying Falcon Technologies’s application was necessary for the protection of investors, the public interest, and to maintain fair and orderly markets. RP 506-07. This appeal followed.

V. ARGUMENT

Section 19(f) of the Exchange Act governs the Commission’s review of FINRA’s denial of Falcon Technologies’s request to process and announce its company-related actions. *See Positron*, 2015 SEC LEXIS 442, at *21; *see also* 15 U.S.C. § 78s(f). The Commission must dismiss Falcon Technologies’s appeal if it finds that: (1) the specific grounds on which FINRA based its denial exist in fact; (2) the denial was in accordance with FINRA rules; and (3) those

rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. *See Positron*, 2015 SEC LEXIS 442, at *21. FINRA’s denial of Falcon Technologies’s request meets these criteria, and the Commission should dismiss Falcon Technologies’s application for review.

A. FINRA’s Denial of Falcon Technologies’s Name and Symbol Change Is Authorized by FINRA’s Rules

Falcon Technologies argues that the UPCC Subcommittee exceeded the authority granted to it under FINRA Rule 6490. Br. at 8-11. Specifically, Falcon Technologies contends that the UPCC Subcommittee has only “ministerial” powers when denying company-related actions, and that FINRA Rule 6490 authorizes the UPCC Subcommittee to deny a request only when “issuers [fail] to disclose information that would be considered material under the federal securities laws.” Br. at 8-9. Falcon Technologies’s arguments about the meaning of FINRA Rule 6490 conflicts with the plain language of the rule and rewrites the rule in a nonsensical way.

1. FINRA Rule 6490 Has Substantive Requirements

As an initial matter, FINRA Rule 6490 is not a ministerial rule. Before the Commission approved FINRA Rule 6490 in 2010, FINRA had limited authority in processing company-related actions for issuers. *See mPhase*, 2015 SEC LEXIS 398, at *5-6 (quoting the Approval Order, 2010 SEC LEXIS 2186, at *5, and stating that “[h]istorically, FINRA has viewed its role in performing issuer-related functions as primarily ministerial.”). The adoption of FINRA Rule 6490, however, significantly changed FINRA’s role from a ministerial one to one that permits the use of judgment to approve or deny company-related actions.⁹ *See id.*

⁹ “In 2010, based on a ‘growing concern that FINRA’s [c]ompany-[r]elated [a]ction 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

[Footnote continued on next page]

The Approval Order's discussion of FINRA Rule 6490(d)(3)(2), the subsection related to an issuer's delinquency in its reporting requirements, reinforces that FINRA's authority to approve or deny company-related actions had transitioned from a ministerial role to a discretionary one with the adoption of FINRA Rule 6490. *See* Approval Order, 2010 SEC LEXIS 2186, at *19-20. Specifically, in response to a comment concerning how FINRA would process an issuer's request for company-related actions when the issuer is not current in its reporting requirements, the Approval Order states:

[W]hen the Department reasonably believes that an issuer . . . has triggered one of the explicitly enumerated factors, the Department would generally conduct an in-depth review FINRA . . . 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 and the public interest and to maintain fair and orderly markets [T]he failure of an issuer to remain current [in] its reporting obligations is one of five factors that FINRA "may" consider in making a deficiency determination.

Id. As the Commission explained, "the proposed factors [in FINRA Rule 6490(d)(3)] are reasonably designed to allow FINRA to deny a request." *Id.* at *20.

FINRA's authority under FINRA Rule 6490 is not merely ministerial. FINRA may deny an issuer's request for company-related actions if an issuer's request is "deficient," based on one or more of the five-factors listed in FINRA Rule 6490(d)(3), and if denial of the issuer's request is "necessary for the protection of investors, the public interest and to maintain fair and orderly markets." *mPhase*, 2015 SEC LEXIS 398, at *6. The Commission should find that FINRA properly exercised its authority under FINRA Rule 6490.

[cont'd]

an issuer's request that FINRA announce a [c]ompany-[r]elated [a]ction [to] the [over-the-counter market] under certain circumstances." *mPhase*, 2015 SEC LEXIS 398, at *5-6 (quoting Approval Order, 2010 SEC LEXIS 2186, at *5-6).

2. FINRA Rule 6490 Allows FINRA to Deny Company-Related Actions Based on an Issuer's Failure to File Periodic Reports

FINRA Rule 6490 is precise and allows FINRA to deny company-related actions based on an issuer's failure to file periodic reports. Under FINRA Rule 6490, FINRA may use its judgment and determine whether a request is deficient. *mPhase*, 2015 SEC LEXIS 398, at *19-20. If FINRA exercises such judgment, however, FINRA must deem the issuer's request deficient based only on one or more of the five factors articulated in FINRA Rule 6490(d)(3). *See* FINRA Rule 6490(d)(3); *mPhase*, 2015 SEC LEXIS 398, at *6 n.11. If one of the five factors exists, then FINRA decides whether it will deny the request. *mPhase*, 2015 SEC LEXIS 398, at *6.

FINRA identified subsection (2) of FINRA Rule 6490(d)(3) as the basis for its denial of Falcon Technologies's name and symbol change. RP 503-07. That subsection permits FINRA to deny an issuer's proposed company-related actions if "the issuer is not current in its reporting requirements, if applicable, to the [Commission] or other regulatory authority[.]" FINRA Rule 6490(d)(3)(2).

FINRA Rule 6490(d)(3)(2) fully authorized FINRA's denial. *See mPhase*, 2015 SEC LEXIS 398, at *42 (quoting FINRA Rule 6490(d)(3)(2) and stating that "subsection (d)(3)(2) . . . allows FINRA to deem a [c]ompany-[r]elated [a]ction deficient if 'the issuer is not current in its reporting requirements, if applicable, to the SEC or other regulatory authority.'"); Approval Order, 2010 SEC LEXIS 2186, at *20 (explaining that "the failure of an issuer to remain current [in] its reporting obligations is one of five factors that FINRA 'may' consider in making a deficiency determination."). FINRA properly exercised its discretion and denied Falcon Technologies's company-related actions based on the issuer's failure to file periodic reports with the Commission, and the Commission should find that FINRA acted within the scope of the rule.

3. FINRA Rule 6490(d)(3)(2) Is Not Limited to Failures to Disclose Issuer Deficiencies

Falcon Technologies argues that FINRA may deny an issuer's request for company-related actions only if the issuer fails to disclose information that would be considered material under the federal securities laws. Br. at 9. Falcon Technologies's interpretation of FINRA Rule 6490 creates limits in the rule where none exist and would result in an ineffective rule.

FINRA Rule 6490(d)(3)(2) says nothing about the nondisclosure of information to FINRA. *mPhase*, 2015 SEC LEXIS 398, at *43. The fact that other subsections of the rule, such as FINRA Rule 6490(d)(3)(1), addresses an incomplete or inaccurate request has no bearing on the interpretation and application of FINRA Rule 6490(d)(3)(2). *See id.* (explaining 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.").

Here, it would make little sense to apply the same basis for a deficiency under FINRA Rule 6490(d)(3)(1) to the remaining four factors provided in the rule. "[E]ach factor [articulated in FINRA Rule 6490(d)(3)] constitutes a separate, independent ground for deeming a request deficient, a point made clear by the express language of [FINRA] Rule 6490(d)(3) stating that a request is deficient if FINRA finds 'one or more of the [deficiency] factors' exists." *Id.* (quoting FINRA Rule 6490(d)(3)). The Commission should find that Falcon Technologies's efforts to limit the meaning of FINRA Rule 6490 are ineffective and dismiss Falcon Technologies's application for review.

B. The Grounds for FINRA's Denial of Falcon Technologies's Company-Related Actions Exist in Fact

The grounds for FINRA's denial of Falcon Technologies's proposed name and symbol change exist in fact. FINRA Rule 6490(d)(3) requires FINRA to conduct a two-step analysis when determining whether to process a request for company-related actions. *Positron*, 2015

SEC LEXIS 442, at*22. First, FINRA must assess whether the issuer's request is deficient based solely on one or more of five enumerated factors stated in the rule. *Id.* Second, if FINRA determines that an issuer's request is deficient, FINRA may decide not to process the issuer's request if denial "is necessary for the protection of investors, the public interest and to maintain fair and orderly markets." *Id.*

1. Falcon Technologies's Request Was Deficient Because Falcon Technologies Failed to File 20 Periodic Reports with the Commission and Was Not Current in Its Reporting to the Commission

Falcon Technologies's request was deficient under FINRA Rule 6490(d)(3)(2), which provides that FINRA may deny an issuer's request if the issuer is "not current in its reporting requirements, if applicable, to the [Commission] or other regulatory authority[.]" Falcon Technologies failed to file 20 required periodic reports with the Commission – 14 quarterly reports for the periods between September 2002 and December 2006, and six annual reports for the periods between June 2001 and June 2006. The grounds for FINRA's denial therefore exist in fact.¹⁰

2. Falcon Technologies's Filing of a Form 15 Did Not Make the Issuer Current in Its Reporting Requirements with the Commission

Falcon Technologies states that FINRA "made no adverse findings that [Falcon Technologies] filed a Form 15 and by extension accepted that [Falcon Technologies] was eligible to file a Form 15" Br. at 10. Falcon Technologies misunderstands FINRA's role in the processing of company-related actions under FINRA Rule 6490.

¹⁰ Falcon Technologies acknowledges its periodic reporting delinquencies. The issuer states, "[p]rior to filing [the] Form 15 on May 15, 2007, the issuer was delinquent with its required [Commission] filings, no requirement at the time to redo or prepare any filings." RP 151.

As an initial matter, FINRA's authority under FINRA Rule 6490 is limited to the processing of company-related actions, which, among the five factors provided in the rule, may turn on whether the issuer is current in its reporting requirements to the Commission or other regulatory authority. To be clear, under FINRA Rule 6490, FINRA may consider whether an issuer is current in its filing of periodic reports with the Commission or other regulatory authority in deciding whether to process an issuer's company-related actions. FINRA, however, cannot compel issuers to make periodic filings with the Commission or any other regulatory authority. Nor can FINRA accept or reject the periodic reports that issuers may file. The authority to compel the filing of periodic reports, and the acceptance and rejection of periodic reports, rests solely with the Commission. *See e.g., Am. Sands Energy Corp.*, Exchange Act Release No. 86477, 2019 SEC LEXIS 1863, at *10-11 (July 25, 2019) (Commission-initiated administrative proceeding to revoke the registration of the issuer's securities based on the issuer's failure to file periodic reports).

Moreover, to the extent that Falcon Technologies was "eligible" to file a Form 15 with the Commission, that filing of the Form 15 did not cure its pre-existing reporting deficiencies. Filing a Form 15 suspends an issuer's duty to file periodic reports in the future. But "[f]iling a Form 15 does not obviate the need to file all delinquent reports, nor does it necessarily moot any sanction" for pre-existing violations of the Exchange Act's reporting requirements. *Aqua Soc 'y, Inc.*, Initial Decisions Release No. 439, 2011 SEC LEXIS 3878, at *19 (Nov. 3, 2011) (citing *Secured Dig. Applications, Inc.*, Exchange Act Release No. 64533, 2011 SEC LEXIS 1791 (May 23, 2011)); *see also Cirtran Corp.*, Initial Decisions Release No. 1134, 2017 SEC LEXIS 1405 (May 11, 2017) (revoking registration for failing to file periodic reports that were due before the filing of a Form 15).

An issuer is “current in its reporting” when it is fully compliant in its reporting. For example, in *Citizens Capital Corp.*, the Commission found that issuers that failed to file all required periodic reports, or that have filed deficient reports, are not “current” in their Exchange Act reporting. *Citizens Capital Corp.*, Exchange Act Release No. 67313, 2012 SEC LEXIS 2024, at *19 (June 29, 2012) (revoking the registration of an issuer’s securities because the issuer had failed to file many periodic reports over a 10-year period). In its order revoking Citizen Capital Corp.’s registration, the Commission explained that the issuer had to come into full compliance by filing all of its delinquent reports in order to become current in its reporting requirements:

Throughout this proceeding, [issuer] repeatedly promised . . . that it would become current with its reporting obligations by September 2011 and that, in doing so, it would provide audited financial statements, neither of which it has done. Further, the [issuer] has provided no specific dates in its briefs on appeal by which it intends to come into full compliance by filing *all* of its delinquent reports, including its missing quarterly reports from 2001 through 2010, and correcting the material deficiencies in the filings it has made.

Id. at *30-31 (emphasis added).

Similarly, in *Impax Laboratories*, the Commission revoked the registration of the issuer’s securities because the issuer had failed to file multiple periodic reports during the previous four years. *See Impax Labs., Inc.*, Exchange Act Release No. 57864, 2008 SEC LEXIS 1197, at *3 (May 23, 2008). Once again, the Commission stated that, to become current in its reporting requirements, the issuer had to file all the delinquent reports:

Although an acceptable revenue recognition accounting policy has been identified, it must now be incorporated into the financial statements for *all* of the outstanding periodic reports, including one annual report and three quarterly reports for each of 2004, 2005, 2006, and 2007 . . . [issuer] already has needed substantially more time than anticipated to address its 2004 delinquencies, making us unconvinced that it is realistic to expect that the [issuer] can become current entirely in its reporting obligations in the foreseeable future.

Id. at *32-33 (emphasis added).

Indeed, the Commission’s Division of Corporation Finance has expressly stated that an issuer is not “current in its reporting” unless it has filed all required periodic reports. In its Compliance and Disclosure Interpretations of the Exchange Act’s registration and reporting provisions, the Division of Corporation Finance directly addresses this question:

Question: When a registrant becomes delinquent in its reporting obligation under Section 13(a) or 15(d), what must it do to become current?

Answer: *A delinquent filer must file all delinquent reports in order to become current in its Exchange Act reporting.* While filing required documents late will not “cure” Section 13(a) or 15(d) violations, and will not make the registrant timely for purposes of eligibility to use certain Securities Act forms, it will permit the registrant to become current in its Exchange Act reporting.

SEC Division of Corporation Finance, *Compliance and Disclosure Interpretations – Question No. 130.02* (Dec. 4, 2012), <https://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm> (last visited Jan. 3, 2020) (emphasis added).

Falcon Technologies’s filing of a Form 15 did not cure its previous reporting deficiencies. To become current, Falcon Technologies must file the 20 periodic reports that are the subject of FINRA’s deficiency determination. Consequently, Falcon Technologies was not current in its reporting requirements to the Commission, the grounds for FINRA’s denial of Falcon Technologies’s proposed name and symbol change exist in fact, and the Commission should dismiss Falcon Technologies’s application for review.

3. FINRA’s Denial of Falcon Technologies’s Request Was Necessary for the Protection of Investors, the Public Interest, and the Maintenance of Fair and Orderly Markets

FINRA Rule 6490(d)(3) states that “where . . . [a] [c]ompany-[r]elated [a]ction 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.” FINRA Rule 6490(d)(3); *see Positron*, 2015 SEC LEXIS 442, at *24. The rule’s use of the permissive

term “may” vests FINRA with discretion in deciding whether to process and announce a company-related action. *Positron*, 2015 SEC LEXIS 442, at *24. The Commission has “long stated that to the extent that discretion enters into FINRA’s decision . . . the discretion in question is FINRA’s, not [the Commission’s],” and the Commission “will not substitute [its] judgment for FINRA’s unless [FINRA’s] decision is unsupported by the record.” *Id.* at *24-25; *mPhase*, 2015 SEC LEXIS 398, at *20. The record here fully supports FINRA’s denial.

FINRA determined that, in light of Falcon Technologies’s non-compliance with its reporting obligations, processing and announcing the issuer’s name and symbol change would pose a threat to investors and market integrity. FINRA specifically found that the “public interest strongly favors issuers becoming current in their Exchange Act reporting obligations.” RP 506. FINRA also determined that an issuer’s failure to file periodic reports violates “a central provision of the Exchange Act, . . . depriv[ing] both existing and prospective holders of its registered stock of the ability to make informed investment decisions based on current and reliable information.” RP 506 (quoting *Am. Sands Energy Corp.*, 2019 SEC LEXIS 1863, at *10-11). FINRA concluded that Falcon Technologies’s five-year history of ignoring its reporting obligations, and its failure to file the 20 periodic reports, “evidence[d] a high degree of disregard for the importance of public disclosure.” RP 507. The record strongly supports FINRA’s judgment, and the Commission should affirm FINRA’s decision.

C. FINRA’s Denial of Falcon Technologies’s Request Was in Accordance with FINRA Rule 6490, and FINRA Applied FINRA Rule 6490 in a Manner Consistent with the Purposes of the Exchange Act

FINRA’s denial of Falcon Technologies’s name and symbol change was in accordance with FINRA’s rules and entirely consistent with the Exchange Act. *See Approval Order*, 2010 SEC LEXIS 2186, at *15-16 (“[T]he proposal is consistent with the [Exchange] Act and . . . Section 15A(b)(6) of the [Exchange] Act,” and “is necessary for the protection of investors and

the public interest and to maintain fair and orderly markets.”). FINRA properly found that Falcon Technologies had failed to file 20 required periodic reports with the Commission between 2001 and 2006, and, consequently, Falcon Technologies was not current in its reporting requirements to the Commission. FINRA determined that Falcon Technologies’s failure to provide complete information was contrary to investor protection and the public interest, and FINRA therefore denied Falcon Technologies’s request to process and announce its company-related actions.

The grounds for FINRA’s denial exist in fact, FINRA’s denial was in accordance with its rules, and FINRA applied its rules in a manner consistent with the purposes of the Exchange Act. The Commission should dismiss Falcon Technologies’s application for review.

D. FINRA’s Application of FINRA Rule 6490 Does Not Cause Confusion or Abrogate State Corporate Law

Falcon Technologies argues that FINRA’s denial of the name and symbol change “creates confusion,” causes “a conflict between state corporate law and FINRA regulation,” and “results in public misinformation.” Br. at 5-6. Falcon Technologies represents that, “[a]t the time of the FINRA refusal, [it] had already received board and shareholder approval and had filed the necessary amended articles with the State of Oregon, legally effectuating the name change.” Br. at 6. Falcon Technologies points to each of these facts to reach an illogical conclusion – that the company’s completion of these legal prerequisites necessitates FINRA’s approval of the name and symbol change. Again, Falcon Technologies misunderstands FINRA Rule 6490.

FINRA Rule 6490 does not provide for the automatic processing and announcing of company-related actions. To the contrary, FINRA’s mandate under FINRA Rule 6490 is “aimed . . . at facilitating trading and settlement” and “promoting investor protection and market

integrity.” *Approval Order*, 2010 SEC LEXIS 2186, at *4. The five factors provided in FINRA Rule 6490 further FINRA’s mandate “to assure that documents supporting a request to process a [c]ompany-[r]elated [a]ction are complete and correct and that its facilities are not misused in furtherance of fraudulent or manipulative acts and practices.” *Id.* at *20-21.

One of the five factors, the one present in this case, is triggered when an issuer is not current in its reporting requirements to the Commission or other regulatory authority. Falcon Technologies’s compliance with the state legal requirements for the name and symbol change has no bearing on FINRA’s mandate under FINRA Rule 6490. As the Commission explained in response to one issuer’s claims that it had already taken the necessary corporate actions and votes, and had filed documents to effectuate the company-related actions. The language and purpose of FINRA Rule 6490 requires more:

[T]he fact that Positron has taken the necessary corporate votes to approve the [c]ompany-[r]elated [a]ctions does not outweigh FINRA’s concerns about the risk of future harm . . . FINRA’s discretionary authority under [FINRA] Rule 6490 is significant. Our 2010 Approval Order made clear that the [FINRA Rule 6490] would alter FINRA’s approval of [c]ompany-[r]elated [a]ctions, which had historically been considered to be ‘ministerial.’ If, as Positron suggests, FINRA was expected to approve every [c]ompany-[r]elated [a]ction where an issuer had taken the necessary shareholder votes under applicable state laws to approve the action, such a reading would be inconsistent with the language and intent of the [r]ule.

Positron, 2015 SEC LEXIS 442, at **18-19, 43-44. The Commission should find that Falcon Technologies’s compliance with the state legal requirements necessary to effect the name and symbol change have no bearing on FINRA’s authority under FINRA Rule 6490, affirm FINRA’s denial, and dismiss the issuer’s application for review.

E. FINRA's Action Is Not Time-Barred

Falcon Technologies contends that FINRA's denial of the issuer's proposed name and symbol change is barred by the five-year statute of limitations contained in 28 U.S.C. § 2462.¹¹ Br. at 11-13. Falcon Technologies's argument falls flat because the limitations period established in 28 U.S.C. § 2462 does not apply to FINRA's denial of Falcon Technologies's request.

First, the Commission has long held that *no* statute of limitations applies to the actions of FINRA and other self-regulatory organizations. FINRA is a private organization, and its actions are not limited by the requirements applicable to a governmental agency, including 28 U.S.C. § 2462. *See, e.g., William D. Hirsh*, 54 S.E.C. 1068, 1077 & n.11 (2000) (“We have consistently held that no statute of limitations applies to the disciplinary actions of the [e]xchange or other self-regulatory organizations.”); *Shamrock Partners, Ltd.*, 53 S.E.C. 1008, 1015 n.15 (1998) (“The five-year statute of limitations . . . does not apply to NASD proceedings.”).

Second, contrary to Falcon Technologies's argument (Br. at 12), FINRA's denial of Falcon Technologies's request for a name and symbol change does not constitute “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture,” and, consequently, 28 U.S.C. § 2462 does not apply. As an initial matter, FINRA does not possess the authority to seek

¹¹ 28 U.S.C. § 2462 provides a default five-year statute of limitation for legal actions taken by the federal government:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the 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 if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

judicial enforcement of any remedy to which 28 U.S.C. § 2462's limitations period attaches. Moreover, in denying Falcon Technologies's request, FINRA did not employ its disciplinary procedures, adjudicate claims that Falcon Technologies had violated the federal securities laws or FINRA rules, or impose any final disciplinary sanction that is subject to Commission review under Section 19(e) of the Exchange Act. *See Larry A. Saylor*, 58 S.E.C. 586, 591 (2005) (“NASD did not employ its disciplinary procedures, did not make a determination that Saylor had violated a statute or rule, and did not impose a final disciplinary sanction.”); *Pac. Stock Exch.'s Options Floor Post X-17*, 51 S.E.C. 261, 266 (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 a punishment or sanction is sought or intended.’”).

Falcon Technologies therefore may not fairly rebrand FINRA's action in denying its request for a name and symbol change as a sanction or “penalty” for purposes of this appeal.¹² *See Morgan Stanley & Co.*, 53 S.E.C. 379, 383 (1997) (“The fact that Morgan was adversely affected by the NASD's exemption denial does not make the NASD's action disciplinary in nature.”); *see also Allen Douglas Secs., Inc.*, 54 S.E.C. 950, 956 n.18 (2004) (rejecting an assertion that NASD's action involved, “either directly or indirectly, the employment of disciplinary procedures”).

FINRA's decision in this matter serves simply to maintain the status quo ante for the remedial purpose of protecting investors, the public interest, and the maintenance of fair and

¹² “[T]he test for whether a sanction is sufficiently punitive to constitute a ‘penalty’ within the meaning of § 2462 is an objective one, not measured from the subjective perspective of the accused (which would render virtually every sanction imposed a penalty).” *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996).

orderly markets.¹³ See *Approval Order*, 2010 SEC LEXIS 2186, at *4 (noting that FINRA’s issuer-related services for the over-the-counter markets “are aimed not only at facilitating trading and settlement, but also promoting investor protection and market integrity”). Because FINRA’s denial preserved the status quo, the period of limitations provided in 28 U.S.C. § 2462 is entirely inapplicable.¹⁴ See *SEC v. Brown*, 740 F. Supp.2d 148, 157 (D.D.C. 2010) (“Equitable relief which is granted upon a showing that it is necessary to prevent future harm to the public is remedial, not punitive.”); *Vladislav Steven Zubkis*, 58 S.E.C. 1014, 1023-24 (2005) (finding that Commission action under Section 15(b) of the Exchange Act was neither punitive nor penal, focused only upon the individual’s risk to the public, and thus was not subject to 28 U.S.C. § 2462’s time limitations).

F. FINRA Rule 6490 Is Not Limited to Allegations of Fraud or Securities Law Violations Against Falcon Technologies

Falcon Technologies argues that FINRA Rule 6490 applies only to requests where issuers or persons connected to issuers have engaged in fraud or securities law violations, citing to the

¹³ Falcon Technologies’s citation to the Fifth Circuit’s unpublished decision in *SEC v. Bartek*, which has no precedential effect, does not detract from this conclusion. Br. at 12. See *SEC v. Bartek*, 484 F. App’x 949 (5th Cir. 2012); see also 5th Cir. R. 47.5.4. The denial of Falcon Technologies’s request for the name and symbol change does not impose a sanction or penalty upon the issuer, or any person associated with the issuer, that could objectively be viewed as having a “stigmatizing effect and long-lasting repercussions.” *Bartek*, 484 F. App’x at 957.

¹⁴ Falcon Technologies’s reliance on *Gabelli v. SEC* is also faulty. Br. at 12. See *Gabelli v. SEC*, 58 U.S. 442 (2013). In *Gabelli*, the United States Supreme Court addressed the question of when the statute of limitations in 28 U.S.C. § 2462 begins to accrue for Commission enforcement actions requesting civil penalties under the Investment Advisers Act of 1940. See *id.* That case has no bearing on the issues before the Commission in this matter. Neither FINRA nor the Commission has brought an enforcement action.

Commission's decisions in *Autochina*, *Positron*, and *mPhase* for this proposition.¹⁵ Br. at 10-11. See *Autochina Int'l Ltd.*, Exchange Act Release No. 79010, 2016 SEC LEXIS 3771, at *1 (Sept. 30, 2016); *Positron*, 2015 SEC LEXIS 442, at *1; *mPhase*, 2015 SEC LEXIS 398, at *1. Falcon Technologies's argument is deeply flawed and has no support in the text of FINRA Rule 6490 or the Commission's Approval Order for the rule. See generally *Approval Order*, 2010 SEC LEXIS 2186, at *1.

Falcon Technologies' argument suffers from the logical fallacy that affirmance of one part of a multi-party rule somehow implies that other parts of the rule have been declared invalid. The Commission should reject this flawed conclusion. FINRA Rule 6490 authorizes FINRA "to conduct in-depth reviews of requests to process [c]ompany-[r]elated [a]ctions and to provide FINRA staff the discretion not to process incomplete requests and requests for which there are certain indicators of potential fraud." *Id.* at *7. The rule also provides FINRA with discretion to deem a company-related action deficient and to decline to process an issuer's documentation concerning the proposed action when doing so "is necessary for the protection of investors and the public interest and to maintain fair and orderly markets." *Id.* at *9. Finally, the rule sets out the five factors upon which FINRA must base its deficiency determination. See *id.* at *10.

Read naturally and consistent with the text of the rule, the five factors provided in FINRA Rule 6490 identify five alternative circumstances in which an issuer's request may be incomplete or indicate potential fraud. The subsection at issue here, subsection two, requires the issuer to be

¹⁵ The Commission should also reject Falcon Technologies's attempt to compare its request for company-related actions to that of other issuers. Cf. *William Scholander*, Exchange Act Release No. 74437, 2015 SEC LEXIS 841, *21 (Mar. 4, 2015) (holding that the appropriateness of FINRA's actions "depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases.").

current in its applicable reporting obligations to the Commission or another regulatory authority. FINRA Rule 6490(d)(3)(2).

Two separate and independent subsections address concerns about fraud or securities laws violations. Subsection three allows the Department to deny an issuer's request if "FINRA has actual knowledge that the issuer, associated persons, officers, directors, transfer agent, legal adviser, promoters or other persons connected to the issuer" or the company-related action "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." FINRA Rule 6490(d)(3)(3). Subsection four allows the Department to deny the issuer's request if FINRA knows, or a government authority or regulator has given FINRA information indicating, that persons connected with the issuer "may be potentially involved in fraudulent activities related to the securities market . . . or pose a threat to public investors." FINRA Rule 6490(d)(3)(4). There is nothing in the text of FINRA Rule 6490, or the Commission's Approval Order, that limits FINRA to denying a company-related action only when the issuer has engaged in fraud or securities law violations.

Falcon Technologies's suggested interpretation of FINRA Rule 6490 would render several parts of the rule to be non-existent. The text of FINRA Rule 6490, as well as the Commission's Approval Order, establishes that FINRA may use its judgment and deny a request for company-related action when certain events raise reasonable concerns about the effect of a proposed company-related action on the investing public and the securities markets.

VI. CONCLUSION

FINRA properly denied Falcon Technologies's request to process and announce its name and symbol change. Falcon Technologies's failure to file 20 required periodic reports over a five-year period raised significant concerns about the company's proposed company-related

actions. The grounds for FINRA's denial exist in fact, FINRA's denial was in accordance with its rules, and FINRA applied its rules in a manner consistent with the purposes of the Exchange Act. Accordingly, FINRA's denial comports fully with Section 19(f) of the Exchange Act, and the Commission should dismiss Falcon Technologies's application for review.

Respectfully Submitted,



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January 6, 2020

APPENDIX A



U.S. Securities and Exchange Commission

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State location: | State of Inc.: OR | Fiscal Year End: 0630
(Office of Life Sciences)

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Filings	Format	Description	Filing Date	File/Film Number
15-12G	Documents	Securities registration termination [Section 12(g)] Acc-no: 0001019687-07-001421 (34 Act) Size: 4 KB	2007-05-15	000-30935 07849463
10QSB	Documents	Optional form for quarterly and transition reports of small business issuers Acc-no: 0001182523-02-000008 Size: 20 KB	2002-10-01	000-30935 02778140
10QSB	Documents	Optional form for quarterly and transition reports of small business issuers Acc-no: 0001182523-02-000007 Size: 20 KB	2002-10-01	000-30935 02778126
10QSB	Documents	Optional form for quarterly and transition reports of small business issuers Acc-no: 0001182523-02-000006 Size: 20 KB	2002-10-01	000-30935 02777926
NT 10-Q	Documents	Notification of inability to timely file Form 10-Q or 10-QSB Acc-no: 0001140377-02-000108 Size: 5 KB	2002-08-15	000-30935 02739462
8-K	Documents	Current report, items 4 and 7 Acc-no: 0001140377-01-500166 Size: 10 KB	2001-12-05	000-30935 1806315
10QSB	Documents	Optional form for quarterly and transition reports of small business issuers Acc-no: 0001140377-01-500164 Size: 24 KB	2001-12-05	000-30935 1806313
10QSB/A	Documents	[Amend] Optional form for quarterly and transition reports of small business issuers Acc-no: 0001140377-01-500128 Size: 22 KB	2001-10-17	000-30935 1760463
10QSB/A	Documents	[Amend] Optional form for quarterly and transition reports of small business issuers Acc-no: 0001140377-01-500126 Size: 21 KB	2001-10-16	000-30935 1760421
8-K	Documents	Current report, items 1 and 6 Acc-no: 0001140377-01-500089 Size: 5 KB	2001-08-03	000-30935 1697366
NT 10-Q	Documents	Notification of inability to timely file Form 10-Q or 10-QSB Acc-no: 0001140377-01-500052 Size: 5 KB	2001-05-16	000-30935 1641277
10QSB	Documents	Optional form for quarterly and transition reports of small business issuers Acc-no: 0001028596-01-500026 Size: 30 KB	2001-05-09	000-30935 1626870
10QSB	Documents	Optional form for quarterly and transition reports of small business issuers Acc-no: 0001028596-01-500025 Size: 28 KB	2001-05-09	000-30935 1626868
10SB12G/A	Documents	[Amend] Registration of securities for small business [Section 12(g)] Acc-no: 0001028596-01-000089 Size: 107 KB	2001-04-20	000-30935 1607866
10SB12G/A	Documents	[Amend] Registration of securities for small business [Section 12(g)] Acc-no: 0001028596-00-000189 Size: 113 KB	2000-07-13	000-30935 672421
10SB12G	Documents	Registration of securities for small business [Section 12(g)] Acc-no: 0001028596-00-000166 Size: 173 KB	2000-06-30	000-30935 666109

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